In the matter of an arbitration
under the Rules of Arbitration of
the International Centre for
Settlement of Investment Disputes

Case No. ARB/10/23

International Dispute
Resolution Centre (IDRC)
1 Paternoster Lane
London EC4M 7BQ

Day 1 Wednesday, 27th July 2022

Hearing on Annulment

Before:
MS DEVA VILLANÚA
PROFESSOR DOUG JONES AO
PROFESSOR LAWRENCE BOO

TECO GUATEMALA HOLDINGS LLC
Claimant/Respondent on Annulment
-v-
REPUBLIC OF GUATEMALA
Respondent/Applicant

Secretary to the Committee: MERCEDES CORDIDO-FREYTES DE KUROWSKI
Assistant to the Committee: FELIPE ARAGÓN BARRERO

Transcript produced by Trevor McGowan
Lisa Gulland and Georgina Vaughn

APPEARANCES

FOR CLAIMANT/RESPONDENT ON ANNULMENT

ANDREA J MENAKER, White & Case LLP
PETR POLÁŠEK, White & Case LLP
KRISTEN M YOUNG, White & Case LLP
POORVI SATIJA, White & Case LLP
KIT CHONG NG, White & Case LLP
BROOKE WILSON, White & Case LLP
SEBASTIAN MODOS, White & Case LLP
DAVID NICHOLSON, TECO Energy Inc
JAVIER CUEBAS, TECO Energy Inc

FOR RESPONDENT/APPLICANT

IGNACIO TORTEROLA, GST LLP
DIEGO GOSIS, GST LLP
QUINN SMITH, GST LLP
PABLO MORI, GST LLP
CARMINE PASCUZZO, GST LLP
FARHOD SHARIPOV, GST LLP
FABIOLA MADRIGAL, GST LLP
NICOLAS GONZÁLEZ, GST LLP
KATHERINE SANOJA, GST LLP
JOSÉ ANGELO DAVID, GST LLP
BETHEL KASSA, GST LLP
WUELMER GÓMEZ, Attorney General of the Republic of Guatemala
RITA CASTEJÓN, Advisor to the Superior Office of the Attorney General's Office
CRISTÍAN RODRÍGUEZ, Advisor to the Superior Office of the Attorney General's Office
LILIAN NÁJERA, Head of the International Affairs Unit of the Attorney General's Office
JULIO SANTIZ, Attorney General's Office
MARIO MÉRIDA, Attorney General's Office
ANDRES PUENTE, Attorney General's Office
DIEGO DE LEÓN, Attorney General's Office
JANIO ROSALES, Minister of Economy
MARIA LUISA FLORES VILLAGRÁN, Vice Minister of Integration and Foreign Trade
VICTORIA MEZA, Director of Foreign Trade, Ministry of Economy
KARLA LIQUEZ, Ministry of Economy
IVANNIA PONCE, Ministry of Economy
TANIA GUZMÁN, Ministry of Economy

INTERPRETERS

DANIEL GIGLIO, Spanish-English interpreter
SILVIA COLLA, Spanish-English interpreter
ANNA SOPHIA CHAPMAN, Spanish-English interpreter

SPANISH COURT REPORTERS

D-R Esteno

SUPPORT STAFF

IVANIA FERNÁNDEZ, ICSID paralegal
DIMITRIOS GEORGIOS KONTOGIANNIS, ICSID intern

11:28 Wednesday, 27th July 2022
(12.17 pm)
THE PRESIDENT: I welcome you all to the hearing in the third arbitration proceeding in the case TECO Guatemala Holdings LLC v The Republic of Guatemala.
Are there any housekeeping issues to address before Guatemala starts its opening statement? And I look at Guatemala first.
DR TORTEROLA: Thank you very much. We don't have any housekeeping matters to discuss, thank you.
THE PRESIDENT: Do we have the hard copies? Two minutes, okay.
DR TORTEROLA: No, no, we have two copies printed, but I think they will not arrive on time.
THE PRESIDENT: I think we can do with the -- is it okay, Ms Menaker, if we just use the electronic version and at some point the hard copies will arrive, so we don't lose more time?
MS MENAKER: Yes.
THE PRESIDENT: Good. Any housekeeping issues on behalf of TECO?
MS MENAKER: No, thank you.
THE PRESIDENT: We do seem to have a technical problem here.
(Pause to resolve a technical problem)
THE PRESIDENT: If no further issues occur, I give the floor

12:18 to Guatemala for its opening statements -- oh, the introductions, sorry, yes. Do please introduce your team. I look at Guatemala first, and then I'll give you the floor.
DR TORTEROLA: Thank you, Madam President and members of the Annulment Committee. I will turn to Spanish to address and introduce the team as well.
(Interpreted) Good [afternoon], Madam President, members of the [Committee] and colleagues here on behalf of TECO. My name is Ignacio Torterola. I speak on behalf of the Republic of Guatemala.
I have with me the Attorney General of the Republic of Guatemala, Dr Wuelmer Gómez, as well as Madame Vice Minister of the Economy of the Republic, Ms Maria Luisa Flores, who will speak to us from the capital of the Republic of Guatemala remotely. We also have with us the two persons responsible for international litigation from the [Attorney General]'s Office of the Republic and the Ministry of the Economy.
I also have beside me my colleagues from GST LLP, and all the other members are all on the list of participants created by the Republic of Guatemala.
Thank you very much.
THE PRESIDENT: Thank you.
Ms Menaker, would you like to introduce your team?

12:20 MS MENAKER: Thank you, Madam President, members of the Committee, and good afternoon.
We have with us today Mr David Nicholson ...
(Pause to resolve a technical problem)
So we have with us here today Mr David Nicholson, who is the vice president and general counsel of TECO Energy; also Mr Javier Cuebas, who is senior corporate counsel from TECO Energy. Along with myself, I have my partners Petr Polášek and Kristen Young and my colleagues Poorvi Satija and Kit Ng.
Thank you very much.
THE PRESIDENT: Excellent.
Mr Torterola, are we now ready for the opening statement?
DR TORTEROLA: (In English) We are ready, Madam President. We will --
THE PRESIDENT: Excellent. The floor is yours.
DR TORTEROLA: Thank you very much.
(12.21 pm)
Opening statement on behalf of Respondent/Applicant
DR TORTEROLA: (Interpreted) Good morning to everyone. I would like to begin by explaining how the Republic of Guatemala's presentation will be put forward.
We will open the presentation with the words from the Vice Minister, Vice Minister Maria Luisa Flores

12:22 Villagrán, who will speak to us from the capital city of Guatemala. Then I will give the floor to my colleague Mr Quinn Smith. Then he will be followed by Mr Diego Gosis. And then I will close with some final conclusions.
My presentation and Ms Villagrán's presentation will be given in Spanish, and the presentation by Mr Gosis and Mr Quinn Smith will be in English.
So to begin with, I'd like to give the floor to our Vice Minister of Economy, Maria Luisa Flores Villagrán.
DR FLORES VILLAGRÁN: (Interpreted) Thank you very much, Mr Torterola.
Dear members of the Annulment Committee, dear Secretary, the TECO counsel and the delegation from Guatemala, it's a pleasure for me to address myself to you to explain what we are doing in Guatemala to work within a framework of competitiveness and growth, mainly because we understand --
THE PRESIDENT: Excuse me, Dr Flores, it would seem there is a technical problem with the interpretation.
(Pause to resolve a technical problem)
You were explaining the work Guatemala is currently doing.
DR FLORES VILLAGRÁN: Yes. As I was saying, Guatemala is working within the framework of competitiveness in order

12:24 to promote growth, because we understand that international trade and attracting investment is one of the main drivers in expanding the economy, and also because we understand that the benefits of foreign direct investment include, amongst others, development, job creation and increased competitiveness in the market.

Our objective is to attract quality foreign investment and optimise the business conditions in the country through continuous improvements in the way government interacts with industry and consumers. In this sense, Guatemala is constantly promoting the development of foreign investment policies, in keeping with the national development objectives, as these are one of the mainstays and pillars of job creation.

Guatemala's commitment has always been to comply with the provisions of trade agreements and fair trade agreements that are in force in the country in accordance with principles of good faith and respect for the fulfilment of its obligations.

In the present case, Guatemala has always endeavoured to act with integrity towards TECO. And this is why it's so important to clarify that Guatemala has complied with the payment to TECO of the amounts ordered in another award that was rendered by

12:26 an arbitral tribunal, and that it will also comply with its obligations if, in the future, it is compelled to pay any other type of compensation.

The fact that Guatemala is making use of all legal means available to it within the international legal system in order to present its defence is not a reason, nor can it be used to say that Guatemala's defence is synonymous with non-compliance because, as I've already said, these proceedings are all part and parcel of our country's legitimate right, and the actions it has taken have been carried out in full respect of the principles of integrity and legality.

Taking that into consideration, we expect that the [Annulment Committee], as well as acting within the jurisdiction established by the CAFTA-DR, [will] act always in the context of maintaining integrity in which disclosure of information is an obligation and not an option. So in this sense, it cannot be argued that the request made by Guatemala through this annulment proceeding is unreasonable, since Guatemala has argued that an independent and impartial tribunal, together with the right to a defence and to a fair trial, are fundamental standards of international law.

(Slide 5) Unfortunately these standards, however, were not met in the arbitration giving rise to this

12:29 annulment proceeding. For example, Guatemala discovered, following the issuance of the Award, that Dr Alexandrov, the arbitrator appointed by TECO, had a nearly 20-year relationship with the damages expert Mr Brent Kaczmarek, also appointed by TECO.

What's more, this relationship included an additional business relationship between Dr Alexandrov's law firm, Sidley Austin, and Mr Kaczmarek's employer, Navigant. The failure to disclose this information was bad news for Guatemala and gave rise to a great deal of concern within the Guatemalan Government. But that concern only increased when we learnt that Dr Alexandrov had never disclosed these connections when it was his obligation to do so. So any reasonable observer would therefore have justifiable doubts about the independence of Dr Alexandrov, and his impartiality, and any possible influence he may have had over other members of the Tribunal.

The other grounds for annulment invoked by Guatemala relate precisely to the Tribunal's decision in regard to damage quantification and interest. And they are based on this suspicion, which is justified and arises from the relationship that exists between arbitrator Dr Alexandrov and the financial expert Mr Kaczmarek.

12:31 So in calculating the Award granted to TECO, the Tribunal failed to consider the very significant valuation evidence put forward by Guatemala regarding inconsistencies in the damages claimed by TECO, unjustifiably using Mr Kaczmarek's reasoning, and improperly arrogated to itself the power to annul parts of the First Award rendered in the dispute, which are already res judicata and therefore fell outside of the scope of the issues that the Tribunal could decide.

In this regard, I must also say that each of these conducts independently justifies the annulment of the Award rendered.

In short, for Guatemala, this annulment proceeding, as I have already mentioned, [represents] the legitimate right to exercise the defence of the state's interests under the ICSID system and under international law, mainly because it's important to ensure the integrity of the investor-state arbitration system and its application in this particular case.

At this moment, without the benefit of the decision of this Annulment Committee, Guatemala has justifiable doubts about the deliberation process and the conditions that ultimately led the Tribunal to reach the decision that it reached. Guatemala is certain that you will agree that there exists a need to restore confidence in

12:33 the system and protect its integrity. And this is why we, with all due respect, have requested that the Award issued in the investment arbitration brought by TECO Guatemala Holdings LLC against the Republic of Guatemala, referred to as the "[re]submission", identified as ARB/10/23, be annulled.

I would like to thank all of the members of the Annulment Committee and all those present for their attention in this matter, and I will now give the floor back to Mr Smith. Thank you.

THE PRESIDENT: Thank you very much, Dr Flores.

MR SMITH: Thank you very much, Vice Minister.

(Slide 3) To begin I just want to emphasise that, in many ways, Guatemala does not want to be here on this issue. But for better or worse, one person, Stanimir Alexandrov, a talented, successful, widely known arbitrator and lawyer, decided, for reasons unknown to any of us, that certain rules and norms of disclosure do not apply to him.

Over the course of the next 45 minutes we are going to look at the applicable law, the standards the parties have used and the undisputed facts. At the conclusion of our time, there will be one inescapable result: that this Award must be annulled.

Guatemala is seeking annulment on two different

12:35 grounds as it relates to --

PROFESSOR JONES: Counsel, may I ask that as you work your way through your PowerPoint, copies of which we are yet to receive in hard copy, you reference the page number of the PowerPoint as you reach each [slide].

MR SMITH: Certainly.

PROFESSOR JONES: That enables us to look at the transcript, refer it to the PowerPoint and refer it to your submissions.

MR SMITH: Excellent.

PROFESSOR JONES: Thank you.

MR SMITH: I happily will do so.

So let's go to slide 4. On slide 4 we see the two different grounds of annulment.

The first is under Article 52(1)(a), because Dr Alexandrov's lack of disclosure of his and his firm's relationship with Mr Kaczmarek and Mr Kaczmarek's employer, Navigant, combined with the nature of the information that was not disclosed, means that the Tribunal was not properly constituted.

The second and independent ground is under Article 52(1)(d), because the existence of an independent and impartial tribunal is a fundamental rule of procedure that Guatemala ceased to receive, based on Dr Alexandrov's lack of disclosure.

12:36 I'm only going to talk about some of the points from what we have written about. Please don't take my silence today as not addressing all of the points or waiving any of them. But these are some of the things that we are going to focus on.

So let's proceed to slide 5. We are going to start with the undisputed facts and the picture that those facts paint.

At the top here we have the relationship between Sidley Austin and Navigant that lasted, from what we know, about 20 years. From the facts that we're going to discuss, one thing is clear: that nobody knows the content of all the facts except for Dr Alexandrov, who refused to disclose them.

So we don't know precisely all the things that were happening and what the relationship was between Sidley and Navigant. We don't know who was billing on those matters. We don't know if Dr Alexandrov billed on the matters, because we don't know what all the matters were.

But we do know that whenever Mr Kaczmarek sat down to testify in front of Dr Alexandrov, Dr Alexandrov was judging the content of what his client employee was saying. So it's not something to dismiss merely because it was an unrelated matter of some sort. It was his

12:38 client sitting in front of him.

These facts alone are different than Eiser v Spain, which we're going to hear a lot about, and they are worse than Eiser v Spain, because they were not present there. And alone they are a ground to annul this Award for failure to be properly constituted or a serious departure from a fundamental rule of procedure.

Next there is this series of lines. These are the lines where we know of cases where Mr Kaczmarek was working for or with Dr Alexandrov. These are seven cases.

Is that all the cases? We find that difficult to believe, because we know that Dr Alexandrov provided inconsistent disclosures in the other cases where he was involved. So we're going to look at those disclosures and what that means for us. But what we do know is what you see right here: these seven cases with just one individual. We don't know if there are other cases with other Navigant experts. It's a lot. And we do know that at least three of them were concurrent, and Lidercón v Peru was almost totally in parallel with the TECO resubmission here.

Again, these are really a troubling picture. But let's look at the facts as they developed in relation to what was happening in this particular case. We start on

12:39 the next slide, slide 6.

On October 6th 2016, TECO appointed Dr Alexandrov. In March 2017, which is only just a few months later, was when, in TCC v Pakistan, Professor Davis, the expert for TCC from Brattle, made a disclosure. He disclosed to that tribunal that he was working -- or that he had been working with -- because it wasn't concurrent in that case -- he had been working with Dr Alexandrov in another case. That disclosure led to an exchange of letters and then that led to the first challenge against Dr Alexandrov.

A mere two weeks later, July 21st 2017, in Eiser v Spain, Spain seeks annulment based on what Dr Alexandrov did not disclose to Spain. So now we have two different countries, two different sets of law firms, and we have the government attorneys from both of those countries who are all deeply troubled by this lack of disclosure and the connections between Dr Alexandrov and his experts.

The other thing to note is the kind of disclosure. Because in TCC v Pakistan, about four cases were disclosed. To Spain, what we know is that there were fifteen cases disclosed; and of those fifteen, one was an ICC case and one was an ICSID case that had not yet been filed.

12:41 So when you think about that first demonstrative that I showed you, that first chart from our memorials, and how we say that we don't know the facts, it is reasonable to believe that we cannot assume that that's it, because this individual has a history of not fully disclosing his connections when challenged, or when asked.

About a month and a half later, September 1st 2017, TECO presents the third Kaczmarek report. So perhaps Dr Alexandrov didn't know that Mr Kaczmarek was going to be the expert in the resubmission proceedings; maybe he wasn't sure. But at this point, he does know: the report has been submitted. And at that point, he could have made a disclosure or he could have resigned. It happens: arbitrators resign, sometimes for no reason at all other than things that are not necessary to disclose. But he chose not to: not to disclose, not to resign. And then he was challenged again in SolEs.

SolEs is important not necessarily because of the second challenge by Spain, although that is important. SolEs is important because of what happened within that tribunal and the members of that tribunal. It included Ms Joan Donaghue and Ms Anna Joubin-Bret.

Ms Donaghue, as we all know, is currently the president of the ICJ. Normally people who are appointed

12:43 to ICSID tribunals are excellent lawyers. Ms Donaghue is more than an excellent lawyer: she is the president of the ICJ.

The other member, Ms Joubin-Bret, shortly thereafter became the secretary of UNCITRAL, so again somebody who is widely respected in the arbitration community.

And for one of those two people, they could not stomach the disclosures that were made. We don't know exactly why, but we know that there was a problem and that Dr Alexandrov chose to resign.

We can try to parse the GAR article that we've seen, and presume that there was something else that happened. But for somebody who doesn't like to resign to choose to resign means that there was something, something deeply wrong. And it represented more than just what two countries and their lawyers were concerned with, but rather what the arbitration community -- at least as embodied in those two highly successful women -- were facing.

We have the fourth Kaczmarek report shortly thereafter. And then here we see the parallel cases of Lidercón v Peru and this case. And what we can also see is that due to this proximity in time, Dr Alexandrov is going to be in contact with Mr Kaczmarek.

Now, we might say: well, he has a lot of cases,

12:44 there are so many things going on. But we are talking about damages experts. These aren't just any kind of expert. A lot of times, damages experts are the first experts you choose. Sometimes they form a part of your pitch to the client. There is a connection between the lead counsel and damages expert, because there has to be, that will often form the way that you present your case and the witnesses that you choose.

So fact that Mr Kaczmarek and Dr Alexandrov are working together in one case while he is sitting in judgment -- supposedly -- on Mr Kaczmarek in another is deeply troubling. It's the kind of thing that needs to be disclosed, because we do not know the level of independence that Dr Alexandrov will have when he is going to listen to Mr Kaczmarek or talk about Mr Kaczmarek's testimony with the other members of the Tribunal.

Now we have the hearing, March 11th to 14th 2019. We mention the hearing because some important things were lost at this hearing. At this hearing, Guatemala didn't know about these connections, these relationships. Guatemala didn't get a chance to ask Mr Kaczmarek about these relationships; it didn't get a chance to question his credibility on these points. And that opportunity, once lost, cannot be reclaimed.

12:46 Shortly thereafter, in June 2019, we have the second Kaczmarek report. The proximity in time is again important, because while Dr Alexandrov is reviewing damages reports in one case, one of which includes the damages report of Mr Kaczmarek, he is also listening to testimony from Mr Kaczmarek, reviewing Mr Kaczmarek's reports in this case to reach a decision on the Award here. So he is in a situation where he is both judging an individual's conduct and preparing an individual's conduct for a different case.

Finally, the Award comes out on May 13th 2020. Eiser is annulled shortly thereafter.

So, before we move to the next slide, I want you to ask yourself some questions that we would like you to think about as we go through the rest of this presentation and as you deliberate.

Why weren't the parties informed? If it was something that was so minor that it was just a mere sort of passing relationship, then the parties could have easily been informed and we would have moved on.

Why didn't Dr Alexandrov resign? He could have resigned early and we could have avoided all these problems. We would have avoided the problems in SolEs, we would have avoided the problems in TCC, and potentially could have even avoided the problems in

12:47 Eiser.

Also, why the inconsistent disclosures? Why is it that between different countries they get different amounts of information?

It's important to point out: Guatemala is not unique here. Guatemala is the third country, on this precise issue, that's bringing this kind of challenge. With all that Dr Alexandrov knew and all that was happening, he chose to say nothing, and that is deeply concerning.

Let's turn to the next slide, slide 7. I'm not going to really get into the background of the grounds for annulment; you all have been on many annulment committees so you are familiar with this.

We're going to talk about Article 52. Next slide, slide 8. These are just some emblematic cases that help us to understand how to look at Article 52. I cite them just to give us a bit of guidance as we go into really the text, and the parties have fully discussed this in their briefs, which you have of course read.

Slide 9, please. Let's begin with Article 52(1)(a), and the word that we are going to focus on is "constituted". "Constituted" doesn't have a temporal limitation; now we are talking about the ordinary meaning. So there are the three different ways that we've looked at under the Vienna Convention.

12:49 Under the ordinary meaning, there is no temporal limitation. It means to give legal form. It is a state of being that continues as long as those elements are present. For example, if we are going to constitute a committee because it has quorum, quorum doesn't end as soon as the meeting starts. The committee is constituted, because it has quorum, as long as the individuals are there. If you are going to constitute a system of courts, they don't stop existing after the legislation is signed; they continue to exist as long as the legislation exists that constituted them.

Something important that Guatemala does, and that was done in Eiser but not in other cases, is looking at what "constitute" means in the other official languages. So if you look at it in Spanish or French, there is a reference to "reunirse", to bring together; "congregarse", to congregate. It is not the notion of a one-time thing, but rather something that continues into the future.

"Constitute" is a verb, and all of these words that I've just mentioned to you are not words about process. Process is described using different words. This is a verb about what it means to exist and have legal form, for that form to continue. There is nothing vague or ambiguous about these words. And honestly, from what we

12:51 have read, there isn't a lot of dispute as to what these words mean.

Now let's go to the next slide, slide 10. I've referenced Eiser (RLAA-3); we're going to reference it a lot. And the reason we reference it here is not just because it's a case that came out with the correct result, but because it is more persuasive, by virtue of the analysis that is done and the way that that committee looked at the words that we are tasked with analysing, and also the facts from that case.

Eiser shares, or we share with Eiser, the definition of, or the ordinary meaning of "constituted", and the other verbs that come before it really don't change the meaning. So it's best just to look at that word, interpret that word and apply it to our case.

Next slide, please, slide 11. This is where the real distinction comes. Instead of looking at "constituted", TECO wants to take us to "procedures".

Now, "procedures", that word isn't in 52(1)(a), right? That's a word that's imported through the word "properly". "Properly", as we know, is an adjective in this context -- actually, it's probably an adverb -- but the point is that "properly" isn't a noun, right? "Process" and "procedure" are nouns. And just because you have a word, "proper", that maybe has the first

three letters of "procedure" or "process", it doesn't mean that we necessarily import it.

On this point, Azurix and OIEG, two cases that are frequently cited by TECO, they really try to go and follow this route. And in both of those cases, they are decidedly not only unhelpful, but unconvincing.

Azurix (RLAA-22) especially, because Azurix, this is one of the earlier decisions. And I think it's important just to reflect on the fact that we're still in a pretty young practice, right? I mean, the modern practice of international arbitration is pretty young. So some of the earlier decisions -- it's nobody's fault -- they were still kind of figuring it out.

And there "constituted" was analysed in the context of a challenge as to the text of the decision on challenge, not as to the underlying facts, right? So it's difficult to really draw much from Azurix, when Azurix was so limited to the kind of challenge that was presented.

OIEG (CLAA-26) really hasn't been widely followed. It only looks at the English version of the Convention; it didn't use the other two languages that kind of help to inform what the word "constituted" means.

And the commentators cited by TECO, they don't really engage with this ordinary meaning, they kind of

pass over it, whenever we have an ordinary meaning and it's there as the verb to really drive that specific piece of Article 52(1)(a). And some of those commentators, really what they are doing is they're talking about what they want to see in the Convention. But that's not what we're doing. We look at what the words are, not the way we would like for those words to be read in other contexts or what we want the Convention to say that it doesn't actually say.

Slide 12. So let's go from ordinary meaning to context. And context, this is an area where again Guatemala has a very strong argument, because when we look at the context and the use of the words "Constitution of the Tribunal", we can look at Article 40(2) and what it requires for the members to have, from Article 14, which is independent judgment.

If we are going to believe that a tribunal member need only be independent at the beginning, once the papers are shuffled for that person to become a member of a tribunal, that really doesn't fit with the obligations imposed by Article 14, because it would mean that arbitrators could lose their independence and continue to serve, just so long as no one found out.

Another thing that is really important is Rule 6(2). This is something that is really avoided by TECO. TECO

wants to look at other things besides the text of Rule 6(2). And Rule 6(2) imposes a "continuing obligation" to notify the Secretary General. If this is continuing, it can't just be at the beginning, right? It's something that goes throughout the life of the tribunal's work.

The context was not at issue in Azurix. And OIEG, strangely enough, never looked at Rule 6(2). It looked at different parts of the Convention, but it doesn't get into Rule 6(2). And that really helps to demonstrate part of the weakness with OIEG.

Next slide, 13. Let's turn to the object and purpose of Article 52(1)(a). It has its own specific object and purpose.

Really the committee in Eiser we think said it really well (RLAA-3, paragraph 75), and you're going to see other references to this kind of language, and that is that there is:

"... no greater threat to the legitimacy and integrity of the proceedings or of the award than the lack of impartiality or independence of one or more of the arbitrators."

In many ways, Article 52(1)(a) is one of the greatest protections that you see here described by the Eiser committee. And to strip it down to what just

happens at the beginning of a case really doesn't speak to its reason for existence.

Slide 14. So on the object and purpose, what TECO is trying to do is it's trying to deviate the interpretation and look at revision. So to limit Article 52(1)(a) to something very, very small, perhaps almost something incapable of having any object and purpose at all, and instead point to revision. So let's talk a bit about revision.

If we're talking about the object and purpose of revision, this is something that OIEG never gets into. This is also true of the footnotes that are cited, or the cites contained in the footnotes that you see referenced there. And this is also something that even TCC didn't advocate for in its counter-memorial on annulment.

(Slide 15) Let's look at the ordinary meaning of the text and how we see revision play out in the Rules and in the Convention.

If you look at the Rules, this is what an applicant has to do: the applicant has to identify the change sought. If you discover facts about an arbitrator, it's kind of difficult to identify the change sought within the award, right? Because it's not something specific in the award; it's the entirety of it. The applicant

would never know what change to identify within the award.

Second, the applicant can never state the fact that it was unknown to the tribunal, because there's always going to be a member of the tribunal that knows the facts. So the applicant will fail on this ground. So that really doesn't make sense, the interpretation of TECO in light of these rules.

You'll see on slide 16 a little bit more about the context of revision. Really here revision is something that Eiser speaks to, but makes a lot of sense. Revision is going to facts that underlie the Tribunal's findings, right? If you look at a request for revision, they say, "We want to revise X finding, Y finding, based on the new facts". Annulment is different: it's looking at the procedure that was followed and those fundamental rules of procedure, it's looking at the constitution of the Tribunal. So that's why these facts that we have here in front of us are best in annulment, because they really have a totally different context.

Next slide, please, slide 17. Finally -- it's not finally. Let's look a little bit about how revision works in the context of post-award remedies. Both in Article 52 and Article 51, they use the word "may": what a party "may" do, not what it "must".

In many cases, there are simultaneous revision and annulment proceedings. It seems kind of strange that if annulment is an exclusive remedy, it can exist only there or you can't have any annulment at all, but it doesn't really make sense with the simultaneous proceedings. Including in proceedings where we are working with White & Case, in the TCC case, where White & Case worked on revision, we worked on annulment.

This is something that wasn't addressed by OIEG. And again, OIEG talks about it a little bit, but what it doesn't talk about is it doesn't talk about the simultaneous nature of these different proceedings and what we have seen develop over time.

Slide 18, please. A little bit more about revision and just kind of what is really being proposed by TECO that Guatemala should have done.

In revision, the members of the initial tribunal are invited to participate; they're not required to. So if any composition in that tribunal changed, then it would defeat the purpose that TECO argues, which is to have those people look at the facts again. And this happens. Sometimes a tribunal member passes away. Sometimes maybe the tribunal member develops a conflict of interest because they moved on, alright? They thought the case was done and they moved on.

So to require something to go to a different composition of that tribunal really is rather unworkable and doesn't make a lot of sense. And also it would make proceedings longer, because then we would have revision and we might have annulment too. So it really defeats this notion that we need to move things along.

Next slide, slide 19. Now we're going to turn to Article 52(1)(d). And again, this is an independent ground. So if there -- there shouldn't be any sort of disquiet regarding Article 52(1)(a); but if there is, 52(1)(d). And here there are fewer slides, not because it's less important [but] because the parties I think are a lot closer in how they interpret it and the distinction doesn't take as long for us to get through.

The parties really aren't disputing that a fundamental rule of procedure includes a right to be heard before an independent and impartial tribunal, or that the parties have a right of defence or fair trial; those are pretty well defined. You know, we're not talking so much about what a serious departure would be; we don't have to have certainty.

Also there doesn't seem to be much dispute that unanimity alone isn't going to mitigate the lack of disclosure, because we don't know what actually happened within that Tribunal.

So let's go to where the parties are at odds, on slide 20.

Really, when you boil TECO's argument down, it's this paragraph (Counter-Memorial, paragraph 313). TECO argues that we should look at Article 52(1)(a) and apply that analysis equally to Article 52(1)(d). To us, that really doesn't fit with the text. The articles have different texts, right? You can't just apply the analysis of one to the other, when the words are so different.

Let's go to the next slide, slide 21. So where does this leave us? Now we're going to move on from our analysis of the Convention and the grounds of annulment and we're going to get into, first, the failure to disclose; and then second, what that means.

Slide 22. Disclosure. There's a lot of helpful stuff on disclosure. First, the text is broad, it's "continuing", and it's defined by any party's view. We don't have to go a lot of places to understand this because it's contained in the text of Rule 6(2).

Also we have the word "circumstance", "any other circumstance". "Any" is a very broad word; "circumstance" is also quite broad. And there's a continuing obligation to disclose any circumstance: again, the broadness, the continuing nature of it. It

13:04 is something that lasts throughout the life of the tribunal.

Next slide, slide 23. This rule isn't something that is somehow unique to ICSID practice. We have here the IBA Rules of Ethics for International Arbitrators 1987. It's been around for a while. Recommended disclosure of:

"... any past or present business relationship, whether direct or indirect ... with any person known to be a potentially important witness ..."

That fits our case really well, right?

TECO has relied on these rules in the past. It doesn't want to anymore, I understand. If I were them, I would say something similar. But the reasons aren't too convincing. The limitations on these rules for international arbitrators, they really look at court proceedings, proceedings to vacate awards. The vacatur is a court concept, which makes sense because courts have their own rules.

And second, TECO would have to identify if it didn't want these rules to apply anymore. The conflict between this recommendation you see here and anything in the 2004 IBA Guidelines on Conflicts of Interest, no conflict is identified between those texts.

THE PRESIDENT: Sorry, counsel. Where did TECO rely on

13:06 these rules before?

MR SMITH: Oh, in the challenge to Professor Oreamuno.

THE PRESIDENT: Oreamuno, okay. Thank you.

MR SMITH: Yes. Sorry, I meant to say that.

PROFESSOR JONES: Counsel, can I just mention that as a member of the IBA committee that drafted the guidelines --

MR SMITH: Yes, I know.

PROFESSOR JONES: -- it was assumed that those guidelines would supersede the rules of ethics.

MR SMITH: Okay. Well, thank you so much, sir.

I guess that brings us to our next point, and that is that if it was to be assumed by the members of that committee, TECO has relied on it itself here in this case; and the fact that TECO has relied on it, which led to Professor Oreamuno resigning, it has benefited from that reliance. And benefiting from that reliance is something that all of us know as judicial estoppel.

In 2006, ICSID amends Rule 6 to add the text as you saw.

Next slide, please, slide 24. Then in 2011 -- this goes back to the challenge of Professor Oreamuno that we mentioned. This is what TECO had argued (REA-73), that:

"... the standard for disclosure does not depend on what information is known by the parties; even publicly

13:07 available information must be disclosed if it falls within the category of information requiring disclosure."

I'm not going to bring up the point of the conflict because Professor Jones has already helped us out on that. But again, I mean, this is an issue where TECO has relied on something; it cannot now deny it.

The last thing we want to point out is 2020, when TECO's counsel, Ms Lamm, or perhaps -- all she did was sign the notice of arbitration. But still, widely known, successful, talented. She argued that, "Google is not enough!" She further described arbitrators as "guardians of the system" (RLAA-72). These are certainly words that Guatemala would adopt.

The main response from TECO is that this only applied to commercial arbitration. I guess that's due to the title of the annual lecture; not the title of the speech, the title of the annual lecture.

Ms Lamm, in that lecture -- you can see it -- she cited to three ICSID cases. Those aren't only commercial; she cites largely to ICSID cases. And in our practice we routinely refer to bodies that might have the word "commercial" in them: UNCITRAL -- "T", "Trade" -- UNCITRAL does lots of commercial work. The fact that commercial work might be done doesn't mean

13:09 that it only applies to commercial arbitrations.

Slide 25. All of these things that we discussed, we can also see what Dr Alexandrov thought about them, and this is what's really helpful about Rule 6(2), because he co-authored the decision in Alpha Projektholding (CLAA-36). This is 2010. So we can be better informed about what he thought was proper disclosure.

He interpreted Rule 6(2)(b) broadly. He viewed the IBA Guidelines as helpful to provide meaning to Rule 6(2)b, and included those words the view "of the parties" (paragraph 63). So on that, we're on the same page with Dr Alexandrov. He also:

"... [paid] heed to Respondent's point that in [any] given case, the very failure to disclose relevant and material circumstances might evidence partiality, regardless of whether actual bias is established."

Again, we agree.

Dr Alexandrov did not recognise this continuing duty to investigate the facts underlying a challenge throughout the life of the case. So here it appears that Dr Alexandrov was quite on the side of Guatemala.

(Slide 26) What else do we know about Dr Alexandrov? He has faced a lot of challenges. His lack of disclosures or his issues that he's had on tribunals have led to challenges by Latvia, Argentina, Ukraine --

13:10 THE PRESIDENT: Sorry, can you go to the previous slide?
MR SMITH: Yes, ma'am. Slide 25?
THE PRESIDENT: So exactly what Dr Alexandrov, as co-author in the decision on a challenge, recognised as to the last bullet point. Did he not recognise a continuing duty of the party, or did he recognise that there was no continuing duty?
MR SMITH: You know what? That is not well drafted, I will tell you right now. What he is saying in that challenge is that the party making the challenge doesn't have to be continuously researching the arbitrators --
THE PRESIDENT: So the decision addresses that point directly?
MR SMITH: Correct.
THE PRESIDENT: Okay.
MR SMITH: Just to be clear, the decision wasn't necessarily made on that point. We are looking at the legal standard that was applied, and from there trying to glean what was in his mind, because it is important to us.
So two challenges from Spain, a challenge from Saudi Arabia, Croatia, Nigeria and Panama: this involves a country from every continent.
MS MENAKER: Excuse me, may I just ask, because I know that this doesn't have any citations.

13:11 MR SMITH: Yes.
MS MENAKER: So are these all on the record? For instance, Saudi Arabia?
MR SMITH: I'm just speaking about cases that are publicly available.
MS MENAKER: Well, you're speaking about them [being] publicly available, but the rules were that we should have citations to the evidence in the record for everything that was on a slide.
MR SMITH: I'm just referencing it for the existence of the case; not for the content of the decision, just the fact that there was a challenge. If this is a problem, the members of the Committee are certainly well aware.
MS MENAKER: Well, you're saying "the existence of the case"; it doesn't even contain the case name, so we don't know what the existence of the case was.
MR SMITH: Madam Chair, we are in your hands as to what you want us to do with this --
THE PRESIDENT: Is this on the record? I don't know. It seems interesting to know in how many challenges Dr Alexandrov has been involved. Is it somewhere in the memorials?
MR SMITH: So most of these cases are. I think the reference to the Saudi Arabia one isn't, and Nigeria is very recent.

13:12 MS MENAKER: Again, Madam Chair, we object. He's stating it as a fact. We were very clear about this at the pre-hearing conference and before, the references. And that's why the references of citations need to be on the slides.
MR SMITH: If it's a problem, we can strike the reference to Saudi Arabia and Nigeria. And I think the rest are on there. We'll see on the next slide.
THE PRESIDENT: Let's strike the whole bullet point, you check, and then you come back to us, okay? Just to be sure what's in the record and what's not.
MR SMITH: Okay. Let's move on.
THE PRESIDENT: Ms Menaker, is that okay for you?
MS MENAKER: I mean, there are also -- they're talking, some of the bullet points, about "countless lawyers ... signed their names to these challenges ... nine law firms". Again, those are facts that I don't believe are on the record, and I can't see the citations to check.
MR SMITH: Well, those are on the record. We can get to that slide and we can go through those specific ones.
THE PRESIDENT: Let's skip the slide and come back to it later, once you have checked what's exactly in the record.
MR SMITH: Sure, no worries.
THE PRESIDENT: Thank you.

13:13 MR SMITH: So Dr Alexandrov has a history of inconsistent disclosures. I spoke about this at the beginning, and how Pakistan learnt of its cases long after they had been disclosed to Spain.
Next slide, please, slide 28. Here are the record cites. These are the different challenges that we have. So it's ICS v Argentina (RLAA-81), Panama (RLAA-57), Pakistan (REA-88), Croatia (CLAA-51), SolEs (REA-34), Eiser (RLAA-3), this case. So you can count the lawyers on those, but those are all the awards that are in the record or are referenced. So let's keep going.
THE PRESIDENT: Is there another one? I think TECO referred to another one in the latest memorial.
MS MENAKER: That was Misen v Ukraine.
THE PRESIDENT: Yes.
MS MENAKER: That's correct.
THE PRESIDENT: Is this one here as well?
MR SMITH: You know what? We didn't include Misen, but that would cover Ukraine.
THE PRESIDENT: Because that one was published in April this year.
MR SMITH: It was. It was recent, yes.
THE PRESIDENT: Will you refer to that case at some point?
MR SMITH: In the slide that was objected to, two slides ago, the word "Ukraine" is there. But we're not going

13:15 to talk about it anymore; we're going to move on.
MS MENAKER: We'll talk about it.
THE PRESIDENT: You will talk about it?
MS MENAKER: We will.
THE PRESIDENT: Excellent. Sorry for the interruption.
MR SMITH: No, no worries.
So how does TECO respond to this? It really doesn't engage with the text of Rule 6(2). It looks at different cases. Those cases are also not analysing the text of the rule. There's some academic writing that's cited, but really we're not getting into the text of the rule, which is what should guide us, also when coupled with Dr Alexandrov's knowledge, his own position.
Next slide (29), please. So let's talk about the other defences. There's primarily -- there's three. We've already mentioned a bit the challenge in 2011.
So let's talk about the next two. This is slide 30. It's about proprietary information supposedly that would be publicly available and should have been known by Guatemala; and Guatemala's lawyers, their potential knowledge would be enough. I'm going to take those each in turn.
So slide 31, the proprietary knowledge. There's no argument that TECO had actual knowledge; this is an argument on constructive knowledge. So if we just

13:16 look at the documents that were presented -- you can look at them yourself -- there is no mention of Dr Alexandrov or Mr Kaczmarek. So if we're going to go the constructive knowledge route, you wouldn't even see it in the text of the exhibits submitted.
On these other two exhibits that we have here (CEA-8, CEA-11), you have to have a premium GAR subscription to have access to these articles. They mention Dr Alexandrov as counsel but there's no mention of Mr Kaczmarek or Navigant. So if this is a constructive knowledge argument, there's really not much there.
Citing to GAR in the past, maybe that meant Freshfields had access. But it's not like we can go through every citation in the record and assume that Guatemala has all those books and all those articles itself, right? That's just not how it works. Counsel has access to different databases and it can make its presentation of what it finds in the databases, but you can't impute that to Guatemala.
Next slide, slide 32. What are the thoughts of Guatemala's lawyers?
There's no real legal test offered by TECO, just some sort of presumptions. But going to presume what a lawyer did or didn't do, and then linking that

13:17 presumption to the client, is really a kind of dangerous exercise.
We picked one example of this: White & Case, in its representation of Grupo Unidos por el Canal, what it was advocating in that context (CLAA-52). Of course it was appropriate, apparently, to look into the disclosures after the award was issued, which is what happened there. There was this request to vacate an award based merely on a failure to disclosure, nothing more. And that the thing that was so wrong was that one arbitrator participating in the appointment of another arbitrator in an unrelated case is a conflict of interest that requires disclosure and vacatur.
All of this under the "evident partiality" standard, which is a very high standard in the United States. Obviously, if we're going to impute arguments from counsel to clients and vice versa, it's not going to work.
There also could have been other reasons that Freshfields didn't present a challenge --
PROFESSOR JONES: Can I just ask for clarification. Am I incorrect in understanding the thrust of this slide 32 to be that you are suggesting that if counsel for a party has access to information which is of relevance to that party's rights, including a right to

13:19 challenge a member of the tribunal, that counsel is entitled, for its own reasons, not to draw that to the attention of its client?
MR SMITH: I'm not saying it's entitled; I'm only saying it might happen. And I can tell you personally that I've seen it happen.
PROFESSOR JONES: That is a very long bow in terms of legal ethics, counsel.
MR SMITH: And it is something that has led to -- I've seen law firms lose clients over it. So I bring it up: I'm just saying that it happens. Did it happen here? I'm not saying it happened here. I'm just saying that there could be --
PROFESSOR JONES: Are you suggesting that if it happened, it would be appropriate or correct?
MR SMITH: If it happened --
PROFESSOR JONES: Or are you saying if it happened, it would be improper?
MR SMITH: Our position personally is that you have to inform your client. If you don't disclose it to your client, it's a problem. What kind of problem, I don't know. Right? I mean, there's a lot of ethical rules; it's quite a thicket, once you get into them. But I am saying that it happens.
THE PRESIDENT: Has Guatemala started any action against its

13:20 prior law firm, against Freshfields?
MR SMITH: No. I think more the point we're trying to make is not -- I'm not trying to criticise Freshfields and say that they knew and sort of didn't say something on purpose. I'm just trying to say that the argument itself is such that there are weaknesses in it, and one of those weaknesses is: sometimes lawyers don't disclose things to their clients. And so we can't just look merely at the lawyers' knowledge, because that argument in and of itself is weak.
PROFESSOR JONES: I think it will be necessary in due course for both parties to deal with the consequences of it being common knowledge that there was a feeding frenzy of challenges against this arbitrator.
MR SMITH: Okay, yes.
I guess my first point on that, to deal with it directly, is: what is common knowledge? Common knowledge amongst those of us in the international arbitration world, the 200 of us or so, maybe 300, that routinely engage in the practice, that's one thing; common knowledge to a client is another, right? And I think that that is borne out by the fact that we subscribe to databases, clients don't, right? Because it's our job as counsel to be kept abreast of things, but it's different when it comes to a client.

13:22 Also we can look at what is publicly available and what must still be disclosed, right? So the fact that something is publicly available doesn't mean that the arbitrator can just stop disclosing, and assume that: well, there's enough of it out there, I'm good. That's something that Ms Lamm addressed in her speech there at American University and it's something that we see in the context of Rule 6, right? It's an obligation on the arbitrator to disclose.
Because if it is so common and it's not a big deal, then just disclose it and move on. That's why the presumption is in favour of disclosure, not the presumption to kind of keep quiet, "because I think personally there's been enough about it".
Next slide, please, slide 33. These are the things that we know about Dr Alexandrov.
We're a little pressed for time, so I'm going to go to the next slide, slide 34. Again, this takes us back to the beginning. You know, these are the facts. So we've showed you the law, we've showed you the rule on disclosure, we've showed you what Dr Alexandrov's position was on the law. In the light of all of that, this is what happened and there was no disclosure.
Next slide, please, slide 35. We've talked about the things that were known; let's talk about things that

13:23 we don't know.
We're never going to know how many cases they worked on together. We're never going to know the issues in those cases, right? We're never going to know if there were overlapping theories or that sort of issue conflict that can arise. We're never going to know that.
We're never going to know how much Navigant was paying to Sidley, whether Dr Alexandrov was billing or not, or if there was any compensation, by virtue of being a partner at Sidley, to Dr Alexandrov from Navigant.
We don't know about the entirety of the relationship, what other experts of Navigant worked with Dr Alexandrov. This is something that was important in Eiser. We're not going to know about who retained who. This is something that's in dispute between the parties. We're not going to know that.
And we're not going to know the views of Professor Stern and Professor Lowe or the impact on the Award by virtue of Dr Alexandrov's participation in the proceedings. Dr Alexandrov is somebody that is well known for his acuity, his ability to analyse issues of damages. So his role within a tribunal can be decisive, and it can sway both members of the tribunal, not just one.

13:25 So based on these reasons that we have presented, this Award should be annulled under both Article 52(1)(a) and 52(1)(d). And with that, I will pass the word to my colleague Mr Gosis.
MR GOSIS: (In English) Maybe it's a good time to have a small break here?
THE PRESIDENT: Yes, I was going to ask you, because there was one that should take place at 1.30. And I don't know how long you intend to take, Mr Gosis, but --
MR GOSIS: (In English) More than 5 minutes.
THE PRESIDENT: That's for sure. But if it's like 15, we could continue. If it's --
MR GOSIS: Maybe more than 45.
THE PRESIDENT: More than 45. Then I'd suggest we break here at this time.
Is that okay, Ms Menaker, if we break now?
MS MENAKER: Yes, of course.
THE PRESIDENT: Yes. So now we are taking -- let's try to make it 10 minutes instead of 15, to make up for the lost time this morning, at the beginning. Excellent.
It's 1.25 past, so we meet at 1.35.
(1.26 pm)
(A short break)
(1.40 pm)
THE PRESIDENT: Mr Gosis.

13:40 MR GOSIS: Thank you very much, Madam President.
For the record and the benefit of the other members of the Committee, to whom I don't have a direct line of sight because of the bundles and the technology, my name is Diego Gosis.
(Slide 36) We will be addressing certain issues of the Resubmission Award dealing with damages. And this is, unsurprisingly, very strongly intertwined with what we just heard from Mr Smith a few minutes ago.
The part of the enormous relevance of the concerns that Guatemala has regarding the conflicts of interest that Dr Alexandrov had with the valuation experts are enhanced in this particular case because every single other ground for annulment brought by Guatemala deals exclusively with the issues of damages, on which the Tribunal, including Mr Alexandrov, took verbatim every single utterance by the valuation expert of TECO, Mr Kaczmarek.
And if we go to the next slide, it would be 37, I guess. The Resubmission Award on damages must be annulled. There are two main threads that we will follow. One deals with the arguments and the findings dealing with the alleged loss of value of the sale of EEGSA.
As the Committee will remember, there were two

13:41 claims originally made by TECO in the original arbitration: a claim for historical losses, losses of cash flow, between 2008 and 2010 -- in late 2010, October 2010, TECO sold its participation in EEGSA through a transaction with EPM, under which it sold its shares in DECA II. Its shares in DECA II meant an indirect transaction of its participation in EEGSA.
So apart from the historical losses derived from the cash flow that TECO claims it should have received and did not receive, which were dealt with in the First Award, there was another claim for the alleged loss of value, the alleged reduction in price that TECO claims it experienced in the sale to EPM as a result of the same measures challenged by Guatemala.
The First Tribunal said: there is insufficient data to award damages for any such loss of value. The First Annulment Committee said: that finding by the First Tribunal should be annulled. That same area of the original dispute was resubmitted in the second arbitration, and the findings of the Tribunal in that discrete area, which is any alleged loss of value in the sale to EPM in October 2010, is what is currently being discussed as what we call the grounds for annulment dealing with loss of value.
Then there is a slightly separate issue, which is

13:43 the issue of interest calculated as from the date of that sale in October 2010. And in both the loss of value and the issues of calculation of interest, the second committee incurred in a failure to state reasons, and this calls for annulment of the Award under Article 52(1)(e) of the ICSID Convention.
Then on both the issue of loss of value and the issue of calculation of interest, there is also a serious departure from a fundamental rule of procedure, which calls for annulment under the ICSID Convention Article 52(1)(d). And in the specific area of the calculation of interest, there is also a manifest excess of powers by the Second Tribunal, which calls for annulment under Article 52(1)(b).
If we go to the next slide, 38. We will start with the issue of annulment for failure to state grounds, as it appears in all of the factual anecdotes of the issues that we are discussing today.
There are basically three ways that a failure to state grounds occurs in the context of the ICSID Convention. It could be through simply a lack of reasoning. It could be where some reasons exist, but too many reasons exist, such that actually they contradict each other. Or there could be inadequate or insufficient reasoning, such that there is no logical

13:45 way to follow from the premises to the conclusion.
If we go to the next slide, 39. We have here a citation from TECO's Memorial in the first annulment. As we mentioned, this is the third annulment. In the first annulment, both TECO and Guatemala have sought annulment of certain portions of the First Award.
TECO submitted in paragraph 85 of their Memorial on Annulment in the first annulment (REA-10) that under Article 52(1)(e), an award should be annulled when it has failed to state the reasons on which it is based and, citing Professor Schreuer, said:
"... the 'purpose of a statement of reasons is to explain to the reader of an award, especially to the parties, how and why the tribunal came to its decision in the light of the facts and applicable law.'"
So it's TECO's position in this same dispute that where an award does not provide the means to understand how and why a decision is arrived at by the tribunal, that decision shall be annulled.
Now we are at slide 40, for the record. TECO seems to understand or rather tries to frame Guatemala's concerns with the grounds expressed in the Award as being issues that deal only with the sufficiency or the adequacy of the reasons, but not with the existence of reasons. In this citation to paragraph 178 of their

13:47 Rejoinder in this phase, this annulment phase, they say:

"None of these points [raised by Guatemala] concern the existence of reasons; all of them pertain to the adequacy of the reasoning provided in the Resubmission Award. The adequacy of reasoning [they claim now], however, is outside the scope of the ad hoc Committee's review and not a basis for annulment ..."

However, in the first annulment proceeding, if we go to slide 41, we have a citation here from paragraphs 87 and 88 of TECO's Memorial on these first partial annulments (REA-10), where it said:

"... 'insufficient or inadequate reasons as well as contradictory reasons can spur an annulment,' because they 'cannot, in themselves, be a reasonable basis for the solutions arrived at.'"

This is paragraph 87. The citations here, you see Soufraki v UAE; there are citations to Caratube v Kazakhstan.

Paragraph 88:

"The reasons requirement also extends to the tribunal's duty to consider or otherwise respond to the arguments and evidence presented by the parties."

With citation to Wena v Egypt also; all authorities to which Guatemala has cited in these annulment proceedings with endorsement.

13:48 In short, TECO had argued in the first annulment proceeding that insufficient and inadequate reasoning was a ground for annulment, which is a position it now tries to disavow.

(Slide 42) TECO had taken longer lengths to actually argue what is it that justifies annulment for failure to state grounds and it said an award should be annulled under Article 52(1)(e) for failure to state grounds if it "failed to address or even acknowledge the extensive expert and documentary evidence adduced by the parties", paragraph 96 of the Memorial on the first annulment; it "failed to articulate any reasons why it ignored [certain] expert evidence", paragraph 103; it "did not provide any explanation as to why" certain evidence "should prevail over [other] documentary and expert evidence", paragraph 106; it "does not address a party's rebuttal without stating any reasons as to why the Tribunal disregarded [the Party's] explanation", paragraph 108.

These are all statements of how Article 52(1)(e) of the ICSID Convention should be interpreted, which if positive with regards to the Second Award should go, under TECO's own theory, to the annulment of the Second Award.

(Slide 43) These arguments by TECO in the first

13:50 annulment led the First ad hoc Committee to actually decide that the Tribunal had:

"... failed to address in any way the Parties' expert reports on the loss of value claim despite the Parties' strong emphasis on expert evidence, and ignored the existence in the record of evidence which at least appeared to be relevant to its analysis."

This is paragraph 138 of the First Annulment Decision (REA-18). That statement would apply verbatim, word for word, to the Second Award. The Second Tribunal failed to address in any way the parties' expert reports on the loss of value claim despite the parties' strong emphasis on expert evidence, and ignored the existence in the record of evidence which at least appeared to be relevant to its analysis. Word for word, the holdings of the First Annulment Committee would apply again to the findings of the Second Tribunal, calling for annulment of the Second Award.

PROFESSOR JONES: So that was your slide 43?

MR GOSIS: That was slide 43, yes, which is paragraph 138 of the First Annulment Decision.

(Slide 44) Now let's double-click, let's zoom in on the specific areas for which annulment is being sought. So we go to the damages for loss of value and we go to slide 45.

13:51 We have here the description of the different claims that have been initiated in the original arbitration. We discussed these already: historical losses on the one hand, and loss of value on the transaction in October 2010 on the second hand.

The Original Tribunal, as we mentioned, has accepted the claim for historical loss in the amount of $21 million-plus. And it has denied the loss of value claim, finding that -- and this is in paragraph 749 of the Original Award (REA-9) -- it had found "no sufficient evidence of the existence and quantum of the losses that were allegedly suffered as a consequence of the sale".

Then TECO said -- we are at slide 46, and this is TECO's Memorial in the first annulment (REA-10, paragraph 96) -- that the Tribunal "failed to address" -- and this is a citation we've already made twice; I don't need to stop here again. But basically, that finding by the First Tribunal should fall because it failed to address the evidence that led to a determination of the loss of value.

The Annulment Decision (REA-18), again, paragraph 138 -- we are at slide 47, for the record -- agreed with that argument by TECO.

This is interesting and very relevant to the rest of

13:53 the discussion, so we stop here and perhaps slow the pace a little bit.

The Second Award (REA-30), paragraphs 80 and 81 -- slide 48 -- explains the relationship between the claim for historical losses, which had been accepted, and the claim for loss of value, which had been rejected, and said:

"The Annulment Committee did not annul the Original Tribunal's decisions leading to the award of historical damages; and those decisions, to the extent that they constituted necessary reasoning leading to the decision set out in the dispositif to award damages for the historical damages, undoubtedly had the quality of res judicata in relation to the historical damages claim. They do not, however, have the quality of res judicata in relation to the 'loss of value' claim, because the 'loss of value' claim is distinct and different from the historical damages claim."

This is not only a legal distinction: this is an economic distinction, this is a practical distinction that any valuator, any practitioner with any experience in valuation, any arbitrator having dealt with issues of valuation will very, very rapidly understand; and which, for our benefit, the Second Tribunal even lays out in detail in paragraph 81 of the Second Award. It said:

13:54 "The difference is evident from the fact that the calculation of the value that EEGSA would have had to EPM as a buyer, 'but for' the breaches of the DR-CAFTA, is not necessarily a straightforward arithmetical exercise involving only data used to calculate the historical damages."

What the Second Tribunal is saying here is it's acknowledging the fact that whatever fact, whatever data you have regarding historical losses would not in itself justify any finding on loss of value to a seller that sells those shares in DECA II, which include the shares in EEGSA, which constitute the basis for the claim of loss of value in this arbitration.

The Second Tribunal goes on to explain even further:

"It cannot be assumed that historical losses suffered by EEGSA would inevitably lead to a reduction of precisely the same amount, adjusted for time differences, etc, in the value of EEGSA to a prospective purchaser."

But even if this was not sufficiently clear itself -- which we would posit it is -- the Second Tribunal went on to provide additional thoughts, examples of precisely why the data that led to the calculation of historical losses could not satisfy the test for deciding on loss of value. It basically said:

13:56 "For example, the market for electricity might have expanded or contracted significantly over the historical period, or there might have been more or fewer potential buyers of EEGSA by the end of the period, or material shifts in the costs of distribution. Any such changes in the market conditions would be expected to affect the value of EEGSA, but would be independent of the question of EEGSA's losses."

So these are all matters -- the Second Tribunal will pick this up again in the discussion of interest -- that, as a result of not being exposed to commercial risks, cease to be relevant to the analysis of the point of anything happening after the moment in which the sale was made.

This has two consequences. One, the value that would be calculated by a prospective buyer and a prospective seller, determining the market price at which they will transact on this, may be affected by things which would be taken into account by a buyer and which would not be attributable as internationally wrongful acts by Guatemala. So we need to see not only the historical cash flows from 2008 to 2010, but also anything else that a seller and buyer would take into account in determining the price.

But from that precise moment, all of these changes

13:57 in the market -- the expansion or reduction in the electricity market, any shifts in the costs of distribution, the existence of additional or more or less potential buyers of EEGSA -- these are all things that, as from the moment the shares were sold, also do not generate any risk to the sums awarded from the Award. These are all commercial risks to which TECO was not exposed as from the moment it had sold. They are treated in separate sections of the Second Award. They speak to the same phenomenon: that as from the moment the sale occurs, there is simply no additional commercial risk run by the seller.

(Slide 49) For its own reasons, or lack thereof, after the First Decision on Annulment, TECO resubmitted its claim for loss of value based on exactly the same economic parameters that had been used to argue their claim for historical losses. And we have here a citation to paragraph 167 of TECO's Resubmission Memorial (REA-22). It basically says:

"Because Mr Kaczmarek used the same integrated model to calculate the loss of cash flow portion of damages and the loss of value portion of damages ..."

They are using the same information that was applied to calculate historical losses to a calculation of loss of value.

13:59 The Second Tribunal started from the following premise, and you will find this in paragraph 93 of the Second Award. And this is slide 50, for the record:

"In order to determine the amount of the 'loss of value' damage caused to Claimant by the breach of the DR CAFTA by Respondent, it is necessary to establish

"a. The value of EEGSA at the point of its sale to EPM ..."

This is October 2010:

"b. The 'But-for' value of EEGSA [and]

"c. The causal link between any loss of value and the breach of the DR CAFTA."

(Slide 51) So let's start with the issue of the actual value of EEGSA, for purposes of this paragraph 93 of the Second Award. The Second Tribunal deals with the issue of actual value in only four paragraphs, and this is paragraphs 95, 96, 97 and 98 of the Second Award, and we have them spread over slides 52, 53 and 54.

(Slide 52) The Second Tribunal says there was a transaction in 2010, and the amount of US$605 million was paid.

"What is not known is how much of that US$605 million ... was attributable to the EEGSA shares held by DECA II, as opposed to the other shareholdings held by DECA II."

14:00 (Slide 53) Then it says, in paragraph 96, that Claimant's expert calculated the actual value within a range of $498 million to $602.9 million using different approaches: EBITDA information, comparable transactions and comparable traded companies. And then it provides a weighted average enterprise value for EEGSA of US$562.4 million.

Respondent's experts, using slightly later data, estimate the actual value of EEGSA in fact as $518 million; or alternatively, using another form of DCF valuation, a value of US$582 million.

Then, in paragraph 97, the Tribunal says:

"Claimant's best estimate ... is US$562 million and Respondent's best estimate is around US$580-582 million: these figures are within 4% of one another."

(Slide 54) In the final paragraph dealing with the issue (98), the Tribunal says:

"Taking note of the range of methodologies employed and the explanations in the Navigant Report ..."

And this is the only reason the Tribunal provides for the following conclusion:

"... the Tribunal has decided to accept the figure identified by Mr Kaczmarek as the actual value of EEGSA at the time of the sale of DECA II: US$562.4 million."

We have simplified, on slide 55, the different

14:02 methods used by the valuators for Claimant and Respondent. Claimant had used a DCF valuation that yielded US$576.2 million, a comparable public companies valuation that yielded a value of US$521 million, comparable transactions that yielded almost US$603 million, and then they came up with a weighted average of all of these three methods. They applied, if I'm not mistaken, 60% of the first method, 30% of the second and 10% of the third. And the weighted average of these three valuations yielded a result of US$562.4 million.

Meanwhile, Dr Abdala had used two different DCF valuations: one, based on the EBITDA from October 2009 to September 2010, yielded a value of US$518.2 million; or a DCF based on [redacted] fairness value that yielded a valuation of US$582 million.

The alternative three methods combined into a fourth for the Claimant and two methods for the Respondent.

TECO's position -- we are at slide 56 -- was that the reason for this choice by the Tribunal to prefer Mr Kaczmarek's valuation over Dr Abdala's was that:

"... unlike Dr Abdala, Mr Kaczmarek had employed multiple methodologies to calculate EEGSA's value in the actual scenario."

This we find in paragraph 342 of TECO's

14:04 Counter-Memorial in this annulment.

Then in the Rejoinder, it somewhat changes the argument to now say that the Tribunal chose Mr Kaczmarek's weighted average enterprise value of $562.4 million because of:

"... the testimony of Guatemala's quantum expert ... that the actual value of EEGSA calculated by TECO's quantum expert Mr Kaczmarek was within the range of EEGSA's actual values calculated by Dr Abdala."

This is in the Rejoinder at paragraph 171.

(Slide 57) However, none of these two reasons is actually to be found in the Award. We read in the Award that -- and we will go to the next slide -- the only reference that the Tribunal makes to the range of values calculated by Dr Abdala was the range between $580 million and $582 million, which is in the second of the methods that it applies; we have that in paragraph 97 of the Second Award. And the only reference to the relationship between these two figures is that the figures are within 4% of one another.

We go to the next slide, slide 58. The Resubmission Award does not state that the reason why it chose US$562.4 million as the actual value was because the amount was within the range of values determined by Respondent's valuator, or why it chose that specific

amount within that range. Any reason -- if it existed -- should have been stated in the Resubmission Award. The only conclusion drawn by the Resubmission Tribunal from the hearing transcript to which TECO cites is that the parties' estimates are within 4% of one another.

Without these reasons, it's impossible to understand why the damages were awarded in this sum. If the fact that these sums are within 4% of one another is sufficient to do away with any difference, then the Tribunal, following that same reasoning, wouldn't have awarded damages.

The damages it awarded for loss of value are within 4% of the actual value calculated by Claimant's valuator in one of its valuations. The $26 million that it awarded on loss of value are very close to 4% of the $602.9 million that the Tribunal was acknowledging was one of the possible valuations by Mr Kaczmarek to EEGSA in the actual value received. So the fact it's only 4% cannot justify, in the Second Tribunal's view, the choice of one value over the other, or else we would have no damages.

Let's go to slide 60.

PROFESSOR JONES: Can I just ask for a clarification?

MR GOSIS: Absolutely.

PROFESSOR JONES: If one looks at paragraph 98 of the Resubmission Award, the Tribunal states that it "has decided to accept the figure identified by Mr Kaczmarek".

Am I correct in understanding your position for Guatemala to be that, in order for reasons to be adequate, it is necessary for the reason for the choice of the expert to be explicit? And if so, I'd be interested in understanding what your submission is in relation to a situation where the Tribunal says that it has reached a conclusion by accepting one expert, as opposed to the other, as reasons or not.

Do you understand my question?

MR GOSIS: I think I do. And if my answer does not fully speak to your question, then I will maybe ask that you insist with any portion that has to be left unanswered.

But let me go to the simplest answer I can provide to what our position on this would be by showing what TECO's position was on this precise point in the first annulment.

If we go back for a second to slide 42, TECO had argued in paragraph 96 of its first Memorial on Partial Annulment that the Tribunal has:

"... failed to address or even acknowledge the extensive expert and documentary evidence adduced by the

parties ..."

(Paragraph 103):

"... failed to articulate any reasons why it ignored [certain] ... evidence ..."

(Paragraph 106):

"... did not provide any explanation as to why [certain evidence] should prevail over [other] documentary and expert evidence."

And (paragraph 108):

"... does not address [a party's] rebuttal, without stating any reasons as to why the Tribunal disregarded [the party's] explanation."

So there's nothing in the Award, paragraphs 95, 96, 97 or 98, that explains why it's choosing Mr Kaczmarek's valuation over Dr Abdala's valuation.

We were about to go there: there had been criticisms by Dr Abdala and Guatemala to the usage of weighted averages of different valuation methods, so the usage of comparable transactions and companies as a source of valuation for entities of this sort, and I think we have that if we go to slide 62.

We have there the precise criticism that had been made by Dr Abdala (REA-25, paragraphs 129-132) to usage of "valuations with multiples (like those applied by Mr Kaczmarek using the comparable publicly traded

company and comparable transaction approaches)", and he had said this is "of limited use".

There's nothing in the Award that speaks to this evidence or that explains why the reasons, the concerns, the criticisms by Dr Abdala, by Guatemala, had been dismissed by the Tribunal, to the effect of simply choosing the valuation using this weighted average chosen by Mr Kaczmarek.

PROFESSOR JONES: So your answer to my question is: if one expert is chosen by a tribunal over another, reasons for that choice have to be given or the reasons are inadequate; am I correct?

MR GOSIS: That is correct. And that is the position which TECO has adopted in the first annulment proceedings, and which Guatemala is currently submitting. Thank you.

(Slide 59) The other position that TECO has tried to articulate was that the fact that there was a "range of methodologies" in one case versus a single methodology in the other would lead to an automatic choice by the Tribunal, preference by the Tribunal of one valuation over the other. Yet the truth of the matter, as we saw, was that while Mr Kaczmarek had used one DCF valuation and two comparables, Dr Abdala had used two DCF valuations. So it's not 3:1, but it's basically 2:2 or 2:1, on the one hand.

14:13 On the other hand, other tribunals that around the same time were dealing with other valuations where the same Mr Kaczmarek was using the same approach of using weighted averages of different valuation methods found that the conclusion reached by weighting those averages was not trustworthy enough to justify a finding of damages.

This had been found by the tribunal in Gold Reserve v Venezuela (RLAA-102, paragraph 831). Basically, it had said that that tribunal was:

"... not convinced that the comparables offered are sufficiently similar to enable them to be used in a weighted valuation calculation. Because of this uncertainty, the Tribunal prefers to use the DCF model only."

All that we mean by this is that if the reason was that it was a multiplicity of methods that had been the subject of a weighted average, then the fact that this multiplicity is the basis for the Tribunal's finding should also have been included in the Award, should be inferred from the Award, which is it is not.

Let us now close this point by -- we can go back to slide 62, which we saw for a second already.

The Resubmission Award glossed over Dr Abdala's evidence without any analysis, without explaining why it

14:14 had found that evidence insufficient, unpersuasive or otherwise unsatisfactory, and failed to address Guatemala's rebuttal, without stating any reasons as to why the Tribunal rejected Guatemala's explanation. This itself should alone satisfy the test for annulment of the Resubmission Award, based on TECO's position in the first annulment proceedings and the findings of the First Annulment Committee.

Separately, this also meant that there was a serious departure from a fundamental rule of procedure by failing to address and resolve the issues before the Tribunal, including specifically the expert evidence adduced in support of Guatemala's position.

For some reason, TECO argues that Guatemala had not made a claim that the Award should be annulled for a serious departure from a fundamental rule of procedure before the Reply on Annulment, and also that it had not elaborated why the serious departure from a fundamental rule of procedure affected in particular the issue of calculation of loss of value claims.

Just for the record, we're at slide 64. To bring some peace of mind to the Committee, of course Guatemala had argued that the Award should be annulled already in its Application for Annulment, paragraph 2(4):

"... a serious departure from a fundamental rule of

14:16 procedure ..."

And of course in its first memorial, the first Memorial on Annulment by Guatemala (REA-18), paragraphs 224 to 226, we see here the arguments why the treatment the Tribunal had provided to the evidence in the record justified a finding by this Committee that the Award should be annulled for a serious departure from a fundamental rule of procedure.

We will leave this discussion here. We will have some further discussion on this point from Dr Torterola later on. Let's move on to the issue of the but-for value of EEGSA, which is one in which the contradictions are perhaps even clearer.

(Slide 67) Basically, the Resubmission Tribunal had two premises for the but-for value of EEGSA, which they discussed in paragraphs 79 to 86 of the Second Award. Those two premises were: that the evidence before the Original Tribunal for historical losses were inadequate to calculate loss of value; and that evidence of some other factor or data would modify the computation of loss of value such that that loss of value could be negative, positive or zero.

TECO basically only argues in response that these were not premises by the Tribunal; that the Tribunal was "merely summarizing the Original Tribunal's conclusions"

14:17 (Counter-Memorial, paragraph 356). And we will show very succinctly that that is simply not correct.

If we go to paragraph 80. We are on slide 69 now. "The Annulment Committee", says the Second Award (REA-30):

"... did not annul the Original Tribunal's decision leading to the award of historical damages; and those decisions, to the extent that they constituted necessary reasoning leading to the decision set out in the dispositif ... undoubtedly had the quality of res judicata [with respect] to the historical damages claim. They do not, however, have the quality of res judicata in relation to the 'loss of value' claim, because the 'loss of value' claim is distinct and different from the historical damages claim."

And you see there footnote 60 speaks to paragraph 107 of the Decision on Annulment. This cannot be a summary of the findings by the First Tribunal if already this paragraph analyses how the issue had been treated by the Annulment Committee that had annulled the findings of that First Tribunal.

But the issue is even clearer if we go to paragraph 82, which we find in slide 70, where the Second Tribunal says:

"The Tribunal does not accept Claimant's argument

14:19 that the distinction between historical damages and loss of value damages has no legal significance ..."

Then we go to paragraph 86, which we have in the next slide (71). Here the Second Tribunal says:

"... [we still have] open ..."

These are the things the Second Tribunal says it shall decide:

"... [we still have] open the question of the amount (which could theoretically be zero or have a positive value or even, in theory, a negative value) of any loss of value. The Tribunal will accordingly proceed to determine that amount."

(Slide 72) The Tribunal went on to say (paragraph 85):

"... it is plainly unsafe to rule out that the question of the amount of any 'loss of value' damages in this case has already been so distinctly argued and determined by the Original Tribunal that it is not only unnecessary but also impermissible for this Tribunal to hear and decide upon fresh submissions on this point."

(Slide 73) This Tribunal -- I mentioned this to this Committee already -- had laid out what the differences conceptually, economically and practically were between calculating historical losses and calculating loss of value, because there were things which one should not

14:20 consider for the purpose of historical value calculations but which a buyer could, probably should, certainly would have taken into account in calculating the value it was willing to pay for the shares in EEGSA in October 2010. And it laid down certain examples of these elements in paragraph 81 of the Resubmission Award.

Now, TECO's counsel had admitted itself -- and we have here citations to pages 943 to 945 of the hearing on resubmission. Towards the end -- a few slides down; 74, if I'm not mistaken. Apologies, but my printed copy does not have numbers on these pages. (Pause) It should be 75.

The right half of the screen shows the admission which was made by TECO's counsel, I think at this point it was Ms Menaker speaking -- we have it around the half of the second page on the screen -- if the Second Tribunal were not to accept that the findings on historical losses had res judicata effect on the loss of value claim, then it should look at other evidence.

If you were to reject that contention, it says, and you think that either the Original Tribunal did not decide that, or that they did but it's not res judicata, then we believe that that is the reasonable assumption.

So it engages with the value that the Second

14:22 Tribunal should give to the evidence in the record. It's accepting that evidence should be introduced into the record to come to that conclusion.

(Slide 76) Guatemala actually also presented expert evidence that would have reduced the loss of value damages claim from $26.8 million to at least $18.2 million. There were four different areas, from miscalculations in operating costs to erroneous usage of cash flows to the entity as opposed to cash flow to the shareholders, to errors in calculation of elasticity of demand, to incorrect updates of the value added for distribution -- that's the acronym for which "VAD" stands, at the bottom of this slide -- which had the impact of reducing the amount of the but-for analysis that Mr Kaczmarek had calculated as yielding a $26.8 million loss of value.

(Slide 77) In the resubmission hearing, we see the Second Tribunal knew that it had to deal with these four issues. And we have here comment by Mr Alexandrov which is saying:

"I'm using for illustrative purposes ..."

And this is from pages 813 and 814 of the transcript for the resubmission hearing:

"I'm using for illustrative purposes the numbers 26 and 18 million ... there are several points where

14:24 Respondent's experts have criticized Mr Kaczmarek's quantification, and we will face a situation where we will have to rule on each one of them ..."

And we go to the bottom of the page:

"... so that we ... can rule on them with the proper reasoning without being annulled."

This is the Second Tribunal saying: if I don't look into each of these four elements that bring the value down, possibly, from $26.8 million to $18.2 million, the result of not looking into that would be that resulting award could be annulled.

Now, guess what? Of course the Resubmission Tribunal failed to provide reasons why it would dismiss these four areas of criticism. And the result, as foretold by Mr Alexandrov during the hearing, is that the Award should be annulled.

(Slide 78) The Resubmission Tribunal contradicted its premises: that the evidence presented before the Original Tribunal to calculate historical losses was inadequate; and that evidence of some other factor or data would modify the computation of loss of value damages, theoretically even to a negative value.

What does a negative value mean? A negative value would mean that it was conceptually possible that the measures of Guatemala that had been challenged would not

14:26 have resulted in a reduction of the price paid but in an increase in the price paid; that TECO had indeed benefited from those measures at the time of selling the EEGSA shares through the transaction in which it sold shares in DECA II. That is what the negative value, which the Second Tribunal knew could be the result of analysing the evidence before it, could yield.

We have identified some of the most visible contradictions, which are not the only contradictions but we have chosen these to exemplify the situation.

(Slide 79) It would seem that whoever drafted paragraph 83 of the Second Award did not quite look eye-to-eye to whoever wrote paragraph 104 of the same Second Award. Because it's simply impossible to maintain that the historical and loss of value claims are significantly different from one another -- as is reinforced by the fact that the Original Tribunal had itself explicitly decided that they were "inadequate to provide all the data necessary for the calculation of the 'loss of value' damages" -- and yet maintain that, "it is evident that the shortfall in the cash flow -- that caused the Original Tribunal to award historical damages for the period from ... 2008 until... 2010 ... would continue until the end of the Third Tariff Period on 31 July 2013", because the period from 2008 to 2010

14:28 are historical losses; the period from 2010 to 2013 can only be seen through the loss of value.

So either the data is sufficient to justify a finding of loss of value because it is "inadequate to provide all the data necessary for calculation of the 'loss of value' damages" -- I'm reading from the fourth-to-last to second-to-last lines in paragraph 83 of the Second Award -- and at the same time find that it is evident that the losses in cash flow that caused the Original Tribunal to award historical damages would continue until July 2013.

It's impossible to maintain at the same time -- we are at the next slide (80) -- that, "it is evident that the shortfall in the cash flow -- that caused the Original Tribunal to award historical damages ... from ... 2008 until ... 2010 ... would continue until the end of ... July 2013", as paragraph 104 says, and that, "The loss of the cash flow resulting in the period from ... 2010 to the end of ... July 2013 had the exactly same cause and ... character as the lost cash flow up to 21 October 2010 for which the Original Tribunal awarded damages" -- and I'm reading from the third-to-last line in paragraph 104 -- and at the same time maintain that, "The Tribunal does not accept Claimant's argument that the distinction between historical damages and loss of

14:29 value damages has no legal significance".

It's impossible to maintain that at the same time you maintain that, "the historical 'loss of value' claims are significantly different from one another [as] is reinforced by the fact that the Original Tribunal" found that the data sufficient to make a finding on one was inadequate and insufficient to make a finding on the other. These two statements, in paragraphs 104 and 82 and 83, are simply incompatible, they cancel each other out, with the result that the Second Award does not contain reasons for its final finding.

Next slide (81). It is impossible to reconcile the finding that, "Having been awarded damages in respect of the period 2008-2010, in a portion of the Original Award that stands as res judicata, this Tribunal considers that Claimant is entitled to recover its share of that shortfall in cash flow until the end of [July] 2013" -- and this is paragraph 105 -- while you also maintain that there were factors like -- and I'm reading from paragraph 81 -- "the market of electricity might have expanded or contracted significantly over the historical period, or there might have been more or fewer potential buyers of EEGSA by the end of the period, or material shifts in the costs of distribution. Any such changes in the market conditions would be expected to affect the

14:31 value of EEGSA" -- hence the loss of value claim -- "but would be independent of the question of EEGSA's losses". Thus, they do not relate to the historical losses that had been awarded, and for which res judicata was admitted.

It's impossible to maintain that the Original Tribunal explicitly decided that the data used for historical losses was "inadequate to provide all the data necessary for the calculation of the 'loss of value' damages [and] can have the standard of res judicata for the present Tribunal and bind it in relation to the calculation of those same 'loss of value' damages" -- and this is the end of paragraph 83 -- while at the same time maintaining that, "Having been awarded damages in respect of the period 2008-2010, in a portion ... that stands as res judicata, this Tribunal considers that Claimant is entitled to recover" those same cash flows through 2013.

(Slide 82) Especially if the Tribunal is to find, as it did in paragraph 138, that:

"The same data and methodology as was accepted by the Original Tribunal is to be employed to calculate the amount of this further entitlement."

It's not like the Second Tribunal made its own independent query into the evidence and by happenstance

14:33 reached results that are compatible with those of the First Tribunal. The Second Tribunal, having said it should use different data, different methods, for different reasons, because of different legal causes and considerations, then went on to say:

"The same data and methodology as was accepted by the Original Tribunal is to be employed ..."

Paragraph 138 assumes that the Second Tribunal is under a mandate to apply the same data and methodology which it had started from the premise it should not use, and it should supplement by the evidence in the record of the Resubmission Tribunal. This is perhaps the quintessential contradiction that calls for the Resubmission Award to be annulled.

(Slide 83) These are genuine contradictions that cancel each other out and call for annulment of the Resubmission Award under Article 52(1)(e). As discussed in MINE v Guinea -- of course, as the Committee knows, part of the canon of analysis of the failure to state reasons as a ground for annulment under Article 52 of the ICSID Convention: the decision on annulment that was authored by, among others, the often-called "architect" of the ICSID Convention, Aron Broches, chair of the annulment committee -- and again, the committee in Tidewater v Venezuela. But also because of the same

14:34 positions that TECO had argued before the First Annulment Committee, and which the First Annulment Committee had in fact accepted.

(Slide 87) Let us now go, for the last few minutes of my presentation, to the issue of post-sale interest.

THE PRESIDENT: Sorry, counsel, before you turn to that matter, when you were dealing with the actual value of the shares and you said that in reaching that decision, the Resubmission Tribunal had incurred a serious departure from a fundamental rule of procedure, you said that that argument had already been made in Guatemala's submissions right from the beginning. And you took us to paragraphs 224, 225 and 226, I believe.

Are you referring in these paragraphs to the actual value or to the but-for value?

MR GOSIS: We are referring to the value. And to the extent there was any doubt as to whether that applied to other areas, that was precisely what was clarified in the Reply. So in the event that there is any portion of the argument that could still be responded to as TECO did in its Counter-Memorial on Annulment, then the issue was further enhanced and clarified, and arguments provided for, in the Reply argument.

The only actual requirement for there to be a statement of grounds of annulment in the Application

14:36 for Annulment is of course that every single ground be identified. And this is of course the language in Article 52 of the ICSID Convention.

Then the responsiveness of every argument: every single word that appears in paragraphs 224 to 236 of Guatemala's Memorial can be predicated on both the but-for and the actual value. At the end of the day, the only finding of damages is the difference between one and the other.

So the fact that in either of those elements or both of those elements there is a glossing over evidence, there is a failure to state grounds, there are reasons that contradict each other, there is a failure to address the argument submitted by the party, that itself leads to a serious departure from a fundamental rule of procedure that affects the conclusions reached by the Tribunal.

We don't think that there's a sufficiently discrete matter being discussed in the actual value or the but-for value. But at the end of the day, it's A minus B that leads to the actual finding --

THE PRESIDENT: Yes, I understand. But what you were focusing on in these three paragraphs is the lack of explanations regarding Guatemala's evidence on the but-for value; is that correct?

14:37 MR GOSIS: It was the failure by the Tribunal to treat that evidence.

THE PRESIDENT: Yes.

MR GOSIS: Yes, you're correct. By which I mean it was not an area of failure to state grounds, but a serious departure.

THE PRESIDENT: It's a serious departure because it did not address --

MR GOSIS: The evidence.

THE PRESIDENT: -- Dr Abdala's criticisms regarding the but-for value; is that correct?

MR GOSIS: It's correct, yes.

THE PRESIDENT: I think I would need some further input on what evidence existed -- and this goes to both parties -- during the resubmission proceedings regarding the but-for scenario. Because we've got the reports, and it seems like they were exactly -- Kaczmarek's -- we've got a Polish colleague who told me that that's the correct way to pronounce that name. So Kaczmarek submitted this -- the report submitted in the resubmission proceedings was the same as the one that existed in the -- regarding the but-for scenario, was it the same? So the cash flows were exactly the same? Were they calculated at the same value in the but-for scenario? That is one of the questions: were they

exactly the same?
And then for the period between 2010 and 2013, was it just a continuous projection of the cash flows estimated for 2008 up to 2010? Or wasn't it just a projection, but were there other elements that were considered?
Because we've heard a lot about this arithmetical approach: it was very simple, and all evidence could have been disregarded in the resubmission proceedings because you could just take what the Original Award decided and how somehow continue projecting it. But I would like to know how that should have been. So whether it's just: well, we've got these cash flows, and I just continue, and at some point I'll have to discount them; or were there some other elements involved to make the projection for 2010 to 2013.
Do you get my question?
MR GOSIS: I did. We will be happy to provide any deeper dive into the evidence for closing arguments tomorrow. But I have already --
THE PRESIDENT: You don't have to address it now. But I can already anticipate it, so if you can do it in the second round, that would be great.
MR GOSIS: But I would still like to offer a preliminary answer, because it's something that we have already seen

in some of the slides.
My first and shortest answer -- and we will of course hear any additional thoughts from Claimant later on. But the valuation case submitted by TECO was the same -- meaning projected from the first to the second periods -- as had been argued in the first arbitration. Which is why we have citation to transcripts from the resubmission hearing where Ms Menaker was discussing how and why TECO considered that the facts, as accepted in the first arbitration, should be granted res judicata status for purposes of the second proceedings; and that if res judicata was not granted, still the evidence to which it referred should be assumed to be correct and stand.
In the case of Guatemala, Guatemala did make an additional review of the evidence, and did introduce additional considerations dealing with issues of damages.
And in a visible nature of that, we see the discussion -- we had a slide which I've managed to lose somehow -- to the comments by Mr Alexandrov in the resubmission hearing. So at the resubmission hearing, they were discussing these four elements that would change the but-for value.
So the position the Resubmission Tribunal was

adopting at the hearing, there were closing arguments by President Lowe -- we can go to the other slide where the transcript was cited (77). President Lowe is saying there -- this is, I think, page 817 of the resubmission hearing:
"... that's the range of issues on which we would be particularly interested in hearing more."
So this simply speaks to the fact that there was a discussion on these four elements that appear, if I'm not mistaken, in the preceding slide, slide 76, that are corrections that had to be introduced to the valuation in the but-for scenario.
You will notice that these criticisms appear in the third Compass report of 2018, and you have citation here to the paragraph in that third report. So these are all materials that were introduced before the Second Tribunal directly.
I don't know if that addresses Madam President's issues sufficiently.
THE PRESIDENT: No, sorry. I still need to understand how these projections were made and how far they included specific elements projected for that period, or there was just a general projection of what they did for the first period and continued it. I need to know.
MR GOSIS: We will be sure to address that in detail for

tomorrow's closing arguments. Thank you. Thank you very much.
THE PRESIDENT: Thank you.
MR GOSIS: And to the extent there is any question the members of the Committee have to any of these points, we of course welcome them as they come to your minds. They feed in to our ability to speak to your concerns there.
(Slide 87) So let's proceed to the issue of post-sale interest now.
(Slide 88) The parties have basically these two positions. On the one hand, said Claimant, interest should be awarded as from the date of that sale in October 2010 at US prime rate plus 2%; while Respondent said interest should be awarded at a risk-free rate. We mentioned this in passing already earlier today.
But basically the legal theory under which, as from the date of that transaction, the only way to calculate interest validly is through a risk-free rate is because the Claimant is not exposed to any form of commercial risk anymore. So the only way to validly update any figure from that moment onwards is through a rate of interest that simply accounts for the time value of money. And that is the risk-free rate, typically calculated by reference to, for instance, US treasury bonds.

14:45 There's some discussion between decisions and tribunals: is it six-month T-bonds, is it ten-year T-bonds? But at any rate, that's conceptually what risk-free rate is.

And the First Tribunal -- we have the next slide, 89 -- paragraph 766 says:

"The Arbitral Tribunal agrees with the Respondent that applying EEGSA's WACC ..."

"WACC" stands, of course, for "weighted average cost of capital", which is the commercial cost of financing that an entity of that type and sort would have to pay to a combination of equity holders and financiers. And the "weighted" portion of that acronym is exactly how the portion that goes to equity should be measured relative to the portion that goes to financing. And of course the reason for that is that the cost of equity is conceptually always higher than the cost of financing.

So the Tribunal says it would make no sense to apply the cost of capital of EEGSA post-October 2010 because:

"... Claimant had sold its interest in EEGSA and ceased to assume the company's operating risks."

So we have here a reason and a consequence. The company is not exposed to commercial risk, that's the reason; then we shall use a risk-free rate as a consequence.

14:47 In the following paragraph (767) -- and we are at slide 90 now -- the Tribunal went on to say:

"... the Arbitral Tribunal agrees with Mr Kaczmarek's evidence that the proper interest should be based on the US Prime rate of interest plus a 2 percent premium in order to reflect a rate that is broadly available to the market."

Unlike in 766, which had a reason and a consequence, there is no reason why a commercial -- that is to say non-risk-free -- rate should be applied, especially if the First Tribunal had started from the premise that a risk-free rate was appropriate.

THE PRESIDENT: Mr Gosis, sorry. Why was there a reference to the WACC? Were there two claims for interest? The primary claim was for the WACC, and subsidiarily it was prime plus 2%?

MR GOSIS: I understand that is the case.

THE PRESIDENT: No? Because this is apparently Mr Kaczmarek's proposal, to use prime plus 2%, but the Tribunal had already ruled that WACC was inappropriate.

MS MENAKER: If I may, just as a factual matter, the WACC was agreed by both parties for the pre-sale interest, which was that $846,000, and then there was an issue as to what interest is on that interest. And that's where we argued it should be US prime plus 2% and they argued

14:48 it should be risk-free rate.

THE PRESIDENT: Okay, I get it, thank you.

MR GOSIS: But both you and us -- and it's unfortunate that neither of us was there at the time of the first arbitration -- but we have to take this portion of this First Award at the face value it carries because -- and this is something that we will get on to in a second -- because it was not annulled, and as a result it has become res judicata.

What it does say is that applying the WACC post-October 2010 would make no sense, and this is all that we know it's saying. This is the reason it's granting. There is no risk, so applying an interest rate that would recognise any form of risk simply makes no sense. And this is what that says.

Then 767 says:

"... the Arbitral Tribunal agrees with Mr Kaczmarek ... that the proper interest should be based on the US Prime rate ... plus a 2 percent premium ..."

The First ad hoc Committee annulled -- remember, this is 766-767 -- it annulled 765, right above 766, and 768, right below 767. And as we can read from the Second Award, paragraph 130, which we have on the next slide (92), only paragraphs 765 and 768 of the Original Award were subsequently annulled. We go on to read at

14:50 the beginning of paragraph 131:

"... in the present proceedings attention was focused on paragraphs 766 and 767, which were not annulled."

And of course, not having been annulled, they became res judicata. There is nothing the Second Tribunal -- or even this second Committee -- could do to strike those two paragraphs from the Award because of course, under Article 55(3) of the ICSID Convention, any portion of an award that was not annulled cannot be reconsidered by subsequent adjudicators in the same dispute.

(Slide 93) Importantly, this paragraph 131 also contains the following reference:

"... there is an apparent inconsistency between paragraph 766, which indicates that a risk-free rate should be applied, and ... 767, which applies what is evidently not a risk-free rate."

So the Second Tribunal acknowledges that US prime plus 2% is not a risk-free rate. This is not an issue of how we calculate a risk-free rate, because the Second Tribunal starts from the premise -- 766, the First Tribunal said, "We shall apply a risk-free rate"; 767, whatever is in there is not a risk-free rate. That is, without a doubt, inconsistent.

So this makes it impossible to agree with TECO when

14:52 they say -- and we are at slide 95, if I may, at paragraph 222 of their Rejoinder on Annulment -- that:

"... there is no contradiction between the Resubmission Tribunal's statement that, after TECO's sale of its investment, the investment 'was no longer at risk' and its Award to TECO of Post-Sale Interest at ... US prime ... plus two percent ..."

Because, as we saw in paragraph 131 of the Second Tribunal, the Second Tribunal itself admitted that what 767 awarded was not risk-free rate, while what 766 awarded was risk-free rate. So it's simply impossible to maintain that there is no contradiction.

The reason provided in 766, that "applying [a] WACC post-October 2010 would ... make [no] sense", speaks specifically to this contradiction, because a WACC would be a rate that is not risk-free; it is a commercial rate that would be obtained -- it's the cost of financing that would be obtained by EEGSA, and not a rate that would consider that no commercial risks were affecting the investment anymore.

So the same paragraph, 766, contains, as I was mentioning before, both the reason why and the effect of there being no risk to which the investment was exposed.

Now, the Second Tribunal could have liked the First Award, it could have disliked it; it could not

14:54 have annulled it. Which it did in practice. In deciding to apply paragraph 767 to the detriment of 766, as it did in paragraph 135, it says:

"... the majority of the Tribunal agrees with the Original Tribunal that the US Prime rate ... plus 2% [is] payable pre- and post-Award until the date of payment ..."

So when it does that -- and the citation here of course is to the Original Award (REA-9), paragraph 767, and footnote 118 of the Second Award; we have it on slide 94 -- and this is part of both the contradiction -- before we move on to the manifest excess of powers.

The First Tribunal says there is a portion that was not annulled. The portion that was not annulled is unclear. And we are halfway through paragraph 131. A majority of the Tribunal considers that these two paragraphs do not have res judicata. And we're still at paragraph 131.

The Tribunal finds, for this or other reasons, it is not bound to apply the interest rate set in paragraph 767. You see that the last three lines of paragraph 131. The Second Tribunal says, "We are not bound to apply paragraph 767". Yet it decides not to apply paragraph 766 but to apply paragraph 767, as we

14:56 see in the Second Award, paragraph 135.

The majority of the Tribunal agrees with the Original Tribunal -- citation to paragraph 767 -- that the US prime rate of interest plus 2%, which the same Tribunal considered was not a risk-free rate, shall apply. It is simply impossible to do that without depriving paragraph 767 of its effect and in practice annulling paragraph 766.

Now we go to slide 96. It is a manifest excess of powers "if a tribunal goes beyond its jurisdiction"; Soufraki v [UAE] (RLAA-10, paragraph 42).

THE PRESIDENT: Could the parties at some point look whether -- I think the WACC was set at 8.8%. Could they please look at whether prime plus 2% always remained, I assume, below 8%?

MS MENAKER: We could look -- it fluctuates, of course, the prime rate.

THE PRESIDENT: It fluctuates until 2020, when Guatemala paid. So --

MS MENAKER: We could let you know that and look at a spreadsheet.

THE PRESIDENT: And if there were projections whenever the Second Award was issued as to how US prime would evolve in the future -- I assume it will always be below 8.8%, but if you could check it.

14:58 MR GOSIS: My recollection is that it always was: that it was always above the risk-free rate and below 8.8%. But of course we will go back to the Committee with specific eyes on that for tomorrow.

THE PRESIDENT: "Risk-free rate" understood as the treasury bonds right?

MR GOSIS: Yes.

THE PRESIDENT: US?

MR GOSIS: US treasury bonds, yes.

MS MENAKER: Could I just ask, since we've had this interruption, if we could have a time check. (Pause)

PROFESSOR JONES: Just before we move on, may I ask a question about 131.

What is the contention, if any, of Guatemala with respect to the views expressed by the Tribunal in 131 about the res judicata question? Are you challenging that; and if so, on what basis?

MR GOSIS: Thank you for your question.

We have two threads of issues with 131: one of them speaks more directly to 131, and the other probably goes all the way down to 135. But on 131, it is inherently inconsistent to recognise that there are two paragraphs which have not been annulled, but that they still will not be applied.

PROFESSOR JONES: I understand that argument. But I'm

trying to see whether you are effectively, by that argument, seeking to challenge the Tribunal's conclusion about res judicata in 131.

MR GOSIS: I think if the Tribunal meant something by saying that it's not annulled, but denying it of res judicata, that made sense. It should have said expressly what it was it was saying and why it was reaching that conclusion. That is nowhere to be found in the Award. And that's one of the ways in which, as per TECO's theory, interpretation of Article 52(1)(e), failure to state grounds, in the first annulment, that alone should suffice to annul the Second Award on the issue of interest also.

It isn't possible -- just to cite from MINE v Guinea -- to go from point A, being that the paragraphs were not annulled, to point B, to say that they are unclear, to the conclusion that it will apply one of them but not the other.

PROFESSOR JONES: But it does that by dealing with the question of res judicata. And it argues that in order for res judicata to apply, there needs to be a clarity of conclusion. Or have I missed something?

MR GOSIS: The clearest issue we have with that statement is that it infringes on the powers that only annulment committees have; in particular, only the First Annulment

Committee had, because it was the only one looking at the Original Award. It's not for the Second Tribunal to decide what portions of an unannulled award constitute and do not constitute res judicata.

The other variation of this discussion that was entertained --

PROFESSOR JONES: I thought a major issue between the parties, and dealt with at the commencement of the Resubmission Award, was a debate with res judicata on a range of issues. And what I'm trying to understand is whether, in the annulment application of Guatemala, you're seeking to challenge the decision of the Resubmission Tribunal on res judicata, and if so, on what basis; or whether you're just arguing: inconsistency, doesn't make sense, therefore should be annulled, and sliding around the issue of res judicata.

Anyway, maybe you can hold that thought and respond later.

MR GOSIS: Yes, I was going to say: the grounds for which Guatemala argues this portion of the Award should be annulled are both a failure to state grounds, which include but do not limit themselves to this contradiction, and a manifest excess of powers in that the Second Tribunal, in adopting the position as it adopted, stepped beyond the jurisdiction that it had.

But we will elaborate on precisely this hinge issue of the specific treatment of the finding of res judicata for the closing arguments tomorrow, if that is alright with the Committee. Thank you very much.

Very briefly, to close on this point, what is a manifest excess of powers? We are at slide 96. It is a manifest excess of powers "if a tribunal goes beyond its jurisdiction"; Soufraki v UAE (RLAA-10, paragraph 42). I think you will remember we have certain snippets from TECO's own submissions in the original arbitration citing to Soufraki v UAE with support.

(RLAA-21, paragraph 49):

"If arbitrators address disputes not included in the powers granted to them, or decide issues not subject to their jurisdiction ... their decision cannot stand and must be set aside."

Mitchell v Congo (RLAA-7, paragraph 20):

"The Tribunal is reproached for having done what it did not have the right to do ..."

In one of the biggest missing portions, if we speak to the failure to state grounds for one last second, is that -- and this was discussed before the Resubmission Tribunal already -- if one were not to apply a risk-free rate to calculate interest as from the date of the

transaction onwards, one would need to identify a legal theory that would explain what is the counter-reason to abandon the reasons the Tribunal itself had adopted to take a risk-free rate.

You go to 766, there is a reason, there is a consequence: if you are not exposed to a certain risk anymore, then interest should be calculated at a risk-free rate.

We have here, at slide 106, the examination of Guatemala's expert, Dr Abdala, where he basically explains this very clearly. Dr Alexandrov asks:

"If we come to a conclusion that a Risk Free Rate is not appropriate, you haven't given us an alternative. You criticize Mr Kaczmarek's rate ... if we decide the Risk Free Rate is not appropriate, the only alternative we have is what Mr Kaczmarek is proposing."

And Dr Abdala says:

"Well, you [would] need to think what would be your underlying economic theory for an appropriate Interest Rate."

There is no appropriate economic theory that would justify adopting 767 in the face of a situation where the company was not exposed to any risk, which was found by both the Original Tribunal and the Second Tribunal.

With this, I pass the floor to my colleague

15:08 Dr Torterola.
THE PRESIDENT: Just a question. Was this issue discussed during the resubmission proceedings? Did the parties discuss the interest that the Resubmission Tribunal should apply, were it to order payment for loss of damages for the loss of value?
MR GOSIS: The citation I just made is from the hearing on resubmission.
THE PRESIDENT: I know. The question is: was Guatemala's primary position there that that was res judicata, and subsidiarily, did it plead on what the appropriate interest rate was? Or did it never mention that that portion was res judicata, and it directly discussed the appropriate interest rate, saying it should be a risk-free rate?
MR GOSIS: We will take a deeper look into the record to find the --
THE PRESIDENT: Do you get my point?
MR GOSIS: Yes, absolutely we do. And thank you, Madam President.
THE PRESIDENT: It's a question raised by TECO, and I wanted Guatemala to address it, either now or in the closing arguments.
MR GOSIS: Certainly.
Just very briefly, the argument being made by

15:09 Dr Abdala in the resubmission hearing is made on the basis of his expert opinion on the reasonability of adopting one rate or another, not on the legal distinction of whether it's res judicata or not.
THE PRESIDENT: Of course, yes.
MR GOSIS: We will go back to the record and find references there for closing arguments tomorrow.
THE PRESIDENT: Thank you.
MR GOSIS: Thank you very much.
PROFESSOR BOO: If I may, would you agree that the Tribunal explains why it reached that the same rate, prime plus 2%, would be sufficient? In other words, if it has got its own rationale, and expressed -- and I believe 133 might have some explanation, where it says as to why it has decided that these are commercial rates that should be borne as part of the loss.
MR GOSIS: If we go back to paragraphs 130 and 131, the Second Tribunal agreed that TECO was not exposed to any commercial risk going forward. And this is why I stopped there for a few seconds earlier today.
It's not that the Second Tribunal considered that prime plus 2% was an appropriate calculation of the risk-free rate; it accepted it had to apply a risk-free rate because there were no risks. And then it said, and it made specific reference to -- I think it's halfway

15:11 through paragraph 131 -- that prime plus 2% is evidently not a risk-free rate.
So that contradiction is nowhere to be solved. There's nothing in the record that lets us jump over that like TECO attempts to do in paragraph 222 of their Rejoinder, where they say: well, there's no contradiction between saying this is not subject to risk but we should use prime.
Well, if you accept, as the Second Tribunal specifically expressed in paragraph 131, that this rate is not a risk-free rate, the issue becomes final. There's no way to jump over that contradiction.
I don't know if that addresses Professor Boo's question.
PROFESSOR BOO: Thank you.
MR GOSIS: Thank you very much.
DR TORTEROLA: I can continue.
THE PRESIDENT: You have some 20 minutes: hopefully that's enough.
DR TORTEROLA: I said I had 25.
THE PRESIDENT: Let's do it in 20.
DR TORTEROLA: I will do my best, but you know that sometimes it's not easy to cut.
(A discussion re timetable took place off the record)
THE PRESIDENT: Let's break then. It is a one-hour lunch

15:14 break. Let's try to do it in 50 minutes, okay? Because we always start a bit later. 50 minutes; is that okay? Good.
(3.14 pm)
(Adjourned until 4.04 pm)
(4.04 pm)
DR TORTEROLA: (Interpreted) Good afternoon to the members of the Committee, Madam President.
I'd like to finish with a series of considerations by way of conclusion in respect to ...
(Pause to resolve a technical problem)
(Slide 133) Madam President, members of the Annulment Committee, I would like to make a series of comments by way of conclusion now. However, the arguments that will follow cannot be considered just as a summary of what my colleagues Mr Smith and Mr Gosis have already said; I would ask the Annulment Committee to take my comments as complementary to what has been said.
I'd like to begin by referring to some of the accusations that have been made in the exchange of written submissions with regard to the supposed strategic use of this annulment process in order to gain time, as has already been said this morning by Madam Minister. This is something that we profoundly

16:06 reject. In the presentations that preceded, we have shown that we have well-founded reasons and manifest reasons to ask for this annulment. And Guatemala has the right -- and in fact the duty -- to use every resource and remedy available to it under the ICSID Convention, and the Guatemalan officials have every right to use those remedies.

So the final presentation that we heard -- and there's been a lot of discussion regarding damages, and my colleague has given us an excellent explanation, and there has been a very active discussion with the Annulment Committee on this. So I won't actually discuss that portion with you, and I will refer specifically to the proper constitution of the Arbitral Tribunal.

However, before beginning that discussion, I would like to say that on at least two of the three occasions referred to previously by Dr Gosis, the Tribunal's approach was to support Mr Kaczmarek's approach. My team has analysed the questions that have been asked by the members of the Resubmission Tribunal, and there are two issues that were discussed before the Tribunal.

The Tribunal had questions on causation, and also the determination of the quantum of damages. Professor Lowe and Professor Stern asked questions on

16:09 causation mainly, and Mr Alexandrov addressed all of his questions -- or at least the vast majority -- to those on damages issues. So anybody who knows Mr Alexandrov's work knows that that's very interesting.

THE PRESIDENT: When you say "damages", are you referring to quantification? Because you are also, I guess, referring to the quantification of damages and grounds for damages.

DR TORTEROLA: Yes.

As I was saying, there is no disconnection between the different grounds that have been put forward. And those are linked to two important issues: one being the constitution of the tribunal, and the other has to do with the contradictions insofar as quantification of damages, contradictions which in some cases refer to excess of power on the part of the tribunal.

So I want to make that point. And as you will see, this is important in terms of the reasoning that must be followed by this Committee. So in this presentation, I would like to look with you at -- and in order to come to conclusions yourselves -- some of the conclusions drawn by the annulment committee in the Eiser case. These have been discussed in the exchange of submissions, and you will know that Eiser is something that may or may not be followed in the future.

16:10 The reason I am looking at this one is because there is a before and after the Eiser case. And all of us who are lawyers and who also wear other hats, in the future we are going to have to take into consideration what the Eiser award says and consider those when we make statements about potential conflicts that may arise.

Over and above that, I'd also like to say that we have to give some sense to the Eiser case and what has happened, because if we don't, the sins of a few will have an impact on the reputation of many others, and it will impact on those who have to make the declarations and will mean sometimes that they are unable to appear in other cases.

But I'd like to refer to the Eiser case because, just like this Annulment Committee, that annulment committee was constituted of some very highly prestigious individuals, people who are arbitrators in international investment arbitrations, as far as I am aware. And that, I believe, is your case.

So I would just like to remind you that those who were involved in Eiser were the former president of the World Trade Organisation, someone who is in a position where he has to deal with similar circumstances and apply the rules and regulations of the WTO and also the Vienna Convention on the Law of Treaties; then we have

16:13 an attorney general from Pakistan and a former president of the Court of Cassation in France. So these are individuals who have forged a path in international investment, and particularly ICSID investment arbitration.

We have made our analysis from the perspective of within the context of Eiser and outside of it. And Mr Smith has referred to the Eiser case, and I would like to address it again in reference to the matters that you are being asked to deal with.

So to begin with, I'd like to look at the definition and the issue of proper constitution of the tribunal. So that is the question of whether it is an obligation that's fixed in time or whether it's a constant obligation, and the impact that would have on the appointment of the tribunal.

(Slide 134) I believe that this is extremely relevant in the Eiser case. And the part referring to the composition of tribunals under ICSID, that chapter is the constitution of the tribunal. So this means that not only is it important at the time when the tribunal is appointed, but also because the members of the tribunal have to demonstrate that they are completely independent and impartial in their judgments. And it refers specifically to that in the text.

16:15 Then Rule 6 that complements this -- and hopefully you will see that shown on the next slide, slide 135 -- Rule 6 specifically says that under the ICSID system, members of the tribunal "assume a continuing obligation ... to notify the Secretary-General ... of any such relationship or circumstance that subsequently arises" and that may impact upon their need to be completely independent and impartial.

So there is a connection between Rule 6(2), in particular, and Chapter IV of the ICSID Convention. And that Rule 6(2) is called "Constitution of the Tribunal". So Article 52(1)(a) talks of the constitution of the tribunal, Chapter IV refers to the constitution of the tribunal and 6(2) refers to the constitution of the tribunal. Therefore, there is a link -- a very clear and coherent link -- between the two.

So the annulment committee considered whether it was appropriate to request a review, and Mr Quinn Smith I believe explained that this morning. But I just wanted to cite for you the words of the Eiser annulment committee in its paragraph 173 (RLAA-3), and you can see that on slide 136, where it says:

"This Committee has difficulty accepting as correct the submission that it cannot examine a challenge to the impartiality and independence of an arbitrator which

16:17 affects the integrity of the proceedings or the validity or legitimacy of an award. Such an interpretation, in the view of this Committee, would be clearly contrary to the mandate of Article 52 as recalled above."

What it's saying basically is: what is the task of the annulment committee? Well, its task is not to review the substance of the decision; rather, an annulment committee's task is to protect the integrity of the ICSID system. And the committee says so clearly.

What more important task could a committee have than that of protecting the integrity of the ICSID system and guaranteeing the independence and impartiality of those who are deciding a case?

(Slide 137) The committee also said (paragraph 175) -- and it was said this morning -- that:

"... there [is] no greater threat to the legitimacy and integrity of the proceedings or of [an] award than the lack of impartiality or independence of one or more of the arbitrators."

And this is what was said in the Suez case, and this dates back to 2008. The Suez case said:

'"... the Committee agrees with Respondent that ... confidence in the independence and impartiality of the arbitrators deciding their case is essential for

16:18 ensuring the integrity of ... the dispute mechanism as such ..."'

So the absence of the qualities set out in 14(1) may constitute a ground for annulment by virtue of Article 52(1)(a).

(Slide 139) Let's look now at paragraph 207. So why is the Eiser case so important with regard to our discussion? Well, because it's the same case. No, I'm sorry: this is even worse, this case.

Why is it worse than Eiser? Well, it's worse because there is a relationship between Navigant and Sidley Austin, and Mr Alexandrov is a partner of Sidley Austin: he must, in one way or another, to a greater or lesser extent, have had some participation in what the Sidley Austin company was paid to assist Navigant. And this is a 20-year-long relationship. So that in and of itself -- let's forget Mr Kaczmarek for now -- the fact that this was not disclosed is grounds for the Award to be annulled. That's all we need to look at. This in itself is cause or grounds for annulment of the Award.

In the Eiser [decision], the committee, in its paragraph [207], decided the committee should address the relationship between Mr Alexandrov, Sidley Austin and Mr Lapuerta from The Brattle Group, and whether it might create a manifest appearance of bias on the part

16:21 of Mr Alexandrov. It was said that he should "disclose this relationship and [understand] what the consequences of his failure to do so [are]".

(Slide 140) The committee, when it made this analysis, is differentiating between TCC -- Tethyan Copper -- and the Bear Creek case, saying: in the case of Bear Creek, the relations were not parallel, because in the case of Bear Creek, Mr Davis's task, who is the expert in that case, had come to an end. I personally disagree: I believe that the tasks did run in parallel. But here they are presented separately.

In our case, as has been shown by Mr Smith this morning, the tasks run totally concurrently, because at that same time Mr Kaczmarek is presenting his reports in the case that he was supposed to be hearing -- in the parallel case where he had been engaged by the Government of Peru.

The committee, in its paragraph 214, says: unlike TCC -- and it's talking about the Eiser case -- "The facts are substantially different here":

"Dr Alexandrov and Mr Lapuerta worked in four cases as counsel and expert for the same party. Two of them, Pluspetrol and the confidential commercial arbitration, were pending when Dr Alexandrov was sitting as an arbitrator in the Underlying Arbitration.

16:23 In addition, Dr Alexandrov was working simultaneously in the Bear Creek arbitration with other Brattle experts."

In our case there were concurrent relationships, whereas in TCC, according to the Eiser committee, they weren't concurrent. But in this case they are concurrent. And here again we've seen that they were concurrent in at least three cases, absolutely concurrent, over and above the cases we are referring to.

So the Annulment Committee would need to ask itself: was there a duty of disclosure, something that could give rise to questioning of the reliability and trustworthiness of Mr Alexandrov and his independence and impartiality?

The committee says a number of things that, for those of us who work in this field, should give us food for thought. It says that the relationship should not make us immune to a conflict of interest, so any doubts that might arise with regard to an arbitration or any circumstances should be disclosed. And if these relations and circumstances are not disclosed, then the rest of us are fools. Because there are people who don't disclose, who don't fulfil their obligations and their duties, and that is what's being protected by the annulment committee.

16:25 Here the conclusion is that in the relations between Mr Lapuerta and Dr Alexandrov, it's a relationship that should have been disclosed. That was the question. Because these are circumstances that should have been disclosed, in order to avoid any doubt about the independence and impartiality of Dr Alexandrov as an arbitrator in the specific arbitration in question.

The Committee needs to have the courage to speak out, and we lawyers know this. It's said that experts in damages work very closely with the lawyers in preparing the case, and during an arbitration there are many exchanges between them. Those of us who act as lawyers are aware that that is the case.

Mr Smith has already said that there are cases that are prepared from the perspective of the damages expert, because as a damages expert you know things that others do not, in terms of economics and finance. And when an expert is engaged and when they go before a tribunal, there is constant interaction and communication.

But nothing could be done without the head of team being aware of it. I would be very unhappy if, as a head of team, somebody was doing something, as a member of my team, with which I disagreed, or was doing it behind my back. And all of the meetings, I should be there. And this should be the case for any

16:27 lawyer who takes his role seriously.

(Slide 145) Also this morning Professor Jones asked a question about knowledge that the Freshfields lawyers may have had about this situation. I would like to answer, if you'd allow me, and go to paragraph 228 of the Eiser decision.

First of all, we and Guatemala do not know what Freshfields knew or did not know at the time, because this was not disclosed to us.

But secondly, and what's more important, is that the primary responsibility of judging that situation is not to ask whether Freshfields' counsel knew or didn't know, or had other interests that were not communicated to Guatemala. The first and foremost obligation to disclose is, as was explained by Mr Smith this morning, a person who was involved in more than 15 cases did not declare that, and that was Mr Alexandrov. We need to begin with the person with that responsibility: that was Mr Alexandrov.

THE PRESIDENT: (Interpreted) Mr Torterola, one thing is the duty that Mr Alexandrov may have or may not have had to disclose things, and another thing is whether Guatemala could have obtained that information through other means. But you have said that Guatemala was unaware.

DR TORTEROLA: Well, I can say that I personally was

16:29 unaware. I had that discussion with Guatemala and I informed myself.

MS MENAKER: I just want to object, because this is testimony. And I held off doing it before. But if he's talking about what Guatemala knows and saying ...

THE PRESIDENT: (In English) If you want to be on record, one second please. This is not being interpreted into Spanish. (Pause)

MS MENAKER: I was just raising an objection because Mr Torterola before made a statement, an evidentiary statement, saying that Freshfields did not tell Guatemala something. There is no witness testimony on the record. Of course, if there was, we would have an opportunity to cross-examine, perhaps even ask for document production. And now he is talking about his personal knowledge, saying:

"... I [was] personally ... unaware. I had that discussion with Guatemala and I informed myself."

I mean, we should not be having factual testimony at this point in this proceeding. It's improper.

THE PRESIDENT: Okay. I just wanted to put some context into something that you mentioned in passing. But I wasn't sure --

DR TORTEROLA: (In English) Yes, I mean, you asked me; that's why I responded.

16:31 THE PRESIDENT: Yes, I did ask.
MS MENAKER: I think the difference is also a matter of constructive knowledge, as opposed to specific individuals' actual knowledge.
DR TORTEROLA: Well, they will have the time to argue that. They will have the time to argue that.
You put me a question, Madam President put me a question, and I responded. That's it. Everything about all the other issues -- and this is not different, I'm sorry, from what we said in our pleadings.
THE PRESIDENT: It's in your pleadings; I just wanted to make sure.
DR TORTEROLA: Yes, it is in our pleadings. And with the exception of what we responded to you, everything else, it is in the pleadings.
MS MENAKER: Your question, Madam President, was:
"... Mr Alexandrov may have had or ... not ... to disclose things ... another thing is whether Guatemala could have obtained that information through other means."
That is a constructive knowledge question, whether they could have; not whether they did, not whether a specific individual knew or relayed information.
And as far as what is in their pleadings, there is one sentence in their pleadings, which again is

16:32 improper, which is a factual statement -- it is only one statement -- which says Guatemala did not know, but that's without any evidence.
DR TORTEROLA: I think that there is a problem here with the interpretation. Your question was not what it has been read in English. Your question was different. And I will read it from Spanish for the translation again. Your question, Madam President -- you can put the question again yourself if you wish -- was:
(Interpreted) "One thing is the obligation that Mr Alexandrov could have had of making some disclosures, and another one is a marginal argument presented by TECO whether Guatemala independently could have obtained that knowledge by other means."
And you declared that Guatemala did not know about that, and I answered: I answered that Guatemala did not have knowledge of that.
THE PRESIDENT: The proper translation would be "would have obtained that knowledge".
DR TORTEROLA: (In English) Yes. I mean, it was a clear question and I have responded. I didn't [do] anything wrong in order to be interrupted in my presentation.
MS MENAKER: I'm just saying: the interpretation again said "could have".
DR TORTEROLA: Yes, but it's a wrong interpretation.

16:33 MS MENAKER: Okay. Well, that is not --
DR TORTEROLA: It's a wrong interpretation.
THE PRESIDENT: It's "would have", whether Guatemala would have obtained it through other means. And Dr Torterola confirmed what was in the written statements: that Guatemala did not. He's not testifying to it; he's just confirming what was already in the record: that Guatemala did not obtain -- that according to them, Guatemala did not obtain that -- according to Guatemala, it did not obtain that knowledge, either through Freshfields or otherwise.
MS MENAKER: And may I -- on that, I have two issues.
There is no evidentiary support in the record. There is one stray line in the pleadings that says Guatemala did not know. That is not evidence. There is no witness statement from anybody saying whether they knew or obtained any information.
And secondly, the other statement that Mr Torterola made in response to your question was with respect to his personal knowledge. So that did go beyond the question and that is testimony.
DR TORTEROLA: Okay. Maybe we can strike what I said, that it was my personal knowledge. The other thing, it's in the record, we can locate it for you; and if it's not in the record, we can strike it. You put a question to me

16:35 and I responded to the question.
THE PRESIDENT: I think it's in the record that Guatemala only learnt later, after the resubmission proceedings. I think that's an allegation that's in the record.
PROFESSOR JONES: It's an assertion in the pleadings, as I understand it; it's not evidentially established.
THE PRESIDENT: Yes. It's not evidence. It's allegation, it's an argument.
DR TORTEROLA: Could I request to the Secretary to tell me how much do I have left?
MS KUROWSKI: You have used 2 hours, 26 minutes and 41 seconds out of the 2 hours and a half.
DR TORTEROLA: Okay. I have 3 minutes then. Thank you.
(Interpreted) I want to say three things.
(Slide 149) Paragraph 250 (RLAA-03), if we put it on the screen, the committee says that:
"The influence of Mr Alexandrov amongst the arbitrators would have been perceived differently in every material aspect, had they known the full facts and the extent of his and Sidley Austin's relationship with the Brattle Group and Mr Lapuerta."
And that is indeed of application here.
The [committee] says (paragraph 251):
"What the Committee can also conclude is that due to this non-disclosure Spain lost the possibility of

16:36 a different award."
Guatemala lost the possibility of a different award.
The committee also found that the non-disclosure violated Article 52(1)(d), and it is difficult to conceive of a more fundamental rule of procedure than the one that indicates that the tribunal resolving a case be independent and impartial.
I repeat our request for annulment of the Award, whether partially or fully, as relevant. Thank you very much, members of the Committee.
THE PRESIDENT: You have a question?
PROFESSOR JONES: Could I just foreshadow a question. We are going to, as an Annulment Committee, consider questions to put to counsel for Friday. But there's one issue that I'd just like to raise, which arises from paragraph 227 of the Eiser annulment committee decision on slide 144 of Guatemala's presentation, and it relates to the role of experts in arbitration.
Some of you may be aware that I have some well-developed views which have been expressed in writing about the role of experts in arbitration, the most detailed version of which is in a paper presented to the ICC institute in Paris last year, and which is on my website. In that material I discuss the history of and the duties of tribunal- and party-appointed experts

16:39 and establish, I think, that tribunal-appointed experts are not advocates engaged by counsel as an extension of their advocacy, but rather are there in the proceedings to assist the tribunal and, although appointed and paid by parties, owe a clear duty of independence and assistance to the tribunal.
Now, this is something which is not discussed in the Eiser decision. And I'm interested in understanding what view each party has about the role of experts in arbitration, including ISDS arbitration, and whether that role is relevant at all to the question of the issue of disclosure.
I'm not expressing a view on that, but I don't think this issue has been ventilated in the Eiser decision or indeed in counsels' submissions so far. It's for reply perhaps, not for answer now.
DR TORTEROLA: (In English) Okay. Thank you very much. The only thing that I would like is just to mention that I think I've been quite clear on that. I mentioned paragraph 227, and I also said that the committee in Eiser had the courage to spell out the kind of relationships that are going on in our ISDS practice between experts, especially experts in damages, and counsel.
But as you suggested, I would like to read your

16:41 article, that I confess that I have not read, and I will answer to your question tomorrow. Thank you.
THE PRESIDENT: Ms Menaker, do you perhaps need a couple of minutes or are we ready to continue?
MS MENAKER: I am ready in half a second.
THE PRESIDENT: Okay, excellent. (Pause)
(4.43 pm)
Opening statement on behalf of Claimant
MS MENAKER: Madam President, members of the Committee, good afternoon again.
(Slide 2) This case has the unfortunate distinction of being one of the longest-running disputes at ICSID. TECO filed its claim nearly a dozen years ago for a breach that occurred two years earlier. As you're well aware, the Original Tribunal committed annullable errors. But given the limited competence of an annulment committee, which is unable to modify or correct an award, TECO was then compelled to resubmit its claim to arbitration in order to recover the amounts that had been wrongfully denied to it.
Now, in the meantime -- and you can see this long history on our first slide here. In the meantime, while this resubmission proceeding was ongoing, TECO also sought to collect on the unannulled Award for the historical losses that had been awarded to it, the

16:44 historical damages and the interest that had been awarded to it, that Guatemala had tried, but failed, to have annulled.
You can also see here on this first slide that that effort lasted four years. It took longer than the resubmission proceeding for TECO to collect on an ICSID Award that was final, that was not subject to any further recourse, and that under the ICSID Convention had the status of a final judgment of a court in an ICSID signatory state.
I'd ask the Committee to keep in mind that Guatemala opened its Reply submission at paragraph 4 by stating:
"... TECO has attempted to confuse the Committee ..."
And yet if you had only read Guatemala's Memorial, you would be forgiven for thinking that TECO had prevailed on its entire damages claim, because you will search in vain throughout that entire Memorial for any mention of the fact that the vast majority of TECO's damages claim in the resubmission proceeding was rejected. There is simply no mention of that fact whatsoever.
(Slide 3) Instead, in its Memorial (paragraphs 159-160), this is what Guatemala said:
"By and large, the Tribunal adopted Mr Kaczmarek's

valuation of TECO's damages ...

"... the Resubmission Tribunal might have not readily and wholly endorsed Mr Kaczmarek's valuation as it did in the Resubmission Award, had it known of Dr Alexandrov's relationship."

But as you can see here, we've mapped out what the claims were throughout the proceedings. And as you also know well by know, that is just patently false, because in the resubmission proceeding TECO did obtain additional damages and interest, but it only received a very small portion of the relief that it sought. It went in asking for $195.7 million and it came out with $26.8 million. That is not a wholesale endorsement of Mr Kaczmarek's valuation by any stretch of the imagination.

In our view, the majority of the Resubmission Tribunal was wrong to deny TECO damages for the loss of cash flow or the loss of value for the period after 2013. That was damages that TECO, in our view, would have earned but for Guatemala's breach.

But as strongly as we believe that, we also recognise that this proceeding has come to an end. So while we may disagree very, very strongly with the majority of the Resubmission Tribunal's reasoning, the fact is that the Award is reasoned, and that both

parties were accorded due process. And that is all the parties have a right to; that is all they can ask for.

Once the Award and the original Annulment Decision were issued, it was all but a foregone conclusion that TECO, at a minimum, would be awarded damages for loss of value damages for the period up through 2013. And this is because those damages were a logical consequence of the Original Award together with the original Annulment Decision.

This is one of the reasons why we've spent quite a bit of time discussing the procedural background of these proceedings: because it's important to us for you to understand that at the time when we submitted our claim to the Resubmission Tribunal, it was all but given that we were entitled to the loss of value damages up through the end of the 2008-2013 tariff period. And the focus of the resubmission proceeding was not on those damages; it was instead on the loss of value damages from 2013 onward, through the end of the concession period, which was another 35-plus years -- 33 or 35 years.

In essence -- and this may respond somewhat, hopefully, to the President's question earlier, but without getting into an enormous amount of detail -- in essence, what TECO had argued was that because the

2008-2013 tariff was unlawfully set at a low rate, the value of the company was diminished. And it was diminished not only for the period of that tariff, because the Original Tribunal had determined the tariff should have been at X, say $200, instead it was set at Y, $100, so we lost the interim, the differential, during that period of time.

But we said that the diminishment in the value was greater than that because when Guatemala had decreased the tariff, they changed the methodology. And we said that when you were forecasting the future cash flows for that company, anybody would forecast the future cash flows for the next tariff period at an equally low rate. But, but for the breach, we would have been entitled to it at a higher rate. And that's why our damages extended beyond that tariff period.

So we argued that that's what anybody would do, whether we stayed in Guatemala and continued to operate the company or whether we sold: that someone would pay less for it because they would consider that at that point in time the tariffs would stay at this artificially low rate.

Guatemala, on the other hand, argued: no, if you award them the lost cash flow for those future periods, you are anticipating that Guatemala will continue to

breach the treaty in the future. That was the crux of the debate between the parties.

What was uncontested -- and remains undisputed -- is that the tariffs are set for five-year periods, and the distributor's revenue is set. The only revenue they make is on this VAD, which is a portion of that tariff.

So TECO, when they sold in the middle of that period -- if they had stayed in Guatemala, the Original Tribunal already had said: the tariff should have been X, instead it was lower, and you get the differential. We sold in the middle of that tariff period, and the Resubmission Tribunal said: it's only logical that we also lost that differential for the remainder of the tariff period, because anybody purchasing the company, the only revenue they are going to get is from that tariff, [and] they were obviously going to pay at the lower tariff rate than if the tariff was higher.

You can see that on this next slide, slide 4. That is what the Resubmission Tribunal decided (REA-30). In paragraph 86 they say:

"It is axiomatic ..."

It's only logical:

"... that the 2008-2013 tariffs must have been a factor in any rational valuation of EEGSA, and that the tariffs would have tended to depress the value of

16:51 EEGSA below the level at which it would have been if the tariffs had been higher and expected to continue at that ... rate."

And then they say (paragraph 104):

"... it is evident that the shortfall in the cash flow -- that caused the Original Tribunal to award historical damages for the period from August 2008 until October 2010, when EEGSA was sold, would continue until the end of the Third Tariff Period [until] ... 2013."

Because again, we submitted our claim to arbitration in 2010, so anything after that were forecasted cash flows. But for the tariff, you didn't have to forecast it: it wasn't changing. And then for what the tariff should have been, the Original Tribunal already decided that, so that would not have changed. So it was really only for the post-2013 period that you are then forecasting a tariff that you don't know what it will be.

And that's what the President of the Resubmission Tribunal asked Guatemala. He said at the resubmission hearing:

"... I think Claimant's taken the point of view that the historical-damages claim logically could go forward to 2013 ..."

We are calling it loss of value because it was after

16:53 the date we submitted the claim, but it's part of that same tariff period. And what does Guatemala say in response?

"I think in terms of going to 2013 in terms of that question, that must be right."

That really shows you that the entire debate during the resubmission proceeding was about the post-2013 damages. With respect to the damages from 2010 to 2013, Guatemala conceded that given the Original Award, given the fact that they had failed to annul that portion of the Original Award, of course we would have had damages for the remainder of that tariff period.

I just note that this exchange is cited by the Tribunal in the Resubmission Award at footnote 122.

The Resubmission Tribunal's award of damages thus was, in TECO's view, the most conservative award that it could have issued based on the Original Tribunal's finding of breach and the annulment decision.

After failing to acknowledge in its Memorial -- anywhere in its Memorial -- that TECO had not been awarded the vast majority of the damages that it had sought, and erroneously stating that the Resubmission Tribunal had "wholly endorsed" Mr Kaczmarek's valuation, after we pointed out in the Counter-Memorial that of course that's not the case, in the Reply, Guatemala

16:54 changed course and came back and said -- and this is from paragraph 365 -- that:

"... Teco ... suffered a staggering loss in these proceedings. For Teco to say that Guatemala 'failed' in these proceedings is thus not only a gross mischaracterization; it is delusional."

Now, think: if TECO failed so miserably in its claim, how can Guatemala allege at the same time that Dr Alexandrov was biased, that he tainted the rest of the Arbitral Tribunal against Guatemala, and that there would have been a materially different outcome had the alleged disclosures been made? By its own admission, Guatemala cannot show this.

In our view, this reveals the obvious opportunistic and bad faith nature of Guatemala's application. And that pretextual nature of Guatemala's arguments and the challenges that it has made is laid bare by its actions over many years to avoid payment of the unannulled portion of the Award.

(Slide 5) You can see here on this slide, before the former Annulment Committee -- now this is seven years ago, when we were last before an annulment committee -- this is the Committee's own quotation language (REA-76, paragraph 34) saying:

"... Guatemala has represented to [the] Committee

16:56 that it undertakes to comply with the Award if it is not annulled."

And we heard something similar this morning. It was after that, after the award of historical damages and interest was not annulled, we therefore wrote to Guatemala asking them to pay us, giving them our bank details. And what happened instead? We needed to file in a US district court to enforce the Award, because Guatemala refused to pay.

And when we moved for enforcement, Guatemala raised not only every argument imaginable, but arguments that directly contradicted what they had argued before the tribunals, and which has in many cases similarities to what they are doing before this Annulment Committee.

So, for example, they first argued that the Award cannot be enforced because the entire Award was annulled; there's nothing left to enforce, it's a nullity. At the same time, we were before the Resubmission Tribunal. Of course they were not making that argument before the Resubmission Tribunal, but before the court they did.

That was back in November 2017. And a year later, September 2018, the court dismisses that argument and says (CLAA-4):

"Guatemala's contention that the relevant award is

16:57 a nullity is unconvincing."
But then they go on to make further arguments, and they argue that the Iberdrola claim was dismissed; and that our Tribunal was obligated, as a matter of res judicata, to dismiss TECO's claim and to follow Iberdrola.
Not only had they not argued that before the Original Tribunal, they had acknowledged that the Iberdrola award had no binding effect on the TECO Tribunal and was not res judicata. They simply had argued: it's persuasive authority, you should come out the same way. We argued: no, it's wrong, you should decide differently. And the Tribunal made its decision.
So for the first time, it turns around in court and says: do not enforce this Award because they violated the fundamental principle of res judicata. Just like they are now telling you: you should annul the award of interest because the Resubmission Tribunal violated the fundamental principle of res judicata. And as I'll show later this afternoon, before the Resubmission Tribunal they not only said no such thing: they expressly disavowed that there was any res judicata ruling on interest.
Then they came up with a new-founded, wholly baseless claim of fraud, accusing TECO of fraud in

16:59 a very defamatory manner, which the court also dismissed. And that's yet another whole year. We're now in October 2019.
Then after that, when the court says, "We need to go back to the court in order to take more steps to enforce", Guatemala says, "It's too soon. We would have paid, but TECO hasn't provided us bank details". Of course we had done so.
Then they again argue, whenever they lose, that it's a fundamental denial of due process. So they accuse the District Court of violating their constitutional due process rights, and they appeal to the DC circuit. And part of their appeal was predicated on the grounds that they had a fundamental right to engage in document discovery, document production for enforcement of a final ICSID award. That was still pending, but other motions for stay were rejected.
And then they plead that Covid has prevented them from making consultations necessary to pay, back in May 2020.
And as you know, finally, November 2020, we collect on that Award. That is only because we succeeded in attaching assets. That is why we were paid, not for any other reason, as I think this shows very clearly.
So now, after a full ten years of arbitration

17:00 proceedings, which started in October 2010 with the filing of our Notice of Arbitration and ended in October 2020 with the rendering of the supplemental decision, Guatemala has now engaged a new counsel, who has admittedly searched to find any possible ground for annulment to raise, and claims to have discovered information that has been publicly available for years, and is using that as a basis to annul this Award. As we'll show throughout the course of this afternoon, this is just the latest pretextual argument put forth by Guatemala to avoid ending this long-running dispute and compensating TECO for harm that it suffered 14 years ago.
I'm now going to turn the floor over to my partner Ms Young, who is going to first explain why Guatemala's application is inadmissible because annulment is not an available remedy for the complaints that Guatemala raises against Dr Alexandrov.
After that, she is going to go on to demonstrate that even if the Committee were to disagree, to find that recourse can be made to annulment rather than to revision or to the disqualification proceeding, depending on the timing, for these types of complaints, that Guatemala's application still must be dismissed because Guatemala has waived any right that it had to

17:02 argue that Dr Alexandrov manifestly lacks independence or impartiality, and this is because Guatemala knew or should have known of the facts on which it relies years before it brought this annulment claim, and therefore it ought to have filed a disqualification application during the pendency of the resubmission hearing.
I'm going to then show that in any event, the circumstances at issue do not show a manifest lack of independence or impartiality on Dr Alexandrov's part.
Then my partner Mr Polášek will demonstrate why Guatemala's arguments to annul the award of loss of value damages for the period from 2010 to 2013 on account of a lack of reasons and a violation of a fundamental rule of procedure fail.
Then finally, I'll come back and explain why Guatemala's request to annul the award of interest at the US prime rate plus 2% on the loss of value damages and the pre-sale interest also fails.
So with that, I'll turn the floor over to Ms Young.
MS YOUNG: Thank you very much. (Pause)
Good afternoon, Madam President, members of the Committee.
As the Committee heard earlier today from counsel for Guatemala, Guatemala argues in this case that the impartiality and independence of an arbitrator can be

17:03 assessed de novo in the context of an annulment proceeding under Article 52(1) of the ICSID Convention, and that the proper recourse does not lie in revision under Article 51. TECO disagrees.

(Slide 8) Annulment under Article 52(1) is not a remedy for alleged arbitrator bias. In the ICSID system, the proper recourse for addressing alleged arbitrator bias is dictated by the timing of when the relevant fact is known, or should have been known. What the ICSID framework tells us is that if the relevant fact is discovered during the course of the arbitration, the party may propose disqualification of the arbitrator under Article 57 of the ICSID Convention. And this is represented on the slide, on the flowchart here, in blue.

Pursuant to Article 58, the decision on the disqualification proposal will be taken by the two other unchallenged arbitrators, or by the chairman of the ICSID Administrative Council in certain defined circumstances.

However, if the relevant fact is discovered after the arbitration proceedings are closed but before the award is issued, the party then may request to reopen the proceedings under ICSID Arbitration Rule 38, on the ground that the new evidence is forthcoming of such

17:05 a nature as to constitute a decisive factor or that there is a vital need for clarification on a certain specific point. This is reflected in purple on the flowchart.

Once the proceedings are reopened and the disqualification proposal is made, the same decision-making process then applies under ICSID Convention Article 58.

If the relevant fact, however, is discovered after the award is issued, the party then may request revision of the award under Article 51 of the ICSID Convention, provided that the request is made within 90 days of the discovery of the fact and within three years from the date of the award. This is what's reflected in green on the flowchart.

The revision request goes to the original tribunal for decision; and if that is not possible because a member is not available, then a new tribunal is constituted. This of course is exceptional. It would happen if a tribunal member had died or was incapacitated. This also could happen with any tribunal, or indeed committee.

In this circumstance, if the fact arises after the award is issued, the enquiry on revision is different from the enquiry in a disqualification proposal.

17:07 In a disqualification proposal, the unchallenged members or the chairman, depending on the circumstances, assess whether the arbitrator manifestly lacks the qualities set out in Article 14(1) of the ICSID Convention or whether the arbitrator was ineligible for appointment: for example, he or she did not meet the relevant nationality requirements.

By contrast, in a revision proceeding under Article 51, the tribunal is called upon to assess, first, whether the new fact was unknown to the tribunal and the applicant, and whether the applicant's ignorance was due to negligence; in other words, whether the new fact is something that was not on the record before the tribunal and was not discoverable by the applicant through reasonable due diligence. It thus imposes an affirmative duty on the parties.

Guatemala said this morning: well, this doesn't work here, because if an arbitrator is biased, it's known to that arbitrator. But that's not the standard. The standard is: was the fact known to the tribunal; in other words, was it on the arbitration record before the tribunal?

(Slide 9) The second issue for the tribunal to assess is whether the new fact is of such a nature as decisively to affect the award; in other words, whether

17:08 the new fact would have had a decisive impact on the outcome of the award, such that the finality of the award should be disturbed.

If the tribunal finds that a new fact of alleged arbitrator bias does not decisively affect the award, the award then stands and the request for revision is rejected. If the tribunal finds that the new fact does decisively affect the award, the award may then be revised accordingly.

The original tribunal is best placed to make these decisions, to assess these issues. Indeed, you heard this morning a litany of issues that Guatemala says we do not know about Dr Alexandrov because we are in annulment; but all of those issues could have been addressed with the Original Tribunal in a revision proceeding. And there is no dispute that Guatemala did not seek revision in this case.

The revision procedure under Article 51 in this way advances several key objectives of the ICSID Convention, including procedural economy, efficiency, and the finality and stability of ICSID awards. And importantly, it also accords with the drafting history of the ICSID Convention.

I would note that counsel for --

PROFESSOR JONES: Could you just help me with this.

17:09 Assume that an application for revision is made on the basis that it was not known until later that there was something undisclosed by one member of the tribunal. How do you say the old tribunal deals with that issue with that member subject to the cloud of that allegation? Bearing in mind that prior to the issue of the award, the question would be whether the remaining members of the tribunal considered that the impugned member should be removed or encouraged to resign.

So how does the tribunal, to deal with this question, approach that? Bearing in mind your test that the question is: would it have made a difference?

MS YOUNG: Right, a decisive difference.

PROFESSOR JONES: Yes.

MS YOUNG: In that scenario, the original tribunal would first determine whether this fact was unknown to the applicant, not based on its negligence. So that would be the first question.

Then the second question would be: is this new fact of such a nature as to decisively affect the award? In other words, now that the tribunal is aware of this fact, would it have materially or decisively changed the outcome of this award?

And the two unchallenged arbitrators, or unimpugned arbitrators, would be in a position then to make that

17:12 decision.

PROFESSOR JONES: How would they deal with the proposition which might occur to them that that impugned tribunal member should be removed and a new member potentially appointed, without the benefit of knowing who that might be or what their contribution to the deliberations of the tribunal as to the outcome might be?

MS YOUNG: In that instance, you potentially could have the impugned arbitrator resign and then be replaced, according to the rules set out in the ICSID Convention. The tribunal then would be reconstituted and potentially re-hear issues, so that the award could be revised accordingly.

PROFESSOR JONES: Would that mean that your test as to whether it was decisively different would have to be deferred until the tribunal was reconstituted?

MS YOUNG: You would have to first determine -- because the second part of your test, once you determine this is a new fact, is whether or not the bias, or the lack of independence or impartiality, had a decisive impact on the award. You have to determine that in the first instance.

Then once that's determined, that the finality of the award should be disturbed, then at that moment in time you could have a replacement of that arbitrator.

17:13 But you would first need to determine: this is of such a nature that materially this award would have been different.

PROFESSOR JONES: Thank you.

MS YOUNG: Okay, I'm going to turn back to slide 10. This goes to the drafting history of the ICSID Convention.

As the drafting history tells us (CLAA-30), the ICSID Convention drafters rejected a proposal from the Costa Rican delegate to add a provision to allow annulment of the award where a disqualification could have been possible had it been made before the award was rendered, so the very circumstance that Guatemala alleges that it finds itself in.

Chairman Broches replied that:

"... he thought the Convention did not leave the problem unresolved since if the grounds for disqualification only became known after the award was rendered, this would be a new fact [that] would enable a revision of the award. He then requested a show of hands that the ... proposal enjoyed little support."

It's important for the Committee to consider the meaning of this proposal. If Guatemala's interpretation in this case were correct that Article 52(1)(a) and/or (d) permit a committee to declare and decide the impartiality of and independence of the arbitrator

17:15 de novo, the Costa Rican proposal would not have been necessary. On the basis of Guatemala's interpretation, the very authority that the Costa Rican delegate was seeking to add already would have been incorporated in Article 52(1)(a) or (d). Neither Chairman Broches nor my other delegate, however, noted that this authority was already incorporated. Rather, the proposal was put to a vote and defeated.

TECO's interpretation also is supported by the decisions of two annulment committees: the committees in Azurix v Argentina and OIEG v Venezuela. This morning you heard from Mr Smith that these decisions are not relevant; that Azurix is an earlier decision that is not reflective of modern practice. We submit that that is not correct. And the reasoning in Azurix was endorsed and adopted by the committee in OIEG, which is from 2018, 4 years ago.

(Slide 11) The committee in Azurix (RLAA-22, paragraph 281), consistent with the drafting history that we just saw, observed that:

"In the event that the party only became aware of the grounds for disqualification of the arbitrator after the award as rendered, this newly discovered fact may provide a basis for revision ... under Article 51 ... but, in the Committee's view, such a newly discovered

fact would not provide a ground for annulment under Article 52(1)(a)."

In OIEG, the committee said the same.

PROFESSOR JONES: I think you are not helping us with the slide numbers. Could you do that, please.

MS YOUNG: Sure, yes. So this is slide 12.

The OIEG committee likewise held (CLAA-26, paragraphs 99) that:

"... Article 52(1)(a) is not the proper means to address the disqualification of an arbitrator."

As the committee noted (paragraph 100):

"... the intent of the drafters ... was to distinguish annulment under Article 52(1)(a) from disqualification under Article 57."

Slide 13. The OIEG committee underscored that, unlike in an annulment proceeding, a reopening or revision would have allowed the arbitrator -- in that case, Alexis Mourre -- "to give his explanations". "Such an outcome", the committee noted (paragraph 152):

"... would have been consistent with the letter and spirit of the ICSID Convention and Arbitration Rules ..."

As the committee highlighted, there is no procedure or mechanism for an arbitrator to provide explanations in an annulment, because the parties' allegations are

not in the form of a disqualification request, so ICSID Arbitration Rule 9 does not apply. While an annulment committee theoretically could invite the arbitrator to provide his or her explanations, TECO is not aware of any annulment committee having done so.

Contrary to Guatemala's suggestion, it cannot be incumbent upon the party proposing annulment to provide a statement from that arbitrator. In such circumstances, the arbitrator would became that party's witness, subjecting the arbitrator potentially to cross-examination by the opposing party. He or she also could be called upon to reveal information about the tribunal's deliberations, which are subject to secrecy under ICSID Arbitration Rule 15.

Allowing disqualification arguments to proceed on annulment thus is procedurally unfair because it does not permit the arbitrator an opportunity to provide explanations in response to the allegations made against him or her, which in turn may have an impact on his or her reputation and standing, as well as future arbitral appointments. It also creates a perverse incentive for a party to wait until the end of an arbitration proceeding to raise disqualification grounds, which is exactly what Guatemala has done here.

On annulment there is no risk of alienating tribunal

members because the award has already been rendered. The party can wait for the award, see if it prevails; if it does not, it files for an annulment. And then in annulment there is no mechanism for the arbitrator to come and provide an explanation to what has been asserted. This is not what the ICSID Convention intended.

Now turning to Article 52(1)(a). This provision provides that an award may be annulled where the tribunal was not properly constituted. In the light of its context, as well as the object and purpose of the ICSID Convention, Article 52(1)(a) cannot be interpreted as providing the parties with a de novo opportunity to challenge members of the tribunal.

(Slide 14) As the Azurix committee found (CLAA-22, paragraph 280), annulment is possible on this ground only where there was a failure to comply properly with the disqualification procedure for challenging members of the tribunal. This is because Article 52(1)(a) covers breaches of the rules governing the process of constitution of tribunals. So that would cover Articles 37 to 40 and 56 to 58 of the ICSID Convention. Accordingly, if those procedures have been properly complied with during the course of the arbitration -- as they were in this case -- the tribunal will be properly

constituted for purposes of Article 52(1)(a). (Pause)

Earlier this afternoon, Guatemala complained that "properly constituted" does not equal "procedures". But the constitution of the tribunal is governed by procedural rules. If the tribunal is not properly constituted, the procedural rules governing its constitution were not properly complied with.

This of course includes rules covering disqualification proposals. If there is a defect in that process, in that procedure, the tribunal and the award may be subject to annulment under 52(1)(a). However, where, as here, disqualification was not proposed, there is no disqualification procedure or decision to review on annulment and no basis to annul the award under Article 52(1)(a).

As the Azurix and OIEG committees --

PROFESSOR JONES: So that was slide 15?

MS YOUNG: Slide 16.

PROFESSOR JONES: You are now at slide 16. Could you keep the slides numbered, please.

MS YOUNG: Yes.

Turning to slide 16. As the Azurix and OIEG committees both found, in addition to being inadmissible under Article 52(1)(a), allegations of arbitrator bias never raised in an arbitration proceeding are equally

17:23 impermissible and inadmissible under Article 52(1)(d).
I want to turn briefly to Guatemala's contrary interpretation that you heard earlier this afternoon, and this is on slide 17.
Guatemala's contrary interpretation suffers from at least three fundamental flaws. The first flaw is that it ignores the distinction in the ICSID system between annulment on the one hand and disqualification on the other. As the OIEG committee found (CLAA-26, paragraph 101):
"... even in the case of an arbitrator's lack of qualities required for the proper constitution of a Tribunal, the remedy expressly identified in the ICSID Convention is not annulment under Article 52(1)(a) but disqualification under Article 57."
Which is what we saw on the flowchart on the first slide.
Slide 18. The second problem is that Guatemala's contrary interpretation ignores the distinction between corruption and other types of arbitrator bias in the ICSID framework. If impartiality and independence were encompassed in Articles 52(1)(a) and/or (d), as Guatemala says, Article 52(1)(c) would be entirely superfluous.
If there is evidence of corruption on the part of

17:24 a tribunal member, that arbitrator ipso facto manifestly lacks independence and impartiality. Corruption is the most extreme category of a manifest lack of independence and impartiality. Accordingly, if you import a manifest lack of independence or impartiality into Article 52(1)(a) or (d), as Guatemala does, there is no need for Article 52(1)(c). All arbitrator bias and misconduct, including corruption, would fall within Articles 52(1)(a) and/or (d). And that is contrary to accepted principles of treaty interpretation, such as effet utile, which requires all provisions of a treaty to have meaning and to be given effect.
It is also contrary to the drafting history of the ICSID Convention. As the drafting history shows -- and this is on slide 19 -- there were two separate efforts to broaden the scope of Article 52(1)(c), both of which were defeated.
First (CLAA-30, page 852), a proposal was made to broaden and replace the word "corruption" with "misconduct". This proposal was defeated 23 to 3.
Slide 20. A second proposal was made by the French delegate to broaden and replace the word "corruption" with "lack of integrity" or "defect in moral character". This proposal was defeated 16 to 4.
Guatemala cannot be permitted to bring in through

17:26 the back door of Articles 52(1)(a) and/or (d) what the drafters expressly rejected in Article 52(1)(c).
Guatemala argued in its pleadings that the comment that you see which follows Mr Chevrier from France, the comment of the Austrian delegate, supports this interpretation. But that's wrong, for two reasons.
The comment of the Austrian delegate was that the French proposal was already covered by (a). First, no delegate concurred with that comment. Instead, the chairman put the French proposal to a vote and it was then defeated.
Second, as we saw earlier, following this exchange, the delegate from Costa Rica subsequently proposed to add the provision allowing annulment where disqualification was possible but not made during the arbitration, and that proposal was rejected. So if the delegates at this point had agreed with the Austrian delegate that this bias already was covered by (a), the Costa Rican proposal that came later never would have been made; it wouldn't have been necessary.
PROFESSOR BOO: I missed -- where is the reference to bias here that was said to be covered? Can you go back?
MS YOUNG: I was just using "bias" as a shorthand. But the phrases were "lack of integrity" or "defect in moral character". It was a proposal by the French delegate to

17:28 take the word "corruption" and to soften it.
PROFESSOR BOO: But in terms of your proposition, saying that the drafting history supports the challenge of an arbitral tribunal lies only in 51 and not in 58, it is just the exchange between Chairman Broches and the Costa Rican delegate?
MS YOUNG: Yes.
PROFESSOR BOO: There was no discussion on that aspect; is that correct?
MS YOUNG: So the point on that -- we can go back to that slide; this is the beginning.
PROFESSOR BOO: Because that seems to be the authority that Azurix was relying upon.
MS YOUNG: So the point I was making is that the exchange here, where there is a proposal to replace the word "corruption" with either "lack of integrity" or "defect in moral character", following this discussion comes the Costa Rican delegate's proposal to add a new provision that would allow for annulment where a disqualification proposal could have been made but was not made. So if the idea of a lack of integrity was already incorporated into 52(1)(a), there would have been no need for an addition.
PROFESSOR BOO: So you equate lack of integrity with conflict of interest?

17:29 MS YOUNG: Yes.
PROFESSOR BOO: And possible disqualification on this basis?
MS YOUNG: Yes, exactly. And we know that because the French delegate's comment refers to Article 14. So he says, "When I refer to Article 14, I am talking about lack of integrity or defect in moral character". So he is trying to add these qualities, the manifest lack of which would be the basis for disqualification. He is saying, "We should add this instead of 'corruption', because corruption is such a high bar. Let's have something not quite so high". And the delegates say no.
PROFESSOR BOO: I think corruption, you can put it aside. The question here is independence and impartiality.
MS YOUNG: Right.
PROFESSOR BOO: Is it the same as lack of integrity? That is something that perhaps needs some discussion.
Sorry, don't let me disturb your --
MS YOUNG: Guatemala is not arguing corruption. Guatemala is arguing that there is a "manifest lack of independence and impartiality", which we obviously dispute.
But we are saying that an allegation of corruption against a Tribunal member under Article 52(1)(c) is of course an issue that the Committee could consider de novo, based on the authority accorded by 52(1)(c).

17:30 What we are saying: an allegation of a lack of independence or impartiality that you are facing here, the drafters considered that and rejected it. They said: we are going to have the bar be corruption.
The reason why, in our submission, they are the same is because you have the reference to Article 14. So when the French delegate is referring to Article 14 -- and of course he says "lack of integrity" and "defect in moral character" -- we know that the terms of Article 14 are -- actually, the terms of Article 14(1) actually say than the individual can be relied upon to exercise independent judgment. So the proposal was to incorporate that idea, exercise of independent judgment, into a specific ground for annulment, which is rejected.
PROFESSOR BOO: Okay.
MS YOUNG: Turning to slide 21, there is another basis on which we submit that there is this distinction between corruption and other types of a lack of independence or impartiality, and that is Article 52(2).
So Article 52(2) creates an exception for evidence of corruption. And it says that where corruption is a ground for annulment:
"... application shall be made within 120 days after discovery of the corruption and in any event within three years [from the date of the award]."

17:32 Again, in this way an annulment committee can consider corruption de novo and the application for annulment can be based on a new fact of corruption that's discovered post-award. But there's no other exception made for any other type of evidence or for any other ground for annulment; it's just corruption, 52(1)(c).
And Chairman Broches explained this (CLAA-30, page 988). He said:
"... with the exception of corruption, [all other grounds] are known to the parties at the very moment they read the award."
In other words, all other grounds cannot be based on new evidence. The only ground, in the drafters' view, that could be based on evidence post-award was corruption. As he explained:
"In the case of corruption, evidence of which may come only later, the same four-month period runs from the time of discovery of corruption subject to a final cut-off date of three years."
It's notable that the cut-off date is the same for a revision request under Article 51: three years. The difference is, however, that where there is evidence of corruption, the issue does not go back to the original tribunal which is being accused of corruption, but

17:33 rather goes to an ad hoc committee. Any other new fact, even a new fact relating to an alleged lack of independence and impartiality, goes back to the original tribunal on revision, to determine whether in fact the fact is new, and then whether or not the award should be revised because it affects the award decisively.
Guatemala argues in its pleadings that there is no reason why this timing exception for corruption should not be extended to other grounds. But there is no basis to extend this to other grounds. Article 52(2) could have been drafted to cover those other grounds, but it was not.
(Slide 22) The final reason on which we submit Guatemala's interpretation is incorrect is that it's inconsistent with the limited scope of review accorded to annulment committees under Article 52(1). It has been recognised and affirmed by numerous ad hoc committees that annulment under the ICSID Convention is not an appeal and it's not a retrial. And I draw the Committee's attention in particular to the comments of the MTD committee (CLAA-88, paragraph 31) that annulment:
"... is a form of review on specified and limited grounds which take as their premise the record before the Tribunal."

17:34 None of the facts or arguments presented by Guatemala concerning Dr Alexandrov was before the original Resubmission Tribunal. All of these facts and circumstances are new. And for the Committee to review these issues de novo, as Guatemala requests, turns this annulment proceeding into a retrial of issues that were not raised before the Resubmission Tribunal. Annulment proceedings cannot be used to formulate new arguments which should have been introduced during the underlying proceeding, here a resubmission proceeding.

Slide 23 relates to the decision in EDF v Argentina (RLAA-4) on which Guatemala relies. The problem with the EDF decision is that the committee's reasoning is internally inconsistent and fundamentally incompatible with the limited scope of review under Article 52(1). If we look at the decision of the committee, it says, first (paragraph 145), that where there has been a disqualification proposal in the underlying arbitration, the committee:

"... is limited to the facts found in the original decision on disqualification."

No other facts can come in, which is of course consistent with Article 52(2) that we just saw.

It also says (paragraph 144):

"... the role of an ad hoc committee is not to

17:36 determine whether or not an arbitrator possesses the requisite qualities of independence and impartiality; Articles 57 and 58 entrust that function to the remaining members of the tribunal, or to the Chairman of the Administrative Council."

It then goes on to say in the very same paragraph, paragraph 144, that:

"Only if the matter is raised for the first time after the proceedings are closed does the ad hoc committee become the primary decision-maker in respect of this issue."

But the committee cites no authority for this proposition, nor does it identify from where this "primary" decision-making authority derives.

The committee also fails to explain how the scope of its authority turns on whether or not the party made a disqualification proposal in the underlying arbitration. Either the committee has the authority to determine whether an arbitrator possesses the requisite qualities of independence and impartiality or it does not. There is simply nothing in the ICSID Convention or the ICSID Arbitration Rules to support the proposition that the committee's authority fundamentally expands in scope where issues of arbitrator bias are not raised in the underlying arbitration. Indeed, as we saw earlier,

17:37 the drafters expressly rejected such a proposition.

Slide 24. The Eiser annulment decision (RLAA-3), to which Guatemala made reference, adopts the same reasoning as EDF. And the decision exemplifies how inconsistent this approach is with the object and purpose of annulment under Article 52(1).

As the decision shows, the Eiser committee adopts a three-step test which involves not only assessing facts not before the original tribunal and identifying what in its view is the proper legal standard, but also whether the alleged bias could have had a material effect on the award. The committee in fact is stepping into the shoes of the tribunal, assessing facts that were not before it, deciding the appropriate legal standard, and then speculating as to whether the alleged bias could have had a material effect on the award. The committee, in TECO's view, has no authority to do that.

(Slide 25) In this case, as the Resubmission Tribunal's Procedural Order No. 1 reflects, Guatemala confirmed that the Tribunal was properly constituted and that it had no objection to any member of the Tribunal. In such circumstances, Guatemala cannot challenge Dr Alexandrov for the very first time on annulment and its application on these grounds is inadmissible.

(Slide 26) In the alternative, even if the Committee

17:39 were to determine that it does have the power and the authority to review Dr Alexandrov's independence and impartiality de novo -- which we submit it does not -- Guatemala has waived any right to seek annulment on this basis because it knew or should have known about the facts and circumstances it raises now to impugn Dr Alexandrov.

Slide 27 includes ICSID Arbitration Rule 9, which provides that a disqualification proposal pursuant to Article 57 must be made:

"... promptly, and in any event before the proceeding is declared closed ..."

Slide 28 has ICSID Arbitration Rule 27, which provides that:

"A party which knows or should have known ..."

Which is that constructive knowledge standard, "should have known":

"... [of an objection but] fails to state [its objection] promptly ... shall be deemed ... to have waived its right to object."

It does not turn on actual knowledge but includes "should have known", a constructive knowledge concept.

(Slide 29) It is well recognised that a failure to seek disqualification promptly results in waiver. This has been established in many cases, including in the

17:40 Cemex v Venezuela decision.
THE PRESIDENT: Ms Young -- sorry, I don't know if you hear me well enough -- is that a requirement or a defence, the prompt filing of a disqualification? Is it a requirement? So the party seeking disqualification, does it have to show that it had no prior knowledge? Or is it rather a defence by whoever is being challenged, or a party opposing the disqualification, to show that there was an implicit or explicit waiver?
MS YOUNG: It is a requirement, because it is an element that needs to be demonstrated by the party making the objection. So the party must demonstrate that it was unaware of these facts. If the party knew or should have known of the facts and waited -- and as we see in the case law, sometimes only a few months -- it has been deemed to have waived the objection.
Why is that important? Because these types of issues the ICSID system wants the parties to raise promptly, so they can be dealt with. Otherwise you have proceedings going on for years, an objection raised again, and then you have to restart. It all goes back to the idea of procedural economy, procedural efficiency and of course, in this situation, finality of awards.
THE PRESIDENT: I know there's an issue here about who has the burden of proof regarding Guatemala's knowledge. If

17:42 you take a different view, please address whether this is to be regarded as a defence or as a requirement, and hence who has the burden of proof. Thank you.
MS YOUNG: So turning back to slide 29. This is one example, the Cemex case (CLAA-33, paragraph 44). In that case the respondent had waited more than five months to file its disqualification proposal and waited two months after the constitution of the tribunal to bring that challenge, which was found to be too long, it was not prompt, and therefore it had waived the objection.
Annulment committees have found similarly. The committee in EDF (RLAA-4, paragraph 131) -- even though we of course disagree with the notion that an ad hoc committee would have the authority to look at these issues, even the EDF committee, that said that it did, said:
"A party which could have raised the matter under Articles 57 and 58 before the proceedings were declared closed but failed to do so cannot ... raise it on annulment."
It said:
"The mechanism created by the ICSID Convention for resolving challenges to arbitrators does not permit a party to keep such a challenge up its sleeve for use

17:43 only at the annulment stage."
And this is precisely what Guatemala is seeking to do here.
Going to the issue of constructive knowledge. The assessment of a party's knowledge under ICSID Arbitration Rule 27 requires enquiry into its constructive or its deemed knowledge. Now, constructive knowledge or deemed knowledge may be established by reference to information available in the public domain, such as media articles and reports, and indeed awards.
(Slide 31) This is affirmed by the disqualification decision in Victor Pey Casado v Chile. In that case the chairman found that the facts forming the basis of the challenge were "publicly available" and had been "reported in the press" (CLAA-34, paragraph 88).
And I note that in this case there's no distinction between client knowledge and lawyer knowledge. We're looking at the knowledge of the parties with reference to what was available in the public domain, such that if one wanted to make an enquiry, what would have been found.
Slide 32: Interocean Oil v Nigeria found similarly (CLAA-35, paragraphs 74-76). In that case there was again public information available to be discovered. And the challenge was not brought until 1,342 days after

17:45 information was available in the public domain, and that was deemed to be too late. The request was not filed promptly and waived. And again here, no distinction between what the client knew versus what the lawyer knew.
(Slide 33) In addition, cases have referred to when information was published on ICSID's website as showing when a party knew or should have known about a particular fact. That was the case in Burlington v Ecuador (CAA-37, paragraphs 74-75). The chairman found in that case that the proposal was not made promptly because Ecuador had sufficient information based on what was published on ICSID's website and the proposal was not timely or promptly made.
(Slide 34) In the original TECO arbitration, Guatemala itself argued that knowledge could be based on when information was published on ICSID's website, and this was in the context of TECO's challenge to Mr Oreamuno.
In that case, Guatemala argued that TECO's challenge allegedly was not filed promptly because TECO knew of Mr Oreamuno's overlapping appointments based on information on ICSID's website (REA-71). As TECO explains, TECO filed its disqualification proposal immediately after the Tribunal was constituted, and

could not do so beforehand: it couldn't file the request until the Tribunal was constituted.

Mr Oreamuno, as you know, resigned before any decision was taken by the other two unchallenged members.

Slide 35. This is the Eiser committee's decision as to constructive knowledge (RLAA-3, paragraphs 188-190).

In our view, the committee set forth a constructive knowledge standard but then improperly applied an actual knowledge standard. Specifically, if you look at paragraph 188, the committee says:

"... the relevant question that the Committee has to address is whether Spain knew or should have known about such relationship ..."

It then also observed that the PSEG award, which was one of the cases relied upon by Spain to show an overlapping relationship between Dr Alexandrov and The Brattle Group, was on the record in the underlying arbitration (paragraph 189).

The committee, however, went on to conclude in paragraph 190 that there was nothing on the record to prove that Spain knew about Dr Alexandrov's professional relationship with The Brattle Group. Specifically, the committee found that:

"The existence of ... information in the public

domain [did] not discharge the burden of the Eiser Parties to prove that Spain was aware of the relevant facts."

So the Eiser committee demanded evidence that Spain actually was aware of the relevant facts, and it ignored the information in the public domain which showed that Spain knew or should have known well before it sought annulment of the facts. It also ignored the fact that the PSEG award was in the record of the underlying arbitration.

The Eiser committee's analysis not only can't be reconciled with ICSID Arbitration Rule 27, that includes a "knew or should have known" standard, but under its construct, a party could never be found to have constructive knowledge, because it's demanding evidence of what Spain knew and saying one must disregard everything in the public domain. And that is not consistent with any of the prior cases on this issue.

Here in this case -- and this is on slide 36 -- Guatemala expressly admitted that it did not look into possible grounds for challenge until after the supplementary decision was issued and Guatemala hired new counsel. Specifically, Guatemala asserted (Reply, paragraph 143) that:

"As any party would reasonably do after an award is

issued against it, Guatemala explored the possibility of exhausting the remedies available to it under the ICSID Convention, including the filing of an annulment application ..."

(Slide 37) Guatemala thus asserts before you that it only recently discovered these facts and circumstances about Dr Alexandrov. Guatemala's assertion, however, is not credible. Like Spain in the Landesbank case, the facts and circumstances raised by Guatemala in this annulment were publicly available: they were known or should have been known to Guatemala and its international legal counsel, Freshfields.

Guatemala has not provided any explanation as to why it needed over four years to identify its concern regarding Dr Alexandrov, when relevant information had been in the public domain years before he was appointed to the Resubmission Tribunal.

(Slide 38) First, we know, based on the record in the resubmission proceeding, that Guatemala knew that Dr Alexandrov and Mr Kaczmarek acted for, and continued to act for, Costa Rica and Peru. Guatemala received copies of both Dr Alexandrov's biography (REA-21) and Mr Kaczmarek's CV (Kazakhstan III, Appendix 1) in the resubmission arbitration which confirmed this.

Indeed, Mr Blackaby, Guatemala's lead counsel in the

resubmission proceeding, asked Mr Kaczmarek about his CV on cross-examination at the hearing in the resubmission case. Mr Blackaby clearly had read his CV. Yet Mr Blackaby did not raise any challenge or concern about Dr Alexandrov.

(Slide 39) In addition, Guatemala knew or should have known that Dr Alexandrov and Mr Kaczmarek acted for the same clients in many cases, including these six cases that are on the slide, cases that include Costa Rica and Peru representations.

All of these awards that mention the involvement of both Dr Alexandrov and Mr Kaczmarek were in the public domain, in some instances for over eight years, on ICSID's website and italaw.com, before Guatemala filed this annulment application. And I note that neither ICSID's website nor italaw.com requires a subscription.

I also draw the --

THE PRESIDENT: Sorry, are these the dates on which they were published on ICSID's website?

MS YOUNG: Correct.

I also remind the Tribunal of what we heard this morning from Guatemala's counsel about other ICSID cases that are publicly available, including a Saudi Arabia case and -- that were included on the slide.

DR TORTEROLA: Objection. The Saudi Arabia issue was

17:52 stricken from the record. We had that discussion this morning. We agreed to withdraw that. So that should be stricken from the record, the statement that has just been made.
MS YOUNG: For clarity, I'm not referring to the Saudi Arabia case, I'm referring to the comment by counsel.
THE PRESIDENT: I didn't even hear what TECO had said.
DR TORTEROLA: Okay, okay.
MS YOUNG: I'll just rephrase. All I'm referring to is the comment that was made by Mr Smith, which was that these cases were all publicly available because they are on ICSID's website, they are on italaw.com and we all know about them. So that's why they had cited them in their slide, even though they are not in our arbitration record.
DR TORTEROLA: Yes, but --
MS YOUNG: Just to show that all of these cases are well known and publicly available.
DR TORTEROLA: Okay. If I may speak, Madam President?
THE PRESIDENT: I'm a bit lost about what all these cases are. Are these the ones I'm seeing here on slide 39?
MS YOUNG: We're not referring to the substance of the cases. We're just talking about the idea that the information that would show an involvement of both

17:53 Dr Alexandrov and Mr Kaczmarek was publicly available in ICSID cases. Guatemala says, "We had no knowledge". That knowledge was available. All the information was available, and publicly available.
And as they said this morning with reference to other types of cases that are also publicly available, "We all know about them, they are publicly available, that's why we've included them in the slide". That just reinforces our point that these things are in the public domain and are therefore available online.
DR TORTEROLA: (In English) This morning was made a big issue of the fact that my colleague Mr Smith mentioned Nigeria and Saudi Arabia as cases, and it was requested that they be stricken from the record. We agreed; we did it voluntarily in order to avoid bringing an issue before the [Committee]. Now Ms Young is precisely raising the same issue.
So she should withdraw any mention to the Saudi Arabia cases, because that has been stricken from the record this morning. That is my objection.
THE PRESIDENT: I think the only point that TECO was making is that these cases, whatever cases, even more cases, they are all in the public domain. That's their point. And you may agree or not, but that's what they say.
DR TORTEROLA: I understand. But the mention to the

17:54 Saudi Arabia case was stricken this morning.
THE PRESIDENT: Okay. I didn't even hear that she said that.
DR TORTEROLA: Yes. It was objected to by Ms Menaker, and we decided to voluntarily strike that from the record. It happened this morning. And now the same case that was stricken, now it's been raised as an example. That is my point, Madam President.
THE PRESIDENT: Okay.
DR TORTEROLA: If you would like to leave it on the record, you leave it on the record. I am just saying that this is the objection that was raised -- unfairly -- this morning.
THE PRESIDENT: It's not in my memory, this record. I didn't even get that.
So these are the cases that are for sure on the record; there might be others that were publicly available. Perhaps.
MS YOUNG: Yes. The comment is merely that these publicly available cases are available to anyone online, and may be downloaded and reviewed, including all the cases one sees on the screen.
DR TORTEROLA: The same should apply to you when my colleague today mentioned the Saudi Arabia case and you objected. So if they are available, why do you object?

17:55 If you don't object --
MS YOUNG: Madam President --
DR TORTEROLA: No, let me finish. If you don't object to keep what Mr Smith said this morning, I don't mind, we can continue. But you are using exactly the same situation that you requested us to strike out this morning now in order to make an argument against Guatemala.
THE PRESIDENT: Let's close it here, please; it's not helpful. Let's continue.
MS YOUNG: In addition to the awards that are publicly available and may be downloaded, there are pleadings that are also publicly available, including the memorial and counter-memorial and other pleadings in the Spence v Costa Rica arbitration. They also reflect an involvement of both Dr Alexandrov and Mr Kaczmarek. They can be download online by anyone.
Indeed, in that case Mr Kaczmarek's testimony -- with the direct examination conducted by Jennifer McCandless from Sidley Austin, not by Dr Alexandrov -- was live-streamed on the ICSID website in both English and in Spanish. And it's also accessible on YouTube; one can watch it even today. So all of this was fully available to Guatemala, and of course to its international counsel at Freshfields.

17:57 In addition to these awards and pleadings and even hearings that were online, if we look at the next slide, slide 40, Guatemala also knew or should have known about the other challenges that had been filed against Dr Alexandrov on which it now relies in this case.

The timeline on this slide, slide 40, shows that the challenges made to Dr Alexandrov in the TCC v Pakistan case (CLAA-60), the Eiser v Spain case (RLAA-3) and the SolEs v Spain case (CLAA-151) all were made in 2017, while the resubmission arbitration was ongoing. These challenges were reported in the media, they were discussed within the arbitration community, and they were well known to Guatemala's international counsel, Freshfields. Yet Guatemala raised no challenge or concern regarding Dr Alexandrov until February 2021, which you see on the right-hand side of the timeline. And it did that after it hired new counsel, GST.

It simply defies all credibility that Freshfields -- a sophisticated and experienced law firm in international arbitration -- was not aware of the series of challenges that were published and discussed publicly.

In addition, the parties in these other challenges stated on the record that their own challenges were prompted by these very same media reports about those

17:58 other challenges. In other words, these were piggyback challenges.

In the Eiser case, Spain stated that the facts only came to light when public reports of such relationship emerged in July 2017 as a consequence of a challenge filed in an unrelated arbitration involving Pakistan, the TCC case. These public reports were made on July 11th and July 12th 2017, and Spain filed for annulment on July 21st 2017.

Likewise, in the TCC case, Pakistan filed a second disqualification proposal on November 25th 2017, shortly after public reporting about his disclosures in the SolEs v Spain case on September 19th and October 24th 2017.

Counsel to Guatemala, just like counsel to Spain and Pakistan, were well aware of these challenges, yet Guatemala did not challenge Dr Alexandrov in this case.

We would also note that Guatemala, throughout the original arbitration, the resubmission proceeding and this annulment proceeding, has relied upon press articles and other types of press release statements, and put them into the record. So it does follow the press on a regular basis, including press like GAR and other types of arbitration-related reporting.

Based on publicly available reports and filings,

18:00 Guatemala also knew or should have known that Navigant had been represented by Sidley Austin.

In short, Guatemala has no excuse for not raising these facts and circumstances years ago. All of the information Guatemala relies upon now for its annulment application has been in the public domain for years. Having failed to raise any challenge to Dr Alexandrov in the resubmission arbitration, Guatemala accordingly has waived any right to seek annulment.

I will now turn the floor back over to my colleague Ms Menaker, who will address Dr Alexandrov's independence and impartiality.

PROFESSOR JONES: An issue that hasn't quite been articulated, and which I raised earlier, and which will be the subject of a reply by Guatemala, is the duty of counsel to draw to their clients' attention opportunities for exercise of rights.

I would be helped by some submissions in relation to the duty of Freshfields to draw to their client's attention rights that they may have with respect to the issue that's been the subject of the submissions you've just made. In your submissions, it's not entirely clear what you say about that. You said Freshfields should have known, Guatemala should have known.

Just speaking from experience as counsel, despite

18:02 the well-informed character of in-house counsel within governments, they are often supplemented in their information by the counsel they engage as outside counsel.

I'd be interested in both parties' submissions on the extent to which it is fair or otherwise to treat "the party" as "the party with its counsel" or not.

(Pause)

THE PRESIDENT: Would this be a good moment to take the short break?

MS MENAKER: Yes.

THE PRESIDENT: Before we move on to the next issue, could we perhaps get a table with all the cases which have addressed the issue of whether an issue had been raised "promptly"? Can we just see what each case said was "promptly"? We've seen 18 months, not more than 6 months; I have no idea. Here we've seen several years. So what have they said about "prompt"?

DR TORTEROLA: Madam President, do you need that chart necessarily by tomorrow?

THE PRESIDENT: No.

DR TORTEROLA: Because we are working in two timezones here: we have our team in Washington, we are here in Europe. Maybe we can have some assessment by tomorrow, but to really have the chart put together, I would request

18:04 a few days after the hearing to do that.
THE PRESIDENT: I'd like to see it in writing at some point. And there's lots of examples given in the memorials, so I think it won't be too difficult to pick those and put them in a chart, in a table.
MS MENAKER: Can I suggest that the parties do that by Friday, the day we have the questioning, because again we are only looking at the cases that are on the record, so we have that. And that way it could be of use to the Committee during Friday, if it has any questions on this.
DR TORTEROLA: My next question would be: is the Committee referring only to those cases that are in the record about this topic? Because this topic is much larger than the cases that are in the record, which has not been necessarily the main issue debated here.
THE PRESIDENT: That it has not been the main issue, whether it was promptly raised?
DR TORTEROLA: Yes, what is "prompt" and what is not "prompt".
MS MENAKER: It's been a big issue raised, and we have quite a lot of authorities in the record on that.
THE PRESIDENT: Let's keep it to what's in the record for now. We may revisit this later, but for now just what's in the record. There's quite a number of decisions, so

18:05 if you can just put them in a neat way so it's easier to see.
So now we break, let's say, for 10 minutes, until 6.15.
(6.06 pm)
(A short break)
(6.18 pm)
THE PRESIDENT: Ms Menaker.
MS MENAKER: Thank you.
(Slide 43) In the further alternative, I am now going to discuss why, even if you were to look at all of this, the underlying circumstances are not a manifest lack of independence or impartiality. I am going to begin with the issue of disclosure, or the alleged non-disclosure.
(Slide 44) As a preliminary point, it's only the underlying circumstances, and not the alleged non-disclosure, that can lead to a finding of a manifest lack of independence or impartiality. And this is very clear in the jurisprudence: it has been made recently clear by the chairman of the ICSID Administrative Council in the Misen v Ukraine disqualification (CLAA-134, paragraph 125), where he stated categorically that:
"... the mere absence of disclosure cannot in and of

18:19 itself make an arbitrator partial or lacking independence; only the facts and circumstances that the arbitrator did not disclose may call into question the existence of the qualities required by Article 14(1) of the ICSID Convention ..."
That also comports with the IBA Guidelines (RLAA-54, page 18), which have said:
"Non-disclosure can't by itself make an arbitrator partial of lacking independence ..."
That's on slide 44.
And this of course makes sense, because even if the duty of disclosure may be conceived as being broader than the circumstances that would warrant a disqualification, ultimately the only thing that one is looking at when deciding whether you manifestly lack independence or impartiality is whether those underlying circumstances exhibit that. So if you don't disclose something that ultimately does not exhibit a lack of independence or impartiality, how can that in and of itself warrant disqualification?
You're not harmed, in other words. Guatemala repeatedly has said: well, they were denied the opportunity to file a disqualification. But if what you failed to disclose would not have been disqualifying, you were not harmed by that, you were not denied any

18:20 fundamental right in that regard.
(Slide 45) What the evidence shows is that any alleged non-disclosure was an "honest exercise of discretion", and this is for two reasons.
The first is that the nature of the facts that we're discussing were all public, as Ms Young just exhibited and showed you. And as other committees and unchallenged tribunal members have acknowledged, when that is the case, you cannot conclude that there was an intention to conceal or to mislead, because you cannot conceal a public fact.
That was laid bare in the Tidewater case (RLAA-60, paragraph 55), where the two unchallenged members, in rejecting a disqualification application against Professor Stern, said that her failure to disclose the underlying circumstances, they found that that was an honest exercise of judgment on her part because she believed "that publicly available information did not require specific disclosure". And went on to say: how can it be said that she was intent on hiding circumstances if those very circumstances were publicly available on the ICSID website? That is of course the same situation that we're facing here.
And indeed, Guatemala itself recognised this very basic, logical fact. Again, going back to TECO's

18:22 challenge of Mr Oreamuno (paragraph 52), Guatemala stated:

"For a duty to disclose to have been breached there must be something which is not public knowledge and therefore needed to be 'disclosed'."

This is on slide 45.

Despite this, Guatemala throughout its pleadings, dozens and dozens of times, alleges that Dr Alexandrov intentionally concealed these circumstances. They say it was deliberate, it was intentional concealment. They go so far as to say that he has engaged in recidivism and he has a penchant for omitting facts. But again just as in these authorities, just as they show, there can be no intentional concealment of publicly available facts.

I won't go over this again, other than to just reference on slide 46, as Ms Young already showed, Dr Alexandrov did actually disclose that he both currently and in the past worked for or was engaged by Costa Rica and Peru; and his work for Philip Morris in that investment arbitration was widely, widely reported over a series of years, back from March 21st 2011. And it was both his involvement in that case and also Brent Kaczmarek's involvement in that case, as you can see in these snippets: both of those were widely reported. It

18:23 cannot possibly be the case that, years later, he intentionally concealed this.

(Slide 47) Again, non-disclosure of public information, as I've said, is not intentional concealment. And I just want to address one of the other authorities that Guatemala repeatedly relies on, which is a speech given by Ms Carolyn Lamm.

First of all, just to reiterate, as we've said in our pleadings, Ms Lamm is a partner at White & Case: of course she does not and has not represented TECO in any of these proceedings. I think that may have been misspoken this morning when they said she signed the NoA, the Notice of Arbitration. She did not. I signed that document.

She is listed, along with yet another partner, on the power of attorney. So she was granted, way back in 20 -- I don't know if it was 2009 or 2010, the power to represent TECO, but she never actually did represent TECO in these proceedings. You won't find her on any of the submissions or at any of the hearings.

But that is all quite irrelevant, ultimately. She does not make law; she is making a speech.

It is a speech on international commercial arbitration, as many recognised, including Philippe Pinsolle in the article that is quoted on slide 47

18:25 (CLAA-131). International commercial arbitration of course is different from investment treaty arbitration in one particular respect: insofar as investment treaty arbitration is public and is transparent and the awards are published. That is not always the case for commercial arbitrations, where it may be more difficult to obtain that information.

In any event, just to put this in context again, at the time when Ms Lamm was arguing here that one should not have to rely on Google in order to find information, she was at the same time trying to set aside an award on the basis of bias of an arbitrator or arbitrators for failure to make disclosure. That motion to vacate was denied: it was denied by the US court, who said that the allegations were speculative and amounted to a "conspiratorial web".

And that is in line with US court on vacatur, where, rather than saying, "Google is not enough!", as Guatemala is apt to keep quoting, what the US courts have actually said on this (CLAA-132, paragraph 10), which accords with investment treaty jurisprudence, is:

"... 'a party should not be permitted to game the system by rolling the dice on whether to raise the challenge during the proceedings or wait until it loses to seek vacatur on the issue.' ... parties should not

18:26 wait until they lose to Google their arbitrators. Parties in arbitration ... do not get 'a second bite at the apple."

The second reason why Dr [Alexandrov]'s alleged non-disclosure was an "honest exercise of discretion", in addition to the information being publicly available, was the very nature of the circumstances.

Guatemala has, throughout the proceedings, said Dr Alexandrov should have disclosed because he had been subject to multiple challenges, so he knew this was problematic. But if one looks at this timeline on slide 48, you will see that opposite conclusion would have been drawn by a reasonable arbitrator in Dr Alexandrov's position.

That's because, as you can see here, during the resubmission proceeding, you have here in green the challenges by Pakistan in the TCC case. And you'll recall again in its Memorial, Guatemala mentioned multiple challenges; did not mention that in the TCC case, there were three authorities at different times that either ruled on or recommended dismissal of those challenges.

So he is challenged for circumstances similar to those that Guatemala raises here, and he is vindicated, right? So he's challenged, and first the PCA Secretary

18:28 General recommends that the disqualification proposal be rejected. Then the two unchallenged members look at it and reject the challenge. Then he is later challenged again, and the chairman of the ICSID Administrative Council also rejects the challenge.

So if you're challenged for something and those challenges are rejected, that would not cause you to think that then you have a duty to disclose those very circumstances that were just found not to exhibit a manifest lack of independence or impartiality.

We all know, for instance, of -- to take an extreme example, you are challenged because someone says, "Well, you were at a conference with -- you were at the IBA conference with Claimant's counsel". And there are things that are not that far removed, right? In the Landesbank case, the arbitrator was at the Frankfurt moot and went to a reception that was organised by claimant's counsel and was challenged. That challenge was dismissed.

Do you think that arbitrator then, the next week, the next month, starts disclosing when he is at conferences that are organised by someone? There is no reason to think that that individual, if he would fail to disclose that, is not engaging in an honest exercise of discretion, because his view has been vindicated.

18:29 You have that in the SolEs case, where Dr Alexandrov does resign, but in his resignation he maintains that the challenge lacked merit.

So again, one cannot conclude anything from that; and the chairman of the ICSID Administrative Council said as much in the Misen v Ukraine decision that I will again get to later.

And finally -- yes.

THE PRESIDENT: Ms Menaker, your point is: Mr Alexandrov at that time had been challenged three times on similar grounds, and you said because one of these challenges was unsuccessful, he still did not think that it raised questions about his impartiality. Is that your point?

MS MENAKER: That is essentially my point. I would just add that of course we have not heard from Dr Alexandrov. So I'm saying that a reasonable arbitrator in his position very well could have concluded that.

And I would say he was not only challenged once, but three times in the same case, and he gets three decisions or opinions denying that, saying: this is not problematic, this does not indicate any lack of independence or impartiality.

So one cannot conclude that a determination by him then not to make a disclosure was an intent to conceal or to mislead the parties, because he would have had no

18:31 reason at that point in time, one would think, to consider that that circumstance was problematic. Because parties unfortunately do bring challenges that are not successful, and they do that frequently, and I think different arbitrators approach it differently.

But there's a limit to how much someone is going to disclose, especially of circumstances that they don't consider problematic and when authorities have vindicated that by dismissing challenges.

The last challenge that they rely on is of course Eiser and the annulment. And they say: well, at that point the annulment occurred, so why did he not disclose at that point? But that was after the Award had been issued. So that's after the Award, so his disclosure cannot affect anything with the Award.

Then they say: well, the supplementary decision hadn't been issued. But again, keep in mind, they're not challenging anything in the supplementary decision. There's nothing about the content of the supplementary decision that they're challenging. They're not arguing that that decision would have come out differently had Dr Alexandrov made a disclosure, or anything of that nature. So again, in our view, that is simply just a red herring.

THE PRESIDENT: So sorry. In your view, after Eiser -- so

18:32 assuming that Eiser standardised or objectively established that relationships, past relationships or concurrent relationships with the expert were a cause of partiality and dependence, if you assume that in theory, you still believe that Dr Alexandrov was under no obligation to review that in the supplementary proceedings?

MS MENAKER: I think given the status of our proceeding, that is correct, again on a number of different grounds. First, the public nature of the information. Second, he no doubt disagreed with that, but granted you don't have to agree with it: one annulment committee found as much.

But given the status, yes, because the Award had been issued. And if you look at, for example, the von Pezold case (CLAA-43), the annulment committee case there, in paragraph 261 the committee is discussing the issue of whether the disqualification application should have been brought in the underlying proceeding, and they say:

"The Committee is unable to agree that a proposal for disqualification at that stage ..."

At a particular stage in the proceeding:

"... would have been futile as the Tribunal had not yet rendered its award."

Meaning if it had been rendered its award already,

it would have been futile.
You see that type of comment also in the OIEG (CLAA-26), although the factual compilation is different than what we're dealing with here as far as the timing. Again, there they also are talking about the fact that Mr Mourre had purportedly already signed the draft of the award by the time the fact giving rise to an alleged duty of disclosure arose, and they say: well, it would have been futile, it would not have made sense for him to make disclosure; he had already signed, apparently, the draft award.
THE PRESIDENT: Thank you.
MS MENAKER: (Slide 49) While on Dr Alexandrov, again, there was no mechanism for him to participate here, we do have on the record his views on this, as [to] why he did not make disclosures in these other cases. And he confirms that it was in the honest exercise of his discretion because his honest belief was that these circumstances were not disqualifying and therefore disclosure of them was unnecessary.
So, for instance, we know in TCC v Pakistan he said (REA-88, paragraph 94) -- and again, because he had the opportunity to comment there:
"I considered -- and continue to be consider -- that the disclosure of my prior work with the Brattle Group

was not necessary."
In SolEs v Spain, he is quoted as saying in the press (REA-33, page 3) that:
"I do not believe that agreements of experts create conflict or require disclosure."
And in Misen v Ukraine, again where he had the opportunity to comment (CLAA-143, paragraphs 13-14), the chairman of the ICSID Administrative Council remarks that:
"Dr Alexandrov also stated that he believed that these circumstances did not create a conflict and did not require disclosure ..."
And there he was bringing them to the parties' attention out of an abundance of caution. That is, of course, many years after Eiser. And this is on slide 49.
(Slide 50) For all of these reasons, any alleged non-disclosure also didn't constitute a serious departure from a fundamental rule of procedure, going back to what I said earlier: that of course if the underlying circumstances are not disqualifying, your inability to have raised a disqualification motion is not a violation of the fundamental rule of procedure. And the counter-argument really assumes its own conclusion, for those same reasons.

Now getting to the underlying circumstances themselves. Speculative assumptions cannot support a manifest lack of independence or impartiality, and this is at slide 51.
This is made clear by a number of, again, awards or disqualification decisions, annulment committee determinations. It must be "the circumstances [that are] actually established (and not merely supposed or inferred)", those are the circumstances that "must negate or place in clear doubt the appearance of impartiality". And that is from Vivendi II (RLAA-70, paragraph 25).
And the Vattenfall committee (CLAA-50 paragraph 93), there they stated that:
"The standard of proof required is that the challenging party ..."
Here Guatemala:
"... must not prove not only facts indicating the lack of independence or impartiality, but also that the lack is 'manifest' or highly probable, [and] not just possible."
(Slide 52) So looking at these facts here and the circumstances, as we've noted in our briefs, the relationship here does not appear on any of the lists of the IBA Guidelines (RLAA-54). The green list does not

contain anything concerning the relationship between an arbitrator and a party's expert; neither does the red list, waivable or non-waivable.
The only mention of an arbitrator and a party's expert is on the orange list. And they discuss this in a very specific context, where you should disclose, and it may present a problem, if you have "a close personal friendship" or "enmity". So it's not just a working relationship, a professional relationship; it's a close personal friendship.
The Alpha Projektholding (CLAA-36, paragraph 61), two members, the unchallenged members of that tribunal took into account in that case the fact that the underlying circumstances did not appear in the IBA Guidelines, and they noted that this is significant, because if it didn't even make its way into the IBA Guidelines -- not even on the green list, they didn't even think that they needed to mention this, much less on the orange or the red list -- it strongly suggests that the circumstances themselves do not require disclosure, and hence also, obviously, cannot be disqualifying.
Here there's absolutely no evidence whatsoever of a close personal relationship between Dr Alexandrov and Mr Kaczmarek. All there is is speculation, Guatemala's

18:40 speculation. And that's what it does: it speculates, without providing any evidence. It says in its Reply, paragraph [184], it says:

"... it could not be discounted that Dr Alexandrov and Mr Kaczmarek have already established a friendship falling within the IBA Guidelines."

It cannot be discounted that they may have established a friendship. That comes nowhere close to proving a close personal friendship.

Guatemala also repeatedly references other disclosures that Dr Alexandrov made in other cases, and suggests from that that again he was doing something wrong here, that he knew he should have disclosed this. But the disclosures that he made are of things that, first, are in the IBA Guidelines and even require disclosure under the ICSID Rules.

So, for example, he disclosed the fact that his firm at the time, Sidley Austin, represented an unsuccessful bidder to acquire TECO, and also that Sidley represented the Bank of Tokyo-Mitsubishi and the Royal Bank of Canada in connection with an accounts receivables financing provided to a company that appeared to be a subsidiary -- because it shared the same name, Tampa Electric -- of TECO, and he was not involved with any of those.

18:41 ICSID Rule 6(2) requires disclosure of past or present professional business or relationships with any of the parties. So of course he's going to disclose any relationship that he or a member of his firm had with TECO or Guatemala. And that's the type of information that you get when you run a conflict search on the parties to the arbitration.

Also in the orange list, in paragraph 3.1.4 of the IBA Guidelines (RLAA-54), that encompasses situations where:

"The arbitrator's law firm has, within the past three years, acted for or against one of the parties, or an affiliate of one of the parties, in an unrelated matter without the involvement of the arbitrator."

So that disclosure fell right within that orange list.

We also heard about ICS v Argentina. There that's very similar. His firm had a client that appeared to be an affiliate of the claimant. He notes he wasn't involved in that representation. Guatemala says the last billing was four years before, and the IBA Guidelines contain a requirement of disclosure for three years. So he was more cautious, and disclosed even though it was four years rather than three years. But again, it still -- even within four years, it falls

18:42 within the ICSID Rule 6(2) that I just quoted.

Now I want to take a look -- when we are looking at the circumstances themselves, and whether they exhibit a manifest lack of independence or impartiality, I want to look at each of the decisions that have been made on the issue as concerns the relationship that's at issue here.

(Slide 53) So starting with the TCC v Pakistan case, as I said, there were three different decisions in that case. The first was the decision of the PCA Secretary General, who was asked to render an opinion that the two unchallenged members could take into account. We don't have that opinion on record, but what we do have is quotations from that opinion. And there has been no indication that these quotations are incorrect or it's been misquoted.

So what you see here is that the PCA Secretary General concluded (CLAA-60, paragraph 573) that:

"... concurrent service as an arbitrator and as a counsel in an unrelated matter in which the same expert has been engaged does not automatically result in a conflict of interest warranting disqualification ... Objective evidence would be required that makes it 'manifest' that the appearance of the same expert in the two proceedings may in the specific case affect the

18:44 arbitrator's decision-making."

And then (paragraph 575):

"The PCA Secretary-General [went on to say] that Pakistan 'ha[d] not shown that the relationship between Dr Alexandrov and [the expert] goes beyond a normal working relationship as is common between counsel and valuation experts involved in international arbitrations."

He goes on to say, in the alternative:

"... even if I were to consider that such prior relationships between an arbitrator and an institute may, in principle, give rise to an appearance of bias, the absence of express rules or arbitral precedent on this issue leads me to conclude that such appearance is in any event not manifest ..."

Here we can glean a few things from this.

First, you need objective evidence that the relationship goes beyond a normal working relationship. That's completely lacking here.

Second, even if it's predicated on this alternative language, there are no rules or precedent that can be interpreted in that manner. The absence of rules that govern this is uncontested: there's no ICSID rule that requires or that talks about this type of relationship. And the ICSID Chairman of the Administrative Council

made clear that it's only the ICSID Convention and Rules that apply in the circumstance.

Guatemala has argued: well, what's different now is that there's arbitral precedent because we have Eiser. That can't mean what they say, because here, if the reason why this disqualification could not succeed was because, in the alternative, first there was no objective evidence, but also there are no rules against this and there's no precedent, if that's correct, it's just correct for the Eiser committee as well. When the Eiser committee was deciding it, they too should not have ruled that way: there were similarly no rules and no arbitral precedent. So they are acting contrary to this; in other words, at odds with this. They are creating precedent.

But just like it would have been wrong to disqualify here, given the lack of rules and lack of precedent, it was wrong, we contend, in Eiser for that committee to do it. And certainly just because Eiser decides it, that cannot mean that then it becomes automatically disqualifying, especially for a case where an award had already been issued, which, as I showed in the timeline, was the case in our situation in TECO.

THE PRESIDENT: Ms Menaker, sorry, do we know if Bear Creek was a past arbitration or a concurrent arbitration? Was

18:47

it running parallel to TCC v Pakistan?

MS MENAKER: I don't want to misspeak, so I need to double-check. I don't recall right off the top of my head.

THE PRESIDENT: Okay. Just if you can check, both parties.

MS MENAKER: (Slide 54) So then the unchallenged members, the second decision we have, is with respect to -- after the PCA Secretary General issues his recommendation, the unchallenged members of the TCC tribunal agree with the PCA Secretary General and they dismiss the challenge: they find that the circumstances do not exhibit a manifest lack of independence or impartiality.

Then third, later, after the second disqualification application is made, that goes to the chairman of ICSID's Administrative Council, and he also dismisses it. He says here a few important things about this. First, if you look at the right side of the page -- this is slide 55, (CLAA-61) paragraph 69 -- this is a quotation from the chairman's decision. He says:

"... 'a third party undertaking a reasonable evaluation of the factual framework ... would not conclude that Dr Alexandrov manifestly evidences an appearance of lack of independence and impartiality ...'"

And important to note there: they are applying

18:48

an objective standard of course, a third party that is looking at this.

The second thing to note is, as I noted before, that Guatemala makes much of the fact that Dr Alexandrov resigned in the SolEs v Spain case. That was also raised here. And what did the ICSID chairman say about that? He said that as far as the reports that the unchallenged members were equally divided, any arguments made on that are "highly speculative". And this additional information, this new fact of the SolEs resignation, cannot be "construed as proof of [Dr Alexandrov's] alleged unreliability to exercise independent judgment in this case."

(Slide 56) So then we come to Misen v Ukraine (CLAA-134), where in this recent decision, from April of this year, the chairman of ICSID's Administrative Council confirmed that, again, acting as arbitrator and counsel with a party's expert, without more, is not disqualifying. And again the chairman states (paragraph 158) that:

"... a third party undertaking a reasonable evaluation of the facts ... would not conclude that [there is] a manifest lack of [independence or impartiality]."

And they dismiss the challenge.

18:50

(Slide 57) Eiser, in its decision (RLAA-3), what it did in addition to imposing an actual knowledge while stating the rule that constructive knowledge was sufficient, it also improperly imposed a new high bar on arbitrators who double-hat, or who act as both counsel and arbitrators. And you can see this in their decision. They talk (paragraph 223) about the increased "risks and possibilities of conflict[s]" when you have arbitrators who also act as counsel, and they say (paragraph 255) therefore they "must set the bar high".

Of course, the Committee is not making any sort of determination as to whether double-hatting should be permissible or not permissible; that's not its mandate. But one should keep in mind that what Guatemala is essentially asking, if it were granted, would essentially amount to a prohibition on the practice, and that's for a number of reasons.

First, if you look at ICSID's working paper from 2021, last year, they found that, in 58% of the cases, there were double-hatters, so to speak.

While Guatemala says that's not at issue, if here -- where there's not been shown any overlap in issues between the cases that Dr Alexandrov and Mr Kaczmarek were working on as counsel and expert respectively, and our case; and there's no evidence of actual bias; and

18:52 there's no evidence that Dr Alexandrov had any sort of undue impact, in fact he dissented on a major portion of the case, and taking that into account; and the public nature of the information, the disclosures that were made, again the lack of overlap of issues -- if that's still sufficient to annul, it is an indictment of double-hatting, because it's difficult to think of a circumstance where that would be okay.

You see this in both the criticisms of the Eiser award and also the prevailing circumstances in the practice today. On slide 58 you see that the Eiser award has been widely criticised for a number of different reasons. If you look at Gary Born's treatise (CLAA-140), he states that the Eiser decision is "unrepresentative and clearly erroneous".

In other articles, others have also interpreted the Eiser decision as essentially drawing a line in the sand against double-hatting, where the ICSID Rules do not prohibit that. They also indicate that it would make the system unworkable, because the fact is that when you have an arbitrator who works as an arbitrator in many, many cases and is also active counsel, you are bound to come across the same experts in both your counsel practice and as arbitrator, given the small community of those experts.

18:53 (Slide 59) Critically, in the Misen v Ukraine decision (CLAA-134), the ICSID administrative chairman rejected Eiser's reasoning. If you look at this, he does not -- perhaps, maybe he was being a little diplomatic, and does not state "I reject Eiser's reasoning", but that is what he is doing. If you look at slide 59, look at the Respondent's argument on the left-hand side. The Respondent suggests (paragraphs 43-44):

"... as a lead counsel in the matter, Dr Alexandrov is in all probability working closely with the Experts and maintaining a professional relationship with them ...

"... the Respondent relies on the decision of the ad hoc Committee in Eiser ... which held that 'damages experts work closely with counsel in the preparation of a case ... They do not and cannot possibly maintain between them the kind of professional distance which is required to be maintained between a party, its counsel and its experts in a case, on[] the one hand, and the members of the tribunal hearing that case on the other'."

Then you look at the decision of the chairman, and he says (paragraph 135):

"... the Respondent's position rests on the

18:55 presumption that damages experts work closely with counsel, and therefore ... cannot maintain 'the required professional distance which is required to be maintained between a party, its counsel and its experts in a case, on[] the one hand, and the members of the tribunal hearing the case, on the other."

That's a quote from Eiser. He goes on to say:

"While the Respondent asserts that '[i]t is likely that as "lead counsel" ... Dr Alexandrov will be working closely with the Experts, maintaining a professional relationship with them', it does not argue that a relationship of dependence exists between Dr Alexandrov and the Experts that could encroach on Dr Alexandrov's independence and impartiality ..."

Then he goes on to say that the cases do not concern similar facts or similar legal issues, and it's not been shown "that the relationship could otherwise cause prejudgment". So based on this evidence, he dismisses the disqualification request.

So he is -- I said "implicitly", but really expressly disagreeing with the Eiser annulment committee's decision. And this is the chairman of ICSID's Administrative Council.

Here, Guatemala also doesn't argue, much less prove, that there is a relationship of dependence between

18:56 Dr Alexandrov and Mr Kaczmarek. Nor could it. There's no financial dependence between them. If anything, they are financially dependent upon the same client; they are not financially dependent upon one another.

Nor does Guatemala argue that the cases concern similar facts or legal issues. They have made no attempt to make such a showing.

Nor does Guatemala show that the relationship could otherwise have caused any prejudgment on the legal issues.

So absent any of those factors, all that's left is the fact that they worked together. If you look at slide 60, you will see, in Misen again, the ICSID chairman. He recognised (CLAA-134, paragraph 141) that:

"Quantum experts specialised in the field ... are few in number. Some interaction between arbitrators and experts is thus to be expected."

Nigel Blackaby, Guatemala's counsel in these proceedings until this annulment proceeding, also recognised (CLAA-66) that:

"There is a body of professional testifying experts who regularly appear before tribunals hearing investment treaty cases."

And Arbitrator Jones has recognised that these repeat experts are actually "a good thing" (CEA-45).

18:57 And as he alluded to with his question earlier, that is because the experts owe a duty to the tribunal. So they are independent experts. Yes, they are retained by a party, but they are independent experts. And when they give their oath in an ICSID arbitration before testifying, they avow that they are going to testify in accordance with their sincere belief. They are not advocates. And it is advantageous then, to have repeat experts because they gain a reputation and they have an incentive not to take extreme positions and not to act as advocates.

So Mr Kaczmarek's retention by clients in cases where Dr Alexandrov was counsel is entirely unsurprising. And you can see in slide 61 that in this survey (CEA-41) Mr Kaczmarek was actually the most commonly retained damages expert in the world in investment arbitration cases. Given that, it would be surprising if someone was very active in the field and had not worked on a case with him.

So going to slide 62. Again, Guatemala's case, when you look at it, it's based on pure speculation. They say, for instance, in their Memorial (paragraph 150) that he, Dr Alexandrov:

"... was working side by side ... cooperating ... no doubt by means of face-to-face meetings and telephone

18:59 communications in undisclosed times and of undisclosed durations ..."

And (Reply, paragraph 184) that:

"... it could not be discounted ..."

Again, I quoted this before:

"... that Dr Alexandrov and Mr Kaczmarek had already established a friendship ..."

In their Application for Annulment in paragraph 39, they talk about an alleged "long-standing" relationship and they say that they "coordinat[ed] directly". They have no evidence of that. In fact, the evidence that is on the record refutes that, because in cases where Dr Alexandrov has acted as counsel in these challenges that have been brought, it turns out that he was not working closely with the damages experts; his partners were.

As my colleague mentioned before, the transcripts for some of these cases are on the record, particularly in Spence v Costa Rica (CEA-51). There you can see that Ms McCandless handled the examination of the damages experts, not Dr Alexandrov.

And in the Misen v Ukraine decision (CLAA-134, paragraph 17), where again Dr Alexandrov was given the opportunity to supply explanations, he explained to the chairman of the Administrative Council that:

19:00 "As ... lead counsel ... he has overall responsibility for the [case], but he is not directly responsible for the ... subject matter of the Experts' testimony ..."

Which again was quantum.

So it's not only pure speculation but it actually goes against the only objective evidence that we have on the record in this case to assume that he was closely coordinating with Mr Kaczmarek in our case.

Then if you look further, what other evidence do we have on the record? Guatemala says here -- and this is at slide 63 -- that Mr Kaczmarek and Dr Alexandrov were "tied to the hip", they were "an inseparable duo". It's like an inseparable quadruplet or sextuplet is what it is, it's not an inseparable duo, because in each of these cases he is apparently alleged to have a special relationship that goes beyond a professional relationship with all of these other damages experts. And that's because there is a small handful and you come across many of them.

So in TCC v Pakistan (CLAA-60, paragraph 564), he was alleged to have a "longstanding, continuing work relationship" with The Brattle Group, Mr Graham Davis. In Eiser v Spain (RLAA-3), it was again the Brattle Group, but it was with Carlos Lapuerta that he was

19:01 alleged to have a close relationship. In SolEs v Spain, Carlos Lapuerta of the Brattle Group, that he spent allegedly "countless hours" working with him (REA-33). In Misen v Ukraine (CLAA-134, paragraphs 43-44), it's yet a different firm: it's Compass Lexecon, and two different experts, with which he is alleged to have "work[ed] closely".

These are normal working relationships; there's nothing special about them. Certainly it does not show that Mr Kaczmarek and Dr Alexandrov were somehow "tied to the hip", as Guatemala alleges.

Further objective evidence undermining this allegation is found on slide 64. Because we know here while Guatemala surmises or speculates and says, "Oftentimes the law firm, the first thing they do is hire the damages experts", sometimes the damages experts come to the pitches to pitch for the case, to get the case. There's no evidence of that.

What evidence is on the record is that Costa Rica put out a tender not only for international counsel but a separate tender for quantum experts. So Costa Rica hired Mr Kaczmarek directly in two cases -- actually three cases, because two of them were consolidated. So these are three of the seven cases Guatemala relies on.

We also know that Peru hired Mr Kaczmarek directly,

19:03 not necessarily through counsel, because Mr Kaczmarek appears as a damages expert in cases for Peru when Sidley Austin was not representing Peru. So in the Gramercy v Peru and Convial v Peru cases, international counsel for Peru was not Sidley Austin or Dr Alexandrov, but Mr Kaczmarek was still Peru's damages expert. This shows that he has a relationship with the clients, as opposed to necessarily with the law firms. He is being hired directly by Costa Rica and directly by Peru.

Mr Kaczmarek and Dr Alexandrov also have been retained by opposing parties. And two examples: Duke Energy v Peru (RL-1016) and Lone Star Funds v Korea (CEA-43). In both of those cases, they are on opposite sides.

And I would draw the Tribunal's attention to paragraph 39 of the Application for Annulment, where Guatemala states erroneously that Dr Alexandrov and Mr Kaczmarek have a "long-standing" relationship, "always defending the same disputed interests". Clearly not true: they are not always defending the same interests.

So as the Saint-Gobain v Venezuela tribunal indicated or held (CLAA-84, paragraph 81):

"Absent any specific facts which indicate that [the arbitrator] is not able to distance himself in

19:04 a professional manner ... [the arbitrator] has the assumption in his favor that he is a legal professional with the ability to keep a professional distance."

And Dr Alexandrov is entitled to that assumption.

We heard a lot about the Lidercón decision. That was the case that was pending during the pendency of TECO's decision, and in the Reply it is mentioned all over the place. What Guatemala fails to say is the Lone Star case was also pending during the TECO resubmission case.

(Slide 65) So if one looks at Lidercón v Peru, a claim for $95 million, and Dr Alexandrov and Mr Kaczmarek are engaged by Peru defending against that $95 million claim during the TECO resubmission proceeding.

Also during the TECO resubmission proceeding, Dr Alexandrov is working for Lone Star Funds bringing a $4.5 billion claim against Korea. Mr Kaczmarek is the expert that is retained by Korea to defeat that claim. That is pending during the resubmission claim.

You hear a lot, you see the timelines where Guatemala has shown where briefs or expert reports were submitted in Lidercón and compared that to our case. Well, here, October 2020, there is a two-day hearing in Lone Star Funds: that's during our proceeding as well.

19:06 Prior to that -- that's an important proceeding: $4.5 billion. They were on opposite sides.

So clearly they are not tied at the hip, they are not an inseparable duo, they don't always work for the same interests, and this is something that Dr Alexandrov did not think warranted disclosure, but it certainly does not indicate any bias. The objective evidence certainly doesn't indicate that this relationship went beyond a normal working professional relationship.

Guatemala's allegations -- yes.

THE PRESIDENT: Sorry, I don't really understand what's in the case versus Korea, the dates that are inside the circle. So it started December 2012, but somehow the tribunal got reconstituted?

MS MENAKER: Unfortunately President Veeder passed away.

THE PRESIDENT: Okay.

MS MENAKER: It was when he was ill. He resigned, and then it was reconstituted. And after reconstitution -- so they have never issued their award; it was still pending. When I said we have the distinction of being one of the long-standing cases, this is also one of the very long-standing cases. So it's been going on for a long time and there has not been an award rendered.

THE PRESIDENT: And October 2020 was the hearing?

MS MENAKER: There was a hearing in October 2020, yes, we

19:08 can see that, from after the tribunal was reconstituted.

THE PRESIDENT: And Alexandrov and Kaczmarek, they've been involved since the beginning, I understand; is that so? I don't know why you have the hearing --

MS MENAKER: Yes. I believe so, yes.

THE PRESIDENT: Why would the hearing date be somehow relevant to us?

MS MENAKER: It just shows that not only was this case ongoing but there was activity in the case.

THE PRESIDENT: Okay.

MS MENAKER: There was actually a hearing where they are on opposite sides during our resubmission proceeding. Because Guatemala has made a big deal about the fact that expert reports for Peru were being filed during our hearing, or during -- excuse me -- our proceeding in close proximity. Well, the same thing was happening in the Lone Star Funds case: there was actually a hearing, so there would have been preparations for that hearing and stuff. And they are in adverse interests there.

THE PRESIDENT: Okay.

MS MENAKER: (Slide 66) Guatemala's allegations regarding the so-called Sidley-Navigant "relationship" also have no bearing on Dr Alexandrov's independence or impartiality for several reasons.

First of all, they look at a slew, again, of

19:09 information that's available from public sources dating as far back as 20 years ago. So apart from the waiver issue, a 20-year-old representation, they do not even make any attempt to show how that could have resulted in a manifest lack of independence or impartiality on Dr Alexandrov's part.

Second, there are a number of unsupported allegations here, and we've pointed that out in our briefs, as far as they're saying that Sidley was Navigant's counsellor for several years, for which they have no evidence. They rely on representations that both predate and postdate either or both of Dr Alexandrov's joining Sidley, leaving Sidley, Mr Kaczmarek's leaving Navigant. And all of these representations are in different practice areas, out of different offices. You basically have Sidley's Chicago office doing some M&A transactions with or for Navigant, and there are securities class lawsuits.

So for all of these reasons -- it's unrelated subject matter, unrelated individuals, the timing is old, it post- or predates different things -- it just cannot possibly show any manifest lack of independence or impartiality. And indeed Guatemala has not supplied any jurisprudence in support of these allegations, any jurisprudence where a finding of a manifest lack of

19:11 independence or impartiality has been made in circumstances analogous to these.

The final point that I want to make is that Guatemala also has now raised in its Reply for the first time that Dr Alexandrov made certain remarks at the hearing that show that he is manifestly lacking independence or impartiality.

As you can see on slide 67, Guatemala has waived its right to bring any such claim, even apart from the other arguments we have on waiver. And that's because, as the Pezold v Zimbabwe ad hoc committee recognised (CLAA-43, paragraphs 261-262), if there is a problem that you have at the hearing, you have to bring a disqualification application either at or promptly thereafter; you don't wait several years after an award has been issued, you see that you lost, and then you complain about something that was said at the hearing.

But also when you look in context at these remarks that Guatemala complains about, they are not only innocuous but they actually show that Dr Alexandrov was being very thorough, was giving everyone an opportunity to answer questions, and simply did not want to repeat grounds that had been gone over the previous day.

So if you look at slide 68, you will see that on March 13th of the hearing there is a back-and-forth

19:12 between Dr Alexandrov and Guatemala's quantum experts, Mr Delamer, where they are discussing the interest rate, the risk-free interest rate. The following day, on the 14th -- this is the comment about which Guatemala complains -- Dr Alexandrov says:

"We had a discussion with Respondent's experts about the risk-free Interest Rate, so I don't want to start beating the dead horse, but if you want to comment on Mr Kaczmarek's proposed rate, please go ahead."

He's saying, "I don't want to go over all of that again, but if you have another comments on what Claimant's expert has now said, please go ahead". And this is because they had an expert conferencing session after the individual experts had testified.

Similarly on the next slide, slide 69, you see the same thing: you see that there is a discussion of how you calculate certain cash flows to the firm or cash flows to equity, and there is back-and-forth with Dr Abdala, Guatemala's quantum expert, and Dr Alexandrov. The following day, Dr Alexandrov says the first issue is -- he's going through a number of issues. He says:

"The first one is cash flows to the firm versus cash flows to equity. Again, that's a horse ... I thought was killed yesterday. Unless you have anything ... you

19:13 want to say, I would move on to the next point ..."

Right? So he's simply saying, "I thought we went over that comprehensively yesterday. If you have anything to add, go ahead, but let's move on to the next point today".

These do not come anywhere near to showing any bias, manifest lack of independence or impartiality.

So finally, with that, I'll turn the floor over to my colleague Mr Polášek, who will discuss ...

(A discussion re timing took place off the record)

MR POLÁŠEK: Good evening. I am Petr Polášek, counsel for TECO, and I will present TECO's argument concerning Guatemala's application for annulment of the Resubmission Award on account of its reasoning concerning damages.

If you will skip to slide 80. Yes, this one.

By way of background, in the original arbitration and in the resubmission arbitration, both parties relied on and adopted the damages calculations by their experts. For TECO, the expert was Mr Kaczmarek; for Guatemala, the expert was Dr Abdala.

In the original arbitration as well as in the resubmission arbitration, both parties calculated the loss of value damages as the difference in the value of EEGSA on the date of its sale, in October 2010, in the

19:16 actual scenario and in the but-for scenario. This basic damages framework was adopted also by the Original Tribunal and by the Resubmission Tribunal.

Guatemala argues that the Resubmission Award failed to state the reasons on which it is based with respect to the actual value and also with respect to the but-for value, so I will address each in turn.

Slide 81. As regards the actual value of EEGSA in the original arbitration, there were no significant differences between the parties. You can see here on the slide what Guatemala said about it in its Post-Hearing Reply (paragraph 161). It said that:

"... there are no significant differences between the parties ..."

Slide 82. In the resubmission arbitration there also were no significant differences between the parties with respect to the actual value. That is because Guatemala's expert, Dr Abdala, calculated the actual value as a range, from $518 million to $582 million, and he derived that from the sale price of EEGSA; and Mr Kaczmarek's actual value of EEGSA was within Dr Abdala's range.

So, as you can see, on cross-examination at the resubmission hearing, Dr Abdala testified that any figure within his range of actual values of EEGSA was

19:18 reasonable to use in the actual scenario as EEGSA's value. This is the testimony of Guatemala's expert: this is what was before the Tribunal when it made its Award.

Guatemala never sought to correct that testimony. It had an opportunity to re-direct Dr Abdala at the hearing. When the Resubmission Tribunal asked whether Guatemala had any re-direct examination, Guatemala said no.

Slide 83. This slide reproduces the beginning of the Tribunal's reasoning on actual value. In the interest of time, we can move on; the Committee can read this for itself.

Slide 84. Here the Resubmission Tribunal described the methodologies that were used by the parties' experts to calculate actual value. It explained that the final conclusions of the expert evidence did not differ radically. Then you can see that it included a footnote there as support for that conclusion: that is footnote 80. That's the paragraph 97 of the Resubmission Award. And again, this is where the Resubmission Tribunal sets forth its reasoning on actual value.

If we follow footnote 80, it points to transcript Day 3, page 682. And there again you see that this is

19:19 the testimony by Guatemala's expert, Dr Abdala, that any value within the range of his actual values is acceptable as the actual value in the actual scenario.

So it is clear that this testimony by Guatemala's own expert at the hearing was among the reasons that the Resubmission Tribunal ruled the way it did on actual value, and we know that because that testimony is cited there, in the middle of the Tribunal's reasoning.

Slide 85. Here the Resubmission Tribunal notes the range of methodologies employed by the experts and the explanations in the Navigant report, and it decided to accept Mr Kaczmarek's actual value of EEGSA; which, again, was within range of the values presented by Guatemala's own expert.

So, in short, the Resubmission Tribunal adopted an actual value of EEGSA that was within Guatemala's own range of actual values.

The Tribunal's reasoning regarding EEGSA's actual value as stated in the Resubmission Award is coherent, it is easily understood, and that is the end of the enquiry under the jurisprudence.

In any event, Guatemala's complaint does not go to the existence of the reasons but it goes to the adequacy of the reasons. This is slide 86. And as the jurisprudence demonstrates, that's not a basis for

19:21 annulment.

Slide 87. Given that the actual value of EEGSA that was adopted by the Tribunal was within Guatemala's own range of actual values, the Tribunal's decision on actual value could not have had, and did not have, any serious adverse impact on Guatemala. This is yet another reason for dismissing Guatemala's application as it relates to actual value. This is supported by the committee decisions in Tulip v Turkey (RLAA-12, paragraph 45) and Orascom v Algeria (RLAA-5, paragraph 125), among others.

Slide 88. In the Reply (paragraph 280), Guatemala for the first time argued that there is a decisive question that the Resubmission Tribunal failed to address. According to Guatemala, that question is whether the sale price of DECA II -- that's the company that owned EEGSA, among other assets -- so whether that sale price should be used as the basis for calculating EEGSA's actual value. According to Guatemala, this was the decisive question that the Resubmission Tribunal failed to address. This was raised for the first time in Guatemala's Reply in this annulment proceeding. But again, because the actual value of EEGSA adopted by the Tribunal was within the range of Guatemala's own range of actual values, this was not, and could not be,

a decisive question.
Guatemala is attempting to suggest that it was a decisive question because, depending on which end of Dr Abdala's range of actual values we use, we might end up with zero damages. I think we heard that also earlier today in Guatemala's opening. That is false. Guatemala cites Dr Abdala's third report as support for that position. But if we read the relevant parts of the [Dr] Abdala report, we see that he speaks about the tariff period after 2013, and it has nothing to do with the damages for the remainder of the 2008-2013 tariff period.
Slide 89. Guatemala commits the same misrepresentation with respect to Dr Alexandrov's question. At the hearing, again, these questions related to the time period after 2013 and had nothing to do with the remainder of the 2008-2013 tariff period.
So there is no basis for this assertion that this is somehow a decisive question.
Slide 90. We can skip that and go to slide 91.
This is just to make the point that this belatedly submitted new ground for annulment is inadmissible because it was presented a year and a half after the Resubmission Tribunal's decision on supplementation, and that proves that it is way beyond the 120-day deadline

under the ICSID Convention. It is also contrary to this Committee's Procedural Order No. 1, paragraph 15.3.
Slide 92. To the extent that the Resubmission Tribunal omitted to decide a question -- which it did not -- but even if it did, the remedy would not be annulment; the remedy would be a request for supplementation. That this is so is supported by Cube v Spain (CLAA-150, paragraph 325), Enron v Argentina (CLAA-84, paragraph 73) and the history of the ICSID Convention (CLAA-30, page 849). Another independent reason for dismissing Guatemala's application as it relates to the actual value of EEGSA.
Turning to the but-for value of EEGSA. Slide 93 reproduces the initial part of the reasoning of the Resubmission Tribunal (paragraphs 103, 105-106). We can move on.
Slide 94. Here I would point to paragraph 117 of the Resubmission Tribunal's Award, which is at the bottom of the page. You can see there that the Tribunal stated that:
"[It] is entitled and obliged to determine for itself what damages, if any, were caused by Respondent's breach ..."
And that's exactly what the Tribunal did.
Let's go to the next slide (95). Here this is

paragraph 138 that was discussed a lot today. As you can see, the Tribunal stated that:
"... Claimant is ... entitled to its share of the portion of the ... cash flow shortfall that related to the period [from] ... 2010 to ... 2013 ..."
And that the amount of damages is $26,793,001. That is the amount that was calculated by Mr Kaczmarek. (Pause)
The Tribunal also made its own determination that:
"The same data and methodology [presented by Mr Kaczmarek that had been] accepted by the Original Tribunal is to be employed to calculate the amount of [the loss of value damages in the resubmission case]."
There was discussion today about that, so I wanted to focus on that a little more.
So let's go to the next slide (96). Here this is the statement by the Tribunal about "The same data and methodology" (paragraph 138), and you can see again there is a footnote there: footnote 122. That's where the Resubmission Tribunal provides its support for why it is making that statement. And you can see that in footnote 122 there is a reference to the Navigant report, other portions of the transcript, and then at the end there is a reference to Day 4, page 996, lines 11-21 of the transcript.

If you look up above, in that portion of the transcript, the President of the Tribunal, Professor Lowe, asked Claimant point blank:
"... Claimant's taken the point of view that the historical-damages claim logically could go forward to 2013 ... What's your position on that?
And Mr Blackaby, Guatemala's counsel, said:
"I think in terms of going to 2013 in terms of that question, that must be right."
And he did not stop there; he continued. He said:
"... those figures are obviously linked to the whole Tariff Review and the whole Tariff ... period."
And again, it's still talking about the entire 2008-2013 tariff period. So again --
THE PRESIDENT: That was a question to Guatemala. Because you said "to Claimant", I think the record shows "to Claimant", but it was to Guatemala, because it was --
MR POLÁŠEK: Yes, thank you for the correction.
So again, we see that the reasoning of the Tribunal is right there. It's cited to the transcript, and this is the status of the record that was before the Tribunal. This is the basis for the Tribunal's decision. It's articulated in the Award.
Slide 97. Guatemala contends that the Tribunal's reasoning concerning EEGSA's but-for value, now turning

19:30 to the but-for value, contradicted what Guatemala describes as the Tribunal's two premises for its damages analysis. Guatemala spent a lot of time on this this morning. I have two short points.

One is that that whole discussion is contained in the Tribunal's analysis of res judicata, and specifically why the Original Tribunal's decision concerning damages is not res judicata as regards the loss of value damages. That's what it is. Those are not the Resubmission Tribunal's own premises for its own damages analysis. That discussion is provided in a completely separate section of the Resubmission Award.

If we look at the first premise -- this is slide 97 -- you can see on the left the premise as Guatemala formulated it in its pleadings. And on the right-hand side you can see the excerpt of the Resubmission Award. It's the same language, and it's plain from the text that this is a description of the Original Tribunal's position; it is not the Resubmission Tribunal's espousal of those conclusions.

Let's go to slide 98: the same thing with respect to the alleged second premise.

Let's go to slide 99. Guatemala contends that the Resubmission Tribunal failed to consider Dr Abdala's corrections to Mr Kaczmarek's but-for calculation, and

19:32 it says that there is:

"... nothing in the Award [that] demonstrates that [the] evidence was even considered."

That's false. If we look at the Resubmission Award, footnote 122 -- that's the footnote we saw previously -- there is a reference to the transcript of Day 1 of the resubmission hearing, page 91, lines 4-7. As you can see in the right bottom corner of this slide, these criticisms were expressly mentioned there, including that they would reduce the damages to $18.2 million. Again, this is the portion of the Award where the Tribunal provides its reasoning, so it's absolutely clear that the Tribunal did consider these criticisms and did not accept them. It's clear on the face of the Award.

Slide 100. In any event, just to give you the background on these criticisms, they were thoroughly discussed at the hearing, they were brought up during expert examinations and also during expert conferencing that the Tribunal ordered.

During those discussions -- we can stay on this slide -- one of the issues that came up was: should we use cash flows to the equity holder or should we use cash flows to the firm? That's the "dead horse" question. The reason why it was referred to as the

19:33 "dead horse" question is that Dr Abdala basically gave it up and conceded that the premises for that criticism are just not reconcilable with the way that the actual transaction happened. And that's on this slide.

The other two issues that were raised -- one related to the elasticity of demand, the other one related to inflation -- again Dr Abdala gave it up: he agreed that those wash away. So there's no surprise that the Tribunal dealt with these criticisms the way it did in the Award.

Slide 101. Guatemala presents an argument that the Resubmission Tribunal committed a serious departure from a fundamental rule of procedure as a separate basis for annulment. Guatemala raised this with respect to both the actual value and the but-for value. Again, on the actual value this fails, because the actual value adopted by the Tribunal was within Guatemala's own range. So this had no impact.

But in any event, Guatemala does not even clear the first hurdle, which is identifying what rule, what rule of procedure it is talking about. Guatemala's pleadings speak about "a rule". That's not a ground for annulment. One needs to identify what specific rule; one has to prove that the rule is fundamental, that it was breached, and that the breach was serious. And

19:35 Guatemala does nothing of that. That's the end of its fundamental rule claim.

The last slide (102). This is just an example. In NextEra v Spain (CLAA-152), the tribunal did not even mention the only witness presented by Spain. And like Guatemala here, Spain complained that this was a serious departure from a fundamental rule of procedure. In that case, Spain said this was a violation of its right to be heard. The NextEra committee stated that the fact that the witness was not mentioned in the award does not mean automatically that the testimony was not considered, and that in any case this is not a violation of the right to be heard. And in our case, we are not even close to that.

That concludes my presentation, thank you.

THE PRESIDENT: Thank you.

MS MENAKER: Thank you. Just a few comments on interest.

DR TORTEROLA: What is the time at this point?

THE PRESIDENT: 10 minutes left.

MS MENAKER: (Slide 103) Just a few comments on interest.

If we turn to slide 104. I won't go through this whole slide, but it puts in diagram form what was awarded by each of the tribunals and annulment committees, and what was annulled. But you will see here, if you look at the bottom, what the Resubmission

19:37 Tribunal did is it granted interest at the US prime rate plus 2% on two newly awarded amounts: on the loss of value damages for 2010 to 2013, and also on the pre-sale interest piece.

The Original Tribunal, as you also know, also awarded interest on the historical or loss of cash flow damages at the same rate: US prime plus 2%. That's clear from paragraph 742, where they state the loss of value damages; and then look at the dispositif of the Award, and they award it at US prime rate plus 2%.

Guatemala paid interest at the US prime rate plus 2% on the amount awarded by the Original Tribunal, and we know that's the case too. The Original Tribunal didn't award any loss of value damages, as we know. It also didn't award that pre-sale interest piece: that was the piece it denied on the grounds of unjust enrichment that was annulled. So it necessarily didn't award any interest on those amounts because it denied those claims for damages.

Go to slide 108. There the crux of Guatemala's claim is that they are saying the Resubmission Tribunal was bound to apply interest at a risk-free rate; that was res judicata. There can't possibly be any effect for a rate of interest on amounts that were not awarded. The Tribunal never made an award on loss of value

19:38 damages, the Original Tribunal, so never awarded an amount of interest. So of course the Resubmission Tribunal couldn't have been bound to apply that. These were new damages and new interest amounts.

(Slide 109) A second reason why there was no res judicata effect on the rate of interest from anything in the Original Award is, as the Resubmission Tribunal said, there's language in that Original Award which is internally inconsistent; that's paragraphs 766 and 767. Paragraph 766 says:

"The Arbitral Tribunal thus agrees with the Respondent that a risk-free rate should be applied."

In the next paragraph (767), it says:

"... the Arbitral Tribunal agrees with Mr Kaczmarek's evidence that the proper interest should be based on the US Prime rate of interest plus a 2 percent premium in order to reflect a rate that is broadly available to the market."

So there is inconsistency there. The Resubmission Tribunal, now in the dispositif, it awards in 767 what it says there, which is the US prime rate plus 2%, and that's what's enforced.

But as far as whether any of these particular paragraphs have any res judicata effect, the Resubmission Tribunal says it can't because in these

19:40 paragraphs there's no definitive ruling because these are inconsistent, and you need a definitive ruling for res judicata.

In slide 110, you will see -- and this responds to a question that was asked today -- that Guatemala not only did not argue that paragraph 766, the language on the risk-free rate, was res judicata, and that the Resubmission Tribunal was bound to apply interest at that rate; it argued the opposite. It argued: you are not bound to apply US prime rate plus 2%, which the Tribunal did; you are free to make your own determination.

You can see that here. This is Mr Dechamps, Guatemala's counsel, acknowledging the inconsistency between paragraphs 766 and 767, saying it's unclear why the Tribunal decided that a risk-free rate should apply to interest, and went on to apply what is effectively a commercial rate. It's a bit hard to understand the reasoning.

Then in their Rejoinder in the resubmission proceeding, they say what's important is that the Original Tribunal made no determination as to the question of interest rate to be applicable to hypothetical future damages; therefore, this Resubmission Tribunal is entitled to decide the issue.

19:41 You can see again, on slide 111, that Guatemala is now estopped from arguing that the Resubmission Tribunal is bound to apply a risk-free rate. Having told the Resubmission Tribunal, "You are not bound by anything, you have to decide by yourself", it can't now seek to annul that decision by saying that they violated a fundamental rule of procedure by not applying res judicata.

If you see here on the right side of the page, at the resubmission hearing, Guatemala's counsel said:

"... the Original Tribunal accepted ... that [the] Risk-Free rate should apply with respect to the [de]termination of historical-damages, and obviously we are not saying this is res judicata ..."

They expressly disavowed that that was binding on the Resubmission Tribunal.

Then later on, he goes on to say:

"... in any event, obviously this finding of the Original Tribunal is limited to historical damages and it cannot be res judicata for this Tribunal."

Their only other argument on interest is that there is no reasoning. This morning you heard them say they needed a legal theory. They said TECO was no longer exposed to the commercial risk of operating in Guatemala after its sale, and that they had no legal theory. As

19:43 Arbitrator Boo pointed out, if you look at slide 112, the legal theory and the legal reasoning is there; Guatemala just chooses to ignore it.

They repeatedly refuse to look at anything but paragraph 131. But if you look at paragraph 133, the reasoning is set out here. And it says:

"While it is true that the Claimant's investment in EEGSA was no longer at risk after it had sold that investment for cash, if Claimant had borrowed in order to fill the gap in the sums owing to it as a consequence of Respondent's breach, it would have had to borrow at commercial rates."

And that is why they awarded a commercial rate of interest at US prime plus 2%. That amount, or the scope of that reasoning, is in line with the extent of the reasoning of other tribunals on interest rates, as we've pointed out and as we show on this slide, and to which Guatemala has offered no response.

So with that, I will close and thank the Committee members for their attention. Thank you.

THE PRESIDENT: Thank you.

For future reference, can we just say that Guatemala's opening statement was H-1, and TECO's, H-2. Okay?

Any housekeeping issues before we close today's

19:44 session? I look at Guatemala.

DR TORTEROLA: We don't have any, Madam President. Thank you.

THE PRESIDENT: Thank you, Mr Torterola.

Ms Menaker?

MS MENAKER: None, thank you.

THE PRESIDENT: Thank you.

(A discussion re the start time for the following day took place off the record)

THE PRESIDENT: See you tomorrow, at a time to be set later. Thank you.

(7.48 pm)

(The hearing adjourned until the following day)