IN THE MATTER OF AN ARBITRATION UNDER THE TREATY BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF THE REPUBLIC OF BOLIVIA CONCERNING THE ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENTS

-and-

THE AGREEMENT BETWEEN THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AND THE GOVERNMENT OF THE REPUBLIC OF BOLIVIA FOR THE PROMOTION AND PROTECTION OF INVESTMENTS

-and-

THE ARBITRATION RULES OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (UNCITRAL)

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In the Matter of Arbitration Between:

GUARACACHI AMERICA, INC. (U.S.A.) and RURELEC PLC (UNITED KINGDOM),

Claimants, — PCA Case No. 2011-17

and

PLURINATIONAL STATE OF BOLIVIA,

Respondent.

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HEARING ON THE MERITS

Tuesday, April 2, 2013

International Chamber of Commerce
112 avenue Kleber
Bosphorus Conference Room
Paris, France

The hearing in the above-entitled matter came on, pursuant to notice, at 9:15 a.m. before:

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MR. MANUEL CONTHE, Arbitrator

PROF. RAÚL EMILIO VINUESA, Arbitrator

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MR. JOSÉ MANUEL GARCÍA REPRESA
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1 P R O C E E D I N G S
2 PRESIDENT JÚDICE: Sorry for the small delay. Thank
3 you very much for coming.
4 (Discussion off the record.)
5 PRESIDENT JÚDICE: I'm going to speak Spanish, then.
6 We're here, so we hope that we're going to make the
7 right decision, and we're here with the Parties and the expert
8 witnesses. This is going to be very important for us. I think
9 that we can start, if you agree.
10 MR. BLACKABY: Thank you, Mr. President, Members of
11 the Tribunal, esteemed colleagues of Bolivia. Before we start
12 on the presentation, there are a number of small housekeeping
13 procedural matters that we would like to raise with the
14 Tribunal that I've had the opportunity to discuss with my
15 colleague, Mr. Silva Romero on the other side, for the purpose
16 of clarification of certain rules to apply.
17 And, in that context, there are a number of smaller
18 issues, but for the purposes of our preparation, the first of
19 which is the timing of the representatives of CNDC, Mercados
20 Energéticos, and EdI. I think there is still an outstanding
21 question as to when they would be examined by the Tribunal,
22 whether that will take place. Our preference was that it take
23 place after the formal witnesses of the case that the Parties
24 have presented so that the Tribunal can then--
25 PRESIDENT JÚDICE: It's the common understanding of

09:17 1 the Parties?

2 MR. BLACKABY: I think it was our understanding but I

3 think it was not the position of Bolivia. So, just to be clear

4 on that point so that we are working on the same principles as

5 to know when they will be examined. Our preference is for them

6 to be examined afterwards because only then will the Tribunal

7 have all of the information that may be relevant to asking them

8 questions; otherwise, there may be a risk that they be called

9 back after the valuation experts had given evidence. So, that

10 would be our preference on that particular point.

11 I don't know whether it makes sense for me to go

12 through the whole points or whether we want to take each point

13 in turn with the response. Should I continue to go through the

14 list?

15 MR. SILVA ROMERO: I think it will be more practical

16 to do it point by point.

17 PRESIDENT JÚDICE: Yes, I think so as well.

18 MR. SILVA ROMERO: Well, in connection with this

19 issue, the position of Bolivia, Mr. President, Arbitrators,

20 it's that it is more logical for you that these witnesses be

21 examined first, CNDC, MEC, and EdI, because they are the ones

22 that set the projections that have been used by the economists

23 to make their calculations. The opposite does not make any

24 sense. The premise on which the economists has worked is what

25 those witnesses have used, so that is why we feel it is more

09:19 1 logical to examine these witnesses first and then to examine
2 the economists.
3 That is our position.
4 PRESIDENT JÚDICE: Yes. Your suggestion, if I
5 understand it, is to start with the fact witnesses, these
6 witnesses next, and then the expert witnesses.
7 The expert witnesses before these outside Tribunal
8 witnesses?
9 MR. BLACKABY: Yes, that's correct.
10 PRESIDENT JÚDICE: Okay. I think the Tribunal can
11 make a decision during the next break. We're not sure as to
12 the possibilities yet, so is there any other point that you
13 would like to raise?
14 MR. BLACKABY: Yes.
15 The second point was the question of the Closing
16 Statements, and I'll ask whether the Tribunal ordered closing
17 statements and indicated at the end of the hearing. If we were
18 to examine our witnesses, the expert witnesses of the other
19 side last, then obviously there will be little time for us to
20 prepare the Closing Statements in relation to that evidence,
21 and I think that it's common ground between the Parties having
22 discussed it this morning that realistically looking at the
23 time, the experts will be examined next Monday, and we would
24 prefer that the Closing Statements be made on the Tuesday
25 afternoon to give both parties the opportunity to absorb that

09:20 1 last evidence on Monday and incorporate it into the Closing
2 Statements.
3 So, our preference would be perhaps to have a prompt
4 start on Tuesday afternoon than to be divided equally between
5 the Parties for Closing Statements. That is agreed between the
6 Parties, if it's acceptable to the Tribunal.
7 MR. SILVA ROMERO: I confirm that that has been our
8 discussion, and that we agree as to that possibility.
9 PRESIDENT JÚDICE: Very well. If the Parties agree,
10 the Tribunal also agree, but we are going to make a decision
11 during our next break.
12 MR. BLACKABY: Very small points, and maybe I will
13 just take these all together.
14 In the last order the Tribunal requested that Bolivia
15 identify the passages in the rather voluminous extracts from
16 Professor Damodaran's books that it had--if possible, but it
17 would be helpful to know either if it is possible or if not in
18 sufficient time for it to be useful in the preparation of our
19 case. So, it's just in that context just to note that that is
20 outstanding, and it will be helpful to know promptly on what
21 passages, if any, they seek to rely on.
22 And, finally, I think it's not made necessarily
23 express in the procedural orders, but I think there has been an
24 agreement between the Parties as well on this point, just to
25 note that the Tribunal and request their concern is that, in

09:22 1 the direct examination of experts that they may give a
2 PowerPoint presentation limited obviously to evidence that they
3 can link to the record.
4 PRESIDENT JÚDICE: And it will be given to the other
5 side and to the Tribunal afterwards at least, the PowerPoint?
6 MR. BLACKABY: I think that is where is one point of
7 difference, is that our preference, just the way these things
8 work, would be to circulate the PowerPoint immediately before
9 the examination. I understand that it's Bolivia's point, but
10 they will clarify, that they would like that presentation to be
11 given the day before, but I will leave Mr. Silva Romero to
12 respond on that point.
13 MR. SILVA ROMERO: In connection with the PowerPoint
14 presentation, Mr. President, Arbitrators, there is no
15 difference between the Parties. Bolivia has no issue in
16 accepting the proposition made by Mr. Blackaby, so it's going
17 to be given later? Yes, I understand--well, at the beginning
18 of the presentation; right? It's going to be circulated at the
19 beginning of the presentation?
20 MR. BLACKABY: Yes, at the beginning of the
21 presentation, yes, that's the practice.
22 MR. SILVA ROMERO: The other point is that it's
23 necessary to identify the extracts from Mr. Damodaran's book,
24 and Mr. García Represa will answer the question.
25 MR. GARCÍA REPRESA: Good morning, Mr. President,

09:24 1 Members of the Tribunal.

2 Just to be clear, Bolivia understands that there is

3 nothing pending in connection with the document. Procedural

4 Order Number 18 says expressly in Paragraph 15 that the

5 Tribunal does not require such identification of paragraphs,

6 this just to be clear.

7 Now, in connection with identifying the pages of the

8 book by Damodaran that are relevant, if time permits, and the

9 Tribunal is aware of the short amount of time that Bolivia has

10 had to respond to that issue, we would do it, but we're working

11 on that at this time.

12 MR. BLACKABY: Just briefly to note on that, members,

13 just one final point. Obviously we did have the courtesy when

14 we provided very limited extracts to identify precisely the

15 passages on which we relied, and at this late stage obviously

16 to produce several hundred pages documents, not knowing what

17 the other Party intends to do with them when it really is

18 incumbent rather than simply introducing documents to identify

19 why it's being introduced at that late stage. We don't have

20 any objection to obviously the whole thing going in, but at

21 least to know roughly what passages, otherwise, we have several

22 hundred pages to review without knowing where the Respondent is

23 going with it, and that would be--I think raise questions of

24 due process.

25 So, I think we would just want them to

09:25 1 identify--clearly that's the Tribunal's desire. They've had
2 several days already. There are still several days before the
3 experts give evidence. I think as a minimum courtesy, in the
4 same way we--as a matter of courtesy identify the passages on
5 which we rely, that they do the same so that there is an
6 equality between the parties, notwithstanding that the whole
7 document is in the record, should something come up during the
8 hearing, but insofar as there's an intention to date to refer
9 to passages, we don't have to await the actual examination and
10 surprises.
11 PRESIDENT JÚDICE: Well, I think we understand what is
12 the point. I think that for the Tribunal it may be useful, but
13 clearly the order was not in a way that it will be mandatory
14 for Bolivia to do that, to work--that I'm sure will be helpful
15 for everybody, if possible. Then let's start, and when we open
16 if it will be possible to provide that help to the other side
17 and also to the Tribunal.
18 MR. BLACKABY: I just have one last point, you'll be
19 pleased to know, which is on the electronic Hearing Bundle. As
20 requested by the Tribunal, we prepared a little USB stick,
21 which has the entire record in a very easy to use format, where
22 you can go to the index and just double-click on the document,
23 and immediately the document appears. We provided a copy of
24 that to the Respondent. We didn't receive any response.
25 It's there. The work has been done. We offer it to

09:27 1 the Tribunal, to Bolivia, to whoever wants to use it. It's
2 simply the record. There is nothing there, and we represent as
3 counsel to the Claimants that it is simply a procedural aid
4 which may be useful to the Tribunal, to the PCA, and to the
5 Respondent as well as to ourselves. But we didn't receive any
6 response on that point, so we would perhaps ask for some
7 clarification on whether or not that would be useful from
8 Bolivia.
9 MR. GARCÍA REPRESA: On behalf of Bolivia,
10 Mr. President, yes, we have received a USB key that contains
11 the Core Bundle referred to by Claimants. In the brief time
12 we've had, we've reviewed the reference to documents and the
13 documents that have been established. We haven't opened each
14 and every document, so we issue a general reservation in
15 connection with this issue.
16 Now, in connection with the indexes and references,
17 there are a series of mistakes that we have identified, and we
18 are going to communicate to the other Party, and I think this
19 may be a matter of minutes to correct this, and I don't think
20 we're going to have any difficulties to use the Core Bundle
21 starting tomorrow.
22 MR. BLACKABY: My understanding is if we can do that,
23 we will hopefully be able to integrate that, then we may be
24 able to circulate an agreed bundle for everyone's benefit
25 before the witnesses begin giving evidence tomorrow, which is

09:29 1 when it will probably be most useful.

2 Thank you.

3 I think with that you will be pleased. That exhausts

4 my shopping list.

5 MR. SILVA ROMERO: With your permission,

6 Mr. President, Bolivia has one additional point that it would

7 like to raise. In the procedural orders issued by the

8 Tribunal, it was stated that the direct examination of the fact

9 witnesses must be brief. We've spoken with the Claimants in

10 connection with this point, and I understand that there is an

11 agreement, and this to avoid problems when the fact witnesses

12 give evidence, well, there is an agreement, I was saying, that

13 the duration of the direct examination be about 15 minutes, so

14 we can only raise objections starting in admitted Number 16 and

15 not Number 11.

16 PRESIDENT JÚDICE: Thank you very much. If the

17 Parties agree, I'm sure the Tribunal will also agree.

18 MR. BLACKABY: I have been informed by my colleagues

19 that I did miss one point, which has some importance, which is

20 with regard to the witnesses called by the Tribunal, CNDC,

21 Mercados Energéticos, and EdI, that there was a difference

22 between the Parties concerning the ability to cross-examine the

23 witnesses of CNDC. Our understanding of the intention of the

24 Tribunal's order was that in that regard and in order to ensure

25 equality and usefulness, because at the end of the day they

09:30 1 were witnesses called by the Tribunal, that each Party has an
2 equal opportunity to ask questions of each of the three and
3 that, as a consequence, either arising out of questions raised
4 by the Tribunal or questions raised by the other Party and in
5 those circumstances maintain an equality. I understand that
6 there seems to be some difference of the ability of the
7 Claimant to ask questions of CNDC, and that would seem to be
8 contrary to basic principles of fairness. They all undertook
9 the same task and, therefore, it would seem reasonable that
10 each of us has an opportunity to ask questions of each of the
11 three that have been called in this circumstance. That has not
12 yet been resolved by the Tribunal.
13 PRESIDENT JÚDICE: Do you have any comments?
14 MR. SILVA ROMERO: First, I would like to make sure
15 that we agree on the 15 minutes.
16 MR. BLACKABY: With regard to the 15 minutes, that
17 sounds reasonable. I'm not personally responsible for the
18 direct examination. I'd like to consult with one of my
19 colleague who is not present this morning, but I will be able
20 to give an answer first thing this afternoon, maybe even after
21 the break this morning, but if I could reserve our response on
22 that point, it will be given today.
23 MR. SILVA ROMERO: And in connection with the other
24 item, my colleague, García Represa, will answer.
25 MR. GARCÍA REPRESA: As we already mentioned during

09:32 1 the telephone discussion we held prior to the hearing, the
2 Tribunal has already issued a decision in their Procedural
3 Order, and there is no reason to modify that, and there is a
4 very clear reason why MEC and CNDC should appear here for
5 examination if the Claimants would like to use their
6 projections, and that is that they have presented--submitted
7 reports that were attached to Abdala's Report with their
8 projections. They have done all the work that is usually
9 carried out by an expert that is working on a hearing. So, if
10 the Tribunal declares that that evidence is inadmissible,
11 Bolivia has no need to examine those witnesses--
12 PRESIDENT JÚDICE: You said that you would not need?
13 MR. GARCÍA REPRESA: That is correct. If those
14 projections are not included in the file, in the record,
15 Bolivia will have no need to examine those witnesses. I am
16 referring to MEC and EdI.
17 Now, in connection with CNDC, the situation is
18 completely different, first, because the projections by MEC and
19 EdI were not done for Bolivia. They were done by Mr. Paz, and
20 Mr. Paz will be here. CNDC, beyond their usual activities in
21 the power market in Bolivia, responded to a written
22 consultation by EGSA to estimate the difference in historical
23 revenue given the application of the Supreme Decree or the
24 inability to apply that Decree knowing that CNDC has the
25 responsibility of maintaining the databases and also

09:34 1 maintaining the information for the power plant. CNDC has not
2 presented--has not submitted a report; therefore, the situation
3 is different from that of EdI and MEC.
4 MR. BLACKABY: Mr. García Represa has indicated that
5 work was undertaken by CNDC with regard to evidence presented
6 in this case, and I think it's for that reason precisely that
7 the Tribunal correctly requested that CNDC also be present; and
8 that, in those circumstance, if the questions arise out of that
9 exercise that was done, then all of these individuals be
10 examined in exactly the same way. There is no fundamental
11 difference. There is no reason--I frankly find it difficult to
12 understand what the objection is if it will just be questions
13 that arise out of the discussion that will take place in this
14 room. It's not--if the Tribunal has called them, the Tribunal
15 will have its questions. There may be some further questions
16 by the other side, and we'll just reserve--we have our right to
17 ask any issues that might arise from that exercise in the same
18 way as they will have the rights to undertake the same thing
19 with regards to Mercados Energéticos or EdI. This seems to me
20 just to be a basic principle of fairness. The question is if
21 any witness is examined at any time. I have never been in a
22 hearing in 20-odd years where any person has given evidence
23 either at the request of the Tribunal or at the request of a
24 Party where one party is excluded from asking questions. That
25 simply is something contrary to any basic principle of

09:36 1 fairness.

2 So, in those circumstances, we believe that if anyone
3 is going to give evidence before this Tribunal, each Party
4 should have its basic right to ask questions that arise out of
5 that exercise.

6 Thank you.

7 PRESIDENT JÚDICE: Thank you.

8 MR. GARCÍA REPRESA: Thank you, Mr. President. I
9 understand, based on what I just heard, that the only questions
10 that the other Party would like to pose to CNDC in connection
11 with the historical damages because of Spot Price is the only
12 issue that should be discussed, and I would like to have their
13 confirmation because this is the only task carried out by CNDC.

14 Now, in connection with due diligence and fairness,
15 Bolivia suggests that neither Party does a cross-examination.
16 This is a witness that was called to appear by the Tribunal.
17 The Tribunal should be the one examining that witness or
18 Expert; and, if there are any questions in connection to the
19 discussion with the Tribunal in that case, we can have some
20 brief questions.

21 But the Tribunal should also know that CNDC was not
22 prepared as a witness in this case. None of the outside
23 lawyers for Bolivia has met with CNDC people. I understand
24 that they arrived last night here in Paris. During the
25 hearing, we're not going to be preparing Experts that we never

09:37 1 met with before. This is not the due process, Mr. President.
2 MR. BLACKABY: Just some final observations. The
3 questions that we want to ask--the questions arising out of the
4 issues obviously in this case in terms of any preparation; and,
5 to be clear, we have never met with Mercados Energéticos or EdI
6 in order to prepare evidence for this case. It was an
7 instruction given by Mr. Abdala to input data into a software
8 model in the same way as I instruct my Secretary to type a
9 letter. That's the exercise that they did; and, for that
10 reason, they were not called as witnesses. It's proprietary
11 software in the same way as Microsoft Word will help you put
12 letters on a page, this software helps to generate figures.
13 It's the same software that CNDC used.
14 So, we did not meet with them as witnesses. They were
15 simply hired in order to run the model because they're
16 proprietary because it costs a lot of money, I guess, to run
17 them, and they're not available for sale in the ordinary way.
18 So, in those circumstances, we're exactly in the same
19 position. The Tribunal wants to see them, ask certain
20 questions. We think that each Party should have the right to
21 ask the questions that arise out of whatever exercise they
22 claim to have done in the circumstance. But I think the
23 Tribunal will have the issue, so I don't think there is
24 anything more useful I can say.
25 PRESIDENT JÚDICE: Thank you very much.

09:38 1 MR. GARCÍA REPRESA: If you allow me, Mr. President,
2 just to reply on behalf of Bolivia, first I would like to make
3 clear, and I hope that this is going to be made clear today,
4 that EdI has not acted as a human calculator. That is to say,
5 to input information and then have some magic results. There
6 is some calculation, and also there are some guided steps that
7 have to be taken, and some steps have been taken whereas others
8 have not.
9 And we're going to explain why. We also indicated
10 that there was a proprietary model that was used for our
11 program. This is software that CNDC offers to all of the
12 generators in Bolivia. This is not a proprietary piece of
13 technology, and the engineer has used the same technology, so
14 this is not something that is unknown to the other Party.
15 Having said this, my suggestion is that after the
16 Opening Arguments today, the Tribunal can make a decision, and
17 I would like that, by the end of the day you can understand why
18 it is important, and if we are going to accept the projections
19 by MEC and EdI, why it is important for Bolivia to examine them
20 based on the due process.
21 PRESIDENT JÚDICE: Unless you want to speak a little
22 more about this, the Tribunal will make a decision on this
23 issue and then on the other issues during the hearing today.
24 MR. BLACKABY: One final formal point. The Tribunal
25 had requested a clarification by today what the status of

09:40 1 Bolivia's deposit was for the purpose of this hearing, and I
2 just wondered if there was any news with regard to that from
3 Bolivia.
4 PRESIDENT JÚDICE: The Tribunal has been informed, but
5 probably...
6 MR. SILVA ROMERO: The Secretary, Mr. President, may
7 report on the communication that we had.
8 SECRETARY DOE: I would like to inform that yesterday
9 we received a communication from the representatives of the
10 Respondent indicating that at the end of this week or at the
11 beginning of next week at the latest we should be receiving the
12 deposit.
13 PRESIDENT JÚDICE: Is that all? Then we can move on
14 to the next step.
15 (Pause.)
16 OPENING STATEMENT BY COUNSEL FOR CLAIMANTS
17 MR. BLACKABY: Members of the Tribunal, esteemed
18 colleagues of Bolivia, this case is about the direct
19 expropriation of the largest power generation company in
20 Bolivia. The company, at the time of expropriation, supplied
21 over 30 percent of Bolivia's electricity.
22 At dawn on the 1st of May of 2010--you can see from
23 Slide 3--without warning, the Bolivian military forcibly took
24 control of Guaracachi's power plants and administrative
25 offices. Bolivia would have you believe that this was, and I

09:45 1 use its words, "an orderly and peaceful takeover." You can see
2 Slide 3 and 4 of the intervention.
3 Members of the Tribunal, imagine that this was the
4 expropriation of a house to build a highway, and imagine that
5 the Government took your house without prior notice by arriving
6 at 6:00 a.m. with soldiers in full camouflage, their faces
7 hidden by balaclavas, grasping machine guns, who don't even
8 knock. They just kick the door down. How can Bolivia say that
9 was peaceful? How can they say it was orderly? Why were there
10 soldiers? Why were there machine guns? There was no attempted
11 resistance or risk of any resistance. Why was this not
12 undertaken by a civil servant knocking at the door and serving
13 a copy of the Nationalization Decree?
14 Why not inform the Claimants in advance of this taking
15 and organize, for example, the joint inspection of facilities
16 in the presence of a judge or a Notary Public, as has happened
17 in many of the cases of direct expropriations in Venezuela, for
18 example?
19 No. This was a shock and awe expropriation. There
20 was the need for a show on May Day. A banner bearing the
21 colors of the national flag was hung over the facade of the
22 company reading, "nacionalizado." The media was alerted ahead
23 of time by the Government to ensure that they would capture the
24 dramatic taking. The same courtesy was not extended to the
25 company's managers or its controlling Shareholder.

09:47 1 On Slide 5 you can see a copy of Decree that was
2 signed by President Morales later that fateful day which
3 effected the transfer of the Claimants' controlling
4 shareholding to ENDE, the Bolivian State-owned electricity
5 company. This is not contested. It is also not contested that
6 Bolivia paid no compensation whatsoever for this taking.
7 Four years prior to this seizure, Bolivia, by its own
8 admission, intended to nationalize Guaracachi along with the
9 other capitalized power generators, and you can see that at
10 Paragraph 8 of the Counter-Memorial, but failed to communicate
11 this to the company itself.
12 As late as April 2010, Rurelec's CEO Peter Earl believed
13 that the Government wanted to discuss a partnership with the
14 controlling Shareholder, not a nationalization. You can see
15 that--sorry, this is from December 2009, just a few months
16 before-- a press release from Rurelec that says, "Where for some
17 time now Rurelec has been exploring ways of working more
18 closely with the Government of Bolivia in a public-private
19 partnership." That was the understanding of the company as
20 late as December 2009.
21 But Bolivia, as we understand now from its pleadings,
22 knew that it intended to nationalize since 2006. It took a
23 number of steps which reduced the value of the capitalized
24 electricity generators and thus attempted to minimize any
25 compensation that would be payable at the end of the process.

09:48 1 Now, the value of an electricity generator is in its
2 revenue stream, and that revenue stream is made up of two
3 elements: Firstly, Spot Prices which are paid to generators
4 for electricity dispatched to the grid, actually dispatched.
5 Second, there are Capacity Payments paid in respect of each
6 unit with capacity available for dispatch to the grid, if
7 needed. Capacity Payments are paid irrespective of how much
8 electricity a unit actually dispatches and are they're
9 necessary to ensure that there is enough excess capacity to
10 prevent blackouts at moments of peak demand.
11 With this nationalization plan in mind, the Government
12 took a number of measures which materially reduced Guaracachi's
13 income. It did this by interfering with the Regulatory
14 Framework for power generation by changing the calculation of
15 its two sources of revenue that had been established in order
16 to attract the investment in the first place.
17 First, it demanded the generators agree to provide a
18 25 percent subsidy for poorer consumers. This was known as the
19 dignity tariff that was introduced in March 2006.
20 Second--and you can see here on the slide the
21 different resolutions that began to erode the Regulatory
22 Framework--second, Bolivia changed the way in which Capacity
23 Price calculations were made in accordance with the Electricity
24 Law, the law that had been established to attract international
25 investment to the sector in the first place. When the

09:50 1 Claimants exercised their right to challenge those measures
2 through Guaracachi, the Supreme Court of Bolivia took no
3 steps--no steps--for nearly five years, and the case remains
4 pending. Guaracachi was denied any effective means of seeking
5 redress and recovering lost payments and having that dispute
6 heard.
7 Third, Bolivia annulled the fundamental basis of the
8 Spot Market established in the Electricity Law: The idea of a
9 uniform price for all generators based on the variable costs of
10 the least efficient unit dispatched. The interference was a
11 carbon copy of a similar measure taken by Argentina against
12 generators which has been held to be a breach of the
13 fair-and-equitable-treatment standard by the ICSID Tribunal in
14 the case of Total against Argentina.
15 The Capacity and Spot Price Measures cumulatively
16 resulted in a 20 percent reduction in income for Guaracachi.
17 In a final transparent attempt to minimize
18 compensation, the military seizure took place just before
19 Guaracachi's largest investment ever was completed, the
20 combined-cycle project. This was to be the most efficient
21 power generator in Bolivia that would have doubled Guaracachi's
22 earnings. What is Bolivia's response to this claim for
23 compensation for the nationalization? Bolivia has mounted
24 three principal lines of defense. Bolivia's main defense is
25 the Claimants' equity stake in Guaracachi, with a market share

09:52 1 of 30 percent of the country's power supply and the strongest
2 history of investment of the capitalized power generators, over
3 $170 million invested, is worth less than nothing. In other
4 words, they needn't have gone in with the military because, no
5 doubt, the Shareholder would have handed them the keys to the
6 company because Bolivia apparently did the Claimants a favor by
7 expropriating Guaracachi because it was valueless.
8 The Tribunal will recognize the old zero sum
9 nationalization game played by many States ever since the
10 Chilean copper nationalizations of the 1970s. The argument is
11 the overused, "We are complying with our international
12 obligations because we will pay you for the asset we have
13 taken, but," as if by magic, "the equity value is zero or
14 negative, so we don't have to pay you anything."
15 In this case, a zero value defies all logic and basic
16 principles of economic evaluation. Let's start with
17 Guaracachi's investment record. You can see here on Slide 8
18 the graph which shows the capacity that was invested by
19 Guaracachi during the 15 years that it was operated since
20 capitalization.
21 Bolivia alleges that Guaracachi
22 disinvested--disinvested--in the Bolivian power grid. Well,
23 that's remarkable how one can disinvest if you go from
24 250 megawatts to in excess of 500 megawatts. Guaracachi has an
25 extraordinary record of investment in new power generation

09:53 1 capacity. It more than doubled since capitalization. At that
2 time, the installed capacity was approximately 250-megawatts.
3 By the time of nationalization it was over 500 megawatts.
4 Guaracachi did this by investing over $175 million in nominal
5 terms in new power generation capacity within its life of its
6 investment. Yet Bolivia's position is it can simply seize that
7 and the 250 megawatts of capacity, additional capacity, that
8 resulted for $0.
9 Now, there are a few simple and objective benchmarks
10 to test Bolivia's proposition before getting into the Expert's
11 financial model, which my colleague, Noah Rubins, will later
12 discuss.
13 Now, one of these is an anchor value that cannot lie,
14 and that's on your Slide 9. Guaracachi's Book Value of equity
15 approved by its Shareholders, and those Shareholders at the
16 time, in 2009 accounts, included State-owned electricity company
17 ENDE which held a 49.9 percent stake. And this was
18 subsequently approved by the company's statutory auditors
19 PricewaterhouseCoopers, and the value that the Bolivian State
20 Shareholder agreed and approved and the value that the
21 statutory auditors confirmed was that the Book Value of equity
22 amounted to 133,711,004 U.S. dollars. That's what the
23 statutory accounts say. The last statutory accounts before the
24 seizure.
25 What's Bolivia's response? They say, "ah, yes, but we

09:55 1 have to look at Market Value, and that's rarely equal to Book
2 Value." That may be the case, but as Mr. Rubins will later
3 explain, even Bolivia's own examples reflect that book value
4 normally materially undervalues the business rather than
5 overvaluing it. In fact, Bolivia was unable to find itself
6 more than a handful of examples where the opposite was true,
7 and none whatsoever where a Book Value of equity was reduced by
8 100 percent to a Market Value of zero. In fact, with regard to
9 the selection that was used, the vast majority of market values
10 were in excess of the Book Value and only a small sample were
11 less than Book Value, and there none was 0 percent of Book
12 Value, as has been suggested by Bolivia in this case.
13 Now, another reference point, and I invite you to turn
14 to the next slide, is the credit rating given to Guaracachi of
15 AA by Pacific Credit Ratings. There are different types of AA,
16 this is a AA2. Worthless companies don't get AA credit ratings
17 or the kind of comments you see on this slide: "A very high
18 payment capacity. Acceptable indebtedness, suitable dividend
19 policy."
20 Yet Bolivia's position is that it can take the benefit
21 of this investment without paying a penny. So, how does
22 Bolivia get to a zero value? Well, they avoid Book Value,
23 obviously, and advocate the Discounted Cash Flow methodology.
24 They then reverse-engineer the discount rate to lower the Net
25 Present Value of future cash flows until it equals debt. Then,

09:57 1 as if by magic, the equity value is zero.

2 In order to achieve that goal, however, Bolivia has

3 had to apply an astronomical 20 percent discount rate in the

4 present case, nearly double that proposed by the Claimant, and

5 Mr. Rubins will explain how they managed to inflate that figure

6 up to this remarkable 20 percent rate. But you don't need to

7 be an economist to see that Bolivia's discount rate is not in

8 line with reality.

9 Now, one place to start when looking at country risk,

10 which is essentially one of the key elements of the discount

11 rate, is to look at the yield on sovereign bonds issued by

12 Bolivia. This is currently 4.8 percent. For 2012 bonds issued

13 by Bolivia, 4.8 percent. Now, it's quite a simple exercise.

14 That basically means that there is Country Risk Premium above

15 the risk-free rate of the U.S. risk-free bonds on which it's

16 based of some 3.09 percent, so a Country Risk Premium of

17 3.09 percent, according to Dr. Abdala.

18 Now, that's all very well. That's the sovereign

19 bonds, but country risk is also, you can imagine, measured by

20 debtholders in a particular enterprise. If I'm taking bonds or

21 buying bonds in Guaracachi or lending to Guaracachi, I'm going

22 to be very concerned about the country risk of Bolivia; and,

23 here, so, the cost of debt is something that's going to be

24 fundamental and which will also include country risk. Here, in

25 2010, Guaracachi's cost of debt at the time of the

09:59 1 nationalization, Guaracachi could borrow money at 7.88 percent.
2 This is not in dispute between the Parties. Bolivia agrees
3 that the cost of debt is 7.88 percent.
4 Which means that it had to come up with a cost of
5 equity of some astronomical, well in excess of 20 percent, in
6 order to come to its discount rate of 20 percent, and there is
7 no other company that has that discrepancy in this field in
8 Latin America between the cost of equity and the cost of debt.
9 There is another example which is quite useful to
10 take. Again, one is hesitant to make too many comparisons
11 between countries, but, for example, international tribunals
12 have concluded that an appropriate discount rate for Argentine
13 electricity utilities at the very heart of its profound
14 economic crisis in December 2001-January 2002 was around
15 12 percent. At a time of macroeconomic meltdown at that
16 particularly moment, nevertheless international tribunals, for
17 example, in the EDF against Argentina Case, another case
18 involving the Electricity Sector, another case involving
19 Electricity Sector governed by very similar norms to the
20 Bolivian sector, 12 percent. National Grid, again in the
21 Electricity Sector, 12 percent. Not 20 percent.
22 Yet Bolivia--in a time of relative macroeconomic
23 stability--and you've seen it's just issued bonds at
24 4.8 percent--is seeking a discount rate of some 20 percent,
25 near 20 percent. Okay. So, that's how they get to their zero

10:01 1 value.

2 Bolivia's second line of defense is to raise a litany
3 of irrelevant side issues which have no bearing on Bolivia's
4 liability under the Treaty or the calculation of damages. For
5 example, Bolivia ignores the extraordinary record of investment
6 of Guaracachi, and instead focuses virtually exclusively on the
7 withdrawal and sale of a handful of old and inefficient
8 generation units claiming that these decapitalized the company,
9 ignoring the fact that the Government itself had excluded these
10 units from the dispatch order and authorized their withdrawal
11 from the generation park, so we're being told we're
12 disinvesting in the company because we're removing old
13 inefficient units duly approved by the Government to be
14 removed.

15 Now, look at the Slide on Paragraph 12--sorry,
16 Slide 12. You can see the decommissioning of approximately
17 50 megawatts of used--unused inefficient capacity over five
18 years and you can see the circle--that's what Bolivia's
19 focusing on--followed a much greater investment of
20 142 megawatts of efficient units in 1999, and the addition in
21 subsequent years of a further 110 megawatts. So, obviously
22 what's happening here is quite simple, and we will go into this
23 in more detail later. Once you make a huge investment in
24 modern efficient power, you can then take away the capacity
25 that is no longer called upon to be used in the grid and which

10:02 1 is no longer receiving any money because the Government says
2 it's so unlikely this is ever going to be used, we're not even
3 going to pay you Capacity Payments for those units. That is
4 the disinvestment of which they're complaining. It's called
5 replacing old inefficient units with new efficient units; and,
6 of course, if you have a factory and you buy a new machine, at
7 the time you got the new machine and the old machine together
8 you will have a greater capacity to make things. But if you're
9 not using the old machines anymore to make things because
10 everything is being made by the new machine, then, of course,
11 what you're going to do? You are going to sell the old
12 machines. So, as you can see, the trend is hugely upwards the
13 whole time.
14 Bolivia makes another attack to highlight at some
15 considerable length a short period in which Guaracachi had
16 limited cash. Now, in spite of spending a great deal of time
17 on this point, on this liquidity point, Bolivia and its Expert
18 acknowledge that these are issues of no consequence to the
19 value of compensation to be paid, and I invite you to look at
20 Slide 13 of the Bolivia's Rejoinder, Paragraph 177. What is
21 relevant to calculate Fair Market Value is not in the months or
22 days before nationalization whether Guaracachi was in a state
23 of illiquidity, rather, the level of debt at the date of
24 nationalization. In spite of the confusion the Claimants seek
25 to create, both its Expert Compass Lexecon and Dr. Flores

10:04 1 considered the same debt, $92.7 million, in their calculations.
2 So, what's the conclusion of this, is that liquidity
3 is a complete what we would call in English a red herring.
4 They have openly accepted it. It had no impact on the
5 calculation of value. It's simply a cash-flow issue that has
6 no long-term impact and is not part of any calculation of value
7 that even their own Expert doesn't take this into account when
8 he's making his calculation.
9 So, you will hear lots and lots about that particular
10 cash crunch, which most companies happen at some stage in their
11 life, but you will also hear how they confronted that, how they
12 responded to that perfectly acceptably, and after
13 nationalization without any new injection of cash the company
14 continued to function perfectly successively for a number of
15 months.
16 The third line of defense is a series of unfounded
17 jurisdictional objections. The jurisdictional basis of this
18 case is very clear. The Treaty states expressly that companies
19 like Guaracachi America and Rurelec qualify for protection as
20 investors, and both treaties establish a very broad definition
21 of investment. Any kind of asset is protected including any
22 form of participation in a company. Guaracachi America
23 directly owns 50.001 percent or owned before nationalization of
24 Guaracachi's shares, and Rurelec owns that same majority stake
25 indirectly through its hundred percent ownership of Guaracachi

10:05 1 America. The whole purpose of these treaties is to ensure
2 cross-border movement of capital, and here there was a massive
3 investment of capital through these two companies. Not a
4 single one of the objections raised, even if successful, would
5 lead to dismissal of the case. All of them deal either with
6 only one of the Claimants or only some of their claims.
7 For example, Bolivia argues that Guaracachi America
8 and Rurelec were not permitted to bring their claims together
9 in a single arbitration, even though the arbitration clauses
10 are perfectly compatible. Bolivia has identified no relevant
11 distinction between them on the merits. No Tribunal has ever
12 dismissed a Claimant on this basis, and you can see why. Which
13 of the two Claimants should go back and start again after three
14 years of arbitration?
15 Another surprising contention is that Rurelec hasn't
16 proven that it acquired its investment in Guaracachi back in
17 2006. In the record, you will find a host of evidence that
18 Mr. Rubins will point you to including the signed December 2005
19 Share Purchase Agreement, the purchase price booked in
20 Rurelec's Audited Financial Statements. Don't forget Rurelec
21 is a public company. You will finds contemporaneous public
22 announcements about the acquisition. You will see pictures of
23 the British Ambassador cutting the ribbon of new capacity.
24 But for Bolivia, apparently there is some problem that
25 this acquisition just didn't happen. There is no explanation

10:07 1 as to how these documents could have come into being if Rurelec
2 didn't acquire Guaracachi shares.
3 But this gives you a flavor of the kind of bizarre
4 distraction we have had to deal with. Mr. Rubins will deal
5 with these in due course.
6 But Bolivia's goal this week is clear, as we've seen
7 it from its pleadings. It's to divert the Tribunal's attention
8 with a series of issues which have no impact on valuation, and
9 that's admitted by their Expert. In order to avoid discussion
10 of the core issue, which is the Fair Market Value of the
11 controlling shareholding of Bolivia's largest electricity
12 generator and the separate heads of loss incurred as a
13 consequence of earlier unlawful interference with the
14 Regulatory Framework.
15 Gentlemen, that brings to a close our introduction, so
16 we will now turn to analyze in more depth the facts of the case
17 and Bolivia's breaches of the Treaty, which I will address, and
18 my colleague, Noah Rubins, will then address the damages
19 flowing from these breaches and conclude with some observations
20 on the jurisdictional challenges.
21 So, let's start with the facts. What is the nature of
22 this investment? In the early 1980s, Bolivia was in economic
23 crisis. The impact of the crisis was unmistakable. Between
24 1981 and 1986, per capita GDP in Bolivia fell by one-third.
25 Prices rose by 20,000 percent, and Bolivia's foreign debt

10:08 1 climbed to nearly $4 billion. It was against this background
2 that Bolivia in 1985 laid the foundations for economic growth
3 with its institution of a structural adjustment program. I
4 could explain it no better than a former Bolivian Vice Minister
5 of Energy and Hydrocarbons, as you can see from the Slide 16,
6 and the Vice Minister explained that Bolivia launched a new
7 economic policy with a priority to consolidate and preserve
8 economic stability and overcome the social and economic crisis
9 the country was undergoing. Through the implementation of a
10 program of structural adjustment the economy began to expand.
11 Now, the most significant of these reforms was the
12 adoption in 1994 of the capitalization program, which started
13 with the electricity sector. Unlike full privatization,
14 capitalization involves the direct injection of private capital
15 by qualified bidders through the issuance of new shares to
16 those private investors.
17 Now, reform was particularly necessary in Bolivia's
18 electricity generation sector because, in spite of Bolivia's
19 protestations to the contrary, it faced significant problems in
20 the wake of the crisis and in the expected new investment that
21 would be needed. It is less a discussion of what the state of the
22 system was than what the system would need to be in order to
23 address the needs of the population in the coming years in
24 light of economic growth.
25 First, the level of investment required for Bolivia's

10:10 1 electricity generation sector was beyond the capability of
2 State-owned ENDE and the Government, and you can see that in
3 Slide 17. In fact, the UNDP and the World Bank noted in 1991
4 that the power sector will demand about $500 million in the
5 next four years. These levels of investment are beyond the
6 financial capabilities of the Government; and for the
7 Government itself to seek to make them, would be at
8 cross-purposes with the "objective of incorporating private
9 capital into the productive sectors".
10 In a 2000 report on lessons learned from the Bolivian
11 reforms, these institutions wrote that "the true overriding
12 rationale for reform in Bolivia was the need to attract private
13 capital to the sector. The Government simply could not afford
14 the future investments and expansion needed to meet demand
15 growth". That's the key thing. They couldn't afford what was
16 needed to meet demand growth. That's the focus, not on the
17 condition of the system when it was taken over.
18 The second problem facing the sector was as you could
19 see from Slide 18 that "the level and structure of electricity
20 tariffs in Bolivia does not reflect the real cost of this
21 public service". Another UNDP-World Bank Report. Now, of
22 course, what that means is the sector was not self-sustaining.
23 The tariffs did not reflect the economic cost of the system.
24 As a consequence, there would need to be Government financing
25 or Government subsidies paid to maintain the system. Bolivia

10:11 1 no longer wanted to participate in a system which would be a
2 drain on public finances. The system should be
3 self-supporting.
4 Ultimately, however, the debate over the state of the
5 Electricity Sector prior to capitalization has no relevance to
6 the issues in dispute between the Parties. What matters and
7 what is not contested is how international investors were
8 courted to invest in the country's electricity sector. Now, as
9 part of the capitalization process, Bolivia transferred all of
10 ENDE's, the State-owned electricity company's, generating
11 assets to three newly created power generation companies.
12 These were Guaracachi, Corani, and Valle Hermoso, which were to
13 be injected with private capital.
14 As part of that process, Guaracachi received ENDE's
15 power plants in Santa Cruz, the Guaracachi Plant, a plant in Sucre,
16 known as the Aranjuez Plant, and a plant in Potosi known as
17 Karachipampa. You can see the location of the plants on the
18 map on this slide, Slide 19. This is where they were in 1995,
19 the three plants.
20 Now foreign investors were invited to bid for the new
21 shares to be issued by Guaracachi equivalent a 50 percent
22 shareholding. Its aim was to attract foreign investors with
23 significant expertise managing power generation businesses and
24 with access to financing. In order to achieve this, it
25 designed Bidding Rules with requirements that only foreign

10:13 1 power generation companies could satisfy. As you can see from
2 the excerpt on Slide 20, bidders had to have five years of
3 experience operating power generation plants. You see here it
4 refers in the first of Slide 20 minimum experience since the
5 1st of January 1990. This is March 1995, so a minimum of five
6 years' experience operating electricity generation plants.
7 And, secondly, it must have a net worth, a patrimonio
8 neto, of $100 million. No Bolivian company could fulfill these
9 conditions.
10 Now, you can see also on the next slide the Government
11 placed English language advertisements in leading international
12 newspapers and publications such as The Wall Street Journal,
13 The Economist, the Financial Times. Here is an example of the
14 text of one of them on Slide 21. Now, of course, the very
15 nature of publishing internationally and in English is seeking
16 to attract international investment.
17 Let's turn to Slide 22. Now, as often happened in
18 these processes, Bolivian Government held roadshow events
19 abroad to solicit international interest in the three power
20 generation business. For instance, this is a program from the
21 roadshow held at a five star hotel in Key Biscayne, Miami, in
22 1994, seminar on a Bolivian power sector reform. Now, it's
23 interesting if you turn the page. One of the elements to be
24 discussed was the new Electricity Law. Now, Bolivia and its
25 consultants marketed the new Electricity Law that was then in

10:14 1 draft form as a key attraction prior to the submission of bids
2 to explain its design and impact, and that was one of the
3 sessions that you saw here for the investors. What does the
4 draft Electricity Law say. So, prospective investors were
5 provided information not only about the business and balance
6 sheets of ENDE up to that date, but also quite naturally about
7 the Regulatory Framework to be established in the forthcoming
8 Electricity Law that was specifically designed to attract the
9 investment, and this is important. There is a legal
10 consequence of a legal regime, a regulatory regime,
11 specifically designed to attract foreign investment.
12 As explained by the United Nations at the time, the
13 overall goal--and this is Slide 24—is “to establish a Legal
14 Framework that fosters a supportive investment climate
15 particularly for the private sector”, and again specifically
16 “this activity will assist in the establishment of a new
17 regulatory framework to encourage private sector participation
18 and competition in the power subsector”.
19 Now, the 32 companies that expressed interest are
20 listed on Slide 25. In fact, the list is a contemporaneous one
21 at Exhibit C-55. Now, that reads pretty much like an
22 international who's who of world leaders in power generation.
23 They were the ones who attended the roadshows and showed an
24 interest in bidding.
25 Now, as explained in the contemporaneous documents, in

10:16 1 order to attract foreign investors, Bolivia committed itself to
2 this new regulatory framework that it actively discussed at the
3 roadshows as we saw from the agenda in Florida. Let's turn to
4 the Regulatory Framework.
5 Well, it was a tried and tested model of merit order
6 that had been invented in Chile for the privatization of its
7 electric utilities. It was so successful in Chile that it was
8 also used for the privatization of the electricity system in
9 Argentina and, to a degree, the United Kingdom. And the system
10 ensures that the cost of electricity reflects the economic cost
11 of the system, meaning no need for further Government subsidies
12 of the system.
13 Now, consistent with Bolivia's desire to establish a
14 stable Electricity Sector and ensure long-term supply, it set
15 out the objectives of the Electricity Law in Article 3, which
16 is on Slide 27; i.e., that all activities related to the
17 electricity industry in Bolivia must be governed by principles
18 of efficiency, transparency, quality, continuity, adaptability,
19 and neutrality, and the second part, 3(f), you see the
20 principle of neutrality requires an impartial treatment
21 (speaking in Spanish), to all electricity companies and
22 consumers.
23 Now, under the Electricity Law, a generator like
24 Guaracachi receives remuneration in two forms, Spot Prices and
25 Capacity Payments, so let's take them in turn. As you can see

10:18 1 from Slide 28, Articles 45(a) and 49(c) and (d) of the
2 Electricity Law established that Spot Prices at the generator
3 level are to be valued at the marginal cost of the system.
4 That's the key phrase. You can see highlighted, "costos
5 marginales de corto plazo de energía del sistema." What does
6 that mean? And you can see again at 49(a) that concept
7 repeated, and again in 49(d) costos marginales. What does that
8 mean? So, let's try and use a graphic to illustrate this.
9 All generators available to dispatch have to declare
10 the variable costs of their generation units to the Comisión
11 Nacional de Despacho de Carga, or CNDC, the Bolivian wholesale
12 electricity market administrator. They do that twice a year.
13 This is my variable cost. The more efficient units, the more
14 expensive capital units have the lowest variable cost. The
15 oldest units, the least efficient units, have the highest
16 variable costs. So you have here a selection of units with
17 variable costs and the left-hand part of the graph is the
18 variable cost, and the bottom axis is increasing demands in
19 kilowatts from the system.
20 Now, generation units are dispatched based upon these
21 variable cost declarations. The most efficient units would be
22 called first, then the next most efficient units and so on
23 until demand is satisfied. So, not all units available to
24 dispatch would necessarily be called upon to dispatch. It
25 depends on the size of the demand.

10:19 1 So, for instance, let's look at the graphic on the
2 slide, and it may help to look at the screens. We may have to
3 have some changes in the animation. At a minimum demand, and
4 you can see here baseload minimum demand, only Units I and
5 II--that is the units with the lowest variable costs--are
6 called upon to dispatch. But as demand increases, generation
7 units with higher variable costs are called upon to dispatch.
8 So, if demand increases, you can see here, for example, Units I
9 to VI would be called upon to dispatch.
10 Now, the key marginal cost of the system that we've
11 seen repeated frequently in the Electricity Law, means that all
12 generators dispatched receive the same uniform rate equal to
13 the rate paid to the least efficient unit known as the marginal
14 unit. That sets the marginal cost of the system. What's the
15 cost of the next unit we need to apply in order to supply
16 electricity?
17 So, basically everyone then gets paid the same amount,
18 whether your units one, two, three, four, five, or six. That's
19 the principle of neutrality. That is the principle of the
20 uniform margin rate.
21 So, here assuming that Unit 6 is called upon to
22 dispatch, Units 1 to 6 will receive remuneration on Spot prices
23 based upon Unit 6's variable declared cost.
24 As a consequence, more efficient units which have
25 lower variable costs--let's look at Unit 1--receive a greater

10:21 1 margin than less efficient units. That's not surprising. Why?
2 Because the more efficient units are much more expensive.
3 There is usually much greater capital investment. Think of
4 what the most efficient units are in a system that is used, for
5 example, in Argentina as well, you have nuclear power. The
6 cost of building a nuclear power station is enormous. The
7 variable cost are relatively low once it's running. Similarly
8 with hydroelectric power. The cost of building a hydroelectric
9 station are enormous. The variable costs are quite low. So,
10 clearly you need other elements in order to send the economic
11 signal to encourage people to build new efficient units, and
12 the economic signal is that you will get the difference between
13 your variable costs and the uniform rate. This uniform
14 marginal price system acts, therefore, as an incentive for
15 generators to add more efficient generation capacity. That
16 will be called upon to more often and allow greater margins,
17 you know. I'm seeing that Unit 1 is making money here, so that
18 encourages me to make a Unit 0 that's going to be even more
19 efficient. That will have a huge capital investment, but I
20 know there will be a bigger margin to repay that capital
21 investment. This is called a merit order, and it's is
22 essentially internationally recognized system, as I say, that
23 Bolivia basically copied from Chile and Argentina and, to a
24 degree, the United Kingdom.
25 Now, this is the principle of neutrality. By having

10:22 1 spot prices determined by the cost of the marginal units, the
2 regulator ensured a uniform and neutral rate to all players in
3 the market. It also ensured that prices were not manipulated
4 by the Government. This is simply an economic exercise. These
5 prices set by the marginal cost will always reflect the
6 economic cost of supplying energy to the system. This is the
7 concept of self-sufficiency.
8 The second principle is efficiency. Now, pursuant to
9 this rule, the remuneration of the least efficient units is
10 reduced, while the remuneration of the most efficient ones is
11 increased, which acts as a major incentive for investment.
12 Now, Bolivia argues that this internationally used
13 system for determining prices on the basis of the marginal cost
14 of the system creates a perverse effect because to use its own
15 words, during the hours of peak demand, the most inefficient
16 unit become the marginal unit and dictate the price that all
17 generators should collect. Well, first of all, whether it's
18 perverse or not, it's the system that applied in Bolivia and
19 it's the system that attracted the investment, but it's not
20 perverse.
21 The receipt of higher prices at times of peak demand
22 reflects the basic economic law of supply and demand. When
23 everyone wants to travel, airplane ticket prices increase.
24 That increase helps pay for the moments of lower demand when
25 the planes may be half empty.

10:24 1 Similarly, if ticket prices increase too much, an
2 airline will be economically incentivized to add aircraft to
3 take advantage of that increase, which in turn will help reduce
4 prices because supply and competition will be greater. In
5 essence, you try to take advantage, but by taking advantage
6 building a new aircraft you increase competition and prices
7 fall again. This is the virtuous circle of this kind of
8 economic model. So, it's not perverse at all. The opposite
9 would be perverse because it would destroy any incentives to
10 invest in new efficient units.
11 So much for Spot Prices. Let's turn to Capacity
12 Prices or saying it in Spanish precio básico por potencia.
13 These are payments made independently of whether the generation
14 unit is called upon to dispatch. They ensure that generators
15 have an incentive to maintain generation units that are ready
16 to dispatch, even if they're not called upon often enough to
17 cover their costs. Capacity Payments are provided for in
18 Article 49 E of the Electricity Law which is on Slide 30.
19 They're calculated based on a cost of investing in, operating,
20 and maintaining the most efficient generation unit called upon
21 to supply power at peak demand. Now, this investment of a
22 generation unit - What is a generation unit? Well, it would include,
23 for example, the market cost of a new turbine and all the
24 complementary equipment needed for that turbine to actually
25 generate electricity such as what you need to connect to the

10:25 1 grid and to the fuel source, et cetera. So, that's essentially
2 the concept of Capacity Prices.
3 Now that we have seen the basic principles of the
4 regulatory framework established to attract the Claimants'
5 investment--and remember that all of this was marketed to the
6 31 companies that you saw listed earlier on--let's turn to the
7 investments actually made by the Claimants in this case based
8 on that framework.
9 Now, Guaracachi America, Inc., invested at the time of
10 capitalization in 1995. It's one of the Claimants in this
11 case. Now, to briefly recall the facts, Energy Initiative, the
12 subsidiary of a company called GPU, won the bid for a stake in
13 Guaracachi and acquired a 50 percent stake for a cash injection
14 of $47.13 million. That was the stake. The Bidding Rules
15 required that Energy Initiatives constitute a company whose
16 sole purpose was to subscribe the Shares in Guaracachi. This may
17 again have some relevance. It was necessary to create a
18 Special Purpose Vehicle to subscribe the shares. That was
19 required by the Government.
20 So, Energy Initiatives consequently constituted the
21 SPV Guaracachi America, Inc., one of the Claimants in this
22 arbitration, which subscribed 50 percent of Guaracachi's shares
23 against the payment of $47 million as you can see from the
24 receipt set out on Slide 32. Now, Guaracachi America and
25 Guaracachi entered into a Capitalization Contract with the

10:27 1 Bolivian State and committed to invest 90 percent of the
2 $47 million in new generation capacity within seven years;
3 i.e., by 2002.
4 Now, Guaracachi America fulfilled that investment
5 obligation by 1999, three years before the deadline. As a
6 result, it was entitled to increase its shareholding and gain
7 control of Guaracachi, which it did by acquiring some 40
8 additional shares in 1999 bringing its shareholding interest to
9 50.001 percent, the same shareholding interest that was
10 expropriated by the nationalization process.
11 As a consequence of taking control, it was able to
12 nominate five of the seven members of Guaracachi's Board of
13 Directors.
14 Now, a few years later, Guaracachi America Inc.'s
15 parent, GPU, merged with another U.S. company, First Energy
16 Corp., which sold its stake in Guaracachi to Bolivia Integrated
17 Energy. Now, in December 2005, Rurelec acquired Bolivia
18 Integrated Energy, which had 100 stake in Guaracachi America
19 through Rurelec subsidiary Birdsong Overseas Limited. The
20 transaction closed on the 5th of January 2006, leaving the
21 structure that you see on Slide 33.
22 Now, under the Claimants' control--let's turn to
23 Slide 35--Guaracachi's power generation capacity doubled from
24 250 to 500 megawatts, accounting for over 30 percent of power
25 generation capacity. So, let's look briefly at these

10:28 1 investments one by one.

2 Slide 36 you can see GCH-9 and 10. This was

3 Guaracachi's first major investment post-capitalization with

4 the addition of two General Electric 6FA gas turbines for the

5 Guaracachi plant in 1999, known as GCH-9 and GCH-10. This

6 added a massive 142 megawatts of installed capacity at a cost

7 of $65 million--$65 million--Slide 36--nearly doubling the

8 effective capacity of the Guaracachi plant. You see some

9 pictures of those turbines. The 6FA gas turbines were the

10 latest technology. The model had been released to the market

11 just one year earlier and was the first of its kind in Bolivia.

12 They were among the most efficient units in the system and

13 therefore were close to the top of the dispatch order. With

14 this investment of $65 million, Guaracachi America

15 significantly exceeded its investment commitment of $47 million

16 under the Capitalization Contract more than three years ahead

17 of schedule.

18 Now, the units were placed into commercial operation

19 in time to avoid scheduled blackouts in the City of Santa Cruz,

20 which desperately needed the new capacity to keep up with the

21 growth and demand resulting from the city's economic expansion,

22 and you can see their Press Release at the time concerning the

23 installation of the new capacity to avoid those blackouts.

24 Now, as Bolivia's generation capacity increased

25 significantly as a result of the investment of the capitalized

10:30 1 generators, including this massive 142-megawatt investment that
2 had just taken place, so did its reserve capacity, such that
3 by 2001, following the big investment that we have just
4 describe and seen in Slide 36, the country had a reserve of
5 approximately 30 percent. What did that mean? It had
6 30 percent of generation capacity that it did not need to use.
7 Having added 142 megawatts of efficient power generation
8 capacity through the brand-new gas turbines, several of
9 Guaracachi's older units that it had inherited from ENDE were
10 displaced from the spot market, and so were no longer called
11 upon to dispatch. You can see here on Slide 38 the reserve.
12 Essentially at the moment of capitalization there was no
13 reserve. Basically all of the power is being used. As a
14 consequence of the capitalization, investments were made, and
15 you can then see reserve increasing with the early investments
16 up to 30 percent, but that began to fall again over the years
17 as demand increased.
18 Now, we looked at the impact of adding more efficient
19 capacity earlier. Now, as the new more efficient capacity is
20 added, less efficient units are displaced outside the demand
21 curve. As you can see from the graphic, imagine that you've
22 got a new unit--remember our last graph showed Units I to
23 VIII--imagine we add a new Unit 0. Now, that new unit can
24 satisfy the baseload, formerly supplied by Units I and II.
25 This in turn means that peak demand can be satisfied by

10:32 1 Unit VI, and in those circumstances, Units VII and VIII are no
2 longer used within the system. Why? Because you've replaced
3 what was needed by VII and VIII with the new more efficient
4 Unit 0, so everything moves to the left.
5 Now, what happens is, if they don't get called upon to
6 dispatch, they don't get any Spot Prices, so they don't get any
7 income from Spot Prices. And if the CNDC--remember the market
8 regulator of this market, the Bolivian Government market
9 regulator--forecasts that particular units will not be
10 dispatched over a long period, they're excluded from the
11 generation part and not entitled to Capacity Payments either.
12 The only ones that are entitled to Capacity Payments are those
13 units which are close to the peak demand where they may be
14 called upon from time to time, but when the units are clearly
15 outside of any risk of being called upon, the Government
16 sensibly excludes them from the generation part. Why should
17 they receive Capacity Payments when you don't need that
18 capacity? And here they didn't need the capacity because
19 they had 30 percent in reserve. With no revenues at all, then, the
20 inefficient units become completely uneconomical. They only
21 incur maintenance cost. They are never called upon to dispatch
22 and they don't receive, as a consequence of the Government's
23 decision, any Capacity Payments.
24 This was the case of ARJ-4 and ARJ-7, two Worthington
25 dual-fuel engines which ran on a mixture of gas and diesel at

10:34 1 the Aranjuez Plant near Sucre. As you can see from Slide 40,
2 the Superintendency of Electricity issued a resolution noting
3 that these units have not been called upon to dispatch for a
4 year and as a consequence authorizing Guaracachi to withdraw
5 the units, and excluding them from the generation park. And
6 this is one of the withdrawals that Bolivia said is us
7 disinvesting in the system. Disinvesting in the system or
8 taking out the least efficient units that make no money because
9 we replaced with 142 megawatts state of the art gas turbines
10 which have brought in 142 new megawatts.
11 One year later, Guaracachi requested the withdrawal of
12 some other old units, GCH-3 and GCH-5 which dated back from
13 1978 and 1983. These were older inefficient Frame 5 units of
14 21 megawatts of installed--
15 PRESIDENT JÚDICE: Excuse me, Mr. Blackaby. This is
16 requested by CNDC or requested to CNDC by the power generation
17 company?
18 MR. BLACKABY: My understanding, and I will
19 double-check, my understanding is that the exclusion from the
20 generation park is a decision that is made by the
21 Superintendency of Electricity having received the information
22 from the CNDC. And then once it's excluded from the generation
23 park, then the natural response to that from Guaracachi is to
24 say now I'm no longer receiving any income, can I dispose of
25 it? Am I authorized to dispose of it.

10:35 1 PRESIDENT JÚDICE: So, you think the first move comes
2 from the power generation company or it comes from CNDC?
3 MR. BLACKABY: The move to exclude from the generation
4 park comes from the Government between the CNDC and the
5 Superintendency of Electricity because they no longer wish to
6 pay for Capacity Payments for inefficient units. Once that has
7 happened, then you have to apply for authorization to remove
8 the units and that's what then happens.
9 Now, as you can see from the slide, the Government
10 administrator--this is Slide 41--the Government administrator
11 of the market, the CNDC, it does forecasts, and the forecast
12 that it made back in 2000 is to analyze what money would be
13 received in terms of Spot Prices and of Capacity Prices for
14 certain units, and you can see here that the CNDC was
15 forecasting that GCH-3 and GCH-5 would not be called upon to
16 dispatch for the next four years because they had been
17 displaced from the Spot Market by the new more efficient
18 capacity. So, you can see all of the zeros.
19 As a consequence in the next slide, Guaracachi then
20 made the only economically sensible decision for a company with
21 these surplus unremunerated units. It sought approval from the
22 Superintendency of Electricity to withdraw the units, and this
23 approval was granted, and you can see here with regard to each
24 one, for example, Articulo Primero, it is authorized to
25 Guaracachi to withdraw unit GCH-5 from the 15th of July 2001.

10:37 1 Similarly for GCH-3.

2 So, there is no disinvestment here. The regulatory

3 incentives set out in the electricity framework had worked

4 perfectly in this case. Efficient power generation capacity

5 had been added, inefficient generation units, which obviously

6 are the ones that also pollute more, were displaced from the

7 market and withdrawn; and, as a consequence, what happened?

8 Look at Slide 43: Wholesale electricity prices were, on

9 average, lower, as you can see from the falling price graph

10 between 1999 and 2003 on the slide. This is exactly what the

11 system was designed to do: Put in more efficient resource, get

12 rid of the inefficient resource, and with the impact of

13 competition, reduce wholesale electricity prices. Bolivia's

14 economic growth was now supported by greater and more

15 environmentally sustainable power generation.

16 Now, as Bolivia's economy grew, you can see from the

17 bottom line on this graph that the roughly 30 percent reserve

18 capacity that had existed between 2001 and 2004 began to shrink

19 to around 18 percent in 2006.

20 Now, as you can see, the consequence, the economic

21 signals were right to incentivize new efficient capacity. Why?

22 Because, of course, the reserve was dropping; therefore, there

23 was anticipated there would be new demand; and, as a

24 consequence, a new incentive to build further generation

25 capacity. And that's exactly what Guaracachi did. Its next

10:39 1 investment was completed in 2006 with the commissioning of four
2 Jenbacher engines of the Aranjuez Plant in Sucre. These became
3 known as ARJ-9 through ARJ-12 and were the most efficient
4 thermal units in the national grid. Because they were so
5 efficient, they were the first thermal units to be called to
6 dispatch and became baseload providers, meaning they were
7 called to dispatch at all times. You can see a picture on
8 Slide 45. This is just one of the four Jenbacher engines that
9 were added.
10 Now, in 2007, another 6FA engine--remember the 6FA are
11 the huge General Electric turbines, gas turbines--similar to
12 the ones installed in 1999 was added to the Guaracachi plant
13 became known as GCH-11. You see a picture of it from the
14 outside installed on Slide 46. Again a picture from some of
15 the machinery inside underneath that. Its installation at the
16 bottom and on the top right-hand side. The Vice Minister of
17 energy seen in the photo on the top right slide on the right
18 left attending the inauguration ceremony in March 2007, and
19 with Mr. Earl, who you will see later on this week, he's on the
20 right-hand side, and in the middle the British Ambassador.
21 This added another extra 70 megawatts. These are huge
22 machines. These added 70 megawatts.
23 Now, in 2008, there were another three Jenbacher units
24 added to be operated alongside the four Jenbacher engines that
25 had been purchased in 2005 adding another 5.7 megawatts of

10:41 1 baseload units. Now, once again, exactly the same way as had
2 happened before, once you put the new capacity in, it enables
3 you to take some of the old capacity out, so Guaracachi
4 requested permission to withdraw two of the Worthington motors
5 that remained at Aranjuez, and what did the regulator say when
6 that was requested? Let's look at Slide 48.
7 This is a resolution of the Superintendent of
8 Electricity saying that the replacement of units ARJ-5 and
9 6--that is to say the Worthingtons--with three new Jenbacher
10 unit, units that are more efficient, cost less to operate, and
11 more reliable and of similar effective capacity, represent a
12 benefit to the system and was in line with the principles of
13 efficiency and adaptability of the Electricity Law. In other
14 words, a full authorization for the withdrawal. Why the
15 withdrawal? Because they'd just been replaced by new more
16 efficient units. Once again, this is used as an example by
17 Bolivia of disinvestment. Getting rid of the old inefficient things.
18 Okay. In 2009, the Government asked Guaracachi to
19 help it solve the dire electricity problems in San Matías, a
20 remote municipality on the border with Brazil. You can see a
21 picture of the municipality there. The San Matías electricity
22 cooperative was insolvent and was buying all its electricity
23 from Brazil, but it had fallen into arrears and power was about
24 to be cut off. Now, as an indication of the high regard of the
25 Government for Guaracachi, it was asked to step in to manage

10:42 1 the cooperative, strengthen its financial position, and build a
2 power plant to supply electricity to the municipality, securing
3 its energy independence. It committed to building one power
4 plant using a Deutz engine which is to be Guaracachi's fifth
5 power plant in Bolivia. You can see Mr. Aliaga, who you will
6 meet later this week, signing the contract for electricity
7 supply in the town.
8 Finally, at the time of nationalization, Guaracachi
9 had purchased two Deutz engines with an additional capacity to
10 ensure that not only would be there be sufficient electricity
11 in the medium to long term for the local supplier, but it also
12 presented an opportunity to export energy to Brazil, and it's
13 worth reading perhaps at your leisure the quotes that were
14 given from the Electricity Authority, the Bolivian Government
15 Electricity Authority, discussing this project. What appears
16 today to be a utopia, what seems to be a utopia, is now a
17 reality in short term or medium term. It says that on the 15th
18 of February, Guaracachi will put in place a new thermoelectric
19 power station capable of producing 2 megawatts sufficient to
20 cover the market, local market, and satisfy increasing
21 Brazilian demand.
22 Now, these engines have to be transported thousands of
23 kilometers to San Matías, where they were installed and
24 adapted, a complex endeavor due to the remoteness of the region
25 and the lack of infrastructure. Unfortunately, the

10:44 1 nationalization took place before the project was fully
2 completed.
3 Now, it's interesting to note that this project would
4 qualify as a contribution under the Agreement between Bolivia
5 and Guaracachi whereby Guaracachi agreed to share the benefit
6 of the United Nations carbon credits it would receive in
7 relation to the combined cycle project. In other words,
8 Guaracachi has already begun fulfilling its side of the bargain
9 in good faith, even though the Government had not yet signed
10 the paperwork for the release of these credits.
11 Now, 2009, turn to the next Slide 50, Guaracachi
12 completed the construction of its fourth power generation plant
13 located in Santa Cruz to house the two units which had to be
14 moved out of the Guaracachi plant to make room for the combined
15 cycle. You can see the construction of the plant on this
16 slide. They were configured in an environmentally friendly way
17 so that the heat generated could be captured and sold or
18 eventually used to power another combined cycle project.
19 Which brings us on to the signature investment of
20 Guaracachi, the combined cycle gas turbine project, which you
21 see in Slide 51.
22 Now, as a result of Guaracachi's work and effort in
23 the preceding five years--this has been a five-year
24 project--the combined cycle project in Santa Cruz was over
25 94 percent complete at the time of nationalization. We will

10:45 1 look at the documents on that.

2 Well, what is the significance of this combined-cycle
3 gas turbine? Put simply, this is the most efficient and
4 environmentally friendly generation unit linked to gas since
5 waste heat from a traditional gas turbine is recycled to be
6 used in electricity generation in a second steam cycle, hence
7 the word "combined" cycle. As you can see on the next page,
8 which is the schematic of how these work, essentially you have
9 two--the two gas GCH 6FA gas turbines, GCH--you have the
10 two gas turbines, GCH-9 and GCH-10 producing electricity in the
11 normal way. Gas comes in, gas is burned, it goes through the
12 turbine, it produces electricity.

13 Now, much like an aircraft throws out waste heat from
14 the jet engines, that's what a turbine does as well, so you see
15 in the middle of the graph two red arrows pointing towards the
16 right. That's the heat that comes from the gas turbines.
17 Instead of simply being sent to the atmosphere, that heat is
18 directed--you can see in Slide 52--towards boilers. These are
19 called heat-recovery steam generators, essentially gas--the
20 heat that comes from the generation goes to that. It heats
21 water. The water becomes steam, the steam powers the steam
22 turbine which produces more electricity from GCH-12, which as
23 you see the third generator here. What's the benefit? Of
24 course, GCH-12 is not using or only using a small amount of
25 additional gas, it's using all the benefit of the waste heat

10:47 1 that was coming from the first two generators.
2 So, why is this combined cycle important for
3 Guaracachi and for Bolivia? Well, its engines were set to
4 double--its earnings were set to double since once on-line the
5 additional 96 megawatts of installed capacity would be the most
6 efficient unit in the system and therefore would be Unit 0, if
7 you like, the first one to be called. The project likewise had
8 a profound impact for Bolivia.
9 Now, let's look at the document we submitted to the
10 United Nations framework summary on Slide 53. You can see it
11 would help ensure that Bolivia's development is based on high
12 efficiency generation, a better use of the natural gas
13 resources of Bolivia, it could use less gas to produce the same
14 electricity, increase the skilled workforce, reduce the need to
15 import power to Santa Cruz, reducing transmission losses, and a
16 landmark project that result in a transfer of technology and
17 knowledge to Bolivia to facilitate other efficiency
18 improvements across the grid.
19 Now, this is not just the submission to the United
20 Nations. This is exactly what the Executive Director of
21 Bolivia's Electricity Authority thought as well. And you see
22 on Slide 54 some extracts from an interview about the project
23 that took place in August 2009. This was a technological
24 revolution, according to the Executive Director of the
25 Electricity Authority. It will convert these units into the

10:48 1 most efficient thermal plants in the interconnected system, and
2 he says below there, "Even more, it will be the beginning of an
3 expansion for the interconnected system to all of the national
4 territory to arrive at places up until now isolated."
5 And, finally, the combined-cycle will have as an
6 objective to promote a better energy efficiency in the company.
7 So, showered with praise by the Electricity Authority
8 as the most efficient unit in the system.
9 Okay. Now, the combined-cycle project was eligible
10 for carbon credits under the United Nations Kyoto Protocol.
11 This was exactly what the Kyoto Protocol was aimed at doing,
12 making sure that people use less energy to produce the same
13 electricity. That is the most environmentally friendly thing
14 you can do. As a consequence you get a carbon credit which you
15 can then sell to those people essentially that are polluting
16 more and that, therefore, they are themselves contributing to
17 or being incentivized to create efficient non-polluting units
18 themselves.
19 Now, Guaracachi had obtained the Bolivian Government's
20 approval to apply to the United Nations for such credits in
21 2008. Its overall project cost about $68 million, excluding
22 financial costs, and it appears that those amounts more or less
23 met the budget as confirmed in the December 2010 progress
24 report. I just want to note that at the time of expropriation,
25 the project was very close to completion. On Slide 55 you will

10:50 1 see that it was 94.4 percent complete, and it used up
2 97.51 percent of the $68 million budget. So, this was
3 something that was about to go on-line. This was not something
4 that was just beginning. It was being built for a number of
5 years.
6 Now, obviously, with the combined-cycle nearly
7 complete, Rurelec and Guaracachi were now looking to their next
8 investment project, specifically to invest in a sixth power
9 generation plant, known as Huaricana, that would come on-line
10 in 2011 and generate 127 megawatts to satisfy electricity
11 demand in the city of La Paz. In that context a cite for the
12 plant was procured, steps were taken to apply for the permits
13 in connection, and you can see a Press Release on the next
14 slide which talks about the project.
15 It's interesting to note on Slide 57 that the
16 Corporación Andina de Fomento was interested in investing in
17 this plant. This is at a time when Bolivia is saying that the
18 company was so illiquid that the banks were no longer
19 interested in looking at financing. Well, it was looking at
20 financing for the new project, let alone the old project, and
21 there you go.
22 So, nationalization of Rurelec's reinvestment. This
23 brings to an end our discussion of the investments. Now let's
24 turn to the nationalization. So, let's look quickly at 58.
25 You can see as a consequence of all of the different steps I've

10:51 1 mentioned you can see what the impact was on power generation
2 capacity.
3 Now, Bolivia has confirmed in this arbitration that
4 its decision to nationalize has been in place since 2006. And
5 the citation from its pleadings is there on the screen at
6 Slide 60. Now, the Government didn't publicize its intention
7 to nationalize the Electricity Sector at the time, but none of
8 the documents produced by Bolivia support this argument or show
9 any publicly announced intention to nationalize Guaracachi.
10 So, as a benefit of hindsight in Bolivia's concession, let's
11 review the implementation of this nationalization decision from
12 the moment it was taken in 2006, when it already knew the end
13 game, full nationalization of Guaracachi. Well, the first was
14 the Dignity Tariff Agreement.
15 Now, here the Government asked private companies to
16 fund a 25 percent discount on electricity prices for the
17 poorest residential consumers. The quid pro quo for this
18 commitment is set out in clauses four and five of the strategic
19 alliance agreement or what we have been calling it, the Dignity
20 Tariff Agreement. As you can see on the Slide 61, these
21 clauses provide that the Government would respect the
22 concessions and licenses granted to electricity companies under
23 the regulatory framework and Clause 5 would exhaust all efforts
24 to maintain the existing pricing regime and not make any
25 changes without consulting the companies in the sector. That's

10:53 1 the deal. You give us the 25 percent subsidy to 50 percent of
2 consumers, the poorest consumers, and we won't meddle with the
3 system for price-fixing.
4 Now, on the basis of this statement, Guaracachi
5 voluntarily signed the Dignity Tariff Agreement. In fact, it
6 had no objection whatsoever to assisting the poorer consumers
7 in this way, on the understanding the Government would not
8 interfere with the Regulatory Framework or seize its
9 investment. We note that in light of this agreement no
10 financial claim is made by the Claimants in respect of this
11 agreement.
12 But, however, as a matter of fact, in retrospect,
13 whilst Bolivia was obtaining an industry commitment to grant
14 25 percent subsidy on the understanding that there will be no
15 changes to the regulatory framework without consultation,
16 Bolivia now admits that it had already decided to nationalize.
17 Bolivia then turned to a series of regulatory measures to
18 reduce further the value of the cash flows.
19 Now, the first thing the Bolivian Government did in
20 the year before the Dignity Tariff Agreement was to do the very
21 thing it had committed not to do: Change the regulatory
22 framework and reduce Capacity Prices without consulting the
23 power generators. This it did through a resolution of the
24 Superintendency of Electricity in February 2007, which took
25 effect in May 2007.

10:54 1 Now, you will recall that Article 49 E of the
2 Electricity Law provides that generators were to receive
3 Capacity Payments sufficient to cover the costs of investing in
4 an efficient peak generation unit. Now, this includes the cost
5 of all equipment necessary to generate electricity, including
6 complementary equipment, and that's exactly what had happened
7 when they were being calculated, all equipment necessary to
8 generate electricity, the turbine plus all of the complementary
9 equipment around the turbine necessary to get the electricity
10 to the grid.
11 However, Resolution 40 was passed by the
12 Superintendency without following the proper control procedure
13 and eliminated the complementary equipment costs component from
14 the Capacity Price setting formula. This resulted in a drastic
15 reduction in such payments.
16 Now, Guaracachi proceeded to challenge Bolivia's
17 violation of the law both on questions of procedure and
18 substance. These appeals have simply been ignored simply by
19 Bolivia's Supreme Court, which has sat on the case without
20 communication for nearly five years, depriving Guaracachi of an
21 effective means of asserting its claims, as will be discussed
22 later. Now, obviously that impacts the cash flows that
23 Guaracachi would otherwise have received had Capacity Payments
24 been calculated in accordance with its understanding of the
25 Electricity Law. My colleague, Noah Rubins, will address the

10:56 1 damages consequences of this.

2 Just over a year after the capacities payments
3 measure, Bolivia proceeded to dismantle the Regulatory
4 Framework for Spot Prices with the introduction of Supreme
5 Decree 29599 in June '08, and a resolution of the
6 Superintendency of Electricity 2832008 in August. As a result,
7 the Spot energy price formation rules in Bolivia's electricity
8 market were altered. How? By the removal of liquid fuel units
9 from the Spot Price formation mechanism. Now, as I previously
10 explained, the Electricity Law, which was passed to attract
11 investors was premised on neutrality efficiency, and remember
12 that wholesale electricity prices must reflect the marginal
13 cost of the system.

14 Now, these measured abolished this fundamental promise
15 resulting in a Spot Price that is no longer neutral nor
16 efficient, nor does it reflect the true economic cost of power
17 generation.

18 Now, you will recall that Bolivia's framework provided
19 that the price was to be determined by the variable cost of the
20 least efficient or marginal unit, and you will recall how this
21 works, and I put the slide up on the screen again, you can see
22 on Slide 62, marginal cost electricity production is declared
23 by each unit supplying to the grid.

24 So, what did Bolivia do with this system of neutrality
25 and efficiency that it had established to attract the capital

10:57 1 investment? Once the capacity had been attracted, Bolivia
2 passed in 2008 these decrees that dramatically affected the
3 principles. They artificially depressed the Spot Prices. Now,
4 the impact is obvious and clearly demonstrated by the next
5 slide.
6 As soon as you take out the least efficient liquid
7 fuel units, imagine that Units VI, VII, and VIII, are dual-fuel
8 units, the supplies further up the dispatch order get paid
9 materially less than the price of the last unit dispatch.
10 Imagine demand is at Y on Slide 63. The electricity framework
11 on which I've made my investment was based upon the Units I to
12 VIII would get paid the variable costs declared by Unit VIII,
13 the last marginal unit called upon to dispatch. By excluding
14 those dual fuel units, Units I to VI get paid a nonuniform rate
15 equivalent to Unit VI. The Unit VII gets paid its actual
16 cost--sorry, equivalent to Unit V, sorry. Unit VI is the
17 dual-fuel unit, Unit VI gets paid its actual cost, Units VII
18 and VIII the same. So, in reality, there are four different
19 prices now being paid for supplying one kilowatt to the grid.
20 So, the effect obviously is significant. The last
21 margin is in the gray sector.
22 And what does this do? Obviously, it disincentivizes
23 investment in new more efficient power generation because the
24 margins are lower; therefore, I'm less interested in making
25 that investment. What does that mean? It means that the

10:59 1 dual-fuel units are used more and more, the least efficient
2 units continue to be in the system, the capacity reduces and
3 that ultimately the system becomes less efficient because
4 you're taking away the economic signal to invest in the new
5 power. Mr. Rubins will address the damages associated with
6 this exercise.
7 Now, in late 2009, the Government found another
8 pressure point to exert over Guaracachi. Guaracachi, under
9 Rurelec's leadership, had applied for carbon credits, as we
10 heard under the United Nations Kyoto Protocol for the
11 combined cycle project.
12 Now, Guaracachi had entered into agreements with the
13 CAF, the Corporación Andina de Fomento, the development bank,
14 and the German Development Bank, KfW, to sell the carbon
15 credits and obtain a pre-payment of approximately $5 million.
16 To render these contracts effective and obtain the pre-payment,
17 the CAF and the KfW had to be designated as project
18 participants. In order to do that, Guaracachi and Bolivia had
19 to sign a simple designation form, designating the CAF and KfW
20 as project participants. Guaracachi asked Bolivia to sign the
21 form. Bolivia failed to sign the form, and only did so after
22 the nationalization took place. That prevented obviously that
23 $5 million of pre-payments that had been agreed, and let's not
24 forget here with regard to carbon credits that had already been
25 agreed by the Bolivian Government in 2008 on the basis of an

11:00 1 agreement pursuant to which the San Matías rural
2 electrification project had been undertaken by Guaracachi.
3 Now, as a consequence of all of this, Guaracachi was
4 concerned when the Government asked for a second Dignity Tariff
5 Agreement to be signed. It had been faced with essentially a
6 failure to comply with the terms of the first Dignity Tariff
7 Agreement, had been meddling with the regulatory framework, it
8 had been engaged in a number of other projects such as the San
9 Matías project, to try and help out, but finally when faced
10 with the second Dignity Tariff Agreement, they said enough is
11 enough. You didn't comply with the first one.
12 Now, the Government retaliated by threatening the
13 company. When no representative from Guaracachi showed up at
14 the 11th of March 2010 signing agreement, the Ministry of
15 Energy and Hydrocarbons told Mr. Aliaga, the General Manager,
16 that the company would have to face the consequences. Back at
17 Guaracachi, the ENDE appointed Directors on Guaracachi's Board
18 warned the other members of the Board that the company is
19 confronting a policy of the State which may cause serious
20 problems for the company, and that's in the Guaracachi Board
21 minutes of March 2010, Exhibit C-184.
22 Guaracachi naturally got the message, that if it did
23 not sign, the company would be seized and so signed the
24 Agreement. Yet, like the first agreement, this did not
25 restrain the Government. Just two weeks after signing the

11:02 1 second Dignity Tariff Agreement, in the early dawn of the 1st
2 of May 2010, Bolivia set out to do what it claims it intended
3 to do since 2006: It forcibly took Guaracachi in the
4 circumstances described in the introduction.
5 Now, when taking over Guaracachi and seizing the
6 Claimants' shares, Bolivia also seized the two Worthington
7 engines that had been acquired by Rurelec subsidiary Energais
8 in 2004. Bolivia refused to release these motors for nearly
9 three years, notwithstanding that they are clearly not part of the
10 nationalization process nor even covered by the Nationalization
11 Decree. No doubt realizing that it had no possible defense to
12 such a seizure and faced with the imminent final hearing,
13 Bolivia offered to return them for the first time just a few
14 weeks ago in its Rejoinder. This has obliged Rurelec to act
15 quickly and undertake a review of the engines on a purely
16 initial basis, given the restrictions of time, which was
17 finally possible just a few days ago. On initial inspection,
18 the engines appear to be complete and therefore, although
19 Rurelec has suffered clear damages as a consequence of its
20 inability to use or sell the engines in any way for three
21 years, in light of the limited amounts in question and the time
22 that might be absorbed in relation to this claim, it is
23 prepared to withdraw the claim from the arbitration and accept
24 the return on the engines on its understanding that they are as
25 complete as of the day of seizure with no removal of parts or

11:04 1 other cannibalization.

2 I understand from Bolivia's counsel that they believe

3 that to be the case, and that they will be giving you formal

4 confirmation of that in the course of the day. In the light of

5 this, we do not think it's necessary to make any further

6 references to the Worthington engines in this opening.

7 This takes me to the section on international law. I

8 don't know whether it would be an appropriate moment for us to

9 break.

10 Mr. President, I don't know, for 10 minutes or

11 whatever is suitable. Thank you.

12 PRESIDENT JÚDICE: Ten minutes, more or less.

13 (Brief recess.)

14 MR. BLACKABY: Okay. Just before I start on

15 international law implications of the facts I have just

16 described, I just want to be clear as to what the position was.

17 I think I did say this, but I want to be clear in terms of the

18 response to the President's questions concerning the way in

19 which the removal of the units takes place.

20 Essentially what happens, as I understand from my

21 Bolivian co-counsel, is that the CNDC, when it's doing its

22 projections, will determine whether or not in the next periods

23 there will be remuneration, whether or not a unit is likely to

24 be called upon as a consequence whether it will receive

25 Capacity Payments. If it's not called upon for a certain

11:23 1 period, it will not receive Capacity Payments and, therefore,
2 will cease to have any economic value to the company that owns
3 it.
4 So, as a consequence of that process, it is taken
5 effectively out of the generation park. I understand it's an
6 automatic process, if it doesn't supply electricity to the grid
7 within a certain time, it automatically is excluded from
8 Capacity Payments. So at that moment when units are excluded
9 from Capacity Payments, what would happen then is that the
10 company would request the Superintendency of Electricity to
11 take that unit out of the License, the generation into the
12 network into the grid is undertaken through a License, would
13 request that that unit be withdrawn from the License. What
14 would then happen is the Superintendency of Electricity will
15 check with all relevant parties, including the CNDC and any
16 other experts whether or not there is any potential use for
17 that unit within the foreseeable future. And if it receives
18 confirmation from the relevant reports after making the
19 investigation that there is no use, then it will authorize the
20 withdrawal of the unit from the License, and that's exactly
21 what happened here, that in each case the Superintendency
22 authorized the withdrawal of the relevant units having verified
23 that they would not be required to be used through the relevant
24 parties. I just wanted to clarify that that's essentially the
25 process. But first it's the exclusion from the Capacity

11:24 1 Payments.

2 Okay. So, let's turn to the questions of

3 international law.

4 It's admitted that the Nationalization Decree of

5 1 May 2010 nationalized the Claimants' investments in

6 Guaracachi. So, once an expropriation has occurred, the first

7 question for this Tribunal is whether that expropriation has

8 occurred lawfully. Now, a lawful expropriation requires

9 compensation in accordance with the standards set out in the

10 relevant Treaty. An unlawful expropriation is not so limited,

11 and there must be full reparation. We're now in Slide 67, as

12 the first slide of the legal description.

13 Now, an unlawful expropriation is not limited in the

14 same way by the terms of the Treaty, and therefore, there must

15 be full reparation of all consequences under the principles set

16 out in the seminal case of the Chorzów Factory, and there it

17 is, the reparation must, as far as possible, wipe out all the

18 consequences of the illegal act and re-establish the situation

19 which would, in all probability, have existed if that act had

20 not been committed.

21 So, let's examine the conditions imposed by the U.K.

22 and U.S. Treaties to check the conditions of a lawful

23 expropriation which we put on the next two slides. Now, you

24 see this U.K. Treaty Exhibit C-1, the relevant passages

25 underlined.

11:26 1 Now, the salient features of this expropriation
2 provision are as follows: In order for an expropriation to be
3 legal, it must be accompanied with just and effective
4 compensation which shall amount to the market value of the
5 investment immediately before the taking and must be
6 effectively realizable and freely transferable. Very familiar
7 provision.
8 Article III(1) of the U.S. Treaty applicable to
9 Guaracachi America: "Neither Party shall expropriate or
10 nationalize the covered investment except upon payment of
11 prompt, adequate and effective compensation, and in accordance
12 with due process of law”. Further, “compensation shall be paid
13 without delay."
14 Now, it's admitted that no compensation was paid to
15 the Claimants for the expropriation of their participation in
16 Guaracachi. Investment case law is clear, an expropriation
17 without compensation is an illegal expropriation. We refer you
18 to several cases in this regard that appear on the next slide
19 with the relevant exhibits and paragraph numbers.
20 PRESIDENT JÚDICE: It's unlawful per se or not?
21 MR. BLACKABY: It is unlawful--if you take something
22 without paying for it, even if you have all of the other
23 criteria satisfied in the public interest, non-discriminatory,
24 et cetera, it is unlawful if you do not make a payment.
25 PRESIDENT JÚDICE: But assuming, just for the sake of

11:27 1 it, that it is worthless, then it would be legal?
2 MR. BLACKABY: Well, in the circumstances in which
3 there had been--insofar as there had been--and I will come on
4 to the next aspect of illegality, which is due process--that
5 there had been a process which had complied with due process in
6 which both Parties had an opportunity to participate, and that
7 that process--and if that process had resulted in a zero
8 value, in a neutral process with a third party determinant,
9 which, in essence, may be the role of this Tribunal, then
10 following that there must be determination.
11 But the process that the State undertakes cannot be a
12 unilateral process to simply determine a zero value and that
13 that excuses it from compensation. It must be a bilateral
14 process. We will come on to some of that. So, in essence, we
15 are not relying solely on the question of the lack of
16 compensation.
17 Of course, here as well, even if it were a lawful
18 expropriation, then the test for compensation is not radically
19 different. It essentially frees the Tribunal from the
20 limitations of the text of the Treaty, but even if the Tribunal
21 were limited by the text of the Treaty, there is not a great
22 deal of difference between the exercise that would be
23 undertaken. But just to be clear here, in light of the
24 circumstances of the taking, we do contend that it is an
25 unlawful expropriation.

11:29 1 So, Bolivia's response is that, while it did perform a
2 calculation with no input from the Claimants and that this
3 calculation showed that the Claimants derived nothing,
4 conveniently.
5 But the expropriation here was also illegal because it
6 was carried out without due process of law. In the
7 expropriation context, due process of law, if you look at the
8 words of the ADC versus Hungary Tribunal requires that there be
9 a legal procedure of a nature to grant an affected investor a
10 reasonable chance within a reasonable time to Claimants'
11 legitimate rights and have its claims heard. Now, of course
12 the Claimants' legitimate rights include their ability to
13 establish their right to adequate compensation.
14 Due process at its most basic requires transparency
15 and the opportunity to be heard, both of which were denied by
16 Bolivia in this case. First of all, in relation to the
17 circumstances of the taking, there was no dialogue or
18 opportunity to be heard as the troops smashed down the front
19 door and entered with their machine guns and balaclavas.
20 With regard to the valuation exercise, the Claimants
21 were not even notified that the valuation process was underway
22 nor were the Claimants appraised of what the procedure was for
23 the valuation, nor were the Claimants able to test Bolivia's
24 evidence or provide evidence of their own. The Claimants were
25 not even provided a copy of the valuation process until the

11:30 1 Rejoinder just a few weeks ago. That is to say, over
2 two-and-a-half years later than its self-imposed 120-day
3 deadline under the nationalization decree. It was presented
4 with as a fait accompli. It's like saying to me I will sell
5 you my watch. I will decide what I want to pay for it.
6 Clearly, any question of valuation must be something that is
7 undertaken in a bilateral fashion with a neutral
8 decision-maker. That's the basic principle of due process.
9 In light of these facts, Bolivia is forced into a
10 rather awkward legal argument that due process does not apply
11 to valuation proceedings, and this position cannot be supported
12 by the Treaties.
13 In conclusion, the expropriation of the Claimants'
14 shares in Guaracachi should be considered unlawful because it
15 lacks due process and because no compensation whatsoever was
16 paid. This results in the application of the customary
17 international law standards of the Chorzów Factory Case, and
18 that's the standard that my colleague Noah Rubins will later
19 discuss, but I do know that even if you did not conclude that
20 it was an unlawful expropriation, the standards set out in the
21 Treaties would apply and essentially there is not a great deal
22 of difference between the two, but-for the purpose of correctly
23 classifying its expropriation, it is an unlawful expropriation.
24 I now propose to walk through with you the other
25 claim in the arbitration relating to Bolivia's measures. Now,

11:32 1 first of all, I would like to look at the Fair and Equitable
2 Treatment breach that we're alleging with regard to the Spot
3 price violation. Article 2(2) of the U.K. Treaty on Slide 73
4 indicates that "investments of nationals or companies of each
5 Contracting Party shall be accorded Fair and Equitable
6 Treatment". The U.S. Treaty provides likewise. These
7 provisions are broad and autonomous. This is the autonomous
8 standard of Fair and Equitable Treatment. It is not the
9 minimum standard of customary international law.
10 The purpose of an autonomous
11 fair-and-equitable-treatment standard is, in the words of the
12 PSEG versus Turkey Tribunal on Slide 74, to "allow for justice
13 to be done in the absence of the more traditional breaches of
14 international law standards, thus ensuring that the protection
15 granted to investment is fully safeguarded".
16 As such, bad faith is not required to breach the
17 standard. As the Azurix's Tribunal noted in Slide 75, it's an
18 objective standard unrelated to whether the Respondent has had
19 any deliberate intention or bad faith in adopting the measure
20 in question. They're not an essential element of the standard.
21 Now, one of the central aspects of the Fair and
22 Equitable Treatment standard in investment treaty law is the
23 requirement that an investor be accorded a stable and
24 predictable investment environment in accordance with
25 legitimate expectations. Indeed, the Tribunal as you can see

11:33 1 on Slide 76 in the Lemire versus Ukraine Case, stated that a
2 factor in any Tribunal's analysis of this standard should be
3 "whether the State has failed to offer a stable and predictable
4 legal framework". Or as the CMS versus Argentina Tribunal
5 stated, "fair and equitable treatment is inseparable from
6 stability and predictability".
7 So with those standards in mind, let's turn
8 first to the concrete facts of the Spot market interference claim. As
9 I explained earlier, the Electricity Law established the
10 mandatory principles governing price formation mechanism of
11 Spot prices. As we noted before, the Electricity Law was
12 established just in advance of the capitalization process for
13 the very purpose of attracting international investment into
14 the sector. Bolivia highlighted the Electricity Law itself as
15 the pillar of the new regulatory framework, as you will recall,
16 Slide 77, showing the roadshows.
17 Now, as we have seen, paramount in the Electricity Law
18 were the basic principles of efficiency and neutrality. As
19 such, and you can see that on Page 78--as such, wholesale
20 electricity prices are to be determined by the "marginal cost of
21 the system" which is determined in three different places in
22 Articles 45 and 49, and I'm scooting over this because we have
23 gone over these already this morning. They established the
24 prices of power at the generators level to be valued at the
25 marginal cost of the system and that the nodal prices are to be

11:35 1 determined on the basis of the marginal cost of the system.
2 Now once the new capacity had been attracted, Bolivia
3 passed in 2008 Supreme Decree 29599 and the Superintendency of
4 Electricity Resolution 283 that violated these principles
5 because they destroyed uniform Spot prices based on the
6 marginal cost of the system, as we have just seen. They
7 eliminated the right to fix the unit price based on the
8 marginal cost of the least efficient unit. In other words, one
9 of the basic principles established by the Electricity Law to
10 attract investments on capitalization, neutrality and that the
11 marginal cost of the system was abrogated once the investment
12 had arrived.
13 Now, this is not the first time that a measure like
14 this has been introduced by a government in Latin America. The
15 Claimants asked the Tribunal to examine carefully the reasoning
16 in Total versus Argentina, an extract from which is at
17 Slide 80. In that case, the Tribunal found that Argentina had
18 breached the Fair and Equitable Treatment principle in the
19 France-Argentina BIT by discarding the marginal cost system and
20 abandoning a uniform Spot price that had been introduced as
21 here to attract private investment into the generation sector.
22 Just as here, the marginal cost of the least efficient units
23 had to be excluded in determining price. That was the measure
24 which was complained of.
25 The Total Tribunal constituted by the Eminent Juris

11:36 1 Professor Giorgio Sacerdoti, Henri Alvarez and Luis Herrera
2 Marcano, found that the Argentine Government had to respect the
3 basic principles of the regulatory regime which had been
4 designed to attract the investments in the sector in the first
5 place. And that, even in the absence of specific promises by
6 the Government, and that you can see, but I would invite the
7 Tribunal to read fully that extract which talks about this
8 particular circumstance in the context of exactly the same
9 measure in regard of exactly the same system.
10 Bolivia's measure copied that of Argentina. It wanted
11 to dictate the costs that it wished to recognize in setting the
12 remuneration of power generators. Even if those costs are set
13 out on an artificial basis and no longer reflect the economic
14 cost of the system. This is an alteration of one of the most
15 fundamental rules governing the Regulatory Framework. The
16 prices are to be neutral and reflect the economic cost of the
17 system. I therefore invite this Tribunal to follow the
18 conclusion reached by the Total Tribunal that tearing up a
19 regulatory regime on uniform prices used to attract investment
20 is a breach of the FET standard.
21 Indeed, the Claimants' case here is stronger than that
22 of Total. Bolivia did make commitments in Article 5 of the
23 2006 Dignity Tariff Agreement that you will see on Slide 81,
24 Bolivia committed to making every effort to maintain the
25 current system of fixing prices for generation activities, and

11:38 1 if changes are made to the governing norms currently in force,
2 they will be made in consultation with the companies of the
3 sector. And that those changes must ensure that income may be
4 retained to ensure sustainability and reliability of supply.
5 Here there was no consultation, no evaluation of the impact on
6 this measure of sustainability and supply. Indeed, by
7 definition, it no longer reflects the economic cost of the
8 system.
9 Okay. Similarly, Article 2(2) of the U.K. Treaty and
10 Article II.3(a) accord investments Full Protection and
11 Security. Slide 83. Now, tribunals have held that the
12 standard of Full Protection and Security encompasses legal and
13 commercial security, that the Biwater Gauff against Tanzania
14 Tribunal stated, when the terms of protection and security are
15 qualified by full, it implies a States guarantee of stability
16 in a secure environment, both physical, commercial, and legal.
17 There is significant case law authority to support
18 this proposition, and we refer the Tribunal also to the cases
19 that we've cited on Slide 84 in support of this position.
20 As we've argued in terms of the FET standard,
21 Bolivia's changes to the Spot price regime based on Supreme
22 Decree 29599 and the Superintendency of Electricity Resolution
23 penalized investors who had made capital investments in
24 generation and reliance upon that regime. This alteration
25 destroyed the legal and commercial security of the Claimants'

11:39 1 investments, and therefore was also a breach of the Full
2 Protection and Security standard of the Treaties.
3 Thirdly, the measure impaired the Claimants'
4 investment as it was unreasonable. As the authentic English
5 language text of Article 2(2) of the U.K. Treaty states,
6 Slide 86, "neither Contracting Party shall in any way impair by
7 unreasonable or discriminatory measures the management,
8 maintenance, use, enjoyment or disposal of investments in its
9 territory of nationals or companies of the other Contracting
10 Party". Similarly, the U.S. Treaty says neither Party shall in
11 any way impair by "unreasonable and discriminatory measures".
12 Now, it is worth noting as well that the U.S.
13 Treaty—and of course the difference between the two is the U.S. Treaty
14 requires unreasonable and discriminatory measure, the U.K.
15 Treaty solely requires an unreasonable or discriminatory
16 measure, but we note in any event that the U.S. Treaty provides
17 a Most Favored Nation Treatment Clause. And if the U.K.
18 investors are treated more favorably then in any event, by
19 Bolivia, then they may invoke that protection under the U.K.
20 Treaty as well.
21 In any event, we note that Bolivia asserts based on a
22 reading of the Spanish official text of the U.K. Treaty that
23 only arbitrary measures are forbidden by its text. So there is
24 effectively a distinction between the two authentic versions of
25 the text. The Claimants, relying on National Grid versus

11:41 1 Argentina, note that this is a distinction without a
2 difference. Arbitrary or unreasonable, is essentially the same
3 thing. As the National Grid Tribunal noted in the sense of
4 something done capriciously, without reason. So we say that
5 that discussion is essentially an unnecessary discussion
6 because unreasonable and arbitrary in this context are
7 essentially synonyms.
8 In any event, where you do have a difference, you must
9 seek to reconcile the text having regard to the object and
10 purpose of the Treaty. Vienna Convention on the Law of
11 Treaties, at Page 89. That Bolivia has not done.
12 So what is an unreasonable measure? Well, the
13 standard of reasonableness requires a showing that the State's
14 conduct bears a reasonable relationship to some rational
15 policy. That's what the Saluka Tribunal stated and it was
16 followed by Biwater Gauff and Rumeli with the exhibit numbers
17 that you see there and the relevant paragraphs.
18 So as the Claimants have stated, and their experts
19 will show, the exclusion of certain generating units from the
20 Spot price means that prices no longer reflect the economic
21 costs of the system. That distorts incentives to invest and
22 undermines the efficiency and long-time sustainability of the
23 Bolivian electricity market in direct contradiction to any
24 rational policy.
25 Indeed, that's exactly what the Total Tribunal says

11:42 1 when looking at the same question under the Argentine Legal
2 Framework, and once again I invite you to go back to Slide 80
3 at your leisure--we don't have time now--to review what the
4 Total Tribunal says with regard to the nature of the rational
5 policy.
6 It's further unreasonable, we would say, on its face
7 to attract international investors on the basis of a specific
8 new regulatory regime and then destroy one of the fundamental
9 tenets of that regime once the investment has occurred. So, we
10 say this is an unreasonable measure.
11 It's also discriminatory in the sense that the
12 principle of neutrality which was protected by the Electricity
13 Law, no longer applies. There is now a discrimination because
14 you will recall that not each unit now is remunerated equally.
15 That the dual-fuel units are remunerated differently from the
16 non-dual-fuel units, so, therefore, there is a discrimination.
17 Okay. So much for the Spot Price Measures. That is
18 essentially a summary, obviously, all this is developed much
19 more fully in our legal briefs.
20 I will now turn to Bolivia's manipulation of the
21 Capacity Payment or as it's referred to in the Electricity Law,
22 the basic price for power, and this is in the context of the
23 effective means protection.
24 Now, Article II(4) of the U.S. Treaty set out at
25 Page 92 provides that "each Party shall provide effective means

11:44 1 of asserting claims and enforcing rights with respect to
2 covered investments”. This provision which applies to
3 Guaracachi America Inc. also applies to Rurelec via the Most
4 Favored Nation Provision of Article 3 of the U.K. Treaty.
5 Now, what's the practice of tribunals in respect to
6 provisions like this you may ask? Well, the Tribunal in White
7 Industries versus India incorporated, Slide 93, an effective
8 means provision in a BIT in similar circumstances also by a
9 Most Favored Nation Clause, so this precise type of clause has
10 been imported by a Most Favored Nation Treatment. This would
11 also apply, we say, to Rurelec. Similarly you can look at the
12 case of EDF versus Argentina, once again which incorporated
13 provisions, substantive provisions, from other agreements and
14 conventions and Bayindir versus Pakistan and MTD v. Chile all
15 of which have incorporated other substantive provisions of
16 third-State BITs through the MFN Clause.
17 Now, as the Claimants have stated in their briefs, the
18 purpose of an effective means provision is to create, and I
19 look at Slide 94, an obligation to develop an effective
20 judicial system, and that's Professor Vandevelde in U.S.
21 International Investment Agreements, at Page 581. Now, this is
22 so the Claimants can have the ability to assert claims and
23 enforce rights. What's interesting is that the effective means
24 provision is lex specialis. It is an autonomous standard. It
25 is different from denial of justice. It's a conceptually

11:45 1 distinct and less demanding test, as the Chevron versus Ecuador
2 Tribunal decided, and that's at Slide 95. The Tribunal agrees
3 with the Claimants that a distinct and potentially less
4 demanding test is applicable under this provision as compared
5 to denial of justice under customary international law.
6 It notes that under this Article, a failure of
7 domestic courts to enforce rights effectively will constitute a
8 violation of this Article, which may not always be sufficient
9 to find a denial of justice under customary international law.
10 So, it's a much higher standard than the customary
11 international law standard.
12 So, what does it mean positively? Well, we could be
13 assisted by the decision in White Industries versus India at
14 Slide 96. What it means is that the host State establish a
15 proper system of laws and institutions, Slide 96, and that
16 those systems work effectively in any given case. You must ask
17 yourself the question, has there been a proper system of laws
18 and institutions established and are those systems working
19 effectively with regard to Guaracachi's claim. Point 1.
20 Has there been indefinite or undue delay in the host
21 State's courts dealing with an investor's claim, okay? That's
22 the next question you must ask. After five years have passed,
23 with not a sign of a breath or a letter out of the Bolivian
24 Supreme Court, does that constitute indefinite or undue delay?
25 Next, the next issue of whether or not effective means

11:47 1 have been provided by the host State is measured against an
2 objective international standard. So it's no excuse for
3 Bolivia to argue as it does that that's the kind of time and
4 that's the kind of treatment that everybody else receives by
5 Bolivia's judicial system. That is not an answer. It's an
6 absolute objective standard that protects the international
7 investor.
8 Now, there is no exhaustion of remedies requirement
9 here. And insofar as Bolivia seeks to exclude its liability
10 under this head via a separate remedy, it must demonstrate that
11 there was a remedy we didn't use that could have had a
12 significant effect on the expediency of the Claimants' court
13 proceedings. Here, Bolivia's legal system did not provide any
14 effective means of hearing Guaracachi's complaint about the
15 Capacity Price Measure. As noted earlier today, in 2007,
16 Capacity Payments were subject to significant changes, in
17 particular the exclusion of complementary equipment from the
18 price calculation. It has a huge impact. Guaracachi
19 challenged those matters as a matter of Bolivian law, on the
20 basis that the appropriate procedures had not been followed and
21 that the changes themselves were contrary to the principles
22 established in the Electricity Law. In the interest of
23 brevity, I refer the Tribunal to our pleadings to review the
24 exact nature of the complaint in our Reply at Paragraphs 148 to
25 159.

11:48 1 But what's relevant for current purposes is that
2 Guaracachi availed itself of the remedies in Bolivia, and the
3 Bolivian Legal Framework did not provide an effective means to
4 enforce its rights. In particular, Guaracachi filed challenges
5 to the relevant resolutions through two separate administrative
6 proceedings, exhausting all remedies available before the
7 administration itself, before the Superintendency of
8 Electricity, and its administrative hierarchy the SIRESE, the
9 authority in charge of supervising the sectoral--the
10 Electricity Sector.
11 Now, you will recall that one of the basis for the
12 challenges was the exclusion of complimentary equipment from
13 the calculation of Capacity Payments. Now, the second basis
14 for the challenge was that the appropriate procedures had not
15 been followed, it was for the CNDC, not for the Superintendency
16 of Electricity to evaluate and propose changes to operating
17 norms, and that the Superintendency of Electricity has imposed
18 the change to Capacity Payments regime on the CNDC.
19 Now, we put the litigation history of the first claim
20 on Slide 97, and you see all of the relevant dates. Started in
21 March 2007, the administrative challenges were commenced, and
22 that was denied by the Superintendency of Electricity. There
23 was the hierarchical appeal before the SIRESE, and SIRESE
24 denied Guaracachi's appeal. So far so good. The system seems
25 to work. And Guaracachi filed the action before the Bolivian

11:50 1 Supreme Court on the 3rd of April 2008. That gave rise to an
2 automatic deadline with regard to responses, so SIRESE and
3 Guaracachi filed the necessary responses which concludes
4 pleadings on the 28th of August 2008, after nearly five years,
5 no sight nor sound from the Bolivian Supreme Court as to what
6 has happened with this action or what steps taken in the
7 action. This conveniently straddles the nationalization, which
8 means, of course, that compensation that we say should have
9 been awarded ultimately had not been awarded and there has not
10 been a proper interpretation of what is a legitimate difference
11 between the Parties.
12 Okay. The other challenge was against the CNDC
13 Resolution and on Paragraph 98 you also see a similar story
14 June 2008, the actions filed before the Bolivian Supreme Court,
15 and nothing has heard since.
16 Since the effective means standard is an objective one
17 and is not excused by the Respondents arguing that such delay
18 is common, whether the Government has sought to improve the
19 effectiveness of its judiciary as Bolivia pleads in its
20 Rejoinder at Paragraph 392 is irrelevant. What matters is
21 whether the Claimants in this case have been provided with an
22 effective means to have this challenge heard. It is not an
23 answer that the Claimants no longer care from the date of
24 nationalization. The absence of effective means before the
25 Bolivian Courts to resolve the issue in question has had a

11:51 1 material impact, even if they decided this case today, we would
2 know whether or not they should have received the Capacity
3 Prices historically, and we would also know whether or not in a
4 DCF calculation, those Capacity Prices should form part of the
5 future cash flows.
6 So, it remains as valid today on the need for an
7 answer as it was as of the date of the nationalization, and
8 still today, five years later, no sight nor sound. Nor even a
9 process.
10 At odds with the effective means standard the delays
11 in the Bolivian justice system have been caused primarily by
12 institutional deficiencies recognized by the Bolivian
13 Government itself. Indeed, in 2006, several positions on the
14 Supreme Court were vacant and the Bolivian Government could not
15 agree on whom to appoint to fill those vacancies due to a
16 political conflict. In December 2006, President Morales
17 himself declared that this kind of delay violated the
18 fundamental rights of access to justice. As a result of this
19 conflicts, in 2010, the date of the nationalization, the courts
20 backlog rose to 8,000 cases. Exhibit C-326 Page 9.
21 Bolivia's inadequate legal system prevented these
22 meritorious claims from being resolved and this caused
23 Claimants to incur significant damage since it lost income it
24 rightfully should have had which would have impacted its
25 historical cash flows and future cash flows relevant in the

11:53 1 calculation of the DCF. This leads me now to pass the baton to
2 my colleague, Noah Rubins, who will now turn to the crucial
3 issue and the central issue in this case, which is the one of
4 damages. Thank you very much for your patience.
5 MR. RUBINS: Thank you, Mr. Blackaby, Members of the
6 Tribunal. Good morning. There are still five minutes left to
7 the morning.
8 That the Claimants' shareholding in Guaracachi was
9 expropriated is not in dispute. What is in dispute is what a
10 willing buyer in the market would have paid for the company
11 when the expropriation took place, and Bolivia contends that
12 the Claimants lost nothing when their shares were taken from
13 them. Really, nothing. In fact, they claim that the value of
14 equity was negative in May 2010, so the Claimants should have
15 thanked the Government for taking this company off their hands.
16 Now, with respect, that is a position with no
17 connection to reality. As Mr. Blackaby explained, Guaracachi
18 was the largest power generator in Bolivia with over a third of
19 the effective capacity in the entire system, capacity that
20 expanded by more than 50 percent in just five years under the
21 Claimants' direction. Installed capacity was set to grow
22 another 96 megawatts or about 22 percent more, and
23 profitability was to double once the combined-cycle plant came
24 online just months after the expropriation.
25 All of the indicators, all of the benchmarks, all the

11:54 1 sanity checks point in one direction: This was a very valuable
2 company. It was a company worth, in total, about $250 million,
3 a quarter of a billion dollars, when it was expropriated.
4 Now, from the very start of this dispute, Bolivia has
5 had to manipulate numbers and adopt unrealistic assumptions to
6 shrink that value down. It's not economics, it's mathematical
7 sleight of hand that lies at the foundation of Bolivia's
8 generous offer of zero.
9 In the remaining time, I'm going to show you how
10 Bolivia has tried to sweep tens of millions of dollars of value
11 under the carpet. I will explain the basis for each of the
12 three compensation claims valued by Dr. Abdala, the
13 nationalization claim, the Spot Price claim, and the Capacity
14 claim.
15 Now, on the first slide, which is Slide 101, you can
16 see the impact of the disagreements between the Experts in this
17 case with respect to compensation for each of the three claims,
18 and you can see that the gap with respect to the
19 nationalization claim is clearly the largest and both the
20 absolute magnitude and the gap between the Parties on the other
21 two claims is significantly less.
22 So, I will begin with the nationalization claim and
23 the Fair Market Value of Guaracachi.
24 I should say at the outset that the Parties agree on
25 quite a lot, actually, in damages, in quantification of

11:56 1 compensation, and the Experts do as well. The Parties agree on
2 the legal standard of compensation for any breach of the
3 Treaties, full compensation sufficient to place the Claimants
4 in the economic position they would have occupied but for the
5 wrongful conduct, the Chorzów Factory formulation. In the case
6 of the nationalization claim, this translates into compensation
7 for the expropriated property at Fair Market Value. That's
8 also not in dispute.
9 Turning to Slide 102, one more basic principle that is
10 not in dispute in this case, is that while the Claimants bear
11 the burden of proof with respect to damages, calculating
12 compensation is by nature an inexact science and, therefore,
13 international law dictates that proving the amount of damages,
14 and I quote, "is not an exercise in certainty as such but an
15 exercise in sufficient certainty." That's Gemplus v. Mexico.
16 And as a result, it's well settled as the SPP Tribunal told us,
17 that "the fact that damages cannot be assessed with certainty is
18 no reason not to award damages when a loss has been incurred".
19 The meaning of Fair Value is also common ground. Fair
20 Value is the value that would be exchanged for the asset in
21 question between a willing buyer and a willing seller in the
22 market with full information and no compulsion to sell.
23 So, we all agree that your job is to simulate a market
24 transaction to sell the equity in Guaracachi as if it had taken
25 place in May 2010.

11:58 1 Both sides' Experts further agree that Fair Market
2 Value is best estimated by the Discounted Cash Flow method you
3 will hear referred to as the DCF, and the DCF involves
4 projecting Guaracachi's expected cash flows standing in
5 May 2010 and looking forward through to the end of Guaracachi's
6 Licenses and reducing these yearly forecasts to a single
7 lump-sum, or present value, as of the 2010 valuation date when
8 nationalization took place. And you use a discount rate to
9 bring those numbers down to present value.
10 The discount rate reflects the time value of money,
11 the fact that a dollar expected 10 years from now is worth less
12 than a dollar expected next year. And it also reflects the
13 risk that that dollar will never be earned at all.
14 The Experts agree that the weighted average of
15 Guaracachi's cost of debt and cost of equity known as the
16 Weighted Average Cost of Capital, or the WACC, is the most
17 appropriate discount rate. Now, they disagree markedly about
18 what the WACC should be, so in any event, both Experts have
19 used a very similar methodology similar in many ways to
20 estimate what Guaracachi would have been worth in May 2010 if
21 it had not been expropriated. The results are very different.
22 Dr. Abdala's opinion is that the Claimants' 50 percent stake in
23 Guaracachi was worth $77.5 million as of May 2010.
24 Now, according to Bolivia, Guaracachi's shares were
25 worth absolutely nothing just before the nationalization. Why?

12:00 1 Well, it's not that Guaracachi was not profitable. Econ One
2 accepts that it was profitable. But Bolivia says that the
3 company's debt was worth slightly more than the firm as a
4 whole, so its equity value was negative, the value left over
5 for Shareholders.
6 The question is: How do each Parties' Experts arrive
7 at his separate equity value.
8 Turning to Slide 103, you see on this slide how the
9 Experts arrive at their final numbers, their final damages
10 number, for Guaracachi equity. They start with the value of
11 the firm as a whole, which for Compass Lexecon, for Dr. Abdala,
12 was, as I said, $247.8 million. For Econ One it was
13 $91.3 million. They subtract the agreed value of debt, $92.7
14 million, and they get what's left over for the Shareholders.
15 For Compass Lexecon, that was $155.1 million. For Econ One, it
16 was negative. You then have to divide that in half because
17 remember the Claimants owned half of the equity, and so that
18 comes to correspondingly 77.5 from Compass Lexecon and still a
19 negative number, slightly less negative, from Econ One.
20 How does Bolivia get a negative number? Well, Dr.
21 Flores has constructed his model using assumptions that shrink
22 the projected future cash flows down to a 2010 present value
23 that's less than the agreed value of debt, as I said.
24 So, where do the differences in this firm value and
25 the resulting equity value come from? If you turn to the next

12:02 1 slide, we've tried to break down for you graphically how the
2 gap of $78.2 million--that's between 77.5 from Dr. Abdala to a
3 negative number, slightly negative number from Dr. Flores, how
4 it breaks down. And you can see that there are only a few
5 really significant areas of difference. It allows you to focus
6 your minds on what really matters. Most of the $78.2 million
7 gap between them comes from the discount rates that each Expert
8 proposes. The only other elements of difference that really
9 matter, relatively speaking, are Dr. Flores's pessimistic
10 projections of Guaracachi's future revenues from Spot
11 Electricity sales and Capacity Payments and his choice of
12 incorrect Inflation Index to project future Capacity Prices.
13 And I will examine each of these big ticket items in turn.
14 The main way Dr. Flores reduces Guaracachi's equity
15 value is by discounting future cash flows at an extremely high
16 annual rate of 19.85 percent, as compared to Dr. Abdala's rate
17 of 10.63 percent. The impact that this has on the equity value
18 of Guaracachi is massive. It accounts for a $128 million
19 reduction in Dr. Flores's estimate of the value of the entire
20 firm and a $64 million reduction in damages. Make no mistake,
21 finding the right discount rate is the most important
22 compensation-related issue facing the Tribunal. Even a very
23 small downward adjustment of Dr. Flores's discount rate,
24 leaving every other assumption he makes unchanged, means that
25 Guaracachi equity had substantial value and Bolivia breached

12:04 1 the Treaties by refusing to pay any compensation. And as I
2 will explain, much more than a slight adjustment to the
3 discount rate of Dr. Flores is required.
4 Now, the WACC, the Weighted Average Cost of Capital,
5 which both Experts have adopted as the discount rate, as I
6 said, reflects the risk that the market associates with the
7 company's future cash flows. When I say "the market," I mean a
8 reasonable and well-informed buyer and seller of the company in
9 question. What do they perceive the risks to be standing at
10 the valuation date and looking forward? The WACC is formed by
11 calculating the Rate of Return that is required by both
12 Shareholders and lenders to invest in Guaracachi weighted by
13 the standard leverage ratio between debt and equity for similar
14 companies.
15 Bolivia has described the discount rate as, and I
16 quote, "one of the most complicated steps of quantification."
17 That's the Rejoinder Paragraph 158. And maybe they've said
18 that to discourage you from looking closely at what Econ One
19 has done. But actually, Dr. Flores's inflation of the discount
20 rate is not that complicated at all. I'm going to break it
21 down for you step by step. If you turn to the next slide,
22 don't be too scared by all the boxes. Both Experts agree that
23 the discount rate, the WACC, should be custom-built for this
24 particular project, and they also agree that the cost of debt
25 of Guaracachi, which they could actually observe historically

12:06 1 at 7.88 percent, is the same, so they agree on that component
2 of the discount rate.
3 So, the real question was, for both of them: What's
4 the cost of equity so they could do this weighted average
5 between debt and equity? Econ One and Compass Lexecon agreed
6 that the cost of equity should be derived using a standard
7 methodology that's called the Capital Asset Pricing Model, or
8 CAPM.
9 How do you do a CAPM? Well, you could find the recipe
10 in any basic corporate finance textbook, and I presented a
11 simplified version on this slide, and it's the component that's
12 in the oval in the middle of the slide. That's the cost of
13 equity, which is one component of the WACC, which is presented
14 at the top of the slide.
15 So, first you take an appropriate risk-free rate as
16 the base to reflect general background investment risk for
17 everybody, and that's normally a U.S. Government bond of a
18 duration corresponding to your project. Then you add a
19 market-risk premium which reflects the additional risk
20 associated with equity stock rather than investing in bonds. A
21 so-called "beta factor" corresponds to the risks associated
22 with the volatility of investments in the particular business
23 sector that you're looking at. The beta is a multiplier which
24 either increases or decreases the market-risk premium,
25 depending on whether the business activity is more or less

12:08 1 volatile than average.

2 And, finally, coming out of the oval box--it's not a

3 box it's an oval, coming out of the oval you may have to add a

4 Country Risk Premium to account for the difference in risk

5 between the project in U.S. or Finland, for example, and the

6 same project carried out in a less stable economy, and the

7 total of all that, all those pieces, gives you that missing

8 element of the WACC, the cost of equity for the project or

9 company in question. That allows you to carry out the weighted

10 average of cost of debt and cost of equity based on the

11 standard debt period for companies like the one you're valuing,

12 and taking care to account for the tax benefits of debt and,

13 voila, you have your WACC.

14 Now, in the vast majority of valuations, the

15 components that I've described are the only elements in the

16 cost of equity. There is a reason for that. Buyers and

17 sellers in the market consider that in a vast majority of cases

18 these elements cover all of the risks that matter when arriving

19 at a fair market price for an enterprise.

20 Now look back at Slide 106, which is again the

21 differences in value between the Experts, and you can see that

22 within the discount rate section we've broken out the different

23 elements of the discount rate which result in a total of

24 $64 million in difference. Dr. Flores's discount rate is

25 higher mainly because he doesn't follow that basic methodology

12:09 1 that I just described. He boosts the cost of equity and, as a
2 result, shrinks future cash flows, and he does that by sticking
3 in two arbitrary additional elements. The first is a so-called
4 "Size Premium"--that's the light blue box at the left--and
5 second, he adds a 50 percent premium to the accepted Country
6 Risk Premium for Bolivia. The Experts agreed that the Country
7 Risk Premium for Bolivia should be just about 7 percent, but
8 then Dr. Flores then adds another 50 percent to that to get to
9 10.5 percent.
10 And the combined effect of these two adders is
11 massive. It's more than half of the difference. You can see
12 that between the Parties. If you work from Dr. Abdala's model,
13 if we include a size premium, the value of the Claimants'
14 investment is reduced by nearly half. And if you add both
15 elements, the value drops by $46 million.
16 Now, in the interest of time, I'm just going to focus
17 on these two elements of the cost of equity: Size Premium and
18 Country Risk Premium. The other various differences between
19 the Experts on elements of the discount rate just don't matter
20 very much from a damages perspective, from the magnitude
21 perspective.
22 First, the Size Premium. The view that a size premium
23 should occasionally be added to the cost of equity was based on
24 some research done in the United States indicating that small
25 companies are riskier than big companies, and therefore, they

12:11 1 draw higher returns on equity.
2 Now, Dr. Flores assumes that Guaracachi is a small
3 company and with no further substantive analysis boosts the
4 cost of equity by 6.28 percent. 6.28 percent. In fact, a size
5 premium is totally inappropriate in this case. It's just a way
6 to turn very valuable future cash flows into a much less
7 valuable present value.
8 PRESIDENT JÚDICE: If you allow me, in your point of
9 view is inappropriate in this case or is inappropriate as a
10 whole?
11 MR. RUBINS: Yes, as Dr. Abdala will explain in due
12 course, the position is that a size premium is always
13 inappropriate, particularly outside the United States, there is
14 no evidence for it as I will come to in a moment--
15 PRESIDENT JÚDICE: That's also my idea of your point
16 of view. That's why I put the question. Thank you.
17 MR. RUBINS: That's right.
18 So, I may be starting from the back and moving to the
19 front, but Guaracachi wasn't small in any event. Dr. Flores
20 only reaches the opposite conclusion by comparing it with
21 companies traded on the New York Stock Exchange and the NASDAQ,
22 but Guaracachi's size relative to companies in the United
23 States market has no effect on its business and exaggerates the
24 risks that will be faced by a willing buyer of Guaracachi's
25 equity.

12:12 1 Guaracachi was the eighth largest company in Bolivia,
2 the fifth largest private company in Bolivia, and the largest
3 power generation company in Bolivia. So, if Guaracachi is
4 considered small for these purposes, that means that a size
5 premium could apply to every company in Bolivia, and that's
6 clearly not the case.
7 You see, when a size premium even might be applied,
8 according to the literature that Dr. Flores cites, it's not
9 done arbitrarily, just based on its Book Value, which is what
10 Dr. Flores did, you have to look at whether the small business
11 risks reflected in such a premium actually affect the company
12 in question. And that just wasn't the case for Guaracachi.
13 Guaracachi operated in an industry where prices were
14 subject to Government regulation, where demand was always
15 steady and growing. So, Guaracachi had little exposure to the
16 kind of business risks that might affect a family owned shoe
17 store in New York, for example, and Guaracachi's operations
18 were transparent. They were reviewed and described in detail
19 by international credit agencies like Fitch and Pacific Credit
20 Ratings.
21 Guaracachi had an active Audit Committee controlled by
22 Minority Shareholders and reported to both the Stock Exchange
23 and to Bondholders. So, unlike some small companies, here
24 there was no risk of hidden defects.
25 Further, Guaracachi's management was stable, it was

12:14 1 composed of professional experts in the electricity industry,
2 supported by experienced international investors. It had a
3 proven history of dividend payments, its capacity was rapidly
4 expanding and its profitability was soon to double, as we have
5 already discussed.
6 In short, in terms of risk, Guaracachi was a heavy
7 hitter, a well-managed viable company to which the unknowns of
8 a typical small business just didn't apply.
9 But in any event, as I just said in answer to the
10 President's question, there is no economic rationale for
11 applying a size premium to the cost of equity for any careful
12 valuation. The main basis for using it is a study carried out
13 on U.S. companies, the main study was carried out back in 1996.
14 But more recent empirical research shows that the relevant size
15 of a company doesn't actually have any impact on risk or
16 returns, particularly for businesses based outside the United
17 States. Those prominent researchers tell us that the Size
18 Premium is nothing but a myth.
19 You're going to hear a lot about Professor Damodaran,
20 who is one of the world's leading scholars in valuation and
21 corporate finance. Dr. Flores relies extensively on Professor
22 Damodaran in his Expert Reports. And Professor Damodaran
23 condemns the use of a size premium in no uncertain terms. And
24 you can find that in Exhibit C-370. He considers that if
25 you're careful in taking into account the underlying

12:16 1 fundamentals of the target company when you project the
2 magnitude of the cash flows, any risks associated with the
3 characteristics of small companies are already taken care of.
4 That means adding a size premium overestimates the risk, it
5 double counts the risk, and undervalues the business you're
6 looking at.
7 And you can see that in practice as well. You can
8 find in the record a number of valuations of investment banks
9 dealing with Latin American electricity companies, and they use
10 discount rates without a size premium. The international
11 market looks at companies for what they are, not based on what
12 some academics in the United States say might be the case
13 there.
14 Now, even if one were to accept--excuse me.
15 Now, the second way that Dr. Flores boosts the
16 discount rate to 20 percent is by exaggerating Bolivian country
17 risk in the cost of equity. As I explained a few minutes ago,
18 a Country Risk Premium reflects the relative risk expectation
19 based on the location of the project, with the United States or
20 a comparable place as the base or risk-free location.
21 And both the Experts agree that a premium is
22 appropriate for Bolivia, and they both use the spread between
23 Bolivia's sovereign debt and the risk-free, for example,
24 Treasury Bills of the United States to arrive at a base premium
25 of 7.02 percent. But then Dr. Flores multiplies that figure by

12:18 1 1.5 to arrive at an astronomical Country Risk Premium of
2 10.53 percent. His justification is that some scholars
3 recommend this multiplier to account for the fact that in
4 emerging countries, investments in companies carries a greater
5 default risk than investing in sovereign bonds. But as Dr.
6 Abdala will explain, that sort of boost in risk is only
7 appropriate for short term valuations, like stock market
8 investments that you're only going to hold for a little while,
9 not for long-term real projects like this one.
10 Again, Professor Damodaran confirms that. He says:
11 "Sovereign and private default risk in emerging countries
12 converge in long-term investments." You can find that in
13 Exhibit EO, that's Econ One, 25. And that's why you don't see
14 a 1.5 multiplier very often out in the market, where real
15 buyers and real sellers value real long-term projects for sale.
16 Now, Professor Damodaran, in addition to all the other
17 amazing things that he does, publishes the definitive list of
18 Country Risk Premiums for most countries around the world, and
19 he updates it from time to time. And when you look at Bolivia
20 in his list for 2010, what do you find? An assessment of
21 country risk that is practically half of Dr. Flores's
22 estimation at 5.5 percent. And you can see this demonstrated
23 on Slide 107. Now, this Country Risk Premium is lower than Dr.
24 Abdala's, as well, and you can see the comparison here, again,
25 the base rate of 7.02 percent, the Country Risk Premium, is

12:20 1 agreed between the Parties.

2 There is another very important landmark that tells
3 you Dr. Flores is off the scale with his 10.5 percent Country
4 Risk Premium for Bolivia. We know, as Mr. Blackaby told us,
5 that Bolivia issued Government bonds in October 2012, and
6 Government bonds are a rather solid indication of
7 country-specific risks. You just compare the borrowing rate of
8 the Government to the risk-free rate, and Bolivia was able to
9 raise debt at just 3.09 percent over U.S. Treasuries.
10 3.09 percent.
11 Now, obviously, that's a different point in time from
12 our valuation date, but it's still very relevant. If Dr.
13 Flores is right that Bolivia's country specific risk was 10.5
14 percent in 2010, then that risk somehow shrank to 3 percent in
15 just over two years. There is a much more reasonable
16 explanation, Members of the Tribunal: Bolivia's Country Risk
17 Premium was not 10.5 percent in 2010. It was more like
18 5 percent or 7 percent, as you can see on the slide.
19 There is also objective confirmation of Dr. Abdala's
20 resulting 10.63 percent discount rate, the WACC. As he will
21 explore with the Tribunal early next week, professional
22 analysts in investment banks determine the discount rates for
23 comparable electricity companies throughout Latin America, and
24 arrived at very similar median results, around 10.63 percent.
25 Meanwhile, Dr. Flores's 20 percent discount rate finds no

12:21 1 parallel among investment bank reports of comparable companies.
2 PRESIDENT JÚDICE: Is it possible to put one question
3 very quickly. At one point that I would appreciate if you or
4 anybody afterwards will explain is what is your comment to the
5 other side's Respondent's point of view that EGSA has used the
6 higher discount rate when it submitted to the United Nations
7 information and also South African company in which of Mr. Earl
8 is a Member of the Board also used a much higher discount rate.
9 I don't recollect that you made previously any comment related
10 thereto. It may be useful for our own analysis. Thank you.
11 Now or later.
12 MR. RUBINS: Thank you, Mr. President. We will
13 definitely address those two issues in due course.
14 Another important landmark for you in choosing the
15 right discount rate is the cost of debt. Now, remember, unlike
16 the cost of equity which is the subject of all this debate,
17 Guaracachi's cost of debt is agreed between the Parties, it's
18 7.88 percent, and that borrowing rate is right in the middle of
19 the pack in terms of the cost of debt for other Latin American
20 electricity companies. Dr. Flores accepts that that is where
21 Guaracachi should be in terms of borrowing rates, but Dr.
22 Flores says the company's cost of equity should be
23 27.66 percent in order to average with the cost of debt to get
24 to 20.
25 And when we look at those same companies elsewhere,

12:23 1 those other companies, you won't find a single one with equity
2 that expensive.
3 So, Dr. Flores is saying Guaracachi's risk profile for
4 lenders is average, but its Shareholders were in a completely
5 different world of risk, demanding massively high returns, and
6 that, with respect, makes no sense. Lenders and Equityholders
7 perceive the same kinds of risk, and that's always expressed in
8 a relatively close relationship between the cost of debt and
9 the cost of equity.
10 Now, Dr. Flores attempts to justify his astronomical
11 discount rate by comparing his 27.66 percent cost of equity or
12 his 20 percent cost of capital, to the expected internal rate
13 of return to equity or equity IRR, for Bolivian power projects
14 generally which he says is between 25 and 30 percent.
15 But IRR, the Internal Rate of Return, is completely
16 irrelevant to setting the proper discount rate, and Dr. Flores
17 knows that. By mixing up these two concepts, the discount rate
18 and the IRR, he's stretching to find any corroboration for a
19 discount rate based on a cost of equity that has no basis in
20 reality or comparison. The Internal Rate of Return is a
21 measure that's used by companies to make the decision whether
22 to invest in a project or to put capital to better use
23 elsewhere.
24 And on the next slide, you can see Professor
25 Damodaran's definition of the IRR. This is, by the way, comes

12:25 1 from one of the documents that Bolivia submitted just before
2 the hearing. Professor Damodaran tells us precisely in this
3 quote that the IRR is the rate that brings future expected cash
4 flows in a project to a Net Present Value of zero.
5 By the way--so, obviously, the IRR is not a benchmark
6 by which to measure the discount rate. If it were, then every
7 company you valued would be worth zero. And, by definition,
8 for a successful project, for a profitable project, the IRR is
9 greater than the cost of capital. That has to be the case.
10 The gap between the IRR and the cost of capital is the
11 motivation for the investor to invest. No one is going to
12 invest if they're the same.
13 So, in other words, observing that the IRR for
14 projects like this is higher than Dr. Abdala's proposed
15 discount rate just means it was a profitable project, which
16 everyone agrees it was.
17 Dr. Flores knows that his reference to the IRR is a
18 non sequitur, and that's why he never mentioned it in his First
19 Report. It was just that by his Second Report, he knew he
20 needed to find some kind of landmark that he could use to
21 secure his very high discount rate.
22 Now, a question may arise in your mind at this point,
23 haven't other investment tribunals dealt with discount rates
24 before? Maybe they can offer some useful guidance. Now, we've
25 hesitated to emphasize too much the dozens of cases in which

12:27 1 tribunals have looked at building a WACC to determine the Fair
2 Market Value of an ongoing enterprise. And cases in which
3 those kinds of tribunals have arrived at a discount rate
4 comparable to the one we believe is right for this case, 10 to
5 11 percent. We hesitated to emphasize that because every case
6 has to be decided on its merits, but Bolivia hasn't been so
7 scrupulous, unfortunately. It has picked out the highest
8 discount rates ever used in publicly available arbitration
9 awards and without further analysis suggests that they suggest
10 Dr. Flores's 20 percent WACC.
11 I will just say this: The risk associated with the
12 Ukrainian broadcasting business, as in Lemire, or with a
13 Greenfield thermal plant in 1990s Indonesia that never got off
14 the ground as in Himpurna, has nothing to do with Guaracachi's
15 risk. Instead, I recommend to you the damages analysis in EDF
16 v. Argentina which you can find at CL-141. That case involved
17 a regulated electricity business in Argentina. Dr. Abdala was
18 the testifying damages expert in that case, so you can ask him
19 about it, if you're interested. The EDF Tribunal, led by Rusty
20 Park and also including Gabriel Kaufmann-Kohler, faced
21 competing WACC calculations. From Dr. Abdala, 11.34 percent,
22 and from Argentina 18.6 percent. Sound familiar? The Tribunal
23 examined each element of the WACC calculation and arrived at
24 11.34 percent. Dr. Abdala's precise proposal. In an
25 electricity company in Latin America admittedly in a country

12:29 1 that was going through economic meltdown at the time, and so
2 was higher risk in country risk than Bolivia in 2010, and there
3 was no Size Premium, there was no 1.5 multiplier boosting the
4 Country Risk Premium.
5 Now, even if you use a 19.85 percent discount rate, a
6 proper projection of Guaracachi's future revenues would still
7 have resulted in a positive value for the company's equity as
8 of May 2010, and that was a problem for Bolivia, because they
9 had to find a way to reach a nil value to justify having
10 offered no compensation for expropriation.
11 So, Bolivia went to work on lowering the projected
12 year-on-year Spot revenues and Capacity Payments with the help
13 of Mr. Paz, the new government-appointed head of Guaracachi.
14 Bolivia contends that a willing buyer and seller in May 2010
15 would have expected Guaracachi's future revenues to drop
16 significantly in the immediate future and then to stagnate in
17 real terms over time in direct contradiction to the historical
18 trend.
19 I return to the slide summarizing the differences
20 between the Experts so that you can see--the yellow box is what
21 I'm talking about--the revenue-related elements which account
22 for a difference of $10.1 million in the Experts' calculation
23 of the damages due to Claimants.
24 So, let's look at the revenue projections. Here, Dr.
25 Abdala assumed that the regulatory measures that changed the

12:30 1 Spot Price and Capacity Payments would have remained in place
2 in the future because he calculated the damages resulting from
3 those measures separately, which I will come to after the
4 nationalization price, so the nationalization damages exclude
5 the impact of the Spot Price Measure and Capacity Payments
6 Measure.
7 So, both Experts make the same assumptions about the
8 background regulatory regime.
9 Now, one of the tricky things about projecting Spot
10 Price Revenues in a regulated electricity system is that the
11 price you are going to get for each unit of electricity depends
12 on which specific other electricity generating units are going
13 to be called on at the point in time in order to satisfy the
14 existing demand of consumers. That's because the system calls
15 on generators to dispatch in the order of their efficiency.
16 You have heard all about that already.
17 Now, luckily, the Government office in charge of
18 electricity has to make just this sort of projections all the
19 time in order to set prices in advance, and the software that
20 the CNDC uses to crunch those numbers in Bolivia is exactly
21 what both sides relied on to calculate Spot dispatch and
22 Capacity Payment projections.
23 Dr. Abdala called on the services of Mercados
24 Energéticos and EdI, whereas Dr. Flores relied primarily as we
25 heard this morning on the present General Manager of

12:32 1 Guaracachi, Mr. Paz. As both Mr. Llarens of MEC and Mr. Paz
2 and also the CNDC for the piece that it was responsible for
3 will explain later this week, revenue projections were made by
4 inputting certain assumptions into the CNDC's software. Dr.
5 Abdala provided careful and precise instructions to MEC and
6 EdI, and he was responsible for all judgment calls. After all,
7 remember, Dr. Abdala is not just one of the world's leading
8 valuation experts. He's also a recognized independent expert
9 in the operation of electricity markets in Latin America, and
10 he's given extensive arbitration testimony in other cases just
11 on that topic alone.
12 By contrast, it looks like Mr. Paz, an employee of the
13 State, who is not an even independent third Party, let alone an
14 expert, made the judgment calls for Bolivia's model. Dr.
15 Flores just adopted his assumptions uncritically without
16 question or verification.
17 Now, Bolivia, through Mr. Paz, adopted pessimistic
18 assumptions about the volume and price of dispatch, bringing
19 Guaracachi's year on year revenues down sharply. Dr. Abdala's
20 instructions to MEC formulated on the basis of his extensive
21 experience in valuation and in electricity markets, were
22 designed to include the most accurate information that willing
23 buyers and sellers in the market would have had at their
24 disposal in 2010. Dr. Abdala considered that a reasonable
25 willing buyer or seller would not have relied on information

12:34 1 that was known to be incorrect. For example, the market
2 wouldn't accept projected dates for the launch of additional
3 high-efficiency capacity that were included in 2010 Government
4 reports because it was already obvious in 2010 that the project
5 launch deadlines were not going to be met.
6 Now, by contrast, Mr. Paz insists on defying reality.
7 He insists on excluding for example Guaracachi's Karachipampa
8 plant from the dispatch runs resulting in less revenue for the
9 company in the future because Guaracachi had requested that it
10 be decommissioned. But as you know, that request was never
11 granted, and the Karachipampa plant remains online today.
12 In short, the assumptions that Dr. Abdala plugged into
13 the CNDC database to project the Spot sales revenues were
14 consistent with reality, and Mr. Paz's were not consistent with
15 reality. Dr. Abdala assumed Spot prices that were stable in
16 real terms, and you can see this on Slide 110. The line shows
17 the Spot selling prices, and you can see to the left of the
18 dotted vertical line are the historical results and to the
19 right of the line are Dr. Abdala's projections, and you can see
20 that it's quite stable and quite consistent.
21 But Econ One, based on Mr. Paz's inputs, assumes a
22 Spot price evolution that's completely divorced from the
23 historical trend. It declines steadily over time. It
24 declines. With electricity demand in Bolivia projected to rise
25 seven to 12 percent per year during 2011 to 2018, with private

12:36 1 capital mostly ejected from the sector and with the completion
2 of new capacity consistently delayed, what could possibly
3 explain Mr. Paz's anti-historical assumptions? Only the need
4 to reach an equity value for Guaracachi of zero.
5 The third element of difference in the Expert's Fair
6 Market Valuations is the indexation of Capacity Payments, which
7 accounts for a $4 million difference between the Experts'
8 valuations of the Claimants' equity in Guaracachi. The
9 difference in opinion here between Dr. Flores and Dr. Abdala is
10 really quite simple. They agree that Capacity Payments would
11 be calculated each year based on the price of turbines in the
12 market. That's what the applicable regulations say.
13 The only question is: What's the best way to predict
14 the price of turbines after 2010? Dr. Abdala identified the
15 specific U.S. producer price index for turbines, and he
16 calculated a 10-year average of that index up to the
17 expropriation date. It seems pretty obvious that this is what
18 a willing buyer or a willing seller in the market would have
19 done, if standing in May 2010 they wanted to have an idea how
20 turbine prices would evolve in the coming years.
21 Dr. Flores, on the other hand, assumes that the price
22 of turbines will move in future according to the general
23 wholesale inflation index for all prices.
24 Now, one thing is clear, specific forces at work in
25 the particular narrow market for turbines has meant that

12:37 1 turbine prices rose faster than general wholesale prices in
2 every year, from 1983, when the Turbine Index was created,
3 until 2010. So, a willing buyer and a willing seller in 2010
4 would reasonably have assumed that the same would be true, on
5 average, in future.
6 Now, Dr. Flores points out that the gap between
7 turbine inflation and general inflation closed in 2011 and
8 2012. But that just isn't relevant to a May 2010 valuation. A
9 buyer and seller in Guaracachi trying to estimate in May 2010
10 the company's likely Capacity Payments in the future would
11 obviously have turned to the most accurate and specific data
12 available, the turbines index, for the past 10 years.
13 Now, in valuation, whether in arbitration or in the
14 real world, you rarely see DCF models standing alone. As
15 useful as it is, the DCF method requires the evaluator to make
16 a number of important assumptions and if one of those
17 assumptions is seriously incorrect, the final result can be
18 distorted.
19 So, benchmarking is a standard technique adopted by
20 valuation experts to check the reasonableness of their
21 valuations. They select another methodology or more than one
22 methodology to crosscheck the primary valuation, and it's
23 understood that the other methods will be less reliable than
24 the primary method, in this case the DCF. But if you get a
25 wildly different result, then you go back to the drawing board

12:39 1 and you carefully rethink the assumptions underlying the
2 Discounted Cash Flow. And if the results are very close, it's
3 likely that the basic assumptions of the DCF were correct. Dr.
4 Abdala has taken the standard benchmarking exercise very
5 seriously. Dr. Flores has not. He has not done a single
6 benchmark, and he has not explained why.
7 Dr. Abdala used both the market multiple comparables
8 approach and Guaracachi's Book Value as stated in its Audited
9 Financial Statements to verify the $155.1 million figure that
10 he calculated as Guaracachi's 100 percent equity as of 1
11 May 2010. Let's first take a look at the valuation using the
12 comparable companies method.
13 This methodology recognizes that public Stock
14 Exchanges are normally very good indicators of underlying
15 company value. Companies that are publicly traded have to
16 release a great deal of financial information to the public,
17 and the volume of share trades every day gives you a real life
18 set of information from thousands of transactions as to how
19 much the market thought the company's equity was worth.
20 So, if we can find companies that are similar to
21 Guaracachi in their business operations that are publicly
22 traded, then we can extrapolate what price the market would
23 attribute to Guaracachi's equity, and this is what Dr. Abdala
24 did. He put together a sample of 51 companies in the same
25 business as Guaracachi from various emerging markets. For each

12:41 1 company he calculated the total Enterprise Value based on
2 market information as at 30 April 2010, the day before the
3 nationalization.
4 For each company, he then measured that relationship
5 between that value and the relevant company's main
6 profitability indicator, EBITDA, or earnings before interest,
7 tax, and depreciation. He took the median of this equity value
8 over EBITDA ratio for the sample which was about 10:1. So, you
9 could conclude that for a company like Guaracachi, the
10 Enterprise Value should be about 10 times yearly EBITDA. Dr.
11 Abdala took Guaracachi's EBITDA and he multiplied it by that
12 benchmark ratio, and the result, after subtracting the value of
13 debt, was an implied equity value of $143 million. Taking
14 50 percent, $71.5 million for the Claimants. And you can see
15 this on the next slide, 111. Very close, very similar to the
16 DCF result.
17 We have another simple benchmark to check Dr. Abdala's
18 main valuation. Guaracachi's Equity Book Value was $133.7
19 million. The Book Value of Equity is reflected in the 2009
20 Financial Statements. That's at Exhibit C-183. It was
21 confirmed by independent auditors and by the Board of
22 Directors, including the Government's representatives. The
23 figure as you will see is rather close to Dr. Abdala's DCF
24 estimate of equity value at $155 million. Obviously, Book
25 Value is a backward looking measure. So, it's by no means the

12:43 1 most precise indicator of value on the market because the
2 market, by its nature, looks forward to future cash flows.
3 But there is a real connection to value. Book Value
4 of Equity rises when new capital injections are made, and it
5 rises when net earnings are collected. It goes down with
6 dividend payments and with losses, so it's a rough historical
7 snapshot of how much value Shareholders hold inside the
8 company. If anything, it will normally underestimate the price
9 that a company will fetch on the market because it doesn't
10 capture the possibility of future improvements and future
11 expansions.
12 But remember, Dr. Flores says Guaracachi's Equity
13 Value was zero in May 2010, and it's practically impossible to
14 explain a divergence of 100 percent between Book Value and
15 Market Value. That just doesn't happen in real life.
16 But Bolivia and Dr. Flores insist that a Book Value of
17 $133.7 dollars in no way undermines their valuation of zero.
18 They're desperate to discredit this solid baseline of value.
19 Dr. Flores tells us that the Market Value of
20 electricity companies may be, and often is, lower than their
21 Book Value. That's a quote from the Rebuttal Report
22 Paragraph 52. Let's test that statement.
23 Dr. Flores observes that nine out of a sample of 30
24 emerging market electricity companies had Market Values below
25 their Book Value. But that's the exception that proves the

12:44 1 rule. He accepts that two-thirds of the companies in this
2 sample had Market Value higher than their Book Value. And
3 moreover, as Dr. Abdala will explain, for those few companies
4 where the opposite was true, the gap between Market Value and
5 Book Value is relatively small. Only three of the 30 companies
6 in the sample had a Market Value that was under half of Book
7 Value. By contrast, where Market Value was higher than Book
8 Value, which was usually the case, the gap was sometimes very
9 large, indeed two times, three times. That's just a reflection
10 on the market emphasis on future opportunities, which Book
11 Value doesn't capture, so it's extra value you're going to see
12 in Market Value but not in Book Value.
13 The main point is this: There is not a single company
14 in Dr. Abdala's sample that even approaches the mismatch
15 between Market and Book Value that Dr. Flores insists was the
16 case for Guaracachi.
17 I note in passing that a lot of ink has been spilled
18 in the Pleadings and Witness Statements and Expert Reports on
19 the effect of the government-mandated UFV inflation adjustments
20 and other changes in accounting in Bolivia that supposedly
21 inflated the Book Value of Equity of Guaracachi. Now, the
22 problem with this argument is, first of all, it applied to all
23 companies in Bolivia. This is not a Guaracachi-specific
24 change. Guaracachi simply did what it was compelled to do by
25 new standards of accounting, and obviously Bolivia believed at

12:46 1 the time--it must have believed at the time--that the changes
2 in accounting with respect to, for example inflation were going
3 to yield more realistic results in accounting books than less.
4 Apparently, Bolivia now contends that the changes it made to
5 accounting made accounting--made Financial Statements more
6 divorced from Real Value than they were before, and that just
7 doesn't make any sense.
8 Now, Dr. Flores is free to believe that neither
9 comparable traded companies nor Book Value of Equity is an
10 appropriate benchmark. But then he should have found some
11 other way to corroborate his extraordinary conclusion that
12 Guaracachi's equity was worthless. He did not, and the reason
13 is clear: Any other valuation method would have only further
14 undermined his opinion. The two benchmark figures,
15 $143 million using comparable traded companies, and $133.7
16 million using Book Value are both very close in magnitude to
17 Dr. Abdala's DCF calculation, and they're logically impossible
18 to square with Dr. Flores's negative valuation result.
19 Let me now come to my concluding point on the
20 nationalization claim, and this results to Guaracachi's
21 so-called "liquidity problems." Bolivia has tried to muddy the
22 waters by making allegations about Guaracachi's profitability,
23 cash position, its ability to obtain further financing and so
24 forth. Bolivia persistently raises this issue both in its
25 pleadings and in Dr. Flores's Rebuttal Report.

12:48 1 Now, as was mentioned earlier, the odd thing is
2 liquidity is not an issue that has any impact on the Experts'
3 valuations whatsoever. The Parties are in agreement that it is
4 Guaracachi's debt-loaded nationalization in its magnitude and
5 not its cash situation that are relevant to damages.
6 On the next slide, 112, you can see the confirmation
7 from Bolivia's Rejoinder. They said, "what is relevant to the
8 Fair Market Value calculation is not whether in the months or
9 days leading to the nationalization, EGSA was illiquid".
10 Now, the Parties also agree about how debt impacts the
11 damages. There is only one way, quite simply, you need to
12 subtract $92.7 million from the value of the whole firm to get
13 the damages. That is the only relevance of the debt. And that
14 makes good sense, because a willing buyer evaluating the
15 company for a potential purchase doesn't care about past cash
16 constraints. He looks forward, not back. He looks forward to
17 understand what cash flows he's likely to have access to and
18 therefore what the value is for him today. But I want to put
19 your minds at ease. Guaracachi was not burdened by liquidity
20 problems. Did Guaracachi have limited cash on hand before the
21 nationalization? Yes. Why? Let's take a quick look. The
22 company's revenues were reduced due to Bolivia's alteration of
23 the Spot Price and Capacity Payments regimes. Guaracachi was
24 waiting in vain for a $5 million pre-payment for carbon credits
25 that the Bolivian Government was stalling by withholding basic

12:50 1 documentation.

2 Bolivia had also insisted that Guaracachi fund both
3 the San Matías Rural Electrification Project and the Dignity
4 Tariff Program, which it did.

5 Most importantly, Guaracachi was in the final stages
6 of the construction of its signature investment project, the
7 combined cycle plant. In light of all of this, it's hardly
8 surprising that the company had less cash on hand than it would
9 have liked.

10 But the situation was hardly critical. Guaracachi's
11 Shareholders agreed to defer the payment of dividends in 2009
12 and 2010 to free up more cash as a form of equity bridge
13 financing. And it negotiated, the company negotiated a waiver
14 on its debt-equity ratio from the CAF in order to clear the way
15 for more loan financing.

16 And CAF, by the way, was actively exploring
17 participation in Guaracachi's next project in December 2009, at
18 the hardest moment in terms of liquidity. You can find its
19 expression of interest at Exhibit 307. Why would CAF do that
20 if the company was on death's door? Any cash shortfall in
21 Guaracachi was small in magnitude and short in duration. All
22 the company had to do was push on until either the carbon
23 credit pre-payment came through or until the combined cycle
24 came on-line towards the end of 2010, at which point its
25 profitability would double.

12:51 1 Bolivia will no doubt look to distract the Tribunal
2 with this issue, pointing to correspondence referring to the
3 2010 cash crunch. Just remember Guaracachi's prospects were
4 excellent and that's all that would have mattered to a willing
5 buyer and a willing seller in the market. Liquidity, as Mr.
6 Blackaby explained, is just a red herring, it's a distraction
7 that is irrelevant to the amount of compensation due just like
8 Bolivia's allegations about decapitalization.
9 Guaracachi was worth a great deal in May 2010, despite
10 the damage that Bolivia had inflicted by its other measures, it
11 was a viable company, it was a profitable company. As of
12 May 2010, it owned 446 megawatts of capacity shortly to expand
13 by 22 percent to 542 megawatts in a market that had and
14 continues to have an excellent payment record. Would 2010 have
15 continued to be a difficult year for Guaracachi until the
16 combined cycle came online, probably, but any temporary
17 liquidity issues were easily resolved by bridge financing, with
18 the knowledge that serious revenues were on their way soon,
19 both Shareholders and lenders were ready to commit additional
20 capital as necessary to fill any cash gap.
21 So, in sum, Bolivia's so-called "Fair Market
22 Valuation" was designed with one goal in mind: To reduce the
23 May 2010 present value of Guaracachi's equity, to create the
24 inclusion--excuse me--to create the illusion that the company's
25 debt was big enough to swallow all of its equity value.

12:53 1 Bolivia's zero-sum game is transparent. It adds
2 unjustified premiums and multipliers to arrive at too high a
3 discount rate. It artificially depresses Spot sales and
4 Capacity Payment revenues by introducing inaccurate assumptions
5 about future online units in the system and the resulting Spot
6 price levels. And Bolivia's Expert has avoided providing a
7 single benchmark to corroborate his valuation.
8 Now, by insisting on the zero value while making the
9 quantification process seem as complicated as possible, Bolivia
10 hopes that you will give up trying to get the right answer, and
11 that you'll pick some number roughly in the middle. To use an
12 often-misused phrase, they hope you will split the baby. But
13 please remember King Solomon, who I'm sure would be very
14 distressed to know how the phrase "split the baby" is used
15 today. King Solomon never intended to split the baby. The
16 message of Solomon is for you today. Partial justice is no
17 justice at all. The Claimants are entitled to the true
18 Solomonic solution, full compensation for their investment in
19 Guaracachi at $77.5 million.
20 Now, very briefly to the other two claims, which are
21 much simpler to describe: The Spot Price claim. Mr. Blackaby
22 explained the basis for this claim. Bolivia altered their
23 regulatory regime that set electricity Spot prices and after
24 August 2008, Spot prices were no longer determined by the cost
25 of the most expensive generating unit.

12:55 1 Now, returning to our summary slide, this is Slide
2 113, we can see that the impact of the Spot Price Measure
3 represents in the calculation of Dr. Abdala $5.1 million,
4 valued as of 29 February 2012 as a proxy for the date of the
5 Award. 29 February 2012, is the date of Dr. Abdala's Report.
6 And to assess the loss caused by the Spot Price Measure, Dr.
7 Abdala instructed MEC to model Spot prices and dispatch volumes
8 with and without that Measure in place, and to look at the
9 difference in resulting revenue for each year.
10 Now, on the next slide, 114, we see the result of
11 that, the magnitude of the gap for the historical period
12 between September 2008 and April 2010, the gap between the Spot
13 prices with and without the Spot Price Measure in place. Now,
14 for the historical period 2008 to 2010, MEC used historical
15 dispatch reports from the CNDC to get the actual Spot prices,
16 the blue line, and then just modified those prices by
17 mathematics to include the costs of the liquid fuel generators
18 that were actually called on to dispatch during that time.
19 They looked at every 15 minute period to see whether there was
20 a liquid fuel generator dispatched, and they added that amount.
21 Now, for the post-May 2010 period, Dr. Abdala used the
22 same MEC projections of Spot prices and dispatch volumes that
23 we discussed earlier in the context of the nationalization
24 claim.
25 Now, Bolivia's estimate of the gap, the distance

12:57 1 between the blue line and the red line on that prior slide, is
2 about half of that calculated by Dr. Abdala. For historical
3 Spot prices, from 2008 to the nationalization, Dr. Flores
4 unquestioningly adopts the CNDC's numbers. This is the place
5 where the CNDC did its work. He gets the CNDC numbers through
6 Mr. Paz.
7 Now, here is the strange thing: The numbers that the
8 CNDC provided to Mr. Paz and then to Dr. Flores are projections
9 of dispatch that were prepared back in mid-2008. They're not
10 the historical figures. They're not the actual prices.
11 Now, neither Mr. Paz nor Dr. Flores has explained why
12 the CNDC decided not to offer historical data for a historical
13 period to calculate historical losses; and, as it turns out,
14 those mid-2008 projections that came from the CNDC seriously
15 underestimated the impact of the Spot Price Measure on
16 Guaracachi's revenues. They underestimated them by, the
17 impact, by about 50 percent.
18 Now, then, for the second part of the Spot Price claim
19 relating to the period after nationalization, Dr. Flores takes
20 a completely different approach.
21 Now, here it would have been normal to apply a
22 projection; that's what Dr. Abdala did using the MEC model.
23 But the CNDC did not provide a but-for dispatch simulation for
24 the post-nationalization period. Mr. Paz didn't prepare a
25 projection, and I assume that they were not asked to do it.

12:59 1 Instead, Dr. Flores does a very simple calculation. He takes
2 that 50 percent gap between the CNDC's 2008 projection and the
3 results of Dr. Abdala's analysis, that 50 percent gap, for the
4 historical period and he applies it to Dr. Abdala's
5 calculations going forward. So he just assumes that Dr.
6 Abdala's projections are 50 percent wrong.
7 Now, why was this done? Why wasn't any projection
8 made? There's no justification provided, and there's no good
9 reason for the approach. It's taking the mistake of the past
10 of Mr. Paz and transforming it into a mistake in the future.
11 Two wrongs certainly do not make a right.
12 Now, very briefly on the quantification of the
13 Capacity Price claim. And this is the set of columns on the
14 right of Slide 115. This claim, as you'll recall, relates to
15 the loss in revenues caused by the exclusion of a 20 percent
16 cost component from the formula used to calculate Capacity
17 Payments. And again, this claim has two components, one
18 historical from the May 2007 implication of the Capacity Price
19 modification and up until nationalization and one comprised of
20 future lost profits that would have been earned after May 2010.
21 Now, Dr. Abdala calculates Capacity Payments as they
22 would have been in the absence of the 20 percent exclusion, and
23 he compares this with the reduced level of Capacity Payments
24 under the influence of the Measure, and then he multiplies the
25 price differential by the forecasted available capacity for

13:01 1 Guaracachi's plants.

2 The pre-nationalization Capacity Payment levels are

3 drawn from MEC's projections, and for the future these are then

4 adjusted by the U.S. PPI Turbine Index, which we talked about

5 before.

6 Now, the differences between the Experts on the

7 Capacity Price claim are really quite small. Dr. Flores agrees

8 with Dr. Abdala's calculation of damages for the Capacity Price

9 Measure for the historical period. It's agreed. It's only the

10 post-nationalization figures that are in dispute. Dr. Flores

11 recognizes that if breach and causation are accepted by the

12 Tribunal, Bolivia is liable for compensation for the

13 pre-nationalization period of $3.7 million.

14 Now, the main reason there's a difference in the

15 post-nationalization period is the discount rate, which we

16 already talked about. If you adopt Compass Lexecon's discount

17 rate, there is an agreed loss between the Experts for the

18 post-nationalization period of $27.5 million. So, if you add

19 this altogether, the agreed amounts really are most of the

20 claim. It's really the discount rate that matters.

21 Now, for just a few concluding words on interest.

22 Interest is an integral component of the full compensation

23 required by international law. Let's recall that general

24 international law provides the relevant standard, not the

25 commercial rate found in the compensation provisions of the

13:03 1 Treaty, as we're dealing with an unlawful expropriation here.
2 Now, Bolivia insists that interest at a rate of LIBOR
3 plus 2 percent would provide appropriate compensation for the
4 Claimants, they say that is a commercial rate. There is plenty
5 to be disputed in that proposition. Just so you have an idea,
6 LIBOR is currently running under 1 percent, substantially under
7 1 percent.
8 The Claimants were caused significant economic damage
9 as a result of the expropriation of their shareholding in
10 Guaracachi, and Bolivia was obligated to compensate for that
11 harm immediately on the date of injury. Bolivia withheld any
12 compensation, and this was also a breach of the Treaties and
13 international law; and, as a result, the Claimants were
14 deprived of the opportunity to invest the compensation to which
15 they were entitled in the ordinary course of their business.
16 The value of that opportunity is represented by the
17 WACC, which, as we discussed, reflects the return on debt and
18 equity that investors require to invest. LIBOR plus 2 percent,
19 on the other hand, assumes that companies use their money to
20 invest in risk-free instruments, and that does not reflect
21 reality.
22 Now, that's all on the rate. But on compounding there
23 is also a difference of opinion.
24 PRESIDENT JÚDICE: Sorry, before that, the Respondent
25 quoted Professor Fisher in their Memorial of Opposition in

13:04 1 which it speaks about an economic fallacy, and I don't remember
2 your comment on that in your Reply. Here or later on, I think
3 it would be appropriate to have some more information about
4 that.
5 MR. RUBINS: Absolutely, and I will say just briefly
6 that that commentary is one view on the subject. There is
7 plenty of views on the subject to the contrary saying that. As
8 I've explained, the point is not the risk to which a Claimant
9 was actually subjected--that's this commentator's point,
10 Fisher. Fisher says well, why should you get 11.34 percent or
11 10.65 percent, the WACC, when you actually didn't go through
12 the project? The problem with that logic is a legal problem
13 because here the Claimant is deprived of an opportunity to
14 invest. It would have had this compensation at the moment of
15 injury. What would it have done with this money? Surely it
16 would not have bought T-bills. That's not what this business
17 does. It invests in projects like this and, therefore, if you
18 apply a so-called "commercial rate," you are under-compensating
19 because you do not compensate for the lost opportunity that was
20 caused by withholding the money.
21 So, it's not that the Claimant actually went through
22 that risk--that's irrelevant--it's that it wasn't permitted to
23 go through that risk and to reap the corresponding returns.
24 PRESIDENT JÚDICE: Thank you.
25 MR. RUBINS: Simple interest rather than compound

13:06 1 interest also does not reflect reality. International
2 tribunals have repeatedly affirmed that compound interest best
3 gives effect to the customary international law rule of full
4 reparation, and you can see on this slide some of the
5 authorities to that effect. Although Bolivia has referred to
6 authority from the 1980s, compound interest has now become the
7 norm.
8 Now, in response, Bolivia's primary argument is to
9 cite the Bolivian Civil Code, which apparently prohibits
10 compound interest in Bolivian contracts. Now, it's rather
11 difficult to understand the relevance of that statement even if
12 it's true, to an assessment of damages for breach of a treaty
13 at international law where compound interest is the norm. So
14 awarding compound interest at the WACC is the only way to
15 ensure full compensation for the harm that Bolivia has caused
16 in breach of the Treaties.
17 So, turning to Slide 117, there you have it. Dr.
18 Abdala carefully and conservatively assessed the damage to the
19 Claimants' investment resulting from Bolivia's measures at
20 $136.4 million, including pre-judgment interest and
21 actualization calculated through the end of February 2012 as a
22 proxy for the date of the Tribunal's Award. That will be of
23 course, have to be updated in due course.
24 That's what I have on damages. I have now a few
25 comments on jurisdiction, unless there is any questions from

13:08 1 the Tribunal on what I have said so far, or if the Tribunal
2 prefers a five-minute break.
3 PRESIDENT JÚDICE: How much time do you expect to use
4 for that final part of your submission?
5 MR. RUBINS: I would expect 15 to 20 minutes.
6 PRESIDENT JÚDICE: That's okay with everybody, to have
7 15 or 20 minutes more, and then we will have a recess? Okay.
8 Please proceed.
9 MR. RUBINS: Thank you very much.
10 The Claimants' case on jurisdiction is very simple.
11 The Claimants are two companies: One British, one American.
12 Each qualifies as a protected investor under a BIT in force
13 with Bolivia, signed by the U.K. and U.S. respectively. Each
14 Claimant had assets at the relevant time that qualify as
15 protected investments within the definitions included in the
16 Treaties, and that investment was in the form of direct and
17 indirect shareholdings in Guaracachi. Both BITs call for
18 UNCITRAL Arbitration of investment disputes, and here we are.
19 Bolivia has done its best to cloud that simple
20 reality. It contests almost none of the fundamental
21 jurisdictional facts with one exception that I will come to.
22 Instead, it has brought seven objections to your authority,
23 hoping that something will stick, hoping against hope to raise
24 some doubt in your mind as to the obvious jurisdictional basis
25 for this case. And in fact, not a single one of these

13:09 1 objections could stop this case from proceeding to the merits,
2 even if there were substance to them, which there isn't.
3 Three of the objections only target one of the
4 Claimants, leaving the other unaffected. Four of the
5 objections are unrelated to the main expropriation claim. None
6 of the objections has any merit, and I will explain that in a
7 moment.
8 First, just very briefly, the basis for jurisdiction
9 in this case, in the interest of time, I will not spend a great
10 deal of time on this. I did want to show you on Slide 119
11 again the corporate chart so that you understand where the
12 Claimants lie in the structure. The Claimants are at the top
13 and at the bottom, Rurelec Plc, the U.K. company at the top of
14 the structure, and Guaracachi America Inc. just above the
15 Bolivian company near the bottom. It's pretty straightforward.
16 Moving to Slide 120, you can see the key,
17 jurisdictional provisions of the Treaty. The qualification of
18 GAI under the U.S. Treaty, is clear, it's a U.S. company,
19 that's proven by its Certificate of Incorporation, and you can
20 see the definition of "investment" here. Investment means
21 every kind of investment owned or controlled directly or
22 indirectly by that national or company, and includes investment
23 consisting or taking the form of shares, stock, and other forms
24 of equity participation in a company. Very simple.
25 Moving to Slide 121, the same is true with respect to

13:11 1 Rurelec under the U.K. Treaty. You can see again, the U.K., a
2 protected company, is an English company. This is an English
3 company. The Certificate of Incorporation is in the record,
4 and again investment is defined extremely broadly. Every kind
5 of asset capable of producing returns, and in particular,
6 though not exclusively, includes shares in and stock of a
7 company and any other form of participation in a company.
8 Given the clarity of this situation, you may wonder
9 why are we even discussing jurisdiction? Because Bolivia was
10 intent to convince you to slow these proceedings down by
11 bifurcation, remember that, which they failed to do. This was
12 part of its general delay strategy with began with the long and
13 calculated pause before engaging counsel and included making
14 its groundless Security for Cost application. In any event, we
15 now have to address each of the objections in turn.
16 Bolivia's first objection is that each of the
17 Claimants should have brought its own arbitration. Think about
18 that. Both Claimants complain about the same Measures, and
19 those Measures impact on the same investment, the same shares
20 in Guaracachi. There can only be one recovery of compensation,
21 and Bolivia doesn't argue that the two Treaties impose
22 different obligations in substance. In any event, the Most
23 Favored Nation Clause in both instruments would even out any
24 discrepancy between the Treaties. Bolivia's objection is
25 purely formal. The Treaties do not state specifically that

13:13 1 Claimants can bring claims together, so they can't.
2 But neither the Treaties nor the applicable arbitral
3 rules forbid combined claims, and this is actually very common
4 in practice.
5 Now, more importantly, adjudicating these claims
6 together is better for everyone concerned--everyone
7 concerned--unless you happen to prefer a processes that is
8 slower, more expensive, and subject to the risk of conflicting
9 decisions.
10 And it's not entirely clear where the difficulty lies
11 for Bolivia. Is the problem that two different treaties are
12 being invoked? Surely, if Rurelec alone benefited from the
13 protection of two different treaties, for example, in Europe
14 it's common as between Bilateral Investment Treaties and the
15 Energy Charter Treaty, Bolivia wouldn't expect two separate
16 arbitrations where the facts and the Measures are the same.
17 There are many examples of cases involving multiple treaties in
18 a single arbitration and no claims have ever been dismissed on
19 that ground.
20 Okay, is the problem that two different Claimants are
21 involved? Surely that can't be the case. Look at the
22 Tribunal's decision in Abaclat. That Tribunal even accepted
23 that 60,000 Claimants can pursue a single treaty arbitration
24 against Argentina, an unnecessary multiplication of procedures
25 is in nobody's interest, especially Bolivia's.

13:15 1 It's important to note that Bolivia has not told you
2 what you should do if you accept this objection. One thing we
3 know is you can't dismiss both the Claimants because the
4 problem is apparently with having two Claimants in the
5 proceeding. But which of the Claimants would you send away?
6 How would you decide whether it's GAI or Rurelec? And in any
7 event, all that would bring is another arbitration against
8 Bolivia by the dismissed Claimant to start from scratch three
9 years on, arguing the same issues again before a new Tribunal.
10 The UNCITRAL Rules which you can see on Slide 122 and
11 Procedural Order Number 1 give this Tribunal wide discretion to
12 conduct the proceeding as it sees fit, so long as the Parties
13 are treated equally and are able to present their case. The
14 Procedural Order gives wide discretion to discharge the duties
15 of the Tribunal and again the main thing is equality of the
16 Parties which is preserved.
17 Now, Bolivia's next objection comes in three parts,
18 all relating to subject-matter jurisdiction over Rurelec's
19 investment in Guaracachi, and as a preface to this, on
20 Slide 123, again you will see the same corporate chart. So,
21 Rurelec we're talking about at the top of the corporate chain.
22 Now, first, Bolivia alleges that Rurelec hasn't proven
23 it owns any stake in Guaracachi at all. Now, that's easily
24 disposed of. There is abundant contemporaneous evidence in the
25 record that Rurelec acquired an indirect shareholding interest

13:17 1 in Guaracachi in January 2006 based on an agreement signed in
2 December 2005.
3 On the next slide, you see that agreement, which is at
4 Exhibit R-61.
5 Rurelec also at the time made public announcements
6 about the acquisition. You can see that on the next slide from
7 the announcements. And Rurelec's audited 2006 and 2007 Annual
8 Reports showed that the purchase price was paid. You can see
9 that on the next slide, 126.
10 And, of course, Rurelec's corporate administrator has
11 certified that the corporate ownership chain is as these
12 documents suggest at all relevant times, that's Exhibit C-226.
13 In fact, remember, the British Ambassador even came to
14 open Guaracachi's GCH-11 unit back in March 2007, right
15 alongside the Bolivian Vice-Minister of Energy and also Peter
16 Earl was there. You saw those pictures earlier. There can be
17 no question that Rurelec was Guaracachi's Majority Shareholder,
18 a British investor, and that this was known to the Bolivian
19 Government.
20 Bolivia simply asserts that the acquisition didn't
21 happen. I suppose they're suggesting that all those documents
22 you just saw are forged. Otherwise, how can it explain the
23 existence of these documents confirming the acquisition? Now,
24 forgery is a very serious allegation, and the Tribunal in Saba
25 Fakes--that's Exhibit RL-53--pointed out that the burden of

13:18 1 proof of any allegations of impropriety is particularly heavy,
2 but Bolivia has no evidence at all to support such an
3 allegation. There is nothing in the record contradicting the
4 clear documents confirming Rurelec's acquisition.
5 Now, next, Bolivia argues that even if the acquisition
6 happened as the documents show it did, indirect investments
7 aren't protected by the U.K. Treaty. Now, in a sense that's an
8 academic point because GAI, the other Claimant, owns the
9 investment directly. So, in any event, you have jurisdiction
10 to decide the Dispute and to award compensation.
11 But in any event, the U.K. Treaty means what it says:
12 An investment means every kind of asset which is capable of
13 producing returns and that expressly includes any form of
14 participation in a company. That's about as broad as you can
15 get. There is no exclusion of indirect shareholdings from the
16 scope of protection, and they are clearly a form of
17 participation in a company. Again and again, tribunals have
18 rejected just this sort of argument.
19 We provided you with the recent example of the
20 Aerolineas case, CL-151, Paragraphs 230 to 232, which follows a
21 long line of other decisions. In that case, the Claimants
22 alleged breach of the Spain-Argentina BIT after Argentina
23 nationalized two airlines. The Claimants held their investment
24 in the airlines through a Spanish intermediary company Air
25 Comet.

13:20 1 And Argentina argued that since the BIT's definition
2 of investment didn't explicitly refer to indirect investments,
3 indirectly held investments were not protected.
4 Now, the Tribunal rejected that argument. It stated
5 very clearly that there was nothing in the broad language of
6 the Treaty which defined investments as any kind of assets,
7 just like ours, and property of every kind. There was nothing
8 in that Treaty to suggest that the BIT was only meant to cover
9 direct investments.
10 Next, Bolivia argues that Rurelec's assets cannot
11 enjoy the protection of the U.K. Treaty as investments unless
12 they're accompanied by a contribution in Bolivia, and they say
13 there was no contribution in Bolivia. Again, this is academic
14 because the same argument isn't made against GAI. So, your
15 jurisdiction to adjudicate is unaffected in any event.
16 But nothing in the Treaty supports the objection.
17 Bolivia wants you to create an implied Treaty term which the
18 drafters apparently neglected to include adding an additional
19 elements of the definition of "investment". The contribution
20 criterion is found in some arbitral decisions relating to the
21 definition of "investment" under the ICSID Convention. The
22 drafters of that Treaty specifically chose to avoid defining
23 the term "investment," and so the Arbitrators had to fill the
24 gap, but this is not an ICSID arbitration. The U.K. Treaty
25 says exactly what qualifies as an investment: Any asset, any

13:22 1 form of participation in a company. And you will find a number
2 of cases referred to in the pleadings confirming that analysis.
3 Now, in any event, Rurelec did make a
4 contribution--make no mistake--in relation to its investment in
5 Guaracachi. First, it paid $35 million to acquire its
6 controlling stake. Compare that to the Investment Treaty Award
7 in Societe Generale against the Dominican Republic, CL-122. In
8 that arbitration, an indirect shareholding in a local
9 electricity company was acquired for $2, and it was found to
10 constitute an investment.
11 Now, Rurelec also directly facilitated the financing
12 of the combined cycle project, and it brought its global
13 expertise to the operation and management of the project, and
14 this was acknowledged expressly by Fitch ratings. So, Rurelec
15 contributed to the Bolivian Electricity Sector, and the
16 Tribunal in any event has subject matter jurisdiction over its
17 Guaracachi stake.
18 Bolivia's next objection affects only GAI. Bolivia
19 argues that it can deny all the benefits of the U.S. Treaty,
20 including the right to arbitrate. And if you turn to
21 Slide 127, you will see the U.S. Treaty provision that they
22 invoke. It says that each Party reserves the right to deny to
23 a company of the other Party the benefits of this Treaty if
24 nationals of a third country own or control the company and the
25 company has no substantial business activities in the territory

13:24 1 of the Party under whose laws it was constituted. So, in other
2 words, this is designed to apply to foreign-owned shell
3 companies.
4 Now, there is no dispute, of course, that GAI is
5 controlled by Rurelec, not a U.S. company, so Point A, the
6 first criterion, is satisfied, but criterion B is in dispute.
7 But the most important point is that this clause does not
8 operate retroactively. In the U.S. Treaty itself, Bolivia did
9 not deny benefits to anybody. It reserved the right to do that
10 in the future. Now, that's a right that has to be exercised
11 before it can produce any effect. According to its Preamble,
12 the U.S. Treaty was created to give meaningful protection to
13 investments, and that objective would be completely undermined
14 if a State could retroactively deny the benefits of a Treaty
15 after it breached its obligations and after the injured
16 investor had launched arbitration to obtain compensation for
17 the harm suffered. For all the years that GAI owned
18 Guaracachi--and Bolivia knew it--it never suggested that GAI
19 would not benefit from the U.S. Treaty. Bolivia only purported
20 to deny the benefits of the Treaty with its objections on
21 17 September 2012.
22 And make no mistake, it also knew--it knew not only
23 that is was a U.S. company, but it knew very well that GAI had
24 only one activity, that activity being managing the Shares of
25 Guaracachi. Why? Because it was in the Bidding Rules. The

13:25 1 Bidding Rules themselves required that the subscriber of the
2 shares be a--be solely created for that purpose, and so GAI was
3 solely created for that purpose. It was also required that
4 there be substantial international electricity experience,
5 which explains why it's controlled by Rurelec. All of this was
6 pre-destined by the Bidding Rules.
7 Now, if you turn to Slide 128, you will see the
8 statement of the Tribunal in Plama v. Bulgaria about the
9 retroactive removal of rights which is just logically not
10 possible, and there are others like Yukos v. Russia, confirming
11 that reserving the right to deny Treaty benefits means that the
12 State has to exercise that right for it to be effective and
13 once it's exercised the denial of benefits can only apply to
14 future events. It can't re-do the past.
15 Now, even if the denial of benefits clause could be
16 invoked with retroactive effect, and to be clear, that would be
17 fundamentally unfair, this is an affirmative defense, so
18 Bolivia bears the burden of proving that the pre-conditions for
19 denying benefits are satisfied. And as I said, the problem
20 here is--for Bolivia is that there were substantial business
21 activities in the United States, despite the fact that, as the
22 Bidding Rules required, GAI had one business line: Managing
23 the Shares of Guaracachi.
24 The Treaty doesn't tell us what "substantial" means.
25 We know from other arbitral decisions, the even the activities

13:27 1 of a traditional holding company can meet the test. See, for
2 example, Pac Rim v. El Salvador, CL-140, Paragraph 4.72. But
3 GAI engaged in substantial business activities in the United
4 States, having maintained offices there, having held annual
5 Shareholders' meetings there and having conducted Board of
6 Directors meetings there. So, in any event, Bolivia cannot
7 deny the benefits of the U.S. Treaty.
8 Bolivia's next objection is that the claims related to
9 Spot prices and Capacity Payments should be dismissed because
10 they weren't specifically described in the Claimants'
11 pre-arbitration Notice of Dispute back in 2010. These three
12 claims are part and parcel with the nationalization. They're
13 all part of the same thing. They were all part of the same
14 Government campaign--
15 (Pause.)
16 MR. RUBINS: Are there any questions, Mr. President?
17 PRESIDENT JÚDICE: No, no, no. Go ahead.
18 MR. RUBINS: So, the three different claims were all
19 part of the same Government campaign to regain control over the
20 Electricity Sector. And where disputes subject to detailed
21 notice are related to other claims that are not subject to
22 detailed notice, tribunals have found that Treaty notification
23 requirements should be deemed satisfied.
24 But even if the notice requirement were not satisfied,
25 that wouldn't be grounds to dismiss the non-expropriation

13:29 1 claims. In the vast majority of cases, tribunals have found
2 pre-arbitration negotiation to be a procedural and not a
3 jurisdictional requirement. On Slide 130 you see just a few of
4 those authorities. And that makes a great deal of sense. It's
5 illogical to send the Claimant away to negotiate only to start
6 arbitration again three or six months later when no agreement
7 is reached. The notice requirement exists to provide an
8 opportunity to negotiate, not to prevent investors from
9 pursuing their claims. By the time a jurisdictional challenge
10 on this basis has been adjudicated, there has been ample notice
11 far more than the three or six months in the Treaty. If there
12 was going to be a settlement, it would have happened. Sending
13 the Claimant away to talk more is simply futile.
14 And let's be clear: Bolivia has no intention to
15 settle these claims. It has never offered any compensation for
16 the expropriation, let alone for the harm caused by the other
17 Measures. Bolivia has described these claims as frivolous and
18 not even claims under international law. So, to send the
19 Claimants and Respondent back to talk more would be futile.
20 Now, Bolivia makes a separate admissibility objection
21 related to the Spot Pricing and Capacity Payment claims, namely
22 that they're not really Treaty claims. Now, this is really a
23 question of the merits. Either we're right in our position on
24 the facts and international law, or we're not. There is no
25 basis to dismiss claims because they are wrong. That is to

13:30 1 say, on jurisdictional grounds. It's for us to prove each of
2 our claims. But as you will find in the Oil Platforms case,
3 CL-100, the point for now is that the claims are presented as
4 Treaty claims, and obviously that's the case, you heard the
5 entire explanation of the relevant Treaty provisions this
6 morning.
7 Now, Bolivia next invokes the fork-in-the-road clause
8 found in Article IX of the U.S. Treaty to exclude the Capacity
9 Payment claim for denial of effective means of redress. Now,
10 Article IX, just all it states is that there is a choice that
11 the investor must make between national courts and arbitration,
12 and once that choice is made, to submit an investment dispute
13 to one or the other, that choice is final.
14 So, in order for the fork-in-the-road provision to
15 apply, Bolivia has to show that GAI--remember, this is only
16 about GAI--already submitted its investment dispute to the
17 national courts in Bolivia. GAI, the investor, GAI never
18 brought any actions in the Bolivian courts in relation to this
19 dispute. In all of the proceedings relating to the
20 nullification of the Capacity Price Measure, Guaracachi was the
21 Claimant. Guaracachi is not a national or company of the
22 United States, and so it cannot be triggered.
23 And, of course, in any event, even Guaracachi didn't
24 submit GAI's investment Treaty claim to the courts. So the
25 investment dispute was not submitted either.

13:32 1 Now, the final objection is the opposite of the
2 fork-in-the-road argument. Bolivia says that while the
3 Capacity Payment claim is barred because related local
4 litigation took place, the Spot Price claim is barred because
5 local litigation did not take place. According to Bolivia, the
6 Claimants were required to use available local remedies before
7 seeking relief from this Tribunal.
8 Now, no provision in either Treaty requires that
9 Claimants use local remedies. In decision after decision,
10 arbitral tribunals have refused to imply a pre-arbitration
11 litigation requirement where the applicable Treaty is silent on
12 that point.
13 Now, this makes perfect sense. The exhaustion of
14 local remedies was a customary law requirement for the espousal
15 of public international law claims by States of their
16 nationals. Investment Treaties and the Arbitration Clauses
17 they contain were precisely designed to do away with that and
18 to provide qualifying investors a direct international remedy
19 that is insulated from domestic courts in the host State.
20 So, Bolivia has advanced a wide array of objections to
21 jurisdiction and admissibility, and I thank the Tribunal for
22 its patience as I addressed each of them. Numbers in this case
23 can be deceptive. Just because there are seven doesn't mean
24 that any of them have any basis. None would lead in any event
25 to the closing of the case without a ruling on the merits or

13:34 1 the dismissal of the main claim for unlawful expropriation.
2 Like so many other aspects of Bolivia's defense, the
3 entire discussion of jurisdiction is a distraction and effort
4 to delay its day of reckoning, and the Tribunal should make
5 short work of setting it to one aside. The day of reckoning
6 for Bolivia has come.
7 Thank you very much, Members of the Tribunal.
8 PRESIDENT JÚDICE: It's clearly not the case facing
9 us, but a very important way of being informed by very
10 sophisticated counsel for both Parties, and, therefore, I think
11 I speak on behalf of my colleagues, we appreciate very much
12 your intervention.
13 Now, the Tribunal will probably put some questions to
14 present but only after the two sides have their pleadings, and
15 then anyway we are now going to have recess for lunch. How
16 much time do you need or prefer?
17 MR. SILVA ROMERO: I'm thinking, Mr. President, that
18 my friends that have represented the Claimants have used three
19 hours and 32 minutes, so at least we have a right to use the
20 same amount of time. Therefore, I wouldn't like to start too
21 late after lunch so as to be able to conclude today as soon as
22 possible and start preparing the rest of the work for our
23 hearings.
24 PRESIDENT JÚDICE: So, one hour?
25 MR. SILVA ROMERO: Yes, I think that one hour would be

13:36 1 perfect.

2 PRESIDENT JÚDICE: Let's reconvene at 2:40.

3 (Whereupon, at 1:35 p.m., the hearing was adjourned

4 until 2:40 p.m., the same day.)

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1 AFTERNOON SESSION
2 MR. RUBINS: There was one question I didn't answer,
3 Mr. President, at the beginning of the opening.
4 PRESIDENT JÚDICE: Probably it's better to ask that in
5 the end, if you agree.
6 And if you allow me, we decided on a number of issues.
7 Obviously, we accepted all your agreements, and we decided that
8 witnesses so-called "Tribunal witnesses" will be heard before
9 the Expert witnesses, and each Party will have the right to
10 direct each one of the free witnesses, so to speak. We have
11 agreed with everything, but what has to do with the Tribunal
12 witnesses, they will be examined before the experts, and each
13 of the Parties has a right to have a direct examination with
14 each of the witnesses, and clearly the Tribunal may have
15 questions, but we would like to have the Parties' cooperation
16 in this regard.
17 MR. BLACKABY: Is there a presentation for us? We
18 haven't received a copy of the presentation.
19 MR. SILVA ROMERO: Don't be anxious. We have copies.
20 (Laughter.)
21 OPENING STATEMENT BY COUNSEL FOR RESPONDENT
22 PROCURADOR MONTERO LARA: Thank you very much,
23 Mr. President. Good afternoon to all of you.
24 I am going to briefly introduce our arguments. This
25 is going to be very brief because Mr. Romero and Mr. Represa

14:43 1 will take the floor afterwards so that they can show in detail
2 the facts that I will refer to in this introduction.
3 Just for the record, my name is Hugo Montero Lara in
4 this proceeding that was brought as a result of an unfair
5 claim, in our opinion. I represent my country as the Attorney
6 General of my country designated by the Constitutional
7 President Evo Morales.
8 As you know, with fairness, dignity, and sovereignty,
9 Bolivia is introducing a change, democratic change process for
10 the cultural, social, and political structures, and the goal is
11 to make sure that all of the Bolivian population has and enjoy
12 minimum necessary services to develop the guiding principle of
13 our philosophy; that is, to have a good life. Within that
14 framework, access to electricity is a fundamental right that is
15 enshrined in our political constitution.
16 In that sense, the Government program, as mentioned
17 this morning and proposed by the then-candidate and now elected
18 Presidency Evo Morales during the democratic elections for the
19 2002-2010 period included as one of the main concepts the
20 reclaiming by the State of the power generators that were
21 privatized in the Nineties, and that were being managed only,
22 and it is understandable to obtain gains without any
23 contribution to the development in the interest of the Bolivian
24 people, and they did not provide an efficient, responsible, and
25 timely supply of electricity to all of the inhabitants of

14:45 1 Bolivia.

2 Evo Morales, who was elected President and also who
3 was consistent with the constituency, recovered the companies
4 for the State.

5 Now, in our argument, we are going to show that the
6 Claimants, after arriving in Bolivia, have had significant
7 revenue without injecting a single penny of their equity.
8 Quite the contrary, taking advantage of their shareholding
9 situation, and also using all of the management positions
10 within EGSA, took the company to an unsustainable level of
11 indebtedness and illiquidity.

12 The Claimants have also insisted on mentioning
13 investments. However, we are going to show, Members of the
14 Tribunal, during this discussion that each of the expenses and
15 the actions of a poor management that the Claimants forcibly
16 call "investments" were not such because they were conducted
17 with EGSA's equity. And, Members of the Tribunal, this should
18 not be understood as an investment. And with the due respect
19 and just to call the different facts the way they should be
20 called, the executors of these actions could be called
21 something else rather than investors. They cannot considered
22 investors under these circumstances.

23 In early 2010, EGSA had no economic capability to face
24 the most basic expenditure for their operations such as to pay
25 the gas invoices necessary for their operation. They had no

14:47 1 capability to obtain new lines of credit. This situation to a
2 situation in which there was a significant delay in the
3 operation of the combined-cycle, and later on this led to the
4 shortage of electric power, and this led to outages and
5 blackouts in 2011, and this had an effect and an impact on the
6 population in the State.
7 On the other hand, the Claimants assert that the
8 nationalization of EGSA was violent and illegal. This is an
9 assertion that is completely false because this is a sovereign
10 act that was conducted based on the current legislation, and it
11 was conducted in a very specific fashion taking care of the
12 security of the people and the infrastructure that was becoming
13 nationalized.
14 This, logically, had to have the support of the public
15 forces, and that's the reason why we have seen some photographs
16 where you can clearly see the Bolivian police forces protecting
17 the infrastructure. You also see gas pipes, but we don't see
18 any violent acts or any use of gas to control the situation.
19 In addition to this, the nationalization of this and
20 other generators, Corani and Valle Hermoso of Decree 493 led to
21 the valuation process of an autonomous company that was hired
22 by public bidding; and, in the case of Corani and Valle
23 Hermoso, the estimates--the Expert estimates gave us a positive
24 value, but in the case of EGSA, valuation showed us a negative
25 amount because of the financial and commercial indebtedness

14:49 1 level. In this context, Mr. President, in addition to what I
2 have already mentioned, we're also going to show that Bolivia
3 never agreed to the accumulation of treaties, Parties, and
4 disputes as mentioned by the Claimant in this case.
5 We're also going to prove that Rurelec did not make
6 any contribution to Bolivia, and it cannot be qualified as an
7 investor.
8 We're going to show that Guaracachi America, Inc., is
9 a paper company that is controlled by a corporation formed or
10 constituted in the British Virgin Islands, and Bolivia has the
11 right to deny the benefits of the Treaty between Bolivia and
12 the United States.
13 We're also going to show that the Claimants have no
14 right to any compensation due to the nationalization since the
15 Fair Market Value when EGSA was nationalized was below the
16 level of their debt.
17 We are also going to prove that the new claims were
18 never informed. Bolivia only learned about those claims
19 through the Memorial, and later on these claims are
20 inadmissible, and the Arbitration Tribunal has no jurisdiction
21 over those claims, and those new claims have the goal of having
22 this Tribunal exceed their jurisdiction and become a judge of
23 last resort in the case of Bolivia and replace the Supreme
24 Court of the Plurinational State of Bolivia.
25 We're also going to prove that these claims are

14:51 1 superficial, and they have no legal or fact basis. And, to
2 develop what I have just mentioned and other issues that have
3 to do with the defense of the State, the Plurinational State of
4 Bolivia, with your indulgence, Mr. President, I am going to
5 give the floor to Mr. Silva Romero and Mr. García Represa, who
6 shall continue with this argument.
7 Thank you very much.
8 PRESIDENT JÚDICE: Thank you very much, Mr. Attorney
9 General.
10 MR. SILVA ROMERO: Mr. President, Mr. Conthe, and
11 Professor Vinuesa, as mentioned by the Attorney General,
12 Members of the Tribunal, this is a case that has to do with the
13 nationalization of a company that had a very high level of
14 indebtedness that exceeded its value. Bolivia has never said
15 that EGSA had zero value. What we have shown in this
16 proceeding is that the level of indebtedness for this company
17 is higher or was higher as of May 10, 2010, higher than its
18 value; therefore, the Claimants have no right to receive any
19 compensation.
20 In this case, we can see that Rurelec made a very bad
21 choice in Bolivia, and why? First, as we know, Rurelec
22 supposedly acquired EGSA's shares indirectly in January 2006,
23 based on what they say, and that is when it was public
24 knowledge that Bolivia, as part of their Government program,
25 was planning to nationalize certain strategic sectors, and that

14:53 1 included the strategic sector of power generation.
2 Second, the record also shows that Rurelec did not
3 invest a single penny in EGSA. That is a question that will
4 come back to us throughout the hearing. How much did Rurelec
5 invest in this business. Bolivia's position is very clear:
6 Rurelec did not invest a single penny. Quite the contrary, all
7 of those wonderful projects that were introduced to us during
8 three hours and 33 minutes this morning were financed, funded
9 with loans of the indebtedness of EGSA's company. And you know
10 where they got their loans? And you have the information in
11 the record, they resorted to international Development Banks,
12 commercial banking, and also through bond issuance.
13 But, third, Rurelec acquired debt for EGSA not only
14 through commercial banking and also bond issuance, they also
15 did so in connection with their own Shareholders. How did they
16 do that? They did that through the reckless distribution of
17 dividends, and they also distributed in a very irresponsible
18 way 70 percent of some revenues that have to do with the
19 accounting revenues used in accordance with what Mrs. Martha
20 Bejarano has said, and you will have an opportunity to hear
21 what she has to say, and this distribution of the revenue in
22 2009 and 2010 increased the indebtedness of the company. Why?
23 Because since the company was not paying, the profit had a
24 death with the Shareholders, so you see how this debt continues
25 to increase through the actions of the Claimants.

14:56 1 Fourth, and as an introduction, nationalization took
2 place, and this was something that had already been decided in
3 2006, and Rurelec, as part of these poor decisions that they
4 made, acquired a third-party funding.
5 What for? To initiate this arbitration, to cover all
6 of the expenses implied in bringing forward a claim against a
7 sovereign State. And what is the expectation that the
8 Claimants have in this case? In our opinion is that they
9 expect for you to request Bolivia to pay something. They are
10 not investing a single penny in the business. They know that
11 this was going to be the--they knew this was going to be
12 nationalized. They also distributed profit, and they start the
13 arbitration with third-party financing, so that you can have
14 finally a check issued to pay for these costs.
15 Our opinion is that you cannot and you should not
16 follow with this opportunistic attitude of the Claimants.
17 Fifth, this is already in the arbitration phase; and,
18 in my opinion, let me tell you that Rurelec's strategy is
19 completely surprising. As the Attorney General has already
20 mentioned, clearly there is no jurisdictional basis in this
21 case. It is incredible to see the mistake made by the
22 Claimants when they tried to accumulate in one proceeding
23 various treaties from various nationalities, parties from
24 various nationalities, and also claims by parties from various
25 nationalities. They are the ones who have the burden of proof

14:58 1 rather than us. They have to prove that Bolivia agreed to this
2 accumulation of claims.
3 Second, they have not even proven that Rurelec made
4 any contribution in Bolivia, and we know that investments,
5 first of all, are contributions, and this has not been proven.
6 Third, when drafting their Memorial, their Statement
7 of Claim and also requesting, trying to determine what they're
8 going to be including in the prayer, they find these three
9 claims that are only cited in the Statement of Claim. That is
10 part of the investment claim, and I should not be explaining
11 this to you. Those claims cannot be decided by this Tribunal,
12 as we are going to explain later on.
13 And because of these premises based on the lack of
14 jurisdiction, Bolivia, unfortunately, is in a situation in
15 which the proceeding did not follow bifurcation. We would have
16 been able to save some costs, and with the rejection of the
17 case as I am going to explain later on.
18 It is also surprising, Members of the Tribunal, that
19 as part of the strategy of the Claimant, they are desperately
20 trying to find claims--you need some basis for these claims,
21 and they are desperately trying to find a link between
22 nationalization and the new claims, so that the various
23 notifications of the claims covered the new claims. That is
24 not possible. There is no link between those two claims.
25 Another issue which was raised in connection with the

15:00 1 merits of the case, you have to be extremely cautious when
2 analyzing the statements by the Claimants in the Claimants'
3 pleadings. When you read in the Claimants' pleadings things
4 like "Bolivia accepts" or "Bolivia doesn't dispute," "it is
5 undisputed," or "the record fully shows," there is actually no
6 evidence of this. Please look at the footnotes. Go to the
7 documents. The documents and the footnote will not show the
8 statements made by Claimants in their pleadings. We have to
9 underscore once again the fact that there is a need, and this
10 need will be met for the Tribunal to look at the record very
11 closely and to its minute detail.
12 Having said this, Bolivia today during this Opening
13 Statement, Members of the Tribunal, is going to divide this
14 into four different sections:
15 First, we're going to address three objections to
16 jurisdiction that you are going to have to dispose of when
17 dealing with this case; then we're going to talk about
18 nationalization; and then we're going to talk about certain
19 jurisdictional objections in relation with the new claims; and
20 then we're going to talk about the merits of these new claims
21 ex abundante cautela.
22 Let us now move to the three jurisdictional objections
23 that we would like to underscore today. The first thing that I
24 would like to indicate is that these three objections to
25 jurisdiction that you can see, if you look at Number 5, they

15:02 1 have different legal effects. This morning, we heard
2 criticisms as to the legal effects of one or the other of these
3 objections. The first, the undue accumulation of treaty
4 parties and claims in this case. Bolivia never consented to
5 such accumulation. The effect of accepting this objection is
6 for the case to be dismissed in its entirety because it was ill
7 presented by Claimants.
8 The effect of accepting the objection that Rurelec is
9 not an investor is that all of claims by Rurelec need to be
10 dismissed because of lack of jurisdiction, and the effect of
11 the objection in connection with the denial of benefits is that
12 the claims by Guaracachi America need to be rejected because of
13 lack of jurisdiction.
14 Let us now talk about the first objection; that is to
15 say Bolivia has not consented to this undue accumulation of
16 treaties, Parties, and claims. Let us remember for a moment
17 what is the strategy of the Claimants in connection with this
18 matter? They have decided to accumulate in this arbitration,
19 in a single proceeding without having shown the consent of
20 Bolivia to do so. They have accumulated different nationality
21 Claimants. Where has Bolivia consented for an American or a
22 British investor on the basis of different treaties to submit
23 claims in one single arbitration proceeding?
24 Secondly, they're accumulating treaties. Where has
25 Bolivia consented that claims be put together the result from

15:04 1 violations of the U.K.-Bolivia Treaty and U.K.-U.S. Treaty, and
2 where ultimately has Bolivia consented to the accumulation of
3 claims by American and British nationals on the basis of
4 different BITs?
5 Claimants, Members of the Tribunal, have not indicated
6 because they don't exist, when, where, and how Bolivia
7 consented to such accumulation. However--and we're looking at
8 Number 7 now--as the Tribunal very clearly said in the Daimler
9 Financial Services AG v. the Republic of Argentina stated,
10 firstly, the consent by the State cannot be assumed in these
11 cases. The general rule when State acts when dealing with the
12 litigations that are different from the ones brought forth in
13 the State is that there has to be consent. So, the general
14 rule is that the individual needs to submit to the jurisdiction
15 of the courts of that State. Only by exception, and when it is
16 unequivocally stated that the State consents to the arbitration
17 of those differences can one resort to arbitration. The
18 exception, then, is arbitration.
19 What are the consequences of these basic principles?
20 That consent must be evidenced and proven by Claimants. They
21 are the ones that need to establish the jurisdictional basis of
22 the claims that they're asserting, and how can that consent be?
23 It can be an express consent, an expressed statement, but it is
24 my understanding that Claimants did not allege in this case
25 that there is a clause in a treaty that says that this

15:06 1 accumulation is permitted. We have two treaties, and they say
2 they can be accumulated? So where is this higher Treaty?
3 Where is this meta-treaty that encompasses the other two BITs?
4 It seems that I'm talking about something that is metaphysical.
5 Nigel Blackaby, my friend, was talking about magic, but now we
6 are talking about Claimants doing wizardry. So it could be
7 implicit or tacit, that consent, as well.
8 But as the Tribunal is saying in the Daimler Financial
9 Services Case v. Argentina, that implicit manifestation of
10 consent by Bolivia has to stem from acts in a very conclusive
11 manner. The standard of proof is very high, to show that a
12 State goes beyond the general rule, which is to solve the
13 disputes in the courts of the State itself, and a series of
14 actions need to be demonstrated that fully determined that the
15 data implicitly provided that consent.
16 As you know, Members of the Tribunal, the position of
17 Bolivia that such proof has not been contributed in this case
18 and that the Tribunal has to state that it lacks jurisdiction
19 in this case. This was what happened in the ICS case versus
20 Argentina.
21 In spite of the fact that we have failed to find any
22 evidence of this implicit consent, it would seem, at least this
23 afternoon it seemed, that the Claimants are alleging some kind
24 of implicit consent. I will give you eight very brief
25 arguments that dispel this idea that there is an implicit

15:08 1 consent by Bolivia in this case as stated by the Claimant.
2 Claimants have recognized the existence of two
3 different disputes between Parties of different nationalities
4 under two different treaties. How is this argument evidenced?
5 Claimants themselves sent two notices of claim that were
6 different. One was sent by Rurelec under the U.K. BIT and the
7 other by Guaracachi America under the U.S. BIT. Evidently
8 given that nationalities are different, the notices are also
9 different, and the treaties are also different.
10 So, Members of the Tribunal, I ask where is the notice
11 of the dispute between Rurelec and Guaracachi America against
12 Bolivia on the basis of this meta BIT for the promotion of
13 protection of investments? That notice does not exist because
14 it cannot exist.
15 We go to Number 11, and this is my second argument,
16 the treaties that have been invoked in this case do not provide
17 for the alleged accumulation by Claimants. The U.K. BIT does
18 not provide for that. Here, you see the basic rules and if you
19 go to Number 13, we can see that the U.S. BIT did not provide
20 for this, either.
21 Claimant, in Paragraph 5 of their Rejoinder on
22 Jurisdiction--this is Number 14--recognize that Bolivia has
23 consented to arbitrate the claim of each Claimant under each
24 Treaty that protects their investments. Rurelec can invoke the
25 U.K. BIT in litigation against Bolivia, and Guaracachi America

15:11 1 can invoke the U.K. Treaty in a case against Bolivia.
2 The third argument--this is Number 15, to allege that
3 the treaties do not prohibit the accumulation of disputes, as
4 Noah Rubins said a few moments ago, well, that is not enough to
5 prove the existence of the consent by Bolivia of the
6 accumulation of proceedings.
7 What is the effect of those acts that allow to
8 concludingly demonstrate that Bolivia consented to the
9 accumulation? The fact that the treaties don't prohibit this,
10 is this enough to show conclusively that Bolivia consented to
11 the accumulation of proceedings? As the Tribunal said in the
12 Noble Energy case v. Ecuador--and this is Number 16--the
13 implicit consent that Claimant seeks to demonstrate must be
14 manifest. And the word manifest has to be clear. It has to be
15 crystal clear. Bolivia should have conducted itself in an
16 unequivocal manner to accept this undue accumulation of
17 Parties, Treaty, and claims.
18 Secondly, that consent, that implicit consent that
19 stems from those manifest actions has to result from elements
20 that are on the record. The position of Bolivia is that
21 Claimants do not find any element that allows for the
22 conclusion that that implicit consent exists in an manifested
23 manner. That's important because the general rule is that
24 States litigate before their own courts. You must be certain
25 that Bolivia consented to this accumulation, if it had done so.

15:13 1 Now, we also talked about what happened with other
2 States in cases where accumulation was done. This is probably
3 very irrelevant. Claimants make reference to a number of cases
4 for Oko Osuuspankkien and Suez, to maintain that in these
5 cases, the States found that accumulation was not
6 inappropriate. So, because of this, you should conclude that
7 accumulation is appropriate.
8 In actuality what happened in these cases is that the
9 Respondent States did not object to the accumulation, and they
10 implicitly consented to that accumulation. When there is an
11 arbitration claim that proposes stipulation and the State does
12 not object to it, the State then accepts, so then you have this
13 meta arbitration agreement that didn't exist before.
14 How did it come into being? Well, with the
15 Arbitration Request and the non-objection by the State.
16 Now, where is this meta Arbitration Agreement that
17 allows for accumulation? In this case, the problem is that
18 Bolivia objected and rejects accumulation and, therefore, there
19 is no meta agreement.
20 My friend Noah Rubins mentioned this afternoon, I
21 think it was, the Abaclat Case v. Argentina. I don't want to
22 go too long in my examination of this case, but I fully agree
23 with the Dissenting Opinion in the case, and I think that, from
24 a legal viewpoint, the opinion of the majority is terrible,
25 simply speaking.

15:15 1 If we go to Number 18, you're going to see the fifth
2 argument. Claimants expressly recognized that the consent of
3 the State is necessary for the consolidation of different
4 proceedings. Here, the Claimants say that there are two
5 realities and the semantic difference between the two. First I
6 accumulate in my arbitration claims, Parties, treaties, and
7 claims, and then they say okay, Rurelec could have started a
8 case under the U.K. BIT Treaty and then later on Guaracachi can
9 start another case on the basis of the U.S. BIT, and then those
10 two cases are going to come together.
11 And it is clear, they say, that the consent of the
12 State is necessary for this consolidation to exist.
13 The question by Bolivia is very simple. What does
14 that distinction consist of? Because the result is exactly the
15 same. Why is consolidation or why is consent necessary in
16 consolidation and not accumulation? If we go to Number 20, we
17 can see how in the ICS case that I mentioned, it is clearly
18 stated that in investment arbitrations, Claimants cannot
19 purport to change the arbitration offered by Bolivia. How is
20 consent formed in these kinds of arbitrations? Where is the
21 offer? Well, it is in the BIT. Where is the offer for
22 accumulation? Claimants cannot come here and change the offers
23 made by Bolivia in the U.K. and U.S. BITs.
24 Claimants, however, seek to modify that offer in spite
25 of the fact that there are highly reputed opinions, for

15:17 1 example, Georgios Petrochilos and Jan Paulsson's opinion in
2 connection that it is necessary for that to exist.
3 Now, if this were not enough--and this is
4 Number 22--the treaties that have been invoked are incompatible
5 in connection with certain issues. All of these issues are
6 jurisdiction in nature.
7 First, the U.K. Treaty only allows for counterclaims,
8 and if we go to Number 23, you know that the U.S. Treaty has a
9 fork-in-the-road provision.
10 And thirdly, the U.S. Treaty, number 24, includes a
11 definition of companies that includes Bolivian companies to
12 extend the protection of the investors.
13 Seventh, and this is Number 25, Claimants in their
14 pleadings invoke the Quiborax Case, but this does not help them
15 because there was only one Treaty in that case, and all the
16 investors were of the same nationality.
17 The eighth point is Number 26, and Claimants also pose
18 as an argument the fact that there are certain cases where
19 Claimants have invoked not only a treaty, but also a law or a
20 contract. When one analyzes the different cases that appear
21 here on 26, we can see that in these cases, the same Parties
22 were involved. For example, Perenco v. Ecuador. In that case,
23 consent was based on a treaty and on a contract signed by the
24 State itself. So, there is no ambiguity in this case, and the
25 Claimant is one of the Contracting Parties under the invoked

15:19 1 Contract.

2 Having said all this, Members of the Tribunal, you may

3 think that if this objection is accepted, it would bring about

4 a very harsh sanction by you, and you would say, well, this is

5 the end of this case. This case was ill submitted, and it

6 cannot continue, and you, Members of the Tribunal, can

7 think--and you can look at Number 27--that a decision to reject

8 the case on the basis of those arguments would be not very

9 pragmatic, that you would not be solving the case between the

10 Parties, so each one of the Parties should start new processes

11 and proceedings, and this is against procedural economy and the

12 resolution of disputes, but I would ask for you to take into

13 account two things. First, let's not think about pragmatism.

14 We are all pragmatic in this business. We have to be

15 pragmatic. We're here to solve matters, but no pragmatism can

16 eliminate the legal need for consent, Members of the Tribunal.

17 And I would like to say something in connection with

18 what Mr. Rubins stated. This issue of accumulation is not a

19 procedural matter. It's not that thanks to the Procedural

20 Order issued by you or by the UNCITRAL Rules you can do

21 whatever you please. You can conduct the proceedings as best

22 you think, but you cannot create a consent of a sovereign State

23 when that consent has never been expressed, and I'm making

24 reference to Slide Number 122 submitted by this Claimants this

25 morning. And no pragmatism can replace the legal need for

15:21 1 consent. At the end of the day, your award may be monitored.
2 For example, the Dutch courts may have the need to look at your
3 Award. And if consent is not clearly defined there, that award
4 may encounter problems.
5 The second issue that I would like for you to take
6 into account--and we're going to show this in a minute--due
7 compensation to Claimants is zero, so to dismiss this case
8 would not be causing any harm to them.
9 Claimants know that our objection is a strong
10 objection, Members of the Tribunal, so much so that just today
11 they made reference to Footnote Number 17 of their Rejoinder on
12 Jurisdiction, and they're saying please don't dismiss the whole
13 case. Just dismiss part of the case. Get rid of Rurelec or
14 Guaracachi America, and Bolivia has said, which one should be
15 should we leave out? Well, Bolivia said, well, we want to get
16 rid of both. But if you need to get rid of one, you can get
17 rid of Rurelec, and this is my own opinion, but now I'm going
18 to talk about the next objection. And let's move on to
19 Slide 29.
20 In our pleadings, Members of the Tribunal, we have
21 already explained that the Tribunal does not have ratione
22 personae jurisdiction on Rurelec in this case. You may
23 remember that we divided this objection into three different
24 arguments:
25 First, we alleged that Rurelec has not shown when it

15:23 1 acquired its indirect shareholding in EGSA, and we would take
2 you to our pleadings in this regard. Also, we have shown that
3 the U.K. Treaty does not include indirect participations, and
4 we can go to our pleadings to look at that as well, and we'd
5 like to look at Number 30, which is our third argument, and the
6 argument is that Claimants have not shown that Rurelec made an
7 investment in Bolivia.
8 Preliminarily speaking--you can go to Number 31--and
9 see the reference there. The case law in connection with
10 investments today is unanimous in the sense that there is an
11 objective concept of what an investment is, and two comments
12 are to be made by me in this regard. The first comment is that
13 it doesn't matter that the arbitration is under UNCITRAL Rules
14 or under ICSID Rules. The objective concept of investment
15 exists nonetheless.
16 The Romak Decision is very important here. We've
17 cited this. It is an UNCITRAL Arbitration, and it is said
18 there that the objective concept of investment must exist.
19 The second thing, which is a consequence of the first,
20 is that the different things that we find in the BIT system are
21 not enough to define investments. The list of items don't
22 define investments. They just identify what the Tribunal in
23 Quiborax case calls inverted objects, but you're not going to
24 find a definition of the action of investing. This action of
25 investing has to be looked at to decide in a specific case

15:25 1 whether an investment existed or not.

2 In the Quiborax Case--number 32--and Allan Fosk, one

3 of the Claimants, that has shown that he held shares in the

4 relevant company, failed to show that he paid for those shares.

5 Given an objective definition of "investment," the Tribunal in

6 the Quiborax Case concluded that Allan Fosk had made no

7 contribution and that he had made no investment in Bolivia and

8 consequently it decided that it had no jurisdiction and no

9 competence in this case, and Allan Fosk is no longer a party to

10 the Quiborax Case.

11 And in this case, the same thing happens. Rurelec

12 never showed that it paid for these shares that it apparently

13 holds. Rurelec seeks to show that it made three consequent

14 contributions that may be equivalent to this first criteria of

15 this objective concept of investment that I referred to.

16 First--this is 33--they say that they paid $35 million

17 to acquire their shares indirectly speaking. We can show you

18 the record. There is no evidence of that payment. Just like

19 Allan Fosk wasn't able to provide evidence, effective evidence

20 of the payments that he had to make. Then if we go to

21 Number 34, they seem to allege that there was a know-how

22 transfer of sorts. There is no evidence on the record that

23 there was a know-how transferred. At some point they say that

24 the arrival of Rurelec improved the operation and management of

25 the company. No evidence exists in that regard.

15:27 1 Now, looking at the state the company was in on
2 May 1st, 2010, and the level of indebtedness that it had when
3 it was nationalized, well, if that is a transfer of know-how
4 and it has to do with how to operate and manage a company,
5 well, I don't know what kind of contribution that is.
6 Claimants also made reference to a Fitch report where
7 they talk about the importance of Rurelec behind EGSA. Very
8 well, this may be quite important, but no mention is made there
9 of a transfer. Here we're talking about the fact of investing,
10 the action of investing. Where is Rurelec's contribution in
11 that Fitch report? That Fitch report proves absolutely
12 nothing.
13 Third, and we go to Number 35 now, Claimants say that
14 an investment is a guarantee by Rurelec to obtain the CAF loan
15 for EGSA. Well, a guarantee is a commercial transaction,
16 purely speaking, and you know that a guarantee cannot be
17 guaranteed as an investment. If not, all bank guarantees that
18 are given in construction projects would make the banks
19 investors, and we all know that that is not the case.
20 So, there is no investment, and Rurelec cannot be
21 qualified as an investor as the Attorney General was indicating
22 in his Opening Statement.
23 Let's look at our third Objection to Jurisdiction, and
24 this has to do with Bolivia denying the benefits of the U.S.
25 BIT to Guaracachi America.

15:29 1 I would like to make two comments in this regard. You
2 have read the witness statements that have been proffered by
3 Claimant, and you're going to see, I'm sure--I'm sure you've
4 seen that there is ambiguity in the terminology used.
5 Guaracachi sometimes is referred to as EGSA--that is to say,
6 the company that operates the thermoelectrical plant and where
7 Guaracachi is sometimes referred to as Guaracachi America. One
8 has to be very careful with this confusion that exists in the
9 witness statements because, as you have understood, these are
10 completely different realities.
11 If you go to 37, and Noah Rubins, my friend, was
12 mentioning this a little while ago, Bolivia denied Guaracachi
13 America the benefits under the Treaty on the basis of two
14 conditions that are provided for in the U.S. BIT.
15 First, evidently, there is no controversy among the
16 Parties, as Noah Rubins himself admitted before. There is no
17 dispute between the Parties in the sense that Guaracachi
18 America is controlled by Bolivia Integrated Energy Limited, and
19 this is a company that was incorporated in the British Virgin
20 Islands. So, that first standard is stated, and we don't have
21 to talk about it anymore.
22 But in connection with the second standard, there is a
23 dispute. We say that Guaracachi America does not conduct
24 commercial activities that are substantial in the United
25 States, and consequently believe it can deny the benefits under

15:31 1 the Treaty.

2 We now go on to Slide 39 in connection with its second

3 condition that Guaracachi America does not have any significant

4 business in the U.S. The Claimants that have the burden of

5 proof because they're the ones that do something or don't do

6 anything in the U.S. have not proven that Guaracachi America

7 does have substantial business activities in the United States.

8 In spite of that burden of proof, the Claimants allege

9 that Bolivia has not proven that Guaracachi America does not

10 have any substantial business activities. That position is

11 incorrect because of nine reasons:

12 First, this is just basic logic, and this is something

13 that we learned in any courses on procedural law, and it is not

14 possible to prove any indefinite potential proposition. If

15 they are trying to have us prove that they don't do something

16 in the U.S., that is impossible.

17 Guaracachi America, second, is the one that can

18 actually provide the proof or the evidence of what they do or

19 they don't do as Anthony Sinclair clearly said in an Article

20 that we cited at Slide 39.

21 Third, if we go to Slide 40, the only goal recognized

22 by Noah Rubins was the subscribing of the 50 percent of

23 Guaracachi's shares. That is not substantial business activity

24 in the U.S. as we see at Slide 41, in spite of what the

25 Claimant said because they're saying that that is the only

15:33 1 object of Guaracachi America is because they asked us to have
2 Guaracachi America have that only goal, but Guaracachi America
3 was never required to be incorporated just to subscribe
4 50 percent of the Shares with EGSA.
5 At 41, you can see the Bidding Terms used in the
6 bidding that led to the capitalization of EGSA.
7 At 42, we see a quote from Pac Rim versus El Salvador,
8 and there we see a very similar fact basis. There, it is said
9 that if the Shares were held in El Salvador, that was not
10 equivalent to significant business activity in a different
11 country. So, based on that decision, I am telling you now that
12 Guaracachi America's shareholding cannot be a significant
13 business activity in the U.S. territory. It would be an absurd
14 proposition.
15 At Slide 43, can you see here on the slide that
16 Guaracachi America did not pay any taxes in 2011-2012, and we
17 all know that if there is any business activity, usually in the
18 world you need to pay a tax.
19 Fifth, Slide 44, they're telling us that Guaracachi
20 America has their offices, registered offices, but this is one
21 of the requirements to have this paper company, shell
22 companies.
23 Sixth, they're telling us we have a principal office
24 in Akron, Ohio. We're showing that this does not belong to
25 Guaracachi America, but rather First Energy that was the

15:35 1 Shareholder with Guaracachi America, and the principal office
2 is another requirement in Delaware, but this does not indicate
3 significant business activity. And they're also telling us
4 that they're appointing an agent, but an agent is just a
5 formality for Delaware law.
6 Eighth, they're telling us that meetings were held,
7 meetings of the stockholders, and also the appointment of
8 directors, and they're also indicating that those are
9 significant business activities, but they're just legal
10 requirements.
11 And if we move on to 48, we're going to see that only
12 one extraordinary Shareholders meetings was held in 2008 to
13 approve the resolutions required by CAF, the Party that gave
14 them the loan, in connection with EGSA's loan. So, the only
15 meeting was held to accept the loan.
16 And at 49 they're telling us that the appointment of
17 the officers is a significant business activity, but once again
18 this is a just a legal requirement in Delaware.
19 Where are the contracts that were entered into by
20 Guaracachi America? Where are the businesses offices in the
21 U.S.? None. There is no business activity, and there is no
22 significant business activity. My friend, Noah Rubins, was
23 saying that we need to define "substantive." Substantive is
24 substantive, and important is important. And given, Members of
25 the Tribunal, that the Claimants clearly know that Guaracachi

15:37 1 America does not have any significant business activity in the
2 U.S., they have resorted to an argument that could save them.
3 And what is this so-called "argument"? And that is
4 that it is too late for Bolivia to deny the benefits of the
5 agreement to Guaracachi America.
6 And the argument is quite surprising--I have not
7 understood it fully--but that is my problem--because they are
8 doing an exercise in hindsight. How can we look back here,
9 that the meaning is different based on the way I studied law,
10 but they're saying that the denial of benefits would not be
11 allowed because this would be something done in retrospective.
12 So I understand this denial of benefits should have been done
13 with a capitalization. So now the problem is that when EGSA
14 was capitalized, the Treaty, the Agreement with the U.S. was
15 not in force. So, what they are saying is the company was
16 capitalized and Bolivia should have said I deny the benefits of
17 a Treaty that is non-existent. Well, if that is the concept
18 that they are proposing, let it be, and this mistaken position
19 is explained through four different concepts:
20 First, and my friends on behalf of Claimants, have
21 asserted concept that indicate that whenever something is not
22 favorable to them, we are rewriting the Treaty, but whenever
23 something is not convenient to us, they are rewriting the
24 Treaty. So they're referring to a temporal denial of the
25 benefits, but there is no limit, no temporal limit based on the

15:39 1 Treaty. Bolivia may deny the benefits, but there is no
2 proscription. Therefore, if we look at the text of the
3 Article, we can see the basis for that assertion.
4 Second, it is impossible in practice to deny benefits
5 at the moment they are notified of the dispute whenever the
6 Dispute notification is served--that is to say, when they
7 realize that they cannot assume that the benefits are denied
8 prior to the existence of the Treaty, they're saying, okay, you
9 need to deny the benefits whenever the notification is served.
10 But prior to--before that, there is a cooling-off period, there
11 is a period to negotiate, and those notifications never include
12 the claims, and something that should be made clear is that
13 this denial of benefits is part of the discretionary power that
14 the State has and the State may decide whether they deny or not
15 those benefits. And because of that discretion, the State
16 should have the information on the claims, the amounts, whether
17 they can be solved amicably or not, especially in connection
18 with the notification of the dispute. The idea is to begin the
19 negotiation and the denial of benefits at that point in time,
20 in my opinion, is impossible.
21 In addition to that, as I mentioned already, we have
22 two notifications of dispute, and it is even more complicated.
23 Third, when the notification is served, it is
24 impossible, they are saying, to deny benefits. So they're
25 saying, well, it should be done upon receiving the Arbitration

15:41 1 Request. But at the moment of the Arbitration Request, the
2 issues are not clearly explained. It is impossible or
3 difficult for the State to use that discretion at that point in
4 time, so the question is, and now I move on to Slide 54--when
5 can benefits be denied?
6 And the great advantage is that the Treaty does not
7 establish any limits. Let's look at any time limit. Bolivia
8 is not unreasonable.
9 So, what is the time limit? This has already been
10 stated by two Tribunals, Pac Rim Cayman versus El Salvador and
11 Ulysseas versus El Salvador. In the first case, this was an
12 ICSID case and the interpretation by the Tribunal was that
13 since the consequence of the denial of benefit is for the
14 Tribunal to declare its lack of jurisdiction, the last moment
15 to deny the benefit is the last moment when the ICSID Rules
16 establish an Objection to Jurisdiction. That is to say,
17 whenever there is a Counter-Memorial by the Respondent, but we
18 have no Counter-Memorial according to the UNCITRAL. That is
19 the governing rule, and we have Ulysseas versus Ecuador, where
20 it says that the last moment is during the Reply or Statement
21 of Defence. And in our case, as you know, Bolivia denied the
22 benefits even before presenting the Reply because of the
23 jurisdictional objections that were presented prior to our
24 Statement of Defense. Therefore, if there is any time limit,
25 that time limit had been defined in the Ulysseas versus Ecuador

15:43 1 Case, and Bolivia denied the benefits earlier before that time
2 line.
3 Fourth, and lastly, Slide Number 57, the so-called
4 investors in this benefit of denial situation, should be aware
5 of the denial of the benefit from the moment the investment is
6 made. That is to say, when Guaracachi America participates
7 with EGSA after capitalization and upon signing the Treaty, the
8 Treaty should have been read, and the Treaty includes the
9 possibility of denial of benefits. That is the reason why the
10 Tribunal in Ulysseas and Pac Rim have indicated that the denial
11 of benefits does not go against the pacta sunt servanda.
12 The investor knew that benefits could be denied, and
13 here we are not referring, Members of the Tribunal, to
14 five-year olds. There is problem in these investment
15 arbitration cases, and that is the fragmentation that we have
16 seen of international law, but there is a principle that you're
17 quite familiar with and that has been developed by the PCI
18 legal cases, and that is part of the trade law and is a
19 principle that was developed by the Arbitrators, and
20 international claims like this are assumed to include competent
21 professionals, so they cannot tell us, we did not know that we
22 could be denied the benefits. But we do know that those
23 Claimants are so smart that they hire excellent lawyers.
24 So, what is the consequence of this denial of
25 benefits, Members of the Tribunal? The consequence is that, as

15:46 1 you have mentioned, and this is Slide 59, the tribunals have
2 decided that they have no jurisdiction on the propositions
3 presented by Guaracachi, Inc., and this is also seen in the
4 Ulysseas and Pac Rim Cases. You may think that this is a very
5 drastic solution, but as you can see, at Slide 60, Anthony
6 Sinclair is telling us the goal of this denial of benefits, and
7 the goal, to sum up, is for the States to agree to avoid claims
8 from certain entities that they referred to as mailbox
9 companies, and if you look at the evidence in the record, it is
10 undisputed that what Guaracachi America, Inc., is a mailbox
11 company, and this mailbox company, together with the company
12 that has the--hasn't done any investment in Bolivia, Rurelec,
13 and accumulating treaties, Parties in an undue fashion, are
14 claiming for compensation due to nationalization of a company
15 that has a debt that exceeded their equity, and that's how I
16 get to the nationalization, and that is the second topic that
17 we would like to address today.
18 In connection with the nationalization, Members of the
19 Tribunal, we are going to address six different issues. I will
20 refer to the first four, which are the easier ones, and García
21 Represa will be referring to the more complicated valuation
22 issues later on. First of all, we are going to introduce some
23 factual, some fact corrections, in connection with the
24 nationalization, and then we are going to refer to the creeping
25 expropriation concept. In case of a nationalization, we're

15:48 1 going to say that nationalization was not illegal.
2 Fourth, we're going to refer to due process.
3 Fifth, we're going to refer to valuation.
4 And, sixth, to the interest rate to be applied.
5 And also in connection with to what we heard this
6 morning.
7 First, let me very quickly mention 10 important facts
8 in connection with the history of nationalization.
9 First, Slide 64, the decision to nationalize the
10 electricity generation companies in Bolivia was public
11 knowledge as of 2005 when the Government program was published
12 that covered 2006-2010, and Rurelec said they bought the
13 company in January 2010. But we don't know what they paid or
14 if they paid anything.
15 Second, there is no doubt that as late the
16 nationalization decision on EGSA was communicated to Earl,
17 Aliaga, and Blanco in February 2009. Therefore, the assertion
18 by the Claimants the nationalization was surprising does not
19 make any sense in this case.
20 Third, Slide 66, at any rate, negotiations to avoid
21 nationalization, there was an attempt to negotiate for the
22 State to buy the Shares held by Guaracachi America, Inc. These
23 negotiations started in May 2009. You can see some letters
24 here on the slide from the Minister of Hydrocarbons and Energy,
25 and these are letters addressed to EGSA. At Slide 67 we see

15:50 1 some reference by Mr. Earl who said that the negotiations
2 started in 2008, but this is mistaken because they only started
3 in 2009.
4 Fourth, Slide 68, what was the result of the
5 negotiations to avoid nationalization? As stated in the
6 minutes of EGSA's meeting, no agreement was reached on the
7 value of the company; therefore, no agreement was made or
8 reached on any payments to be made in favor of Rurelec, and
9 those negotiations came to an end back then.
10 Fifth, Slide 69, Bolivia has announced and also after
11 an attempt to negotiate in good faith with Rurelec and
12 Guaracachi America, rather Rurelec because Guaracachi America
13 is a shell company, decided to nationalize EGSA. And as you
14 are well aware, they did show through Supreme Decree 493 of
15 May 4th, 2010, and that was the way to nationalize Guaracachi's
16 shares in EGSA.
17 That Decree states two things: First, that there
18 should be a compensation; and, second, that there is a goal to
19 obtain the value of the compensation, and the value will be
20 determined as a result of a valuation process to be carried out
21 by an independent company to be hired by ENDE within 120
22 business days. And these are clear conditions, and this is an
23 evaluation that has to be conducted by an independent company.
24 At Slide 70, we see that the witnesses of the
25 Claimant, as part of a dramatic story, tell us that this was a

15:52 1 violent act of nationalization, and the Attorney General has
2 already expressed how this is incorrect. And Mr. Paz, one of
3 our witnesses that will be appearing here before you, also says
4 in his statement that this assertion is not correct. It is
5 very easy to use photographs and to make assertions that the
6 army got there so that you can have a negative image of Bolivia
7 and you can conclude that Bolivia should pay something to these
8 "investors." That rhetoric should not be included in this type
9 of forum.
10 Seventh, at Slide 71, based on Supreme Decree 493 and
11 they organized a bid in June 2010 to hire that independent
12 company to value the three electricity companies in Bolivia to
13 be nationalized, and we already mentioned them. Valle Hermoso,
14 Corani S.A., and EGSA, the company that is at the core of this
15 claim.
16 And it is important to indicate that this call to
17 present bids introduced three concepts: First, that the
18 independent company had to use the Discounted Cash Flow as used
19 by the experts here Mr. Abdala and Mr. Flores.
20 Second, the Bidding Terms also indicated that the
21 independent company had to have access to all of the financial
22 information, as they did.
23 And, third, the Bidding Rules also stated that the
24 independent company to conduct the valuation would also have
25 access to the offices of the three power companies that were

15:54 1 nationalized.

2 Eighth in Slide 75, on July 5th, 2010, Bolivia
3 explained Rurelec the mechanism and the various timelines for
4 the valuation process.

5 Ninth, Slide 76, in July 2010, Profin Consultants was
6 awarded the bid to value Valle Hermoso, Corani, and Guaracachi.

7 And the past last part in this timeline and for you to
8 be able to put together the truth after what you heard this
9 morning, on November 8th, Bolivia informed the Claimant that
10 EGSA's value is negative based on Profin's valuation. Indeed,
11 as we can see on Slide 78, Profin concluded that the estimated
12 value of the company was about $68 million. They also verified
13 as the experts have done in this case was $92 million.

14 In addition to 5.6, money that was available that
15 yields a negative value of 18,327,000. So, given these
16 figures, it is obvious that the company does not have to pay
17 any money. This shows, Members of the Tribunal, that this is
18 just a nationalization case, and I thought that we were also
19 going to be having the same understanding when my friend
20 Blackaby mentioned that direct expropriation, but I would say
21 that for over an hour we had to listen to a completely new case
22 that has to do with the violation of a Fair and Equitable
23 Treatment under the investment, and the nationalization case is
24 not as strong as they mentioned or they thought it was, and we
25 are looking for other criteria to get the check that I

15:56 1 mentioned at the very beginning.
2 And because this is a nationalization case, the theory
3 that is being used in some of their pleadings has to do with
4 creeping expropriation, but that makes no sense, and now this
5 takes me to the other issue that we wanted to address in
6 connection with nationalization. In the Counter-Memorial on
7 Jurisdiction, the Claimants are suggesting for this theory
8 first, and they're also referring to their claims, and in an
9 attempt to establish the link between nationalization and new
10 claims so as to run away from the jurisdictional objection
11 saying that the cooling-off period was not observed, but that
12 theory was not developed at length in their writings, in their
13 pleadings, in their Reply.
14 Slide 51 on the merits, 81, 82 in particular, the
15 Claimants are referring to some plot for creeping
16 expropriation, but they do not develop that theory. And
17 whatever be the case, at Slide 83, there is reference to the
18 Burlington Resources versus Ecuador case. It is absurd to
19 refer to creeping expropriation when there was expropriation.
20 These acts are equivalent to direct expropriation. Therefore,
21 creeping expropriation is excluded.
22 Now, I am here of the third comments on the
23 nationalization issue, and that is to prove that it was not
24 illegal because Bolivia does not owe any compensation to the
25 Claimants, and this is at Slide 85.

15:58 1 In connection with the treaties, the payment of
2 compensation should be the only obligation Bolivia has. At
3 Slide 26, Profin Consultores concluded the EGSA's value was
4 negative. Econ one, as part of this arbitration, also reached
5 the conclusion that the value was negative.
6 Now, to determine the adequate nature had to do with
7 the quantum rather than the liability. There shouldn't be in
8 this case illegal expropriation. The Claimants--and this is at
9 88--allege that the outcome by Profin Consultants was already
10 cooked, was already determined, but they do not prove that.
11 They're trying to say that these experts from Profin were not
12 independent. But where is their proof? How did they prove
13 that? How can they prove that there was corruption? How do
14 they prove that someone called them to do so or that they
15 exerted any pressure on them?
16 I was listening to my friend Noah Rubins, who said
17 that somehow we allege that they presented falsified documents,
18 that we never said that. And the Claimants have not
19 established that Profin Consultores was not independent. And
20 this is something key to this case.
21 This is actually something quite new to this case.
22 And more incredible enough is to have heard these
23 suggestions that there was a lack of independence. In the fact
24 was the case we have determined that in Valle Hermoso and
25 Corani, the other two plants, Profin found positive values.

16:01 1 Why? Because the debt levels of Valle Hermoso and Corani were
2 not the same as the debt that EGSA had.
3 So, here we have to look at the debt that Claimants
4 left in EGSA. If we look at 89, I wanted to underscore the
5 contradictions that Claimants find in connection with the
6 situation EGSA was in. EGSA was sometimes a wonderful
7 corporation, and this morning we heard everything that EGSA did
8 to increase the capacity of generation of electricity, but the
9 question is with what money? Well, with loans.
10 And sometimes they seem to recognize that the company
11 had liquidity problems. The fact is that there was a loan,
12 there was a debt, there was an imprudent distribution in
13 diligence, and that Rurelec did not put in a penny in the
14 business.
15 Now, this is my fourth and last comment that I will
16 make before yielding the floor to Jose Manuel, and this in
17 connection with nationalization. I wanted to underscore the
18 fact that due process was met during the nationalization
19 process. And I wanted to make two comments, very brief
20 comments of that.
21 First, Claimants do not allege that the Supreme Decree
22 of nationalization has implied a violation of due process. To
23 the very contrary, as I showed before, there were good-faith
24 negotiations before nationalization.
25 What they seem to allege and we've heard some of this

16:02 1 today, is that the violation of due process took place during
2 the assessment process or the valuation process, rather. I
3 don't see in the treaties an obligation to respect due process
4 during valuation. I think that Claimants are trying to redraft
5 the Treaty when it's convenient for them or when it behooves
6 them.
7 The violation of due process arises out of two things.
8 One thing that they have not proven is that Profin is not
9 independent, and there is no evidence in the record of that.
10 And second, they were not involved in the valuation process.
11 Bolivia gave all the information to the Experts, and the
12 experts provide a report, and they found a negative amount,
13 18 million.
14 So, what it does it mean that the two Parties have to
15 be involved? Well, this would lead to an arbitration anyhow,
16 trying to see whether Mr. Abdala or Mr. Flores are the ones who
17 are right.
18 And if we go to 92, as I was saying, Claimants are
19 trying to redraft the treaties. No treaty conditions, the
20 legality of nationalization to the respect of due process at
21 the time of valuation.
22 The valuation process, as I said before, yielded a
23 negative result. This was confirmed by Econ One in this
24 arbitration, and now I will give the floor to Jose Manuel
25 García Represa.

16:04 1 Is this a good time for a 10-minute break maybe?
2 PRESIDENT JÚDICE: I think that this would be a good
3 time for a five-minute break, and then we're going to resume
4 right away.
5 MR. SILVA ROMERO: Thank you very much, Mr. President.
6 Thank you, Arbitrators for your patience. Thank you.
7 (Brief recess.)
8 PRESIDENT JÚDICE: Whenever you're ready.
9 MR. GARCÍA REPRESA: Thank you, Mr. President.
10 Good afternoon. In the next few minutes I'm going to
11 provide details on the reasons why you should conclude that
12 Bolivia should pay no compensation to the Claimants. Unlike
13 what you've heard this morning, I'm not going to theorize, and
14 I'm not going to talk about the rhetoric about what the
15 Claimant should or should not have invested like my friends
16 have done without explaining to you who has invested and when,
17 et cetera, they all said that there are many machines that had
18 been established. Enron was an enormous company before it
19 fell, and ultimately it was worth zero.
20 I'm not going to exaggerate the position of my
21 friends, but the calculations made by Bolivia are not something
22 that comes out of magic, and they're not exaggerated,
23 especially the discount rate. I think I've heard the word
24 astronomic five times today. It is not astronomic when you
25 consider the risks of these kinds of operations by these kinds

16:17 1 of companies in Bolivia at the 2010 valuation date.

2 What I'm going to do, Members of the Tribunal, is to
3 show you the facts as documented and the numbers that you can
4 show where those numbers are. And I'm going to apologize
5 beforehand, but as you know, the devil is in the details. And
6 much more so after what we've heard this morning.

7 By way of introduction, I'm going to make seven brief
8 comments, just to give you a fair context of the economics of
9 the matter that we're going to deal with in just a moment. As
10 my colleague said a moment ago, this is a quantum case, and
11 this morning I must say we wasted about an hour up until 11:45
12 in the morning. Well, nothing was said on quantum. We talked
13 about investments, this investment, some things that have no
14 relevance whatsoever.

15 What is important, however, is if you conclude that
16 the Fair Market Value of EGSA at the nationalization date is
17 lower than its debt, there are three logical consequences.

18 First, Bolivia has no obligation to compensate. This
19 is clear under international law. If an act, even though it
20 may be illicit, exists there is no obligation to compensate if
21 the victim has not suffered no economic loss. A number of
22 tribunals have asserted so. And I'm going to give you an
23 example which is the Biwater Gauff Case where the Tribunal that
24 was made up of Gary Borne, Toby Landau and Professor Hanotiau
25 concluded, just like you should, that at the date of

16:18 1 expropriation the investment had no economic value whatsoever.
2 The second logical conclusion is that if EGSA was
3 worth less than its debt, there can be no unlawful
4 expropriation. The only argument of illegality that Claimants
5 have put forth have to do with lack of payment and the alleged
6 violation of the due process as Mr. Silva Romero said.
7 And the third conclusion is that this would mean the
8 end of this arbitration and the Claimants are going to have to
9 pay court costs. This Tribunal does not have jurisdiction on
10 the new claims by the Claimant that were presented at the last
11 minute to force Bolivia's hand.
12 The second preliminary comment is Claimants like in
13 other cases have the burden of proof. What do they have to
14 prove? The existence of a damage, and we are going to talk
15 about that now, and they have to also prove causation, and they
16 have to prove the amount of that damage, and that's where the
17 economists and experts come in.
18 We heard this morning that an valuation is not an
19 exact science. And well, there is a margin for error. There
20 are some incompletions. There are some uncorroborated data.
21 No. That is not the case at all, sirs. For you to say that a
22 payment has to be made, you have to be sure that the figures
23 are real, and I'm going to say why Claimants are not showing
24 actual figures.
25 My colleagues have talked about those issues where

16:20 1 there is no dispute. You're going to find a transparency that
2 shows this, the method of calculation, the willing buyer
3 standard. But I do have to talk about the importance of the
4 valuation date, and you are going to see later on that in this
5 case, the Claimants choose information, they pick and choose,
6 they are going to use something that was not in force at the
7 valuation date, and then they make up a model that is going to
8 yield a great result. We are going to see why this is in
9 error.

10 Another issue that is not disputed among the Parties
11 and we have heard a lot of insistence on this, is that at the
12 nationalization date, EGSA had a financial debt of
13 $92.7 million, and you've heard this before, and an important
14 accumulated number of unpaid invoices. More than $21 million
15 as of December '09, and $35 million at the nationalization
16 date, and this is very important because I'm going to tie it
17 with what I'm going to say next.

18 Fourth preliminary statement, the position of Bolivia
19 is not that EGSA was worth zero as of the nationalization date.
20 EGSA is worth less than its debts, so the value that a willing
21 buyer would have paid is null. There are many examples of the
22 sale of companies for zero when they have no value whatsoever
23 because they're heavily indebted. My colleagues talked about a
24 company that was bought for $2; in that case, 50 percent of the
25 company was bought for $2.

16:22 1 In the Statement of Defence, Bolivia explains the
2 value of EGSA at the nationalization date which is $91.3
3 million. As Mr. Flores explained, the Fair Market Value of the
4 Share capital is nil. Pro fin, the consultant that conducted
5 the first independent evaluation of EGSA, concluded also that
6 EGSA had a positive corporate value, 69 million, but the debt
7 was 92.7 million, so the value is negative, and that is why we
8 have seen no compensation offers.
9 Now, misunderstanding this position of Bolivia to make
10 it so that it's incredibly relevant--was expropriated and that
11 Bolivia zero value of defense, and this is not true either.
12 The debate is as to whether EGSA is worth more or less
13 than $97.7 million.
14 Third preliminary comment, Bolivia has always
15 recognized its international obligation to compensate for the
16 nationalization of the electricity companies. To compensate
17 means to pay the Fair Market Value of the company, just that
18 value and no more than that. The Decree that was mentioned
19 before that ordered the nationalization of EGSA, ordered the
20 nationalization of the other main generation companies in the
21 country, Corani and Valle Hermoso, it also provided for the
22 calculation of the corresponding compensation, same as with
23 EGSA. There was a public bid to choose a company to value
24 those three generators. Each one of those generators was
25 valued, and Bolivia paid the compensations that came out of

16:24 1 that valuation. 18.42 million for Corani controlled by GDF
2 Suez, and the lawyers here are the lawyers for Corani in this
3 case, and they know this case very, very well.
4 Bolivia also paid 10.25 million to the Valle Hermoso
5 Shareholders.
6 Now, if we have the same process for the three
7 companies and one of them has no positive value, why? Why is
8 that? EGSA was the only one that had no positive value because
9 its situation was quite different from the other two companies.
10 You have some press articles mentioning this.
11 Sixth preliminary comment, and I'm going to go into
12 detail later on, I'm sure you heard this morning and you saw
13 the pleadings of the Claimants, they say that this is a nice
14 company, a pretty company, and a buoyant company, but there is
15 no proof of that apart from an accounting that reflects things
16 from an accounting viewpoint but it doesn't reflect the
17 actuality of the situation.
18 And also there are certain reports by a credit rating
19 company that do not say what the Claimants wanted to say when
20 one tries to understand what a credit rating is in Bolivia.
21 I call your attention to certain accounting practices
22 of EGSA before the nationalization, and also a change in
23 accounting policy that occurred in 2009. Curiously enough, in
24 anticipation of the nationalization, it was decided to improve
25 these statements of account by deferring expenses so the

16:26 1 outcome is much better than what it really was, so EGSA had
2 serious economic and financial difficulties, and had it not
3 been for these changes in accounting, it would have reported
4 losses in 2009 as we will prove later on.
5 Now, regardless of what I just said, it is clear, and
6 we're not--we haven't disputed this, that the economic
7 difficulties before the nationalization are not per se what
8 determined the Fair Market Value at the nationalization date.
9 But this allows us to understand why EGSA at that date was
10 worth less than its debts.
11 The seventh and last comment is that the Dispute of
12 the Fair Market Value on EGSA revolves around two fundamental
13 issues. You can see those on the screen. Mr. Flores prepared
14 this, and it shows the differences between the Experts.
15 The first difference is the projections of future
16 income. You will begin by saying this because these income
17 projections are the basis of a flow of funds model. So why, by
18 looking at these charts, they say, okay, these are the
19 differences, and then there is a little part in yellow where
20 they say the difference is actually smaller. Well, this chart
21 does not represent the actual difference. Please look at the
22 last report of Mr. Flores' Report after the Second Report by
23 Abdala, and look at the chart there. Whoever has to do with
24 income represents a difference of 43 percent amongst the
25 Experts.

16:28 1 The second difference, main difference, between the
2 Experts is the discount rate that must be applied to the future
3 flow that has to be discounted, and there are other points, but
4 I'm not going to deal with them because we don't have enough
5 time.
6 As we're going to show, the position of the Claimants
7 has nothing to do with the reality of the electricity
8 generation in Bolivia and does not take into account the risks
9 inherent to this activity by a large company like EGSA that
10 would have been considered by a willing buyer.
11 I will now state in more detail the really bad
12 economic situation of EGSA as of the date of nationalization,
13 then I'm going to focus on explaining why the Fair Market Value
14 calculated by the Expert opponent by Bolivia with realistic
15 suppositions and data at the date of nationalization is
16 reasonable and correct, and then I'm going to explain why the
17 alternative valuation methods proposed by Claimants are not
18 applicable, and then lastly I will talk about the calculation
19 of interest.
20 As I was saying, as a background, it is useful to look
21 at the financial and economic status of EGSA at the time of
22 nationalization, and here I'm going to say that there is a
23 difference between the initial pleadings of the Claimant and
24 the situation that we're living today.
25 The first pleading mentioned no difficulty. EGSA is

16:30 1 clean, in a perfect status, it reports benefits. Nothing
2 happens. As Bolivia started to explain the economic
3 difficulties in this case, the Claimants say, okay, yes, we did
4 have some difficulties, but they were temporary in nature, and
5 Bolivia has been lucky enough to find internal communications
6 that Claimants conducted in EGSA, and by looking at those
7 communications you are going to see the true reality of the
8 company and not what they are having you believe today.
9 What is that reality? Well, since the Fiscal
10 Year 2008, EGSA was no longer able to pay dividends, including
11 accounting dividends on paper. Claimants say, well, we left
12 the dividend money to invest. This is not a good Samaritan
13 company. What happened is the company could not pay for those
14 dividends because it didn't have any cash. Had it done so, it
15 would have violated a series of covenants and financial
16 commitments that would have been made payable the date of the
17 company and this would have entailed bankruptcy.
18 In March 2009, Fitch rating reduced the rating because
19 of the weakening of their rate profile due to the financing of
20 their investment plan with debt. Now, two issues in connection
21 with this, and Silva Romero already alleged to this. All this
22 was financed with EGSA debt. There was not a single dollar
23 that was contributed to this by the Claimants. As Mr. Paz
24 indicated as a result of this reduction, in the credit rating,
25 EGSA just decided to change company. From Fitch they moved on

16:32 1 to Pacific Credit Ratings, and that's the reason why the
2 Claimants are focusing on what Pacific Credit Ratings said.
3 But you should not be confused by what the Claimants told you,
4 where they're saying AA or AA2, that is a Bolivian rating
5 system. If you look at Mr. Flores's Report, you're going to
6 see why that rating is not comparable to Fitch international
7 ratings.
8 Another undisputed fact, is that in December 2009,
9 Mr. Blanco, the Financial Manager of EGSA, and this is one of
10 the pieces of information that we were able to obtain,
11 indicated that EGSA wasn't able to obtain more financing and
12 they had liquidity problems. It was not provisional. They had
13 already exhausted all of the resources to obtain funding and
14 financing and their level of debt was too high to obtain any
15 financing.
16 And I think it is important now to refer to
17 December 22nd, 2009, you already heard this morning that by the
18 end of 2009 CAF was willing to extend financings but that is
19 not the case. I would like to see one single document where
20 that is stated. C-307 is the press communication by Rurelec,
21 but where do you see the letter by CAF indicating that there
22 was any offer to finance.
23 And in January 2010, Mr. Blanco insisted on the
24 illiquidity and the impossibility of obtaining financing, and
25 I'm going to read this in English: I would like to recall you

16:34 1 that the combined-cycle project and San Matías do not have more
2 cash available, and the CERs, that's the carbon credits, money
3 have to be used to pay back the bridge loans we got in December
4 of last year. That was with the Visa bank, and there are other
5 references, all different lenders. Furthermore, it will be
6 almost impossible to get additional financial resources,
7 without complying with the covenants.
8 This is also said by the Claimants' witnesses before
9 starting this arbitration.
10 Now, why is this text relevant? Because, contrary to
11 what you heard today, the money that had to be received from
12 the CERs, that is the 4.5 million, that money was not going to
13 solve the illiquidity problems. That money had already been
14 committed to paying back a bridge loan that had been obtained
15 in November. So how could that solve the liquidity problems.
16 And this also shows, as Mr. Daniel Flores explains,
17 that excess problems were more serious than just a mismatch of
18 the Treasury funds. Mismatches are common, and that's the
19 reason why there is banking finance, but if no bank is
20 available to finance the Treasury, that indicates a serious
21 problem.
22 So, we continue with this timeline, and what the
23 Claimant said. This is not something that Bolivia said. This
24 is the minute of EGSA's Board of Directors January 2010, and
25 I'm going to read what it says, and you can reach your own

16:35 1 conclusions. Given the liquidity of the company, payments to
2 suppliers have been suspended, and no new purchase orders are
3 being placed, and this is going to have a negative impact on
4 the completion date of the project, and the project refers to
5 the combined-cycle project. So when they tell you that this is
6 provisional or as soon as the combined goes into operation, the
7 problems are going to be solved, but bear in mind that no new
8 purchase orders were being placed and everything had been
9 installed, and there was no information as to when this
10 combined-cycle was going to be completed.
11 Now, we come to February 2010. This is a date close
12 to the nationalization, in February, and here invoking a
13 significant delay in the operation of the combined-cycle
14 project that has an impact on higher financial costs. EGSA is
15 requesting CAF to modify their Financing Terms and Conditions
16 since EGSA knew that they were unable to comply with those
17 terms.
18 And there is also an external report dated March 2010
19 that shows how EGSA's auditors say that they have met the
20 requirements by CAF, and we also know that CAF never authorized
21 any of this prior to the nationalization. The Claimants say
22 that this was authorized, but that was after the
23 nationalization. A willing buyer cannot be--base his or her
24 decision on the fact that CAF, that is a development rather
25 than a commercial bank, will give me concessionary conditions,

16:37 1 and that is not what a willing buyer would take into account.
2 Now, we continue, and I'm sorry because I continue to
3 insist on the facts, and in my opinion this is key for you to
4 have a good knowledge of the situation in March 2010.
5 Mr. Aliaga, then General Manager and nowadays witness of the
6 Claimants, recognized that EGSA could not continue to apply the
7 tariff, the Dignity Tariff, and this was below a million
8 dollars a year for them, and they said that they could not
9 continue to apply this because they were in a deep illiquidity
10 situation with an unsustainable cash flow, and their
11 indebtedness capability had reached a threshold, and it was
12 impossible to have access to other loans.
13 So, if CAF had already pledged their support, why was
14 the General Manager saying what he was saying here? In
15 March 2010, Mr. Blanco was even clearer, and here I am going to
16 quote this as it reads here. The General Manager says,
17 furthermore, we don't have money to even pay our bills.
18 Given this situation, we get to the nationalization
19 date that you have for your consideration. EGSA owed suppliers
20 almost $35 million, 21 million as of December 2009, according
21 to the Financial Statements.
22 Now, the Claimants' explanation is that, here I quote,
23 "EGSA was financed with the money of the suppliers." One thing
24 is to negotiate and agree with the suppliers some delayed
25 payment conditions. This is something that can be agreed

16:39 1 between the companies, but something completely different is to
2 have a cease of payment. Now, to have cease of payments with
3 the suppliers is basically mockery.
4 And given that commercial debt, what's the biggest
5 share? Are we referring payments to the only gas supply? The
6 key input that EGSA needed to operate, but if we think of how
7 much they owed, they owed almost $14 million, that is
8 equivalent of seven months of gas consumption for the company,
9 and as you can see in this document that was provided by the
10 Claimant, the last payment they made prior to the
11 nationalization had to do with the partial payment of the first
12 invoice for consumption in October 2009.
13 Now, compare this data to what we hear in their Reply,
14 they said that EGSA had no problems, Guaracachi was not in
15 arrears on loan payments, nor did it accumulate unpaid gas
16 bills. That is at Slide 122. Mr. Abdala, in his last report
17 actually recognized that these invoices needed to be paid
18 immediately, and Supply Contract between YPFB and the company
19 said that if we do not pay within 30 days I'm going to
20 interrupt supply. And a company that is seven months in arrear
21 is not in a good situation.
22 So, as of the date of nationalization, there is a
23 commercial debt and also financial debt for $92.7 million, and
24 this is not even disputed.
25 And because of the deferral of some maintenance costs

16:41 1 and their accounting policy as well as some other adjustments
2 based on inflation, EGSA would have reported losses for over
3 10 million Bolivian pesos, almost $1.5 million in 2009.
4 Given the situation and the Claimants were careful not
5 to mention what happened after nationalization, the State was
6 forced to bail out EGSA with a contribution of over $20 million
7 with the national electricity company, including 5 million that
8 Corani and Valle Hermoso had to provide, and also a deferral of
9 the payments in terms of the debt they had with the gas
10 provider.
11 The only aspect that allowed for the recovery of EGSA
12 after nationalization, and once again a willing buyer not
13 having been able to consider this, is the financial bailout by
14 the State, and that was possible because EGSA was a State-run
15 company, and the willing company would not have had that
16 situation.
17 And, second, the compensation paid by EGSA's insurance
18 given an accident that occurred in 2011 due to a short circuit
19 in the combined-cycle project. The published data shows that
20 compensation equal $8.1 million, and this is not something to
21 be considered by a willing buyer.
22 Without these two factors, including in 2010, EGSA
23 would have reported losses.
24 All this, as I mentioned before, is just part of the
25 context.

16:43 1 Now we get to the economic aspects and that is why the
2 Fair Market Value of the company with realistic assumptions and
3 also the data as of the date of nationalization, contrary to
4 what the Claimants did, is a reasonable and appropriate
5 calculation.
6 Let me assure you that I will address the main two
7 divergency, the main two differences. The economies' point of
8 view, the discount rate to follow the same order that we see in
9 the economic model, I'm just going to refer to cost,
10 investment, and working capital because my colleagues have said
11 nothing about that, but it is somehow relevant to understand
12 how the Claimants have proceeded in this case.
13 To begin with, and I think that both Parties agree
14 with this, the DCF method is well-known that it is useful only
15 based on reasonable assumptions. It is sensitive to the input
16 by the various experts. Therefore, what I would like for you
17 to remember at all times is that the information is something
18 that a willing buyer could have known at the nationalization
19 date or whether these are just pieces of information that were
20 not existent at the time of the nationalization.
21 I am not going to give you a theoretical, a long
22 theoretical explanation. I'm just letting you know that we are
23 going to cover some of the input to this model, and we're going
24 to start with revenue. They tried to minimize this, but I'm
25 going to explain you why they did that.

16:44 1 In terms of revenue projections, we have clear
2 components. First of all, the sale of energy; second, the
3 compensation for capacity; and, third, the sale of carbon
4 credits. And I'm going to cover this in order.
5 Now, for the Tribunal, I am already at Slide 127.
6 The revenue for the sale of power has to do with the
7 remuneration received for the power that it sold per hour
8 within the EGSA system. There is a Spot Price that is applied
9 to each megawatt hour, and I'm going to suggest looking at this
10 revenue from the sale of power. The amount to be generated and
11 sold in the Spot Market in the future by EGSA unit is dependent
12 upon the future offer and demand of power and the various units
13 that contribute to that offer and demand.
14 Why am I saying that? On the one hand, you're going
15 to see that the CNDC documents offer you the first component,
16 the demand, and you're going to see databases and information
17 published by the National Committee, CNDC, this organism, this
18 entity that includes transmission, distribution, and State
19 representative. CNDC is the one that has to make sure that the
20 offer is enough to satisfy or to meet the expected demand and
21 clearly the power demand depends on the year and the time of
22 the day. That has to be based on projections, also based on
23 information communicated by power generators.
24 What are the two main documents that include those
25 projections that are established by CNDC?

16:47 1 First of all, there is a document that is called the
2 Optimal Expansion Plan, POES, and POES includes 10-year
3 projections for the new generators, the new hydroelectric
4 plants that are going to become operational. And this POES is
5 updated yearly. Some of the projects are slower than others,
6 others are abandoned. But you're going to see on this slide
7 taken from the information provided by Mr. Paz that POES uses
8 the information provided by the companies. And this POES is
9 mandatory. This is the first document that I wanted to refer
10 to this. This is a document by CNDC. The second one is the
11 mid-term planning report, PNP, and that is the weekly planning
12 of the system for the next four years.
13 Why am I referring to this PNP as opposed to the POES?
14 Because the PNP is more detailed. This is the document that
15 includes the databases, for example, hydrology and all of the
16 information that would allow for the creation of simulation and
17 models in the future.
18 Because of that, Mr. Paz uses POES and PNP which were
19 available on valuation date to estimate projections for
20 dispatch, and there is some other information provided by CNDC
21 that could cover weekly or daily dispatch numbers, and I'm not
22 going to mention that to simplify the situation.
23 So, once the energy or the power required by the
24 system is established, the demand, the amount of power to be
25 dispatched by EGSA's units to meet that demand is based on the

16:49 1 efficiency of the various units that are contributing to the
2 system. Why is it based on the efficiency? When we're
3 referring to the efficiency, the most efficient units are the
4 once that produce power at the least cost, the most inefficient
5 are the ones producing at the highest cost.
6 And in Bolivia and many other countries, the principle
7 is that power has to be provided at the lowest cost available.
8 Therefore, the most efficient units are called to provide
9 service. And as demand increases, those units that are less
10 efficient start to operate too.
11 At 129, you're going to see on the left, based on CNDC
12 information, the generation cost for the various units in the
13 country in May-October 2010, and this was a document that was
14 published on April 30, 2010, a day before the nationalization.
15 All of the units are the units held by EGSA.
16 And as you can see, given the efficiency level, first
17 of all, you have the hydroelectric plants with minimal costs,
18 and you have a pass-through units or reservoir units, and here
19 we have the combined-cycle which was already projected or
20 expected for 2010. You can see increase of cost as you go down
21 the table, and you get to the very end of the table where you
22 see the famous diesel or dual engines of the Aranjuez Plant.
23 Let me mention something that in my opinion is
24 interesting. The highest price of a turbine per megawatt is
25 1798. So--1857, sorry. So instead of the 1857, the price goes

16:51 1 on to 4196. The price is more than twice as high, and the red
2 box is that you saw are not correct.
3 PRESIDENT JÚDICE: I'm sorry, I have a question. Do
4 you know the reason why CNDC has not requested the
5 decommissioning of those turbines since they're so expensive?
6 MR. GARCÍA REPRESA: That's a very good question
7 Mr. President. When the projections were done, CNDC was
8 establishing or determining that there could be demand for
9 those units, and let me warn you this is already included in
10 the model, but when those units become so inefficient that they
11 cannot contribute to the system because there are some other
12 more efficient units, those should be decommissioned, and
13 that's one of the pieces of criticisms that we have to the
14 model provided by the Claimants. According to them, these
15 units are always operational, but these are the same units that
16 were eliminated for estimating the Spot Price. It doesn't mean
17 that they were decommissioned. They can continue to operate,
18 but they're not going to determine the price for all of units,
19 they're going to have as a compensation a variable cost, but
20 they're not going to lose money. They will continue to have
21 some revenue, but it will not be a windfall situation.
22 Now I move on to the right, based on the CNDC data,
23 this is an example of the units and how they go into operation.
24 At the bottom you have the hydroelectric plant and how they're
25 more efficient, and we get to the top where we have the least

16:53 1 efficient plants, and you can see the dual engines by EGSA
2 towards the top.
3 So, look at the blue color on the page, look very
4 closely, and you are going to see the dual engines, and you're
5 just basically going to see that this is only during the peak
6 consumption times. This morning when I said that given the
7 modification of the Spot Price, now we're going to remove units
8 six, seven, and eight, and I did the estimate, and if you
9 remove that, you are removing almost 40 percent of the
10 offer--of the supply. And this is in the document, the dual
11 engines only provide for 0.3 percent of the demand, and it was
12 said that those units that supplied less than 1 percent of the
13 power would be excluded from the Spot Price calculation. That
14 was the regulatory change that was explained to you this
15 morning.
16 Upon determining the supply and the demand and also
17 the units that would contribute to the future needs, we are
18 here to estimate the price to be imposed on that amount. The
19 Spot Price is regulated by Operational Standard Number 3. That
20 is--that was issued in 2008. This includes dual
21 engines--dual-diesel engines, and as my colleagues mentioned
22 this morning, the principle of Spot Price is to compensate all
23 of the units given the total cost of production for the
24 available unit necessary to inject an additional kilowatt an
25 hour into the system. So that is the marginal unit. And as I

16:55 1 mentioned, that is the one to set the price for all of the
2 other units.
3 This is a clear incentive, in spite of what we heard
4 this morning, to maintain very inefficient units, and you,
5 Mr. President, asked, how could it be that those units with
6 such an expensive level of operation are still operational?
7 How could it be that EGSA sold gas-fired turbines that could
8 have been installed very efficiently, but they maintained these
9 engines from 1970. Why do they continue to have this type of
10 engines in production?
11 PRESIDENT JÚDICE: Why is it that CNDC said okay, we
12 need to Commission these ones rather than the other ones?
13 There was a right to ask for the decommissioning, so it is not
14 clear to me. Of course, it might be clear at end, but I do not
15 understand it now.
16 MR. GARCÍA REPRESA: I'm trying to jump ahead here.
17 There is also an issue of retransmission. If one unit, a
18 remote unit may have a very high cost, but that network does
19 not include any other unit that could replace it, these units
20 may be as to operate as part of a network that is not
21 interconnected to the National Grid.
22 And here I'm trying to simplify the issue, but the
23 Claimant should also take into account the transmission lines.
24 If they're not developed, we cannot have a highly efficient
25 transmission system, and that is one of the other problems that

16:56 1 was ignored by the Claimants.

2 And my colleagues can help me get a better

3 understanding before the end of the hearing, I imagine.

4 PRESIDENT JÚDICE: Thank you.

5 MR. GARCÍA REPRESA: What are the mistakes made by the

6 Claimant when estimating the revenue and to determine the

7 revenue based on the capacity? And let me explain to you how

8 to conduct this calculation.

9 First of all, you need to look at the supply

10 projection that is part of the POES, and you're going to see an

11 image of the POES. I wouldn't like to go into too much the

12 detail, but this was the POES enforce at the time of

13 nationalization. And if you look to the right, at Slide 131,

14 the second to last line refers to Rositas in Santa Cruz that

15 was commissioned on January 18th, and the capabilities 400,

16 this is four times more capacity than what was already provided

17 for. This is January 2008. So you take the supply and the

18 contribution of all of these units, that electric units are

19 more efficient and they're going to take the place of those

20 that are less efficient. And second we looked at the demand

21 projection, the POES already gives us information as to the

22 percentage increase, and all of this information is introduced

23 into a piece of software as authorized by CNDC, and Mr. Paz can

24 explain this, and FSCVP (ph.) is the software that actually

25 estimates the power dispatched, that is to say the power

16:58 1 produced by EGSA's units to meet the demand at a minimal cost.
2 So you're going to see the number of units to operate to
3 produce so many megawatts and also what the price is per hour,
4 and that is useful to estimate the total revenue, the total
5 future revenue. At Page 133, you have projections by Mr. Paz,
6 and you have the results of this study, 2018, because it is the
7 same horizon of projections used by MEC. And that is the
8 question, why 2018? And we're going to see now why.
9 So, we have seen already the Claimants' mistakes,
10 first mistake. They select information that was unavailable at
11 the time of valuation. This is in hindsight, or it was
12 information that was already outdated by that date, and because
13 of this, there is an artificial inflation of the prices. As my
14 colleagues mentioned, these are not pessimistic assumptions. I
15 was surprised that this morning they did not show you any of
16 the documents that I am going to show you now.
17 What do the Claimants do? First of all, they reduce
18 the supply of new units or they delay their commissioning, new
19 units that would have displaced, and this is at Slide 135, new
20 units that would have displaced those that were the least
21 efficient within EGSA.
22 To the left you have the expansion plan. This is the
23 current one at 35, the date of nationalization, we see Rositas
24 here, the last line, 400 megawatts, to the right you have the
25 expansion plan used by MEC.

17:00 1 What happened to Rositas? Did it disappear? Now
2 we're going to see why it disappeared.
3 What is the relevance of the reduction of the supply
4 of new units? Well, first, they inflate the power that EGSA is
5 going to contribute to the system, including those inefficient
6 engines, and also when contributing these inefficient engines,
7 the prices are going to artificially go up.
8 They achieve this result by ignoring the POES current
9 as of the nationalization date and they take the POES that was
10 published in 2010 in December.
11 Sometimes it's confusing because they say, I take the
12 2010 POES, the one published in December 2010 that covers a
13 period 2011-2021, but the one at the nationalization date was
14 published in November '09, and the projections go from 2010 to
15 2020.
16 So, what do the Claimants do? They inflate the
17 demand, how do they do that? They do that by using a document
18 that has the highest projection of demand increases.
19 Go to 136, you are going to see on the left the POES
20 used by Mr. Paz as of the nationalization date, and then on the
21 right you have MEC's. You see that in 2010 the projected
22 demand, the projected demand is higher in MEC's than in Paz's
23 report. If you look at the growth rates projected in 2012, in
24 Mr. Paz's, is .1 percent and 4.6 percent is what Claimants
25 used, so demand keeps increasing so that they have to

17:02 1 contribute more by using the EGSA units, and the inefficient
2 units are going to have to participate more, and the price is
3 going to be even higher.
4 Another error of the Claimant is that they simply
5 modify the expectations that the market had at the initial
6 nationalization date. At 137 we see the mysterious
7 disappearance of Rositas. If it had to be commissioned in
8 January 2018, according to the nationalization plans, why is it
9 no longer present in the information used by MEC? This is
10 especially serious because the POES, the POES that was not
11 there at the nationalization date, it includes Rositas, but not
12 in January 2018, but in January 2019.
13 What is the result? Well, it disappears from MEC's
14 projections because they are supposed to be commissioned in
15 2018. So, there are some questions to be posed in this regard.
16 What is the impact of this? Well, it delays the
17 commissioning of some of the units, for them to come later or
18 earlier. In the DCF model, the years that have the most value
19 are the first years in the model, the ones that have the lesser
20 impact on the discount rate. So, Claimants are trying to push
21 any project to the end of that model, and for the units to be
22 present during the first years.
23 The explanation of Abdala in its Second Report to
24 exclude Rositas is really surprising. Basically, what they're
25 saying is, Look, the Rositas project was way too big for

17:04 1 Bolivia, and that's why it was excluded. It's a fact, and I
2 have to resort to hindsight, Sino Hidro and Hidro China are
3 supporting this project, and this project is currently being
4 established and that this project is going to be carried on in
5 spite of the Claimants, and EGSA units sell more energy, and
6 they sell the energy at a higher price.
7 The third mistake of the Claimants, and this is going
8 to be of interest to the President--is that in the mathematical
9 calculations, they make mistakes. They conducted sensitivity
10 calculations after the calculations made by Bolivia. What
11 would have happened if I included Rositas in 2018? Well,
12 logically to commission that hydroelectrical plant, that would
13 mean the displacement of other units. So, we see in this
14 sensitivity analysis, Rositas, and the addition of new capacity
15 starting in 2015, we see that there are certain turbines,
16 Guaracachi one and two have a zero production rate. If those
17 turbines do not make any contributions to the system because
18 they're not efficient, how is it possible that in those years
19 the dual engines maintain production and they go to seven and
20 nine gigawatts hour, and that is there ad infinitum, and they
21 are always going to be giving me a price of $40 per megawatt
22 hour.
23 The fourth mistaken that I need to mention--and as you
24 can see there are many--is that Claimant maintained in
25 operation the Karachipampa 1 unit. At the date of

17:06 1 nationalization, it was foreseen that it was no longer going to
2 be a part of the system, and this is not something that Bolivia
3 says. Marcelo Blanco says, the Financial Manager of EGSA when
4 in January 2010 is presenting the yearly budget to the Board of
5 Directors. What is he saying? Well, Karachipampa 1 will stop
6 operating in August 2010 because it's going to withdraw from
7 the interconnect system. There was an application to withdraw
8 the unit from the system, and there were projections with the
9 CNDC to exclude that unit. What is the argument to include
10 these in the calculations by Claimants? They said no, the
11 company changed its criteria, and the company continues its
12 operations. Yeah, that's perfect that this happens after the
13 nationalization. That unit has nothing to do in this model.
14 To conclude, in connection with the projections of the
15 sale of energy, and I go at length because it's necessary for
16 you to understand where the problems lie because you have to
17 understand why Bolivia has insisted on excluding the
18 projections by MEC and by others. Well, as to the conclusion I
19 was saying, Mr. Paz has used the databases available at the
20 date of valuation considering the only change which is the fact
21 that the combined-cycle would have been operational by 2010
22 because that's what a willing buyer would have accepted, and in
23 November 1st, 2010, the combined-cycle started operations.
24 This is considered in the financial model by Bolivia and by
25 Abdala. So this thing about a delay of the combined-cycle

17:08 1 project, when, where it has zero economic impact on the
2 valuation models.
3 What Paz has not done is used hindsight and he has not
4 eliminated or included other projects that were not in the
5 projections of the CNDC, which are compulsory, so he has done
6 what a willing buyer has done without any kind of prejudice.
7 So, let's look at the second source of income, the
8 payment for capacity. My colleagues have explained these
9 things very well this morning for the basis for this payment,
10 so I'm not going to repeat myself, but I'm going to mention
11 something that they had not. They say the capacities paid on
12 the basis of the basic price for capacity.
13 So, this is paid by using half of that price,
14 something called the cold reserve. That is to say, some units
15 that are available but are not required by demand, and they're
16 on reserve, and at the disposal of the system, if there is a
17 failure in the system or if there is some kind of serious need,
18 so those units are paid at 50 percent.
19 So, we're going to see the amount and the price, so
20 we're going to be able to systematize the problems here. How
21 can we calculate the firm based capacity? Well, we go back to
22 the POES, this expansion plan, and the PNP, but we're going to
23 use a different software now, but I'm not going to go into the
24 details here.
25 So, Claimants have not calculated this firm future

17:10 1 capacity. If one considers the expansion of the system, there
2 are going to be variations as to the units that are going to be
3 contributed, what years, the less efficient units are going to
4 be contributing less, if the demand stays stable or is more
5 demand, et cetera.
6 Go to 143. To the left you see what MEC has done, and
7 to the right you have Mr. Paz's. Now, you're going to have to
8 explain this to me. Starting in 2012, all of the Guaracachi
9 units produce exactly the same. I cannot show you the end of
10 the model, but this is a constant starting in 2012. Why? What
11 has Mr. Paz done? Well, considering the projections of the
12 CNDC and the databases and everything else that has to be
13 considered, he estimated the capacity that will be paid in the
14 future. So, look at the right here. There are certain EGSA
15 units that are going to be displaced gradually starting in 2012
16 and 2013. They're being displaced, and they're being put in
17 the cold reserve status. This cold reserve status is paid at
18 50 percent of the basic Capacity Price.
19 So, here we have a series of errors by Claimants in
20 connection with their income projections.
21 So, let's look at this basic price for capacity. Now
22 I'm going to make reference to operating norm number 19. This
23 morning you were explained how there is a price based on the
24 cost of investing in turbines, this is a price that is
25 published by the gas turbine handbook to the cost of investing

17:12 1 in the turbine, there are other costs as well, transportation,
2 customs, et cetera. So this is going to include the payment
3 that the company is going to get to recover its costs.
4 Now, within these costs there is a component that is a
5 variable cost component, 20 percent. This was to be applied
6 until a change in February 2007, but these simulations have no
7 impact whatsoever because the Experts, both of them, consider
8 the latest regulations in force.
9 What are the errors in Mr. Abdala's calculation? It
10 has to do with the indexation of the price of turbines. This
11 morning, I was surprised to hear this, but you look at the
12 Turbine Producer Price Index, and you say okay, you get that
13 index between 2000 and 2010 and you apply this to the future.
14 But if you go to 145, you are going to see the exercise here.
15 Red is the indexation by Compass Lexecon, and Compass Lexecon
16 is saying I'm going to apply this to the future.
17 In '09 and in '08, that index was inflated enormously
18 because the cost of turbines is associated to the cost of raw
19 materials. In '09, it increased by 20--1103, and then it fell
20 later on.
21 So, instead of considering 2000 to 2010, why doesn't
22 he consider 1990-2010, and the rate would be 2.3 percent, which
23 is a significant difference. Why doesn't he consider 83, which
24 is the first year the index was published until 2010? Here the
25 growth would have been two and some percent.

17:14 1 Mr. Flores looks at the evolution of this index
2 vis-à-vis inflation in general, and understands that there is a
3 correlation, and it looks at this at 2.5 percent established by
4 Compass Lexecon, and this is in the range of a turbine price
5 index. Nothing exceptional here. What is clear here is that
6 the index used by Abdala--I don't know why he used that time
7 period--he's going to have to explain that, but it is clear,
8 then, that there is no ground for the kind of index applied by
9 Abdala.
10 I'm going to talk about revenues and this has to do
11 with the carbon credit sale, and I'm not going to give you
12 information as to why carbon credits were established, but both
13 experts calculate carbon credits in the same way. They
14 considered the contracts that had been entered into with the
15 CAF and the German company going for a period going to 2013,
16 and then they considered the price of the futures Contract of
17 these carbon credits.
18 What is striking is that in the first Abdala Report,
19 he forgets that this income, 30 percent had to be contributed
20 to the State because there were two inter-institutional
21 agreements. Luckily, after reading Flores's report, Abdala
22 corrected his report, and then the problem is averted, but I do
23 have to call your attention on that correction and others made
24 by Abdala. What he says is, okay, I didn't know about the
25 CERs, I didn't know, I'm going to break to other things, and

17:15 1 I'm going to mention that in a moment, but I allocated a lot of
2 expenses for EGSA, and he reduces the administrative expenses
3 for EGSA. Why does he do that? It's a mystery, really. And
4 then he balances the corrections that he should have done
5 because of what Mr. Flores said in his is report.
6 So, the corrections meant a 12 percent decrease in the
7 calculation made by Abdala. Part of this reduction is
8 compensated by a reduction in administrative expenses.
9 Now, we get to cost, and my colleagues have said
10 nothing about this, but I'm going to be very quick. And when I
11 talk about costs, I'm talking about deductions from income.
12 Some of them are costs, some them are taxes. First transaction
13 tax operating costs and depreciation. I talked about operating
14 costs already. And if you go to 149, you are going to see how
15 Mr. Flores agreed with the administrative costs included by
16 Abdala. If you go to 150, you're going to see how the
17 Claimants say in their Reply that he made minor corrections,
18 Abdala made minor corrections. Twelve percent is not a minor
19 correction. And he said that in Econ One, Abdala changed the
20 administrative costs. But he did this without any kind of
21 criticism from Econ One.
22 Now, in connection with depreciation of taxes, one
23 would have to mention that Mr. Abdala made a number of
24 corrections, and we invited him to make those corrections, and
25 the matter was solved after those corrections were made, and

17:17 1 then we are going to look at the changes in working capital.
2 This is something that has not been mentioned, and I need to
3 mention this because it's relevant.
4 What is the interesting thing here when we're talking
5 about working capital? If the company is going to have more
6 capital needs in the future, the company is not going to be
7 able to avail itself of the same flows in the future. So what
8 is the relevance of all this in practical terms? The experts
9 disagree as to how that enormous commercial debt needs to be
10 repaid that EGSA had at the time of nationalization, and that's
11 why my friends have not mentioned this because it calls your
12 attention to the debt. At the time, EGSA had $35 million in
13 debt, 21 million in the statements of Financial Statements of
14 2009, and Mr. Abdala, in his first model, without saying
15 anything in his report, he only--in the model says, well, the
16 commercial debt, well, I'm going to push it forward, and the
17 distribution is not going to be normal up until the fifth year
18 of the model. Think of the impact of this. The initial flows,
19 the first years in the model are higher, so the value will be
20 higher.
21 What did he do when Mr. Flores criticized this, when
22 Flores said that a willing buyer could not assume that gas will
23 no longer be paid, and that the gas company is going to allow
24 the willing buyer to scale these in five years.
25 So, Mr. Abdala corrects this and says okay, yes,

17:19 1 perhaps all of these invoices should have been paid on the date
2 of the valuation, but he does not say anything about the other
3 invoices that he continues to push forth in time.
4 And this is the last item in connection with the DCF,
5 and I'm talking about the projections of CAPEX, and nothing has
6 been said by my friends in this connection. Why? Because
7 they're not interested in your knowing about this. This is a
8 component that deducts flows. It is very common in these cases
9 that Claimants minimize the future capital investments. In
10 this case, we are in an unheard of situation. Here, we're
11 talking about future investments 2010 to 2038, and the value is
12 $0. If you go to 157, you're going to see the Compass Lexecon
13 model. You're going to see some of the expenses here to
14 complete the combined-cycle, and then zero.
15 And then 28 years operating with a 1970s engine, no
16 investments, no capital investment, not even to extend the
17 useful life of the material.
18 If you go to 158, you are going to see the years of
19 service of each of EGSA's units, and there is no controversy in
20 this regard. Mr. Paz explains that, in my experience and after
21 consulting with some providers, the work necessary to extend
22 the useful life of the older units indicated in red here and
23 periodic repairs monthly made, mean that there would be an
24 additional investment of at least $2.5 million per unit, and we
25 have nothing by Claimants here.

17:21 1 It is curious that Abdala, when it is in his interest
2 to do so, and we're going to talk about comparables in a
3 minute--says no, EGSA's licenses would have been renewed in
4 2038 because it's a logical thing. A company that invests in
5 time sees its License renewed because, if not, there would be
6 no incentive to renew licenses. That's fine. But why there
7 are no investments in his model? Why is there no CAPEX here?
8 That is the end of my presentation in connection with
9 the input to calculate flows.
10 I still have to talk about the discount rate. I'm
11 sorry, so Claimants have inflated their demand, increasing
12 revenue, reducing costs to obtain future flow of funds than
13 even the most optimistic of willing buyers would have expected.
14 They're trying to minimize this saying that it's a very, very
15 small portion of the difference. Well, it is 43 percent of the
16 difference between the Parties, and with this I will now talk
17 to you about the discount rate.
18 As you know, once the flows have been calculated, the
19 present value is lower than the sum of the flows. A dollar in
20 10 years is going to be worth less than a dollar today.
21 Now, here we have some agreement and some
22 disagreement. The Agreement has to do with methodology. Both
23 experts calculate the WACC, the Weighted Average Cost of
24 Capital. Mr. Rubins, my colleague, gave you an explanation
25 that in my mind is correct except for the fact that he's

17:23 1 completely mistaken when he's trying to distinguish the
2 discount rate from the IRR. But in his explanation he's
3 missing one fundamental word. One thing is the IRR expected,
4 and there are economists here in the Tribunal, and I hope this
5 is clear. One thing if the profitability rate that you expect
6 in a project and the other thing is the Minimum Rate of
7 profitability that a project has to yield to attract investment
8 either with capital or with debt. If that investment does not
9 attract at a minimum a profitability that is enough to cover
10 costs for equity and debt, no one would make an investment.
11 Now, apart from covering the costs of debt and equity,
12 one can expect higher profitability, and that is the margin
13 mentioned by them. All these documents talk about a Minimum
14 Rate of Return, threshold and benchmark Internal Rates of
15 Return. These are rates that the investment must provide for
16 an investor to put a dollar in the project. Here in 161 you
17 have the detail of the differences between the experts in
18 connection with the discount rate, and you see these agreements
19 here, and I have highlighted here the Size Premium and the
20 Country Risk Premium, and these are the main differences, and
21 I'm going to show you why the rate of 19.89 percent that
22 Mr. Flores has calculated is from an economic viewpoint fully
23 justified and entirely reasonable according to the facts of the
24 case.
25 Now, in connection with the Size Premium, you've heard

17:25 1 the answer to the President. It is the supposition of the
2 Claimant is that this is never applied. There have been
3 studies that have considered this, but in actuality this is
4 never applied.
5 Now, in reality, the Size Premium is something that is
6 present in the financial literature, and it's undeniable, and
7 the markets see that investing in small companies carries with
8 it higher risk than investing in larger companies, so smaller
9 companies need to defer more return to compensate for the
10 higher risk.
11 So, any person that invests in the Stock Exchange
12 knows that when they talk about small and mid-caps, small
13 mid-caps, well, they have to offer a higher profitability than
14 the CAT 40, for example. Why, because they have a higher risk?
15 You are remunerating risk here.
16 Econ One uses the Size Premium of 628 percent
17 published by Ibbotson Morningstar, and you have been told this
18 is today that this is something that only happens in the
19 States, and it cannot be considered outside of the United
20 States. I understand that this is completely false, and I
21 would like for you to ask about this, to ask this question of
22 the economist, but when they tell you this is not applied,
23 well, Compass Lexecon apply the Size Premium in other cases
24 when they represent States, of course. If you look at 163,
25 you're going to see a report by LECG. This was then merged and

17:27 1 became Compass Lexecon. This is a report by Professor Spiller.
2 He co-authored some expert reports with Mr. Abdala in the case
3 of ICSID Railroad Development Corporation versus Guatemala.
4 What is Mr. Spiller saying?
5 "It is well documented in financial literature that
6 smaller companies typically enjoy higher return than larger
7 companies. The capital asset pricing method does not fully
8 account by itself for the greater risk and, hence, greater
9 return that small stocks show in the long run. Given the
10 effect of firm size on returns, I include, I include as I did
11 for the computation of the beta, a size premium in the
12 calculation of the cost of equity, which takes into account the
13 excess premium that is not already captured by the higher betas
14 that characterize firms of the size of the company. I derive
15 this premium also from Morningstar's Valuation Yearbook."
16 What did Mr. Flores say in this case? Exactly the
17 same that Spiller said. The source for the Size Premium is the
18 same. The discount rate that Spiller suggested in this case
19 was 18.75 percent.
20 When Claimants talk about astronomical rates in this
21 case, well, Members of the Tribunal, I invite you to consider
22 the experience and the other documents I'm going to show you in
23 a minute. We're not making anything up here; we're only
24 looking at the realities of the case.
25 In connection with the Country Risk Premium, which is

17:29 1 the other difference between the experts, well, both experts
2 use the same index, and they look at the Emerging Market Bond
3 Index that is used to calculate the risk premium of the
4 sovereign debt of Bolivia, and here is where our debate starts.
5 Why? Because Mr. Abdala simply takes this rate, which
6 is the rate of the sovereign debt of Bolivia, and Mr. Flores
7 says, no, have you to apply to this a 1.5 multiplier. That
8 multiplier, you have to understand, is necessary to take into
9 account the following. It is not the same to invest in debt
10 than to invest in shares. The risk is not the same. So, this
11 should be obvious, but apparently it is not for our colleagues.
12 Clearly, the risk is higher when you're investing in a
13 company run by the State as opposed to investing in public
14 issued--public bonds.
15 Now, the main argument of the Claimants to reject this
16 multiplying factor is based on Abdala's Report that Professor
17 Damodaran, whose name will keep coming up, is applied to only a
18 few months or only days. And this is incorrect. As you can
19 see at Page 166 of Mr. Damodaran's text, after explaining why
20 the multiplier factor should be applied, and while default risk
21 premiums and Equity-Risk Premiums are highly correlated, and
22 one would expect equity spreads to be higher than debt spreads,
23 one could expect five or 10 years, but five to 10 years is not
24 the same as months or days. And down below to the right you
25 see the multiplier, and Damodaran gives an example of--to

17:31 1 Mr. Flores applies 1.5.
2 Based on the country risk premium, this morning you
3 heard the issuance in 2012 more than two years after
4 nationalization, and that was clearly hindsight and not even
5 Mr. Abdala uses that in his report, even though he mentioned
6 it, but you are not shown what Mr. Flores did in his last
7 report. The yield rates of the sovereign bonds have to do with
8 an international circumstance that does not reflect the risk
9 premium. And you can see what happens with the sovereign debt
10 of many states. Many states that used to be considered safe
11 are no longer safe. This is an excess of supply of sovereign
12 debt, and this supply gets to various countries that are new to
13 this and whose conditions are more favorable than the
14 conditions used to be in the past. As usual, to see that there
15 are other methods that are also accepted to estimate the
16 premium country risk, the Country Risk Premium, and whose
17 result is above 19.85 percent. The Claimant never answered
18 this, and this has to do with the economic aspect, and why is
19 this discount rate of 19.85 a reasonable rate? At 168 you have
20 an indication of cases, a listing of cases, that have applied
21 elevated country risk and discount rates, and these rates are
22 specific to the project, but this is in response to what our
23 colleague said, that 19.85 is an astronomical rate that has
24 never seen before.
25 And there are three reasons specific to this case that

17:33 1 make a rate of 19.85 reasonable. First of all, at 169, you can
2 see that this is consistent, as the President said, with the
3 rate that the Claimants used just before the nationalization to
4 sustain the viability of the combined-cycle. Second, because
5 it is also consistent with the rate applied to other
6 electricity generation project prior to nationalization, and
7 because it is the rate used if other projects in countries that
8 have less of a risk than Bolivia by companies of Mr. Earl, who
9 will be appearing here tomorrow.
10 The first reason, as I mentioned before, and the
11 Claimants have not said anything in this connection, the 19.85
12 discount rate is completely consistent with the rate used right
13 before nationalization for the combined-cycle project, and I am
14 showing here at Page 171 a letter by Rurelec's broker,
15 Mr. Hichens. Mr. Hichens's name can be seen in various
16 documents from 2006, I am going to quote the following, equity
17 return, here we're referring to the minimal value, "The current
18 benchmark equity return for investors is in greenfield power
19 generation projects in Europe is currently between 15 and
20 18 percent. These are European projects, and we all agree that
21 for these projects that are of a greenfield type the risk is
22 lower."
23 And we agree that Bolivia is part of these emerging
24 countries; when considering the returns required on Emerging
25 Market, we would expect a five to 10 percent premium on this

17:35 1 range, but a minimum benchmark, but once again the Minimum
2 Rate, is likely to be 20 percent. Considering the political
3 climate in Bolivia, with the current perception (albeit
4 incorrect) the nationalization, the type of wholesale power
5 market, mainly Spot Markets, and the fact that lenders'
6 premiums above LIBOR are 5 to 7 percent, the benchmark internal
7 rate of return, benchmark, for an equity investment in Bolivia
8 is likely to be between 25 and 30 percent reflecting the risk
9 premium an investor requires for this market.
10 This letter by Mr. Hichens was necessary to obtain the
11 approval of the combined-cycle project by the United Nations
12 mechanism that manages the mechanism that was created under the
13 Kyoto Protocol, and this was validated in the documentation
14 presented before the United Nations on April 7, 2010. This is
15 three weeks before the nationalization, and Tusur (ph.) says I
16 have a letter by Hichens where it says that the minimum IRR for
17 a project of this type in Bolivia is between 25 and 30 percent.
18 You have this letter again on 173. I think that we have
19 already seen this.
20 What is the importance of this letter for the
21 calculation by the Parties? If we look at the estimates by
22 Mr. Abdala and Mr. Flores at 174, the cost of equity, that is
23 to say that IRR, that is the Minimum Rate for Shareholders
24 estimated by Mr. Abdala equals 14.7 percent. This is
25 14.45 percent. This is even lower than the 15 to 18 percent

17:37 1 required for Europe. If we think of Mr. Hichens's letter.
2 Now, Mr. Flores says 27.66 percent, and this is
3 properly placed between 25 and 30 percent as stated by Hichens.
4 Who paid Hichens? Rurelec paid Hichens, and of course
5 the other Party is no longer interested, and this is the letter
6 that we provided based on the number on the evidence. This is
7 the letter that the Claimants had from the very beginning, and
8 we had to find it in the record in time to introduce it to you.
9 The discount rate estimated by Mr. Flores is also reasonable
10 because it is consistent with what is applied to other power
11 generation projects before the nationalization, and please look
12 at 176. 176, this is a document published by the United
13 Nations, the same Clean Development Mechanism in connection
14 with the hydroelectrical project in Taquesi River in the
15 northeastern section of area of La Paz nine months prior to
16 nationalization. This was similar to the combined-cycle
17 project. And likewise the promoters, the advocates of this
18 project had to defend or had to present the minimum IRR for
19 this project or to be able to invest. And what did they tell
20 the United Nations? The primary economic benchmark used by
21 TBH, in its decision whether or not to participate in a
22 project, is its Rate of Return as measured by the project's
23 after-tax IRR. Once again, the relationship between the Rate
24 of Return and the minimum expected rate to invest is key. The
25 threshold after-tax Internal Rate of Return for TBH to invest

17:39 1 in a project in a Third World country is 20 percent. This is
2 totally comparable to the 19.85 percent, and this has nothing
3 to do with the cost of capital and the cost of debt. This is
4 global return.
5 And why is this return--this rate reasonable as stated
6 by Mr. Flores? Because this is also used in other projects by
7 Mr. Earl in other companies such as South Africa, and he has a
8 document of EGSA Group, EGSA Group Plc, one of the thousands of
9 companies that carry the name of Mr. Earl where it says the
10 group intends to identify and enter into projects which will
11 achieve a project IRR of no less again 20 percent. Once again
12 this is the Minimum Rate, and this is information that was
13 presented to the Stock Exchange in London, and clearly the
14 information that is provided internationally is sacred at this
15 level.
16 So, what is the conclusion that I am expecting you to
17 get to, based on the discount rate? And even though you're
18 going to listen to the experts at the end of the hearing, I
19 hope that you're already aware that Bolivia's position is not
20 exaggerated. It is not unreasonable. Those are exaggerations
21 that are part of the rhetoric.
22 And having said that, I will refer to the other
23 valuation method. If you allow me, I am going to consult with
24 my colleagues to determine how much time I have left.
25 (Pause.)

17:41 1 MR. GARCÍA REPRESA: If you allow me, I am going to
2 continue with the quantification, and valuation, and then we
3 are going to have a break.
4 We have two hours and 50 minutes left.
5 The Claimant has referred to other methods, the
6 methods of the Book Value and comparable value, and the Book
7 Value for EGSA. It's seen first in the second pleading by the
8 Claimants. Mr. Abdala did not mention this in his first
9 report. He actually rejected it, and out of the blue it shows
10 up in the Second Report.
11 And let me tell you a little bit why this is just out
12 of the blue.
13 The comparable method, once again, we always go back
14 to the same when we talk about this.
15 PRESIDENT JÚDICE: Yes, we have read the statements of
16 the Parties.
17 MR. GARCÍA REPRESA: And there is information, and
18 here there is a discussion on how to estimate this, but out of
19 the 30 companies analyzed by Mr. Abdala, all of these companies
20 are from countries that have less risk than Bolivia except for
21 three companies that are from Pakistan, and you're going to see
22 the detail in the pleadings, but you're going to see that those
23 companies cannot be compared, and they cannot be compared to
24 EGSA, in particular those that are the media for the--the
25 median for EGSA. That is at 182. Amber Energy and AES. And

17:43 1 on Slide 25 when the big companies were mentioned as part of
2 the roadshow, you see the AES logo, but if you're telling me
3 that that is comparable to EGSA.
4 The second problem we have with this method is that
5 Mr. Abdala mixes in that combination of 30 companies, companies
6 that have unlimited operations in time and also companies that
7 have limited operations in time. What is the problem with
8 that? $1 as revenue for a company that has an unlimited
9 horizon. That is the one used here is worth more than a future
10 dollar of a company that is going to come to an end in a
11 minute. How can we show this? At 183, Mr. Flores separates
12 from Mr. Flores's report the companies by determining those
13 that have a fixed term and those that have indefinite term, and
14 we have a dramatic difference in the numbers.
15 And as I mentioned before, Mr. Abdala indicates that
16 we need to consider that EGSA's licenses were extended, but
17 because whenever there is an investment of capital, there is an
18 extension also of the License by the regulator.
19 So, yes, that is good, but why do we see zero for
20 investment as stated by Mr. Abdala? That is not consistent.
21 Second, the Book Value. Mr. Flores, in connection
22 with the comparable value, can explain to you the problem with
23 the calculation, which is quite complex. The Book Value,
24 they're saying, the Claimants are saying that given that
25 Mr. Abdala estimates a Book Value of 133 million, that is a

17:45 1 good indication, and you should take that figure to get to a
2 good number. And I liked it when the Claimant said that this
3 method cannot lie. I can show you quite the opposite.
4 And I am going to show you this with the economic
5 theory, second with the conduct of the Claimants, and third why
6 these famous Financial Statements of EGSA are not reliable.
7 First, the economic theory. This is stated by
8 Mr. Abdala. He's saying, "The B.V. approach has the main
9 limitations of being backward-looking method and thus it does
10 not provide a direct measure of Fair Market Value, Compass
11 Lexecon Footnote Number 15, and I think that this is the end of
12 the debate." At any rate you have the comment by Professor
13 Damodaran at Slide 18, but I think that here the practice of
14 the Claimant is the most important. They're saying that
15 Bolivia has been looking for some strange examples of cases in
16 which acquisition is for a value below the Book Value. I'm not
17 sure of what examples they're referring to. They're saying
18 that these are examples of their own samples, but I am going to
19 EGSA acquisition examples. And what are the examples we have?
20 The only two sales of shares within EGSA for the same
21 Shareholding that the Claimants said they had is in 2003 where
22 one of the subsidiaries sells to Integrated Energy, and the
23 other one in 2006. In 2003, look at 189. The seller indicates
24 that the Shares were sold for 33 million below the Book Value.
25 This is not a hypothetical value. This is the 10-K. This is

17:47 1 the information provided to--in March 2004 to the ACC. Once
2 again, on the next page, we do not have any proof of payment,
3 but let's imagine that that was the case. This is Hichens once
4 again. Rurelec has acquired 50.001 percent of Guaracachi for
5 35 million, which represents a discount of 20 percent to Book
6 Value. So, they are saying that they bought with a 20 percent
7 discount, but now they are saying that this Book Value is an
8 indispensable minimum value.
9 In connection with the payment, we had also requested
10 for evidence of payment. We did not request that again even
11 though Bolivia is insisting on adverse inference.
12 But given these two examples of operations that are
13 public knowledge, a hypothetical buyer in May 2007 would not
14 have paid for Book Value and to expect or to assume the
15 opposite is an absurdity.
16 Why did I say that the accounting statements of 2009
17 for EGSA are not reliable?
18 First, because there is inflationary adjustment that
19 is reflected in those Financial Statements, and at 193 you're
20 going to see the impact of that inflationary impact,
21 inflationary adjustment. And for you to understand what it is.
22 You have an example of 192 as described by Mr. Flores, and I am
23 going to try to go through the example. The example is the
24 following. In January 2007, a turbine is bought at $1 million.
25 With exchange rate, it is recorded ass 8 million Bolivian

17:49 1 pesos. In 2008, it was bought in 2007. In 2008 there is an
2 adjustment based on inflation, and now the price is 9.85.
3 What is the actual value? Imagine that there is no
4 depreciation or nothing of the sort, $1 million. If we convert
5 that to Bolivian pesos, now that is 7 million. What does it
6 mean? It means that we have a real value of 7 million Bolivian
7 pesos that is recorded for this unit with 9.85 million. What
8 is the difference? A paper difference, a paper revenue. This
9 is the net asset.
10 PRESIDENT JÚDICE: Was that a general rule in Bolivia?
11 MR. GARCÍA REPRESA: Yes, this is a general rule in
12 Bolivia, and the presentation by Bolivia is not that that
13 adjustment is incorrect, but when you consider the value of the
14 company, to consider the value without eliminating the effects
15 of the adjustment is an economic fallacy. And you're going to
16 see that it was incorrect to use those profits on paper to
17 distribute dividends or to pay dividends.
18 PriceWaterhouse also said this when they reviewed the
19 Financial Statements of 2008 that was the application, the
20 early application of this. They showed that 91.8 percent of
21 the profits for that year were for accounting adjustments.
22 196, the auditing committee of EGSA was concerned, given the
23 overvaluation of the assets. This is within EGSA. They were
24 concerned about the overvaluation of the assets. And aware of
25 that problem that agreed it's based on the regulations, but we

17:51 1 also need to know the basis for those numbers when Rurelec
2 reconciled the figures. They did not include inflationary
3 adjustments. Why is Rurelec going to record a lower value
4 other than because those inflationary adjustments have no
5 economic value?
6 And at 198 you're going to see the impact as
7 Ms. Bejarano has shown of that inflationary index or rate, and
8 the goal is to increase the net value of the company. When we
9 are referring to Book Value, that is the value of the net
10 assets, and they're asking you for total equity and to consider
11 as value of this Net Equity or total equity, things that were
12 not connected to the economic situation. But why was I telling
13 you that this inflationary adjustments have an impact on
14 dividend distribution? If you look at the accounting
15 information, 199 from the Financial Statements, when one looks
16 at the number of--at the amount of profits based on the real
17 profits, consistently from 2007, profits were distributed above
18 the actual numbers, and this is the capitalization we are
19 referring to.
20 And the second distortion that has impact on the Book
21 Value and this is something on discretionary by the company, he
22 said in 2009 there was a change of the accounting standard, and
23 they're saying, well, now I am going to defer this in time, and
24 I am going to pay this off throughout so many years. At 201,
25 if we eliminate the impact of the inflationary adjustment, EGSA

17:53 1 has losses in 2009.
2 And my conclusion, before moving on to a different
3 topic, is that this is not a case in which the Tribunal can say
4 that we're going to reach middle point. Bolivia's figures are
5 well supported, but you need to take into account the
6 following. At 202, the Claimants are telling you in this case
7 that they're alleging investment of $35 million in 2006. Out
8 of the blue, as a magic act when we add Spot Prices and future
9 prices is worth $106 million. This is times 221 percent.
10 But what happens at the same time? The financial debt
11 moved from 28.8 and 95.3 million, and the other liabilities go
12 from 7.6 million to 32.2 million. And this is information
13 taken from the first line of the report by Mr. Abdala, and we
14 can give you that information if you have bad source or the
15 reference if you have any questions. I was going to refer to
16 the interest rate, but I think that we can do it very quickly.
17 I they that it is more important to refer to the
18 treaties, and you can get to the fact whether that rate should
19 include risk or not, and the President this morning asked
20 something about the publication by Fisher, and my colleague
21 said that is one way to look at the thing, but there are many
22 other options. Once again I think it is important because at
23 207 you're going to see Abdala's criterion. What is his way?
24 We do not have his legal criterion. We do not know what his
25 view is, but we do know, as we see at 208, that Compass

17:55 1 Lexecon's view in other cases was to use an interest-free
2 interest rate, a risk-free interest rate. The Tribunal also
3 followed Chambouelyron's recommendation to use the 10-year U.S.
4 Treasury Bond rates for purposes of pre-judgment interest rate
5 calculation based on the concept that Claimant was no longer
6 exposed to commercial risk after its assets were expropriated.
7 That is what we are saying in this case, and what is the
8 implication by the other Party? That is, if they had received
9 the money, they would have invested it in some other thing, and
10 they would have made some profit, but yes, with the new
11 investment there is also a new risk, and that return is the
12 compensation on risk.
13 So, with this new interest rate, they are trying to
14 have us compensate them for a risk that they're not facing, and
15 that is a basic fallacy. They would like to have the
16 guaranteed return by the State for investment that they have
17 not carried out since 2010.
18 Finally, at 209, you have the provision from the
19 Bolivian code that bans the principle of anatocism, and there
20 are some other tribunals that say that the compound rate can be
21 applied. And when can it be applied, when the other rates can
22 be applied when there is a ban on compound rate by legislation,
23 and I thank you for your patience, and now we would be
24 referring to the new claims presented by the Claimants, and if
25 you agree we can have the break.

17:59 1 (Brief recess.)

2 MR. GARCÍA REPRESA: Thank you very much,

3 Mr. President.

4 In the time that I have remaining--and Mr. Silva

5 Romero will conclude in about 10 minutes, but I'm going to

6 explain to you why the Tribunal lacks jurisdiction on the new

7 claims because it does not meet the treaty conditions in

8 connection with prior claims and notices. And in connection

9 with the first objection, the fact that these new claims were

10 never duly notified under the Treaty, never notified to

11 Bolivia, if you go to the slides, you are going to find the

12 language of the treaties in Page 213. And I think this is

13 clear, and I don't think any interpretation is in order to see

14 that the consent of Bolivia and of the other States to

15 arbitration--in the case the other States are the U.K. and the

16 U.S.--is conditional. It says here that the Dispute shall be

17 submitted to arbitration if and only if three months have

18 elapsed since the date the dispute arose. In the U.K. Treaty,

19 only those disputes that have not been resolved can be

20 submitted six months after the notice of the claim was put

21 forth.

22 And where is that notice? We asked that of the

23 Claimants. Claimants said initially, or what they tried to say

24 initially, was that those conditions do not exist because the

25 language of the Treaty is somewhat different, and one would

18:13 1 require notification, the other says nothing about
2 notification. So, in the Murphy Case, the Tribunal interpreted
3 this in a correct manner, in my opinion, and the Dispute
4 emerges when a violation of the Treaty is alleged, and this
5 allegation starts the cooling-off period. This seems to be
6 quite logical. If one does not notify a violation of a treaty,
7 how are the Parties going to be able to negotiate to resolve an
8 alleged treaty violation?
9 Claimants have recognized in this case that the new
10 claims were invoked for the first time in the Statement of
11 Claim, and this is at 215. This is the Statement of Defence on
12 Objections, which is what the Claimants have submitted.
13 The pleadings of the Claimants state that perhaps at
14 least these conditions are not compulsory, but there is a
15 fundamental problem that they run into, according to the
16 treaties. The Claimants themselves in the Notices of
17 Arbitration and of the Dispute--Page 217 here--expressly
18 recognized the compulsory nature of the conditions that had to
19 do with prior notification, and this was before the new claims
20 were asserted and before Bolivia told them that they had not
21 asserted those claims.
22 The other argument of the Claimants is that these
23 conditions are perhaps not jurisdictional in nature. This is
24 just something procedural, that it does not go into the
25 jurisdiction of this illustrious Arbitral Tribunal, but that's

18:15 1 the fundamental question they run into as well, that the
2 Claimants themselves had recognized the jurisdictional nature
3 of these conditions under these treaties. You're going to find
4 the Notice of Arbitration and the Statement of Claim in both
5 cases under the heading "Consent of the Parties to
6 Arbitration." They developed the meeting of these conditions.
7 When we talk about consent, we talk about the matters before
8 the Arbitral Tribunal.
9 You can review the international case law. You have
10 in 219 the Murphy Case and then you have Burlington Resources
11 v. Ecuador; where the Tribunal, headed by Gabrielle
12 Kaufmann-Kohler, considered that the lack of negotiation and
13 notification deprives the State from the possibility of
14 deciding on the Dispute, and the claims were declared
15 inadmissible, and the Tribunal said that it did not have
16 jurisdiction in connection with those claims.
17 Another argument that was put forth by the Claimants
18 recently is that it would be futile to request prior
19 negotiation and notice afterwards what had happened, and this
20 was mentioned in the Reply, under 222 of the slides here, and
21 this argument does not hold water, legally speaking, and from
22 the facts the viewpoint is impossible to understand.
23 Why does it not hold water, legally speaking? As
24 Mr. Silva Romero, said one cannot ignore the conditions and one
25 cannot presume consent and ignore the conditions that the

18:17 1 States have given in connection with their consent on the basis
2 of futility or lack of usefulness. The consent of the State is
3 conditioned upon those--the consent of the State is based upon
4 those conditions, these under the Vienna Convention and pacta
5 sunt servanda.
6 Now, the fact that this does not make any sense--and
7 there is no transparency in connection with this because it
8 would be impossible to understand, but what they're trying to
9 tell us is the following. Given that the negotiations that the
10 Parties held after the nationalization and that went up until
11 2011 yielded no results, it was futile to notify the claims a
12 year before when they submitted the Notice of Arbitration in
13 November 2010. You can see the dates here. The dates do not
14 really match. So, that's why I'm saying that, in fact, the
15 argument for futility cannot prosper.
16 Lastly--and this is what they've said today--well,
17 they allege that all these issues are included in the same
18 dispute. They rely on the chronology, simply. They say, as
19 the regulatory changes in the Spot Price are before the
20 nationalization and the Government program the nationalization
21 was foreseen beforehand, this is part and parcel of the same
22 program.
23 If you go to 224, you are going to see the Lucchetti
24 Award, Lucchetti versus Peru, where the Tribunal had to define
25 what the dispute was, and the Tribunal said that the relevant

18:19 1 thing was to determine if and to what extent the purpose or the
2 fact that the real basis of the claim was the facts connected
3 to nationalization. I see no connection between the new
4 claims. I don't know what this basic Capacity Price has to do
5 with nationalization, but if there were any doubts, you could
6 ask yourself how can this be part of the program by the State
7 that will lead to nationalization when there is a series of
8 companies that are private generator companies that represent
9 approximately 25 percent of the capacity that are still subject
10 to those regulatory changes? Apart from those private
11 companies, the regulatory changes apply to the nationalized
12 companies. This was not a part of a plan that had nothing to
13 do with nationalization or the nationalization of the sector.
14 If you have any doubts, the five private companies that
15 continue to contribute are Cobee, Hidroeléctrica Boliviana,
16 Synergía, and Guabira Energía. I think I'm missing one.
17 It is clear, then, that the Claimants have failed to
18 meet the conditions under the treaties, and here you're going
19 to find in 226 and others what the Claimants have said at each
20 stage of this proceeding. In the notice of dispute, nothing is
21 said about the new claims. Then we go to, "This dispute
22 concerns Government's 1 May 2010 expropriation." That is the
23 new dispute. Explain to me where the new claims fit in here.
24 Then we go to the Notice of Arbitration, six months
25 later after the nationalization, and let's look at the

18:21 1 chronology here, the changes in Spot Prices on PBP go back to
2 '06 and '08, and so they had time to give notice of them
3 beforehand before November 2010, and in that notice the dispute
4 is just nationalization. The Measures, as you can see, are
5 just the non-payment of compensation and the violations to the
6 Treaty, at 229, are closely related to nationalization.
7 In the Statement of Claim, three years and nine months
8 later after the regulatory changes of the Spot Prices and five
9 years and one month after the modification of the calculation
10 of the basic Capacity Price, is that these new claims come to
11 being, and you're going to see under 231 how the Claimants have
12 tried to correct things between the Statement of Claim and the
13 Notice of Arbitration, and we have our submissions and our
14 pleadings.
15 What is the conclusion in connection with this
16 objection, Members of the Tribunal? Just like in the Murphy
17 Case, since the Claimants did not meet the conditions of the
18 Treaty before starting this arbitration, those new claims are
19 inadmissible, and the Tribunal lacks jurisdiction on them. As
20 I said at the beginning, another objection that is applied to
21 the three new claims, which is the objection based on the fact
22 that these are claims under Bolivian law when the consent of
23 the State in connection with the type of dispute to be
24 submitted to arbitration are disputes that are borne of rights
25 under the Treaty, well, you are going to find all the arguments

18:23 1 in connection thereto in our files on the record.
2 I would like to briefly talk about the Spot Prices
3 claim. This is under 239. This claim, apart from the
4 objections that I mentioned, is premature in nature, and the
5 regulatory change is in agreement with the Treaties, and the
6 Claimants cannot show that the change in the Regulatory
7 Framework harmed them anyway, and it also shows that the
8 calculations are poorly made. Well, I have to correct the
9 presentation made by my colleagues in connection with the Spot
10 Prices. I believe he's not saying there is exhaustion of
11 remedies; this has nothing to do with this. As other tribunals
12 have recognized in the past, as the ones cited on Page 241, is
13 that for an internationally wrongful act to exist, the
14 international investor has to have done something to criticize
15 the measure that you are criticizing, at least an attempt to
16 criticize.
17 If you go to 242, you're going to see the different
18 remedies that the investor had at its disposal. Challenges,
19 the appeals to administrative authority, we're not saying they
20 had to exhaust every single remedy, but at least they had to
21 do--make an effort in order to do this.
22 Then we go to the basic arguments in connection with
23 the Spot Prices. Claimants say that the modification of the
24 Regulatory Framework had violated the FET and also the full
25 security and protection and the provision of arbitrary

18:25 1 measures. I'm going to mention the facts that reject each one
2 of these claims, these three claims.
3 It is important to look at things in context here.
4 When we talk about Fair and Equitable Treatment in this case,
5 that claim can only be applied to the new claim for Spot
6 Prices. It doesn't apply to the nationalization of the company
7 or to the other two claims. So, bear this in mind and place it
8 in context.
9 Secondly, I think it's important for you to know that
10 there are two fallacies, two initial fallacies, in the argument
11 of the Claimants that render the other things false. For them,
12 the FET standard has to do with the changing nature of the
13 legal order. This is the stability clause of the legal system
14 because of the effect of the FET in the treaties.
15 And then it says that the Regulatory Framework of the
16 support price had been stable, and that it changed, and that
17 change was so serious that it constitutes an arbitrary measure
18 that adversely impacts the investment. It allows us not to
19 recover the investment, et cetera.
20 So, let's look at all this. If we go through 245, you
21 are going to see the changes that took place since '95 to '08.
22 These are the ones that they criticize. Far from having
23 stability, you will see that here that there had been changes
24 specifically in the electrical sector market. This is the
25 subject to advances, technological advances, and investments as

18:27 1 well. What Claimants are saying, "Please, Number 9 and
2 Number 10 should be eliminated, and please go back to the older
3 regime."
4 What is the fallacy that I was mentioning before in
5 connection with stability? Claimants know they have no
6 commitment of stability in this case. The generation licenses
7 which are the contracts that allow EGSA to operate provided
8 that the legislation was going to be subject to Bolivian law
9 and to the resolutions of the Superintendency now and in the
10 future. This is nothing further from a stability clause.
11 International jurisprudence recognizes that the Fair and
12 Equitable Treatment standard is not an insurance policy against
13 legal changes. This is not a legitimate and reasonable
14 expectation as it was said in the EDF Case and other tribunals
15 that have said the same thing.
16 Aware there is no guarantee of stability, Claimants
17 have tried to look for a stability commitment elsewhere, and
18 that is in the Dignity Tariff Agreement that we entered into in
19 2006 under Clause 5. You saw this this morning. This is not a
20 stability clause. It only says that there is a commitment for
21 prior consultation.
22 And there is something else. The legitimate
23 expectations are those that exist at the time of the
24 investment. This stability--I'm sorry, this tariff, Dignity
25 Tariff Agreement was--dates back to '06. So, when they talk

18:29 1 about '05 in that case, how could there be a legitimate
2 expectation of an agreement that did not exist at that time?
3 No answer has been provided for this.
4 They forgot to mention as well in their pleadings--and
5 Bolivia called their attention to this--was that there was
6 another agreement in March 2010, a little before the
7 nationalization, where a number of companies, not only EGSA,
8 accepted to extend the dignity tariff and stated that the
9 clauses of the '06 Agreement had been complied with.
10 They mentioned that perhaps they had twisted their
11 hand to sign the Dignity Tariff Agreement. There is a letter
12 sent to the Minister of Hydrocarbons--and this is under
13 242--and it says the only reason for the delay in our signature
14 of the 2010 tariff, dignity tariff, has been the delay in
15 connection with the financial position of the combined-cycle
16 project of the CAF.
17 Now, they say that this is an arbitrary measure. I
18 have explained to you before--and you are going to see this in
19 254--that this was an entirely reasonable measure knowing that
20 these dual motors that contributed .8 of the capacity made the
21 price multiplied by two. And if you go to 255, there is a
22 report by the Director of the wholesale electrical market, the
23 generator market, where they say, "Look at what happens to the
24 price when you have the dual units. With the dual units and
25 without the dual units, look at what the price does in this

18:31 1 case."

2 And I call your attention to these two graphs.

3 They're not at the same scale. The one on the left doesn't

4 even reach a 20-dollar price; and the one on the right, the

5 price goes up to almost $40, and you see here how the tariff

6 goes up by twice as much.

7 And here you're going to see some comments that there

8 are other countries that have done this as well. Here, you

9 have a reference to Guatemala and to the right--and this is

10 interesting because I rely on what my colleague said this

11 morning--Mr. Abdala, in 1993, in this text talks about--Abdala

12 was a young economist--I'm not saying that he's a young

13 economist anymore--talks about measures taken in 1993, and it

14 says that Argentina has excluded from the price-setting system

15 of the machines that, if they're called upon, they did not meet

16 the economic concept of the marginal cost. The main objective

17 of this measure was not to unnecessarily increase the price of

18 electricity because of the marginalizing presence of the

19 generators that are considered not efficient because they only

20 work with expensive fuel and they have a low thermal yield.

21 In any case, the FET standard would mean that there is

22 a significant impact of this measure, a drastic impact on the

23 investor.

24 That's where we see quite an interesting contradiction

25 as presented by the Claimants when they attempt to tell you

18:32 1 that there is a violation of the Fair and Equitable Treatment,
2 and this measure had an incredible impact. But when Mr. Abdala
3 quantifies the damages, at 260, you're going to see that he's
4 telling us that the impact was 3 million up to nationalization,
5 and that throughout 20-80 years, the impact equals $1 million.
6 And this is going to be a brief additional comment.
7 At 260, you can see Econ One figures. This morning, Noah
8 Rubins told you in an alarming tone of voice, How could it be
9 that Econ One had not projected the demand for energy and the
10 prices, but with Econ One's estimate it gets to $0.3 million;
11 and, with Claimants' estimate, it gets to 0.3? There is a
12 small difference when you round up the figures, but I think
13 what I heard this morning doesn't make any sense.
14 With this, Members of the Tribunal, I'm going to refer
15 briefly to the last item that has to do with quantum, and this
16 is at 264. The estimates by Mr. Abdala leave behind an
17 important aspect of the tariff regime in Bolivia that has to do
18 with tariff stabilization in force since 2003. Tariff
19 stabilization means with an increase or decrease of the tariff,
20 some funds are not used for the company, but rather for the
21 Stabilization Fund. At 264, you can see on top the estimate by
22 Mr. Abdala. There, for him the damage is the difference
23 between the red and the blue line, and below you see the
24 condition or the situation of the Stabilization Fund during
25 those dates. When the Stabilization Fund increased, it means

18:34 1 that the amount was over the stabilized amount, and the money
2 is devoted to the special fund. So, over the dotted line,
3 EGSA's share has increased. So, including without the
4 regulatory control, EGSA would not have received any more
5 funds. Those funds would have gone to the Stabilization Fund.
6 And what could have been the value in 2010, but the Claimants
7 have not done anything to this end.
8 Now I give the floor to Mr. Silva Romero. Thank you
9 very much.
10 MR. SILVA ROMERO: Thank you very much. With the
11 indulgence of the Tribunal, we can conclude in five to seven
12 minutes.
13 We need to argue in connection with the new claims
14 included in the Statement of the Claim, it has to do with the
15 basic Capacity Price and also the claim for the Worthington
16 engines. In connection with the Worthington engines, you're
17 going to see at 264 onward certain facts that I would like to
18 refer to. But since we have already listened to Mr. Blackaby
19 on this claim--that is to say that that was withdrawn--I
20 understand, based on certain conditions, my proposal is to read
21 the transcript. Bolivia will read the transcript, we will look
22 at the conditions; and, on the upcoming days, we are going to
23 see whether Bolivia can refer to this so as to eliminate this
24 claim. And this is in connection with the cooperation expected
25 by the Tribunal so as to remove this small claim from the list

18:36 1 of items that you need to address.

2 So, I am going to focus the very last minutes of my

3 presentation on the new claim in connection with the price that

4 you can see starting at 267.

5 And you will remember, based on our reading, that

6 based on this new claim we have a new argument, first, that the

7 Tribunal has no jurisdiction to listen--to hear this; and,

8 second, that Bolivia has not unfulfilled any international

9 obligation to offer effective means to the Claimants; and,

10 third, that causality has not been proven. And I am going to

11 refer to these three arguments.

12 First, in connection with the absence or the lack of

13 jurisdiction, let me say something very quickly. First, I need

14 to remind you, at 269, that the Treaty between the U.S. and

15 Bolivia includes a fork or bifurcation clause or forum-shopping

16 clause, and I don't think there is any dispute regarding this.

17 But also the Claimants state that, for this provision to apply,

18 there should be triple identity. That means--and I do not see

19 any triple identity here--there should be a coincidence amongst

20 the Parties, the legal foundation so that the fork in the road

21 works.

22 Now, I have three comments here in connection with

23 this theory of the Claimants that this triple identity has to

24 be applied.

25 First, we should ask where this text comes from. We

18:39 1 all know that that test is not part of the public law. This
2 was a test that was invented by procedural people from Italy
3 who invented procedural law and made it into a science, and
4 this science that was invented by these characters lead to lis
5 pendens and res judicata, and that is the origin of the triple
6 identity.
7 Now, Bolivia's position is that tests cannot be
8 transferred to the fork-in-the-road clause. And as an example,
9 if a legal basis for both claims has to be the same, this
10 clause will never be applied because, in practice, on the one
11 hand, you have international arbitration such as the one that
12 we have here and proceedings before State courts, and the basis
13 would be the violation of the local law, the domestic law, and
14 in the other case it will be a violation of international
15 treaties to protect investment. So, for this reason, the
16 fork-in-the-road clause cannot be applied in these cases.
17 And in the Chevron Case versus Ecuador, you can see
18 that the Tribunal, the triple identity test cannot--should not
19 be applied because the fork-in-the-road clause would have no
20 legal effect.
21 Third, in connection with this jurisdiction objection,
22 how could this clause be interpreted; that is to say, the fork
23 in the road? Zachary Douglas and Jan Paulsson give us some
24 indication that, in my opinion, should be observed. They
25 suggest that we need to determine whether in the end this is

18:41 1 the same dispute. And Jan Paulsson, in the decision, at 271,
2 indicates that there is a need to determine the fundamental
3 basis of both claims what the grievance was in both cases to
4 see if we're referring to the same.
5 Fourth, in connection with the jurisdictional
6 proposition claim, the situation is the same. That is to say,
7 in both cases, in both instances, the objective is to recover,
8 in the Claimants' words, in revenue that they did not receive.
9 Now I am going to move to the basic Capacity Price
10 claim, and that is that Bolivia had not violated the obligation
11 to offer effective means to the Claimant, and that is 274.
12 First of all, this obligation to offer effective means is the
13 following.
14 Once again, Gabrielle Kaufmann-Kohler, in Duke Energy
15 versus Ecuador, gave us some guidelines there, and she says
16 that, in sum, this obligation to offer effective means is in
17 cases of denial of justice. So, to prove that those means were
18 not offered, the Claimants should prove that there was denial
19 of justice in our case. However, these Claimants have not
20 proven that there has been any denial of justice.
21 And let me offer two cases. First of all, as I
22 understand, the Claimants are complaining about the length of
23 time necessary to solve the issues before the Supreme Court
24 based on 1612 and 1706 of SSDE. The remedies were--the appeals
25 were presented before the Supreme Court in April 2008, and the

18:43 1 nationalization took place in April 2010. So, in practice,
2 these Claimants are referring to a delay of two years and one
3 month and one year and eleven months in the other case, and
4 that is accepted by the Claimants when they stated in their
5 pleadings that it was useless to ask for Precautionary Measures
6 due to nationalization. So, it is clear from the point of view
7 of Bolivia that that is a completely superficial or frivolous
8 claim. At 276, even today, the length of this proceeding, this
9 is part of EGSA, which is part of ENDE rather than Guaracachi
10 America. Duration does not represent denial of justice based
11 on the standards of international law.
12 In the Chevron Case, Ecuador was punished for a
13 13-year delay. Here we're just talking about months. In the
14 case of White versus India, India was considered guilty for
15 this nine-year delay, and the human rights tribunal of Europe
16 considered that a five-year delay for administrative
17 proceedings is not accepted.
18 At 277, one of our witnesses that will appear here
19 before you, Dr. Quispe, tells you that the usual duration of
20 the case before the Bolivian Supreme Court is five years and
21 six months, and this is something that has been acknowledged by
22 EGSA's Board of Directors before the nationalization, as we can
23 see at 277, the minutes of the Board of Directors of 2009.
24 The fourth comment is that the Claimants allege, as
25 they said today, that the reform in Bolivia delayed this

18:45 1 process, and our witness Quispe says that this is false, and he
2 underlines that this reform has eliminated the bottleneck in
3 the legal offices; and, as a result, administrative of justice
4 in Bolivia has become more efficient.
5 The other comment in connection with the violation of
6 offering effective means, at any rate, the position of Bolivia
7 is that, by definition, there couldn't be a violation of the
8 effective-means standard if it is proven that the alleged
9 investor had resources that were not used. This is what the
10 Tribunal said again in Chevron.
11 And if we look at 280, we see that our witness again,
12 Dr. Quispe, says that EGSA had resources that they did not use,
13 and they could ask for the suspension of the Measures, but they
14 did not do that, so an investor cannot claim that not all of
15 the effective means were offered if some means were not used.
16 That's what we learned in Chevron.
17 And now we're going to see the last argument in
18 connection with this new claim, and that is that the Claimants
19 have not established the causality or the damage or the
20 causation and the damage, the Supreme Court has not decided;
21 therefore, we do not know if there will be damage, for example,
22 thinking of an eventual damage or a hypothetical damage that
23 cannot be compensated.
24 And in connection with causation, I would like to
25 underline that if I understand this correctly, it has to do

18:47 1 with the delay in issuing a decision, but what would be the
2 damage in this delay in case the resolution of the Supreme
3 Court favors the Claimants? That would probably be the
4 interest that they failed to receive for over a period of time
5 or maybe the delay may lead to some lost income. And what
6 would happen if the decision of the Supreme Court is contrary
7 to this, because that is the final decision in Bolivia about
8 this issue? Then what would be the claim? Denial of justice
9 due to a delay? Once again, there couldn't be causation
10 because, in the end, from the conceptual point of view, no
11 damage was established.
12 With this, Members of the Tribunal, Bolivia thanks you
13 for your attention, the patience, and also Bolivia would like
14 to thank our colleagues representing the Claimants for their
15 patience, and we therefore conclude our Opening Statement.
16 Thank you very much.
17 PRESIDENT JÚDICE: Thank you very much.
18 This proves what I mentioned in the morning: There is
19 no need to be patient because teams like yours make our task
20 really valuable and enjoyable.
21 I think that the Tribunal will have some questions,
22 but if you agree, we are going to discuss it tomorrow because I
23 think we are all a little bit tired, and I think we will be
24 able to recover the time later on.
25 MR. SILVA ROMERO: Yes, Mr. President. Before we

18:49 1 begin with the examination of the fact witnesses, I wanted to
2 remind Mr. Blackaby that we had an agreement to limit direct
3 examination to 15 minutes, and I understand that Nigel had to
4 discuss this with Caroline.
5 MR. BLACKABY: Could I have just two minutes just to
6 consult about that? Thank you.
7 (Pause.)
8 MR. BLACKABY: Just to confirm, yes, we can agree on a
9 maximum of 15 minutes for direct examination of factual
10 witnesses. We already agreed on experts; that's already been
11 dealt with.
12 Just to be clear, Mr. Rubins was clarifying there was
13 one outstanding question that you asked this morning,
14 Mr. President, and he was wondering whether or not you would
15 expect to hear the response from that tomorrow morning.
16 PRESIDENT JÚDICE: Yes.
17 MR. BLACKABY: Okay. Perfect. The other questions
18 from the Tribunal, will they come before the witness
19 examinations tomorrow?
20 PRESIDENT JÚDICE: Yes, they will come the first thing
21 that will happen tomorrow morning.
22 MR. BLACKABY: Great. Thank you for the
23 clarification.
24 PRESIDENT JÚDICE: 9:00?
25 MR. SILVA ROMERO: 9:30?

18:51 1 (Discussion off microphone.)

2 MR. BLACKABY: We will be here we 9:30.

3 (Whereupon, at 6:51 p.m., the hearing was adjourned

4 until 9:30 a.m. the following day.)

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CERTIFICATE OF REPORTER

I, David A. Kasdan, RDR-CRR, Court Reporter, do hereby certify that the foregoing proceedings were stenographically recorded by me and thereafter reduced to typewritten form by computer-assisted transcription under my direction and supervision; and that the foregoing transcript is a true and accurate record of the proceedings.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to this action in this proceeding, nor financially or otherwise interested in the outcome of this litigation.

____

DAVID A. KASDAN