PCA Case No. 2011-17

IN THE MATTER OF AN ARBITRATION BEFORE A TRIBUNAL CONSTITUTED PURSUANT TO

A. 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 INVESTMENT

- AND -

B. 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 -

C. THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW ARBITRATION RULES (2010)

- between -

1. GUARACACHI AMERICA, INC.

2. RURELEC PLC

(the "Claimants")

- *v.* -

THE PLURINATIONAL STATE OF BOLIVIA

(the "Respondent" or "Bolivia", and together with the Claimants, the "Parties")

AWARD

---

31 January 2014

Tribunal:

Dr José Miguel Júdice, Presiding Arbitrator

Mr Manuel Conthe

Dr Raúl Emilio Vinuesa

Secretary to the Tribunal: Martin Doe

CLAIMANTS' REPRESENTATIVES:

Mr Nigel Blackaby
Mr Noah D. Rubins
Mr Lluís Paradell
Ms Caroline Richard
Mr Jeffery Commission
Mr Francisco Abriani
Ms Belinda McRae
Freshfields Bruckhaus Deringer US LLP

RESPONDENT'S REPRESENTATIVES:

Dr Hugo Raúl Montero Lara, Attorney General
Ms Elizabeth Arismendi Chumacero, Deputy Defense Attorney and Legal Counsel to the State
Office of the Attorney General

Mr Eduardo Silva Romero
Mr José-Manuel García Represa
Mr Álvaro Galindo Cardona
Mr Juan Felipe Merizalde
Ms Ana Carolina Silva
Dechert LLP

TABLE OF CONTENTS

LIST OF ABBREVIATIONS

Adjudication Decree	Supreme Decree No. 24047, 29 June 1995, published in the *Gaceta Oficial* No. 1886 on 30 June 1995
BIE	Bolivia Integrated Energy Limited
BIT	Bilateral Investment Treaty
Birdsong	Birdsong Overseas Ltd.
Bolivia	Plurinational State of Bolivia
BV	Book Value
CAF	Andean Development Fund (in Spanish: *Corporación Andina de Fomento*)
CAPEX	Capital Expenditures
CAPM	Capital Asset Pricing Model
Capitalization Law	Law No. 1544, 21 March 1994, published in the *Gaceta Oficial* No. 1824 on 22 March 1994
CCGT	Combined Cycle Gas Turbine
CER	Certified Emission Reductions
Claimants	Guaracachi America, Inc., and Rurelec Plc.
Claimants' Post-Hearing Brief	Claimants' Post-Hearing Brief dated 31 May 2013
CNDC	National Power Dispatch Comittee (in Spanish: *Comité Nacional de Despacho de Carga*)
Compass Lexecon	Valuation report prepared by Mr Abdala on behalf of Compass Lexecon
Counter-Memorial on Jurisdiction	Claimants' Counter-Memorial on Jurisdiction dated 26 October 2012

DCF	Discounted Cash Flow
Econ One	Valuation report prepared by Mr Flores on behalf of Econ One
EdI	*Estudios de Infraestructura*
EGSA	*Empresa Eléctrica Guaracachi S.A.* (formerly known as *Empresa Eléctrica Guaracachi SAM*)
Electricity Law	Law No. 1604, 21 December 1994, published in the *Gaceta Oficial* No. 1862 on 21 December 1994
ENDE	National Electricity Company (in Spanish: *Empresa Nacional de Electricidad*)
Energais	*Energía para Sistemas Aislados Energais S.A.*
ESA	*Energía para Sistemas Aislados ESA S.A.*
ESMAP	Energy Sector Management Assistance Program
EV	Enterprise Value
FMV	Fair Market Value
FOB	Free on board
GAI	Guaracachi America, Inc.
GDP	Gross Domestic Product
GPU	General Public Utilities Power Inc.
ICSID	International Centre for Settlement of Investment Disputes
IEL	Integrated Energy Limited
Investment Law	Law No. 1182, 17 September 1990, published in the *Gaceta Oficial* No. 1162 on 17 September 1990
IRR	Internal Rate of Return
MEC	*Mercados Energéticos Consultores*

Memorial on Jurisdiction	Respondent's Memorial on Jurisdiction dated 17 September 2012
MFN	Most Favoured Nation
MTP	Medium Term Programming
Nationalisation Decree	Supreme Decree No. 0493, 1 May 2010, published in the *Gaceta Oficial* No. 127NEC on 1 May 2010
New Claims	Alleged violations of the BITs by Bolivia in connection with: (i) electricity spot prices; (ii) capacity payments; and (iii) the two Worthington engines. According to the Respondent, these claims were raised neither in the Notice of Dispute dated 13 May 2010 nor in the Notice of Arbitration dated 24 November 2010.
OPEX	Operating Expenses
PBP	Capacity Price (in Spanish: *Precio Básico por Potencia*)
PCA	Permanent Court of Arbitration
POES	Optimal Plan for Expansion of the Interconnected System (in Spanish: *Plan Óptimo de Expansión del Sistema Interconectado*)
PPI	US Producer Price Index
Privatization Law	Law No. 1330, 24 April 1992, published in the *Gaceta Oficial* No. 1735 on 5 May 1992
Procedural Order No. 1	Terms of Appointment and Procedural Order No. 1
Rejoinder on Jurisdiction	Claimants' Rejoinder on Jurisdiction dated 20 December 2012
Rejoinder on the Merits	Respondent's Rejoinder on the Merits dated 21 January 2013
Reply on Jurisdiction	Claimants' Reply on Jurisdiction dated 26 November 2012
Reply on the Merits	Respondent's Reply on the Merits dated 21 January 2013
Request for Bifurcation	Respondent's Request for Bifurcation dated 9 August 2012
Respondent	Plurinational State of Bolivia

Respondent's Post-Hearing Brief	Respondent's Post-Hearing Brief dated 31 May 2013
ROME 1995 and 2001	Wholesale Electricity Market Operation Regulations (*Reglamento de Operación del Mercado Eléctrico Mayorista*), of 28 June 1995 and 2 March 2001, respectively
RPT 1995 and 2001	Prices and Tariffs Regulations (*Reglamento de Precios y Tarifas de la Electricidad*), of 28 June 1995 and 2 March 2001, respectively
Rurelec	Rurelec Plc.
SCC	Arbitration Institute of the Stockholm Chamber of Commerce
SIN	National Interconnected System
SIRESE	*Sistema de Regulación Sectorial*
SPV	Special Purpose Vehicle
SSDE	*Superintendencia de Electricidad*
Statement of Claim	Claimants' Statement of Claim dated 1 March 2012
Statement of Defence	Respondent's Statement of Defence dated 15 October 2012
Treaties	US-Bolivia BIT and UK-Bolivia BIT
UFV	Domestic Inflation Index (in Spanish: *Unidad de Fomento de Vivienda*)
UK-Bolivia BIT	Agreement between the Government of the United Kingdom and Northern Ireland and the Government of the Republic of Bolivia for the Promotion and Protection of Investments; executed on 24 May 1988 and in force since 16 February 1990
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Rules	United Nations Commission on International Trade Law Arbitration Rules, as revised in 2010
UNDP	United Nations Development Programme

US-Bolivia BIT	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 Investment; executed on 17 April 1998 and in force since 6 June 2001
USD	United States Dollars
VCLT	Vienna Convention on the Law of Treaties of 22 May 1969
WACC	Weighted Average Cost of Capital (in Spanish: *Costo Promedio Ponderado del Capital* – CPPC)
WB	Willing Buyer
WBS	Willing Buyer Standard

CHAPTER I – INTRODUCTION

A. THE PARTIES

1. The Claimants in the present arbitration are Guaracachi America, Inc., a company incorporated in the United States of America, with its principal place of business at Loockerman Square 32, Suite L-100, Dover, Delaware, United States of America (hereinafter, "**GAI**"), and Rurelec Plc, a company constituted under the laws in force in the United Kingdom, with its principal place of business at Prince Consort House, 5^{th} Floor, 27-29 Albert Embankment, London SE1 7TJ, United Kingdom (hereinafter, "**Rurelec**", and together with GAI, the "**Claimants**"). The Claimants are represented in these proceedings by:

   Nigel Blackaby, Freshfields Bruckhaus Deringer US LLP
   Noah D. Rubins, Freshfields Bruckhaus Deringer US LLP
   Lluís Paradell, Freshfields Bruckhaus Deringer US LLP
   Caroline Richard, Freshfields Bruckhaus Deringer US LLP
   Jeffery Commission, Freshfields Bruckhaus Deringer US LLP
   Francisco Abriani, Freshfields Bruckhaus Deringer US LLP
   Belinda McRae, Freshfields Bruckhaus Deringer US LLP

2. The Respondent in the present arbitration is the Plurinational State of Bolivia (hereinafter, "**Bolivia**" or the "**Respondent**"). The Respondent is represented in these proceedings by:

   Hugo Raúl Montero Lara, Attorney General
   Elizabeth Arismendi Chumacero, Deputy Defense Attorney and Legal Counsel to the State
   Eduardo Silva Romero, Dechert (Paris) LLP
   José-Manuel García Represa, Dechert (Paris) LLP
   Álvaro Galindo Cardona, Dechert LLP
   Juan Felipe Merizalde, Dechert LLP
   Ana Carolina Silva, Dechert (Paris) LLP

B. BACKGROUND TO THE ARBITRATION

3. The Claimants commenced these proceedings by a Notice of Arbitration dated 24 November 2010 pursuant to Article 3 of the United Nations Commission on International Trade Law Arbitration Rules, as revised in 2010 (hereinafter, the "**UNCITRAL Rules**"), Article IX of

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 Investment (hereinafter, the "**US-Bolivia BIT**"), and Article VIII of the Agreement between the Government of the United Kingdom and Northern Ireland and the Government of the Republic of Bolivia for the Promotion and Protection of Investments (hereinafter, the "**UK-Bolivia BIT**", and together with the US-Bolivia BIT, the "**Treaties**" or "**BITs**").

4. The Claimants alleged that the nationalisation carried out by the Bolivian State of GAI's and Rurelec's 50.001% shareholding in *Empresa Eléctrica Guaracachi S.A.* (hereinafter, "**EGSA**"), a company incorporated under the laws of Bolivia, as well as the failure to obtain justice through the Bolivian court system, caused injury to the Claimants quantified at USD 142.3 million. Moreover, they argued that Bolivia seized further assets owned by Rurelec's subsidiary, *Energía para Sistemas Aislados Energais S.A.* (hereinafter, "**Energais**"), resulting in a further loss of USD 661,535. Therefore, they commenced these proceedings so as to obtain adequate and effective compensation from the Tribunal.[1]

[1] Notice of Arbitration, ¶4; Statement of Claim, ¶¶3-4; Claimants' Post-Hearing Brief, ¶1.

CHAPTER II – PROCEDURAL HISTORY

5. By letter dated 24 November 2010, pursuant to Article IX of the US-Bolivia BIT and Article VIII of the UK-Bolivia BIT, the Claimants served the Respondent with a Notice of Arbitration, which was received by the latter on 30 November 2010.

6. By letter dated 12 January 2011, the Claimants appointed Mr Manuel Conthe as the first arbitrator.

7. On 28 March 2011, given that the deadline of 30 days from the appointment of the first arbitrator had elapsed without the Respondent appointing an arbitrator, the Claimants requested that the Secretary-General of the Permanent Court of Arbitration (hereinafter, the "**PCA**") designate an appointing authority to appoint the second arbitrator.

8. On 27 April 2011, the Secretary-General of the PCA designated H.E. Judge Gilbert Guillaume as appointing authority in this arbitration for all purposes under the UNCITRAL Rules.

9. On 3 May 2011, the Respondent sent a letter appointing Dr Raúl Emilio Vinuesa as the second arbitrator. Such appointment was accepted by the Claimants on 10 May 2011.

10. On 20 June 2011, in light of the Parties' inability to agree on the appointment of the presiding arbitrator, the appointing authority was requested to proceed with such appointment. As requested, by letter dated 8 August 2011, H.E. Judge Gilbert Guillaume appointed Dr José Miguel Júdice as the presiding arbitrator.

11. On 9 December 2011, taking into account the agreements reached between the Parties, the Parties communicated a copy of the Terms of Appointment and Procedural Order No. 1 (hereinafter, the "**Procedural Order No. 1**") to the PCA, which provided, *inter alia*, that the languages of the arbitration would be English and Spanish, that the PCA would act as registry and administering authority for the proceedings, and that the place and legal seat of the proceedings would be The Hague. In addition, Procedural Order No. 1 set forth the following procedural calendar:

> "***12. Pleadings: Number, Sequence, Time Limits***
>
> *12.1. The Claimants shall file its Statement of Claim on 1 March 2012.*
>
> *12.2. The Respondent shall file its Statement of Defense, pursuant to the UNCITRAL Rules, on 1 August 2012.*

12.3. The Claimants shall file its Reply, in accordance with Article 24 of the UNCITRAL Rules, on 1 November 2012.

12.4. The Respondent shall file its Rejoinder, in accordance with Article 24 of the UNCITRAL Rules, on 1 February 2013.

[…]

12.7. An oral hearing will be held from 1 to 10 April 2013 (exclusive of the weekend) at which the Parties will present their experts and witnesses, and make oral submissions."

12. On 1 March 2012, the Claimants submitted, in accordance with Procedural Order No. 1, their Statement of Claim in English, accompanied by witness statements, the expert report of Dr Manuel Abdala, and all other evidence relied upon in support of their Statement of Claim.

13. On 23 March 2012, the Claimants submitted, in accordance with Procedural Order No. 1, a Spanish translation of the documents mentioned in the previous paragraph.

14. By letter dated 26 June 2012, the Respondent informed both the Tribunal and the Claimants that, on 13 June 2012, the Office of the Attorney General had determined that the public tender to retain the services of external counsel had been unsuccessful, since none of the tendering firms had met the required conditions. As a consequence, the Respondent requested a two (2) month extension for the submission of its Statement of Defence.

15. On 2 July 2012, after considering the Claimants' arguments against granting such an extension, the Tribunal issued Procedural Order No. 2. The Tribunal decided to grant a 45-day extension. In addition, it urged the Parties to try to agree within a deadline of 30 days on a calendar for further submissions that would not require postponing the scheduled hearing.

16. On 9 August 2012, following the Parties' failure to reach an agreement and the expiry of the aforementioned deadline, the Tribunal issued Procedural Order No. 3, wherein it was decided that the procedural calendar would be as follows:

"*(a) The Respondent shall file its Statement of Defense, pursuant to the UNCITRAL Rules, on 14 September 2012;*

(b) The Claimants shall file their Reply, in accordance with Article 24 of the UNCITRAL Rules, on 5 December 2012;

(c) *The Respondent shall file its Rejoinder, in accordance with Article 24 of the UNCITRAL Rules, on 22 February 2013; and*

(d) *An oral hearing will be held on 1-10 April 2013 (exclusive of the weekend) at which the Parties will be able to examine experts and witnesses, and make oral submissions.*"

17. By letter dated 9 August 2012, the Respondent informed the Tribunal that it had retained Dechert (Paris) LLP as external counsel. Moreover, it requested that the Tribunal bifurcate the proceedings (hereinafter, the "**Request for Bifurcation**") pursuant to Article 23(3) of the UNCITRAL Rules, on the following grounds: (i) the merely contractual nature of the Claimants' claims; (ii) the Claimants, by resorting to the Bolivian courts, have exercised a choice under the fork-in-the-road clause provided for in the US-Bolivia BIT, such that the arbitration should proceed only in respect of the nationalisation claim; and (iii) the premature nature of the claims raised by the Claimants.

18. On 13 August 2012, the Tribunal issued Procedural Order No. 4 wherein the Claimants were granted until 23 August 2012 to submit any comments they might have on the Request for Bifurcation. The procedural calendar set forth in Procedural Order No. 3 was maintained.

19. By e-mail of 23 August 2012, the Claimants requested that the Tribunal grant an extension of the deadline set forth in Procedural Order No. 4, until 27 August 2012, in order to "*have an opportunity to consult with the Claimants' representatives with respect to the Respondent's request*."

20. By e-mail of 23 August 2012, the presiding arbitrator granted the extension requested by the Claimants.

21. On 24 August 2012, the Tribunal issued Procedural Order No. 5, wherein it confirmed the extension granted by the presiding arbitrator by e-mail, while maintaining the procedural calendar set forth in Procedural Order No. 3.

22. By letter dated 27 August 2012, the Claimants submitted their Response to Respondent's Request for Bifurcation and submitted new evidence in support thereof. The Claimants requested that the Tribunal reject such Request on the following grounds: (i) the Request for Bifurcation was a dilatory tactic contrary to the procedural agreement reached by the Parties set forth in Procedural Order No. 1, (ii) bifurcation would not achieve any greater efficiency

or economy, and (iii) bifurcation was also inappropriate as the jurisdictional objections could not be separated from the merits of the dispute.

23. By letter dated 29 August 2012, the Respondent acknowledged receipt of the Claimants' Response to the Request for Bifurcation and made a series of clarifications and corrections to the Tribunal on the matter, asserting that the Claimants had raised new claims (hereinafter, the "**New Claims**").[2]

24. On 30 August 2012, the Tribunal issued Procedural Order No. 6, disregarding the last letter sent by Respondent given its untimely nature. In such Order, the Tribunal acknowledged the difficulty of deciding on the Request for Bifurcation due to the lack of complete information on the position of the Parties and concluded as follows:

> "*(a) The calendar of submissions, defined through common agreement by Procedural Order No. 1 as amended by Procedural Orders Nos. 2 and 3, is maintained and therefore Respondent shall file its Statement of Defense on 14 September 2012, and the other Submissions will follow as and in accordance with the defined calendar;*
>
> *(b) On 14 September 2012, either as part of its Statement of Defense or in a separate Memorial on Jurisdiction, the Respondent shall set forth in full its objections to the jurisdiction of the Arbitral Tribunal;*
>
> *(c) On 15 October 2012, the Claimants shall file a Counter-Memorial on Jurisdiction;*
>
> *(d) On 31 October 2012, the Respondent may file a Reply on Jurisdiction;*
>
> *(e) If a Reply has been filed, the Claimants may file a Rejoinder on Jurisdiction on 15 November 2012;*
>
> *(f) Once the Parties have fully pleaded the jurisdictional issues, as set forth in the above calendar, the Tribunal will decide whether (i) to bifurcate the proceedings and hold specific hearings on the jurisdictional issues, (ii) to refuse the requested bifurcation and therefore to decide on its own jurisdiction following the scheduled hearings on the merits, or (iii) to decide on its jurisdiction without the need for any hearing;*

[2] According to the Respondent, "New Claims" are alleged violations of the BITs on the part of Bolivia in connection with: (i) electricity spot prices; (ii) power or capacity payments; and (iii) the two Worthington engines. According to the Respondent, these claims were not raised in the Notice of Dispute dated 13 May 2010 or in the Notice of Arbitration dated 24 November 2010.

> (g) *To allow the possibility referred under f) (iii) above, and in accordance with Article 17(3) of the UNCITRAL Rule 2010, Parties are requested to state on their Memorial and Counter-Memorial whether they would request an oral hearing on jurisdiction, even if the Arbitral Tribunal considers it unnecessary.*"

25. By e-mail of 30 August 2012, the Respondent requested that the Tribunal reconsider the decision adopted in Procedural Order No. 6 "*taking into account the arguments submitted in good faith*" in its letter dated 29 August 2012. Furthermore, the Respondent requested a further 45-day extension, until 29 October 2012, to file its Statement of Defence "*taking into account (i) the inclusion of New Claims by the Claimants in the Statement of Claim, (ii) the recent hiring of the legal team of Dechert and (iii) that the Respondent has only received the electronic damages model of Dr Manuel Abdala, Claimants' expert, last Wednesday, 29 August 2012*" [Tribunal's translation].

26. By letter dated 3 September 2012, the Claimants objected to the Respondent's request on two grounds: (i) the Respondent had been in possession of the Statement of Claim since 1 March 2012, which was enough time to have submitted its Statement of Defence, and (ii) the delay and the request for an additional extension to submit its Statement of Defence were both unjustifiable and unfair. They requested that the Respondent adhere to the calendar established in Procedural Order No. 6.

27. On 3 September 2012, the Tribunal issued Procedural Order No. 7, whereby, in order to ensure the conditions necessary for the Respondent to submit its Statement of Defence, the Tribunal decided to modify the schedule of submissions on the merits, whilst not making any change to the schedule of submissions on jurisdiction. Hence, the Tribunal set a new calendar:

> "*a) On 5 October 2012, the Respondent shall file a Response;*
>
> *b) On 4 January 2013, the Claimants shall file Reply;*
>
> *c) On 13 February 2013, the Respondent shall file a Rejoinder;*
>
> *d) On 14 March 2013, each Party shall provide, with a copy to the Tribunal and the PCA: (a) the names of the witnesses whose statement or report has been submitted by the other Party with the request that they be available for cross-examination at the hearing; and (b) as the case may be, a request for the Tribunal to permit the appearance at the hearing of witnesses whose statement or report has been submitted by the Party.*"

28. By subsequent e-mails between the Parties and the Tribunal dated 14 September 2012, it was agreed that the Respondent would file its Memorial on Jurisdiction on 17 September 2012.

29. On 17 September 2012, the Respondent filed its Memorial on Jurisdiction, together with witness statements and relevant supporting evidence. Once again, the Respondent reiterated its request that the Tribunal bifurcate the proceedings on the following grounds: "*(a) Claimants have commenced an arbitration that entails an undue joinder of Treaties and claims into a single proceeding before a single tribunal; (b) Rurelec is neither an 'investor' nor holds an 'investment' in Bolivia in the terms of the United Kingdom Treaty; and (c) Bolivia is entitled to deny the benefits of the United States Treaty to Guaracachi America pursuant to Article XII thereof*" [Tribunal's Translation].

30. By letter dated 22 September 2012, the PCA informed the Respondent that the abovementioned documents had been received and that the Tribunal had decided to continue the proceedings pursuant to the timetables set forth in Procedural Orders Nos. 6 and 7.

31. By e-mail of 23 September 2012, the Respondent informed the PCA that "*it has made a formal request that a true bifurcation be ordered and that the scheduled deadlines regarding the merits of the case, including that of October 5, 2012 for the submission of the Respondent's Statement of Defense, be set aside*".

32. By letter dated 24 September 2012, the PCA informed the Respondent that the Tribunal, "*considering that there are no new facts that would justify amending the calendars set forth in its prior orders*", maintained the deadlines established in Procedural Orders Nos. 6 and 7.

33. By letter dated 4 October 2012, the Respondent requested an extension of 10 days, until Monday, 15 October, to the deadline to file its Response on the merits on the following grounds: (i) the New Claims raised by the Claimants were sufficiently complex from a technical standpoint that their expert had been unable to complete his work; (ii) the expert appointed by the Respondent had only had one month and one week to prepare an answer to such report, whereas the Claimants' expert had had at least 15 months between the submission of the Notice of Arbitration and the Statement of Claim to prepare his report; and (iii) were such extension to be granted, it would not affect the procedural calendar set forth in Procedural Order No. 6. Additionally, the Respondent proposed a new procedural calendar whereby, if the extension requested were granted, it would give up 10 days for the purpose of preparing its Rejoinder, thus ensuring that the Claimants' right to file their Reply was not curtailed.

34. By subsequent e-mails of the same date, the Tribunal decided to grant the extension requested by the Respondent. Furthermore, it took note of the consequences suggested by the Respondent with respect to the reduction of the period for filing its Rejoinder.

35. By subsequent e-mail, the Claimants regretted not having had the opportunity to comment on the extension requested by the Respondent before the Tribunal decided thereon. On the other hand, they requested that the Tribunal grant a 10-day extension as from the date of receipt of the Statement of Defence, until 26 October 2012, to submit their Counter-Memorial on Jurisdiction, as otherwise they would have only 10 days as from the reception of the Statement of Defence to file their Counter-Memorial on Jurisdiction.

36. In response to this request, by e-mail of 4 October 2012, Respondent informed the Tribunal that such an extension would affect the subsequent dates set forth in the procedural calendar, as Bolivia was to file its Reply on Jurisdiction on 31 October 2012, i.e., five days following receipt of Claimants' Counter-Memorial on Jurisdiction. Accordingly, it argued that it should be able to file its Reply on Jurisdiction no earlier than 9 November 2012. However, in view of other commitments that posed a conflict with such date, it requested that, were the Claimants' extension to be granted, it be allowed to submit its Reply on Jurisdiction by 23 November 2012.

37. By e-mail of 5 October 2012, the Claimants consented to Bolivia's proposal, provided that they were allowed to file their Rejoinder on Jurisdiction by 17 December 2012.

38. On 9 October 2012, the Tribunal issued Procedural Order No. 8. The Tribunal accepted, "as a strict and final exception", the Respondent's request that the deadline for the filing of its Statement of Defence be extended until 15 October 2012, together with the consequences suggested by the Respondent with respect to the reduction of the period for the filing its Rejoinder. Finally, the Tribunal accepted the agreement reached by the Parties with respect to the extensions for the filing of their submissions on jurisdiction. Therefore, a new schedule was established, for submissions on the merits as well as on jurisdiction as follows:

> "*a) On 15 October 2012, the Respondent shall file their Statement of Defence;*
>
> *b) On 26 October 2012, the Claimants shall file their Counter-Memorial on Jurisdiction;*
>
> *c) On 23 November 2012, the Respondent may file a Reply on Jurisdiction;*

d) If a Reply has been filed, the Claimants may file a Rejoinder on Jurisdiction on 17 December 2012;

e) Once the Parties have fully pleaded the jurisdictional issues, as set forth in the above calendar, the Tribunal will decide whether (i) to bifurcate the proceedings and hold specific hearings on the jurisdictional issues, (ii) to refuse the requested bifurcation and therefore to decide on its own jurisdiction following the scheduled hearings on the merits, or (iii) to decide on its jurisdiction without the need for any hearing;

f) On 13 January 2013, the Claimants shall file Reply on the merits;

g) On 13 February 2013, the Respondent shall file a Rejoinder on the merits; and

h) On 14 March 2013, each Party shall provide, with a copy to the Tribunal and the PCA: (a) the names of the witnesses whose statement or report has been submitted by the other Party with the request that they be available for cross-examination at the hearing; and (b) as the case may be, a request for the Tribunal to permit the appearance at the hearing of witnesses whose statement or report has been submitted by the Party."

39. On 15 October 2012, the Respondent filed its Statement of Defence and supporting documents, as stated in Procedural Order No. 8.

40. By letter dated 19 October 2012, the Claimants acknowledged receipt of the above documents and requested the valuation model prepared by the Respondent's expert in electronic format.

41. On 22 October 2012, the Respondent made the valuation report available to the Claimants in electronic format as requested.

42. On 26 October 2012, the Claimants submitted their Counter-Memorial on Jurisdiction in accordance with the schedule set forth in Procedural Order No. 8.

43. On 23 November 2012, the Tribunal issued Procedural Order No. 9. The Tribunal accepted the possibility of holding a hearing on jurisdiction within the period between 21 January and 8 February 2013 and lasting a maximum of three days. However, it would not alter the dates scheduled for the hearing on the merits, if any was held. At the same time, it invited the Parties to make any comments on this proposal by 27 November 2012.

44. By e-mail of 23 November 2012, the Respondent requested that the Tribunal grant a three-day extension, until 26 November 2012, for the submission of its Reply on Jurisdiction, as agreed by the Claimants on the condition that the Claimants would be granted an equivalent period to file their Rejoinder.

45. By subsequent e-mails of the same date, the Claimants confirmed and the Tribunal accepted the agreement invoked by the Respondent.

46. On 26 November 2012, in accordance with the abovementioned agreement, the Respondent filed its Reply on Jurisdiction.

47. By letter dated 27 November 2012, the Claimants submitted their comments as requested by the Tribunal in Procedural Order No. 9. They informed the Tribunal that due to other professional commitments, they would be unavailable on the dates proposed for the holding of a hearing on jurisdiction, and restated their position that a single hearing should be held on both jurisdictional objections and the merits of the case.

48. By letter of the same date, the Respondent also submitted its comments regarding a possible hearing on jurisdiction. In this regard, the Respondent (i) expressed its disagreement with the failure to suspend the proceedings on the merits; (ii) proposed that the hearing on jurisdiction be held on the dates scheduled for the hearing on the merits; and, finally, (iii) informed the Tribunal that its representatives would be available for a hearing on jurisdiction on 4-5 February 2013, and suggested that the hearing be held in Paris.

49. On 30 November 2012, the Respondent filed its Reply on Jurisdiction, together with all relevant supporting documents.

50. By letter dated 12 December 2012, the Claimants stated that due to certain alleged actions by Bolivia *Mercados Energéticos Consultores* (hereinafter, "**MEC**") had ceased providing technical services to Compass Lexecon.

51. On 17 December 2012, the Tribunal issued Procedural Order No. 10, whereby it decided that no hearing on jurisdiction would be held and confirmed the extensions previously agreed upon by the Parties.

52. On 20 December 2012, the Claimants filed their Rejoinder on Jurisdiction, together with all relevant supporting documents.

53. By e-mail of 2 January 2013, the Claimants informed the Tribunal that the Parties had reached an agreement on the submission of the Reply on the Merits. Thus, the Claimants would file their Reply on 21 January 2013, whereas the Respondent would file its Rejoinder on 20 February 2013. By subsequent e-mails of the same date, the Respondent confirmed and the Tribunal accepted such agreement.

54. By letter dated 2 January 2013, the Claimants drew to the attention of the Tribunal the Decision on Jurisdiction adopted in *Teinver S.A. v. Argentine Republic* dated 21 December 2012, as they deemed it relevant to certain key aspects of this arbitration.

55. By letter dated 14 January 2013, the Respondent provided its comments with respect to the *Teinver S.A. v. Argentine Republic* case.

56. On 21 January 2013, the Claimants filed their Reply on the Merits, together with all relevant supporting documents.

57. On 25 January 2013, the Tribunal issued Procedural Order No. 11. The Tribunal accepted the extensions previously agreed upon by the Parties and admitted the Parties' allegations on the *Teinver S.A. v. Argentine Republic* case, such that those were henceforth to be treated as part of the their written submissions.

58. By subsequent letter from the PCA of the same date, the Parties were required to make an additional deposit so as to cover future arbitration expenses.

59. By letter dated 25 January 2013, the Respondent responded to the Claimants' letter dated 12 December 2012 regarding MEC. Bolivia denied the Claimants' allegations that it had intimidated or otherwise caused MEC to resign from their role in this arbitration.

60. By e-mail of 6 February 2013, the Respondent informed the Tribunal that the Parties had reached an agreement on an extension of the deadlines for the submission of the Rejoinder on the Merits.

61. By e-mail of 7 February 2013, the Claimants confirmed the abovementioned agreement.

62. By letter dated 12 February 2013, the Respondent submitted a Request for a Document Production Order and a Request for *Cautio Judicatum Solvi*.

63. On 14 February 2013, the Tribunal issued Procedural Order No. 12, whereby it accepted the extension previously agreed upon by the Parties and urged the Claimants to comment on both Requests submitted by the Respondent.

64. By letter dated 15 February 2013, and within the deadline set forth in Procedural Order No. 12, the Claimants filed their Response to the Request for a Document Production Order.

65. By letter dated 20 February 2013, and within the deadline set forth in Procedural Order No. 12, the Claimants filed their Response to the Request for *Cautio Judicatum Solvi*.

66. On 21 February 2013, the Tribunal issued Procedural Order No. 13, whereby it accepted the abovementioned agreement reached by the Parties and decided not to order the Claimants' production of the "agreement" and "further documentation" requested by the Respondent. Moreover, it confirmed that there was no conflict of interest whatsoever between the Tribunal and Salvia Investments (the funder).

67. By letter dated 1 March 2013, the Tribunal accepted that the hearing be moved to Paris and held on 2-6 April, with 8 April held in reserve.

68. By subsequent e-mails, the Parties agreed that the hearing be held in Paris on 2-5 and 8 April, with 9 April held in reserve. Furthermore, the Respondent informed the Tribunal that the Parties had reached an agreement on a brief extension of the deadline for the submission of the Rejoinder on the Merits.

69. As previously agreed upon, on 3 March 2013, the Respondent filed its Rejoinder on the Merits.

70. By letter dated 3 March 2013, the Respondent requested that the Tribunal declare inadmissible the excerpts of the reports of Mr Abdala of Compass Lexecon that had been prepared first by MEC and later by *Estudios de Infraestructura* (hereinafter, "**EdI**"), since the individuals who had prepared these had not been identified.

71. On 11 March 2013, the Tribunal issued Procedural Order No. 14, wherein it dismissed the Request for *Cautio Judicatum Solvi*, due to insufficient evidence of the Claimants' alleged insolvency.

72. On 11 March 2013, the Tribunal issued Procedural Order No. 15. The Tribunal confirmed the prior agreement and accepted that the hearing be held in Paris on the dates agreed upon by the Parties. In addition, it requested that, by 14 March 2013, the Parties submit the lists of

their respective witnesses and experts who would appear during the hearing, and proposed that a telephone conference call be held among the Tribunal, the PCA and the Parties on 26 March 2013.

73. By letter dated 14 March 2013, the Claimants responded to the request that the excerpts of the Compass Lexecon Report that had been prepared by both MEC and EdI be declared inadmissible. They opposed Bolivia's request and argued that the Respondent itself had also failed to identify the individuals who had prepared the relevant excerpts of reports attributed to the *Comité Nacional de Despacho de Carga* (hereinafter, the "**CNDC**").

74. By letters dated 14 March 2013, both Parties provided the Tribunal with their respective lists of witnesses and experts.

75. On 21 March 2013, the Tribunal issued Procedural Order No. 16, whereby it decided that it would be useful to have representatives of MEC, EdI, and CNDC appear at the hearing. For such purpose, it requested that the Parties contact the relevant representatives of these entities and provide the Tribunal with their contact details by 25 March 2013. The PCA contacted MEC's representative.

76. On 26 March 2013, in accordance with Procedural Order No. 15, the aforementioned telephone conference call was held among the Tribunal, the Parties, and the PCA.

77. On 27 March 2013, the Tribunal issued Procedural Order No. 17, wherein it settled the matters on which agreement could not be reached between the Parties during the telephone conference call, including, *inter alia*, the duration of opening statements, the scope and allocation of time for the examination of witnesses and experts, and the submission of new documents by the Claimants. With respect to the latter, the Tribunal decided to allow the Claimants to submit the new documents and that the Respondent should be granted an opportunity to comment on these.

78. As stated in Procedural Order No. 17, the Claimants submitted their new documents on 27 March 2013, and the Respondent provided its comments on these on 28 March 2013.

79. By letter dated 29 March 2013, the Claimants requested that the Tribunal allow them to respond to the submissions made by the Respondent with its comments of 28 March 2013. Moreover, considering the length of these submissions, the Claimants requested that the Respondent identify the excerpts of Professor Damodaran's work on which it intended to rely during the hearing.

80. By subsequent e-mail of the same date, the Tribunal concluded that there was no need for additional comments by the Claimants and decided to admit the documents submitted by them, with the exception of Exhibits C-363 to C-367. The Tribunal also decided to admit the documents submitted by the Respondent, with the exception of Exhibit R-169.

81. On 1 April 2013, the Tribunal issued Procedural Order No. 18, whereby it confirmed the foregoing decision and requested that the Respondent identify the excerpts of Exhibits R-170 and R-171 on which it intended to rely during the hearing.

82. On 2-5, 8 and 9 April 2013, the hearing on jurisdiction and the merits was held in Paris.

83. On 12 April 2013, the Tribunal issued Procedural Order No. 19, whereby it confirmed the agreement reached by the Parties regarding the submission of post-hearing briefs.

84. By e-mails dated 17 May 2013, both Parties submitted their agreed corrections to the hearing transcripts.

85. By e-mails dated 24 May 2013, the Parties informed the Tribunal that they had agreed to submit their post-hearing briefs one week later than the date established in Procedural Order No. 19. The Tribunal accepted this agreement by subsequent e-mail.

86. On 31 May 2013, both Parties submitted their post-hearing briefs and costs submissions, together with all supporting documents.

87. By letter dated 24 June 2013, the Claimants submitted a copy of the award in *Liman Caspian Oil v. Kazakhstan*.

88. By letter dated 26 June 2013, the PCA invited the Respondent to comment on the Claimants' letter, noting that, following receipt of the Respondent's comments, the proceedings would be deemed closed.

89. By letter dated 30 June 2013, the Respondent commented on the Claimants' letter and the Claimants' costs submission.

90. By letter dated 8 July 2013, the Claimants objected to the content of the Respondent's letter.

91. By e-mail of 9 July 2013, the Presiding Arbitrator noted the Claimants' letter and the proceedings were thus closed.

92. By letter dated 20 December 2013, the Respondent requested that the Tribunal re-open the proceedings and allow the submission of certain materials relating to Mr Abdala's participation in the *Pan American Energy v. Bolivia* proceedings.

93. By letter dated 27 December 2013, the Claimants' opposed the Respondent's request to re-open the proceedings.

94. On 2 January 2014, the Tribunal issued Procedural Order No. 20, wherein it declined to re-open the proceedings.

CHAPTER III – FACTUAL BACKGROUND

A. INTRODUCTION

95. GAI, a company incorporated in the United States of America, and Rurelec, a company constituted under the laws of the United Kingdom, acting in their capacity as Claimants in these arbitration proceedings, submit claims for economic compensation against the Plurinational State of Bolivia, by virtue of their status as investors from the United States and the United Kingdom in accordance with the Treaties between these two States and Bolivia.

96. The Claimants have brought these arbitration proceedings in order to obtain compensation from Bolivia for the damages allegedly caused by modifications made to the regulatory framework governing the electricity sector, the failure of the Bolivian judiciary to provide justice and, ultimately, the nationalisation of both investors' 50.001% stake in EGSA.

B. FACTUAL CONTEXT PRIOR TO THE PRIVATIZATION OF EGSA

97. According to the Claimants, during the 1980s, Bolivia faced an economic crisis marked by a drop in investments, savings, exports, consumption, and a decreasing GDP, as well as by periods of hyperinflation, a large foreign debt, etc. This situation also threatened to produce an imbalance in the balance of payments, which would render impossible any attempt at the future growth of the county.[3]

98. Therefore, the Claimants state that, in 1985, the Bolivian Government, with the support of several multilateral organisations and agencies, decided to implement a structural reform program consisting in the elimination of local price controls, the reduction of tariffs, the encouragement of currency floating, the promotion of the private sector, the privatization of State-owned companies, and the reduction of the degree of economic regulation.[4]

99. Starting in 1991, the effects of the reforms could be clearly observed. As of that year, according to Claimants, the Bolivian economy experienced considerable growth. This development also coincided with funding from international institutions to boost the Bolivian economy, in turn benefiting the electricity sector, to which part of such funding was allocated.

[3] Statement of Claim, ¶21; Reply on the Merits, ¶14. See Transcript (English), Day 1, 2 April 2013, 35:22-36:1.

[4] Statement of Claim, ¶22. See Transcript (English), Day 1, 2 April 2013, 36:1-36:10.

100. Nonetheless, from the Claimants' viewpoint, the funds allocated were not enough. Bolivia's electricity sector accounted for 50% of the country's exports, and took up 40% of public investment. This meant that, without a continuous injection of funds from international institutions, the sector remained at constant risk.[5]

101. While the Respondent asserts that the Bolivian electricity sector at the time was sustainable,[6] the Claimants allege that the electricity sector faced various problems, such as a worldwide lack of funding (which entailed the reduction of multilateral funding for the electricity sector), the freezing of new investments (due to the suspension during the economic crisis of the application of the 9% rate of return on investment established in the National Electricity Code), and the limited technical abilities of the National Electricity Management Agency, the entity responsible for the regulation of electricity services.[7]

102. The Claimants contend that these difficulties forced the Bolivian electricity sector and the National Electricity Company (*Empresa Nacional de Electricidad*, hereinafter, "**ENDE**"), the State electricity producer, into a difficult financial position and made it necessary to restructure the sector with the benefit of financial aid and technical capacity from foreign investors.[8]

103. However, the Respondent asserts that ENDE was the largest electricity generator in the country and also had highly qualified personnel[9] and modern electrical units. Moreover, ENDE had reported positive financial results through 1995 (the year of the capitalization) and had a generation capacity of 498 MW.[10]

104. The Claimants deny that ENDE enjoyed such a good position and argue that its financial results do not truly reflect the reality of the situation. Thus, between 1986 and 1993, the Government had to absorb part of ENDE's debt, covering its liabilities by using USD 102 million of YPFB and treasury funds. Furthermore, contrary to Bolivia's assertions,[11] the joint

---

[5] Statement of Claim, ¶¶23-24.

[6] Statement of Defense, ¶¶26, and 31; Rejoinder on the Merits, ¶¶30-40. In addition, the Respondent claims that the good condition of the electricity sector was confirmed by the *Energy Sector Management Assistance Program* (hereinafter, "**ESMAP**"), and by neighboring countries. Therefore, it claims that capitalization was not an emergency measure.

[7] Statement of Claim, ¶25.

[8] Statement of Claim ¶26. See Transcript (English), Day 1, 2 April 2013, 36:13-38:6.

[9] In this regard, the Claimants affirm in their Reply on the Merits, ¶21, that Bolivia has only challenged the qualification of the personnel hired by ENDE. Thus, the Respondent has accepted the fact that the General Electricity Directorate was limited (in terms of technical capacity) due to budget constraints.

[10] Statement of Defense, ¶¶30, 32-33.

[11] Statement of Defense, ¶33.

report of the United Nations Development Program (hereinafter, "**UNDP**") and the World Bank described ENDE's financial position as "strained".[12] Therefore, a considerable injection of funds was necessary to ensure the preservation of the electricity sector in Bolivia.

105. The Respondent for its part denies the foregoing assertions and reaffirms that ENDE yielded positive financial results as set forth in its annual reports. In addition, the Respondent asserts that the Bolivian electricity sector was able to finance itself, except during the period used by the Claimants (1983-1985). In fact, the UNDP and World Bank deemed ENDE to be one of the most efficient electricity generation and transmission companies.[13]

C. THE NEW REGULATORY FRAMEWORK FOR THE BOLIVIAN ELECTRICITY SECTOR

1. Legal Framework

106. At the beginning of the 1990s, Bolivia implemented broad reforms aimed at attracting foreign investors and establishing a new regulatory framework that would foster the involvement of the private sector and competition in the energy sector and, in particular, in the electricity industry.[14]

107. In this vein, in September 1990, Bolivia enacted Law No. 1182 (hereinafter, the "**Investment Law**") for the purposes of "stimulating" and "ensuring" national and foreign investments in Bolivia, as reinforced by treaties.[15]

108. Subsequently, in 1992, Bolivia passed Law No. 1330 (hereinafter, the "**Privatization Law**"), chiefly targeted at the privatization of small State-owned enterprises.

109. In 1994, the Bolivian Government enacted a new law, Law No. 1544 (hereinafter, the "**Capitalization Law**"), through which the private sector was allowed to participate in international public tenders and bid for equity offerings, thus acquiring shares in the main

[12] Reply on the Merits, ¶19; Joint UNDP/World Bank Program of Assistance with the Management of the Energy Sector, "Bolivia: Restructuring and Capitalization of the Electricity Supply Industry - An Outline for Change", Report No. 21520 of 12 September 1995, p. 24 (Exhibit **C-61**); Witness Statement of Juan Carlos Andrade, 21 January 2013, ¶14.

[13] Rejoinder on the Merits, ¶¶40-44.

[14] Statement of Claim, ¶27; Reply on the Merits, ¶¶24-28; Claimants' Post-Hearing Brief, ¶27. See Transcript (English), Day 1, 2 April 2013, 36:13-38:6. 39:14-41:3; Transcript (English), Day 6, 9 April 2013, 1338:17-1338:23.

[15] Statement of Claim, ¶27.

State-controlled entities,[16] including ENTEL (telecommunications), YPFB (hydrocarbons), ENDE (generation and transmission of electricity), ENAF (mineral-ore processing), LAB (airlines), and ENFE (railways).[17]

110. The statutory privatization scheme allowed private investors to acquire a 50% interest in the abovementioned entities, as well as to obtain control over the management of the relevant State-owned companies in exchange for a certain amount of capital. The remaining 50% (which investors were not allowed to acquire) was allocated to a public fund, created to guarantee Bolivian pensions.[18]

111. The cornerstone of the regulatory framework was Law No. 1604 of 1994, (hereinafter, the "**Electricity Law**"), which established the basic framework for the supply of electricity. In addition, an independent entity was created, the Electricity Superintendency (*Superintendencia de Electricidad*, hereinafter, the "**SSDE**"), charged with the enforcement of the Electricity Law and the management of the electricity sector,[19] and the National Power Dispatch Committee (*Comité Nacional de Despacho de Carga*, hereinafter, the "**CNDC**"), which was subject to the oversight of the SSDE.[20]

112. Afterwards, in further development of the objectives of the Electricity Law, the Wholesale Electricity Market Operation Regulations (*Reglamento de Operación del Mercado Eléctrico Mayorista*, hereinafter, "**ROME 1995**") and the Prices and Tariffs Regulations (*Reglamento de Precios y Tarifas*, hereinafter "**RPT 1995**") were jointly issued in 1995.[21] Finally, in 2001, Supreme Decrees No. 26093 and No. 26094 published a new ROME and RPT (hereinafter, "**ROME 2001**" and "**RPT 2001**"),[22] which replaced the prior ones.

[16] Statement of Claim, ¶29; Statement of Defense, ¶39; Rejoinder on the Merits, ¶47.

[17] Statement of Claim, ¶29.

[18] Statement of Claim, ¶29; Statement of Defense, ¶¶42, and 44.

[19] Statement of Claim, ¶38.

[20] Statementof Claim, ¶38; Memorial on Jurisdiction, ¶212.

[21] Memorial on Jurisdiction, ¶¶214-216.

[22] Memorial on Jurisdiction, ¶¶222, and 225.

2. Guarantees Afforded by the Regulatory Framework

113. The new regulatory framework included a series of guarantees based on the principles of efficiency, transparency, quality, continuity, adaptability and neutrality, enshrined in Section 3 of the Electricity Law.[23]

114. These guarantees were in line with the guidelines laid down by the UNDP and the World Bank, which may be summed up as follows: "*(a) ensure that the interconnected system would be operated at the minimum level of cost following appropriate reliability and environmental standards; (b) promote—through competition and private sector participation—an efficient and reliable electricity supply and the efficient use of electricity; (c) open the sector to private initiative and strengthen market competition, open access to networks, improve efficiency, and attract fresh capital for its development; (d) set tariffs that reflect operational and financial costs, while adopting an explicit and direct system of subsidies for basic supplies of electricity to target low income households, and for the expansion of the service; (e) establish a regulatory, institutional and legal environment to enable the utilities to compete on equal basis; and (f) ensure that these policy directives would be followed through the creation of an effective, transparent and independent regulatory framework that clearly states the rights and responsibilities of the different sector players.*"[24]

D. CREATION OF EGSA FOLLOWING THE CAPITALIZATION OF ENDE

115. The Capitalization Law provided for the transfer of the assets of State-owned enterprises, including ENDE, to new companies that would receive an inflow of private capital through an international public tender process.

116. Additionally, the Electricity Law set forth that the National Interconnected System (*Sistema Interconectado de Electricidad*; hereinafter, "**SIN**"), which had been until then composed of vertically-integrated companies, would now be split into generation companies, transmission companies, and distribution companies. Thus, the assets of ENDE were separated and three new generation companies were created: Corani, Valle Hermoso, and EGSA. Three power

[23] See Electricity Law (Exhibit **C-5**). See Transcript (English), Day 1, 2 April 2013, 41:13-41:22.

[24] Statement of Claim, ¶42; See Joint UNDP/World Bank Energy Sector Management Assistance Program, "Bolivia: Restructuring and Capitalization of the Electricity Supply Industry—an Outline for Change", Report No. 21520, 12 September 1995, (Exhibit **C-61**).

plants belonging to ENDE were transferred to the latter company: Guaracachi in Santa Cruz, Aranjuez in Sucre, and Karachipampa in Potosí.[25]

117. In 1994, the international public tender process, in which 50% of the capital of EGSA was tendered, was commenced.

E. INVESTMENTS PURPORTEDLY MADE BY THE CLAIMANTS

118. On 29 June 1995, Energy Initiatives, Inc., a US subsidiary of General Public Utilities Power Inc. (hereinafter, "**GPU**"), was declared the successful bidder in the abovementioned international public tender, with a bid of USD 47.13 million in exchange for a 50% shareholding in EGSA, which at that time held the three aforementioned gas plants.[26]

119. Pursuant to the Terms and Conditions of the tender, the successful bidder could be—or, in the Claimants' opinion, had to be—a company whose sole purpose was to hold the shares of the company which was the subject of the tender.[27] Accordingly, Energy Initiatives set up a subsidiary, GAI, one of the Claimants in these proceedings.[28]

120. Later, on 28 July 1995, after EGSA was granted an electricity generation license for a period of 30 years for each of the plants (renewed for 10 additional years) as well as license agreements, Bolivia, GAI, and EGSA entered into a Capitalization Agreement. This Agreement provided that payment had in fact been made and determined the allocation of the new capital: 90% was to be allocated, within seven years, to capital investments that would increase generation capacity.[29]

121. In 1998, in order to increase electricity generation capacity, EGSA's shareholders and Board of Directors[30] approved the purchase of two General Electric 6FA industrial gas turbines, known as GCH-9 and GCH-10. These were installed in the Santa Cruz plant and started

---

[25] Statement of Defense, ¶40. See Transcript (English), Day 1, 2 April 2013, 38:6-38:19.

[26] Statement of Claim, ¶53; Statement of Defense, ¶42; Rejoinder on the Merits, ¶48; Claimants' Post-Hearing Brief, ¶29. See Transcript (English), Day 1, 2 April 2013, 47:9-47:14.

[27] Statement of Claim, ¶57; Claimants' Post-Hearing Brief, ¶29. See Terms of Reference (Exhibit **C-7**, Article 2.3).

[28] Statement of Claim, ¶57; Claimants' Post-Hearing Brief, ¶29. See Certificate of Incorporation of GAI Inc. of 13 July 1995 (Exhibit **C-11**), and Proof of Subscription of 50% of the shares of Empresa Eléctrica Guaracachi SAM (EGSA) by GAI Inc for USD 47.131 million of 28 July 1995 (Exhibit **C-12**); Letter from the Central Bank of Bolivia to the Minister of Capitalization of 28 July 1995 (Exhibit **C-13**). See Transcript (English), Day 1, 2 April 2013, 47:14-47:24 and Day 6, 9 April 2013, 1339:15-1340:3.

[29] Statement of Claim, ¶58. See Capitalization Agreement, clauses 5.1 and 8 (Exhibit **C-14**). See Transcript (English), Day 1, 2 April 2013, 47:24-48:3.

[30] It is worth clarifying that at this point the Claimants had no control over EGSA (they only held 50% of the shares), so that the Board was not chiefly composed by shareholders of the current Claimants.

operating in 1999. According to the Claimants, this constituted a new investment of USD 65 million and produced a capacity increase of 149.9 MW.[31]

122. This meant that, by 1999, EGSA had an aggregate capacity of 397.6 MW and had made, according to the Claimants, investments of USD 72.2 million in Bolivia (representing 154.3% of the USD 47.1 million in new capital which EGSA had received).[32] Given that these investment exceeded those required by the 90% investment obligation established in the Capitalization Agreement, GAI was allowed to acquire in 1999 an additional 0.001% of EGSA's capital, thus gaining control over the company[33] and over the appointment five out of seven members of the Board.

123. In 2001, GPU merged with First Energy Corp., another US company. Then, in 2003, First Energy Corp. sold its interest in GAI to Bolivia Integrated Energy Limited (hereinafter, "**BIE**"), a British Virgin Islands company which is itself a subsidiary of Integrated Energy Limited (hereinafter, "**IEL**"), a company incorporated in the United Kingdom.[34]

---

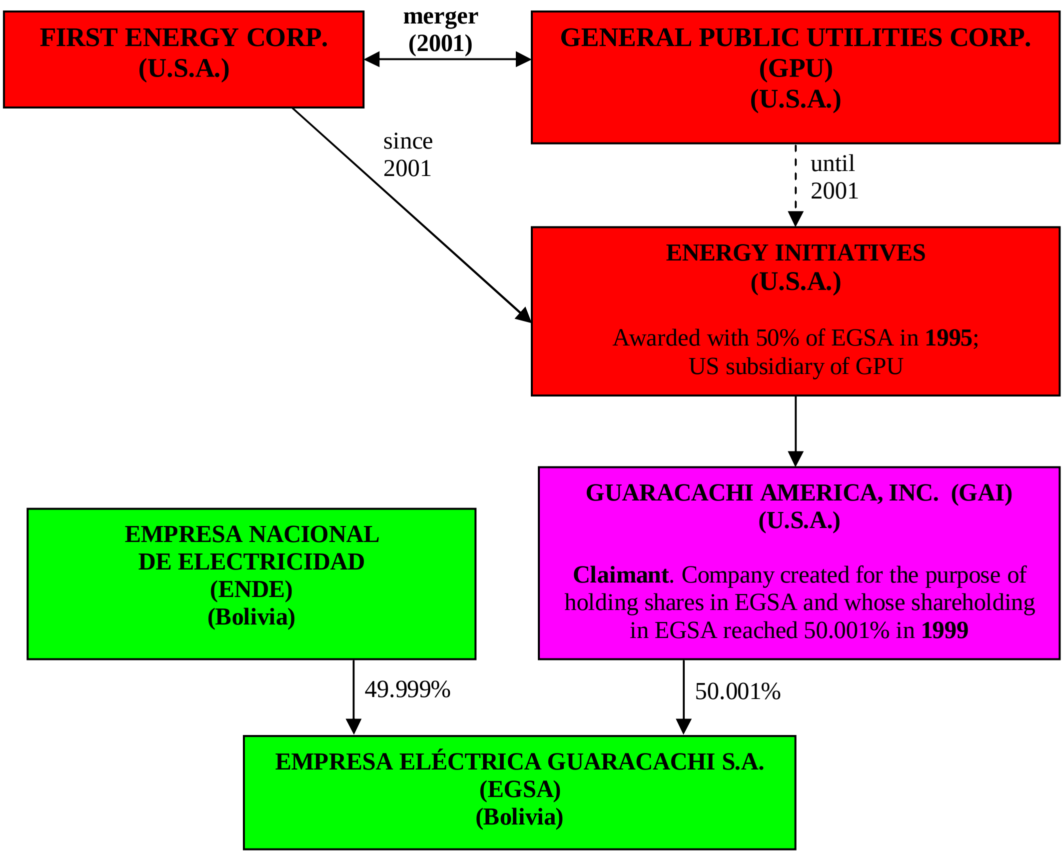
[31] Statement of Claim, ¶60; Reply on the Merits, ¶¶38-40. See Transcript (English), Day 1, 2 April 2013, 48:22-49:23.

[32] Statement of Claim, ¶63. See Gover Barja and Miguel Urquiola, *Capitalización y Privatización en Bolivia: Una aproximación a una evaluación*, February 2003 (Exhibit **C-96**); Witness Statement of Lanza, ¶19.

[33] Statement of Claim, ¶65; Statement of Defense, ¶44; Rejoinder on the Merits, ¶49. See Transcript (English), Day 1, 2 April 2013, 48:4-48:13.

[34] Statement of Claim, ¶66. See Transcript (English), Day 1, 2 April 2013, 48:14-48:17.

Figure 1: EGSA's Shareholding Structure until 2001



124. On 8 October 2004, by means of a sale agreement between Rurelec and EGSA, Rurelec acquired *Energía para Sistemas Aislados ESA S.A.* (hereinafter, "**ESA**"), a subsidiary of EGSA which was subsequently converted by Rurelec into Energais.[35]

125. According to the Claimants, a few months later, in 2005, Rurelec, through its wholly owned British Virgin Islands subsidiary Birdsong Overseas Limited (hereinafter "**Birdsong**"), entered into an agreement with IEL for the acquisition of 100% of the shares of BIE for USD 35 million, thereby indirectly acquiring 100% of GAI.[36] According to the Claimants, this sale closed on 6 January 2006, after which Rurelec had acquired indirect ownership, through Birdsong and BIE, of 100% of GAI.[37] Nonetheless, the Respondent argues, based on the

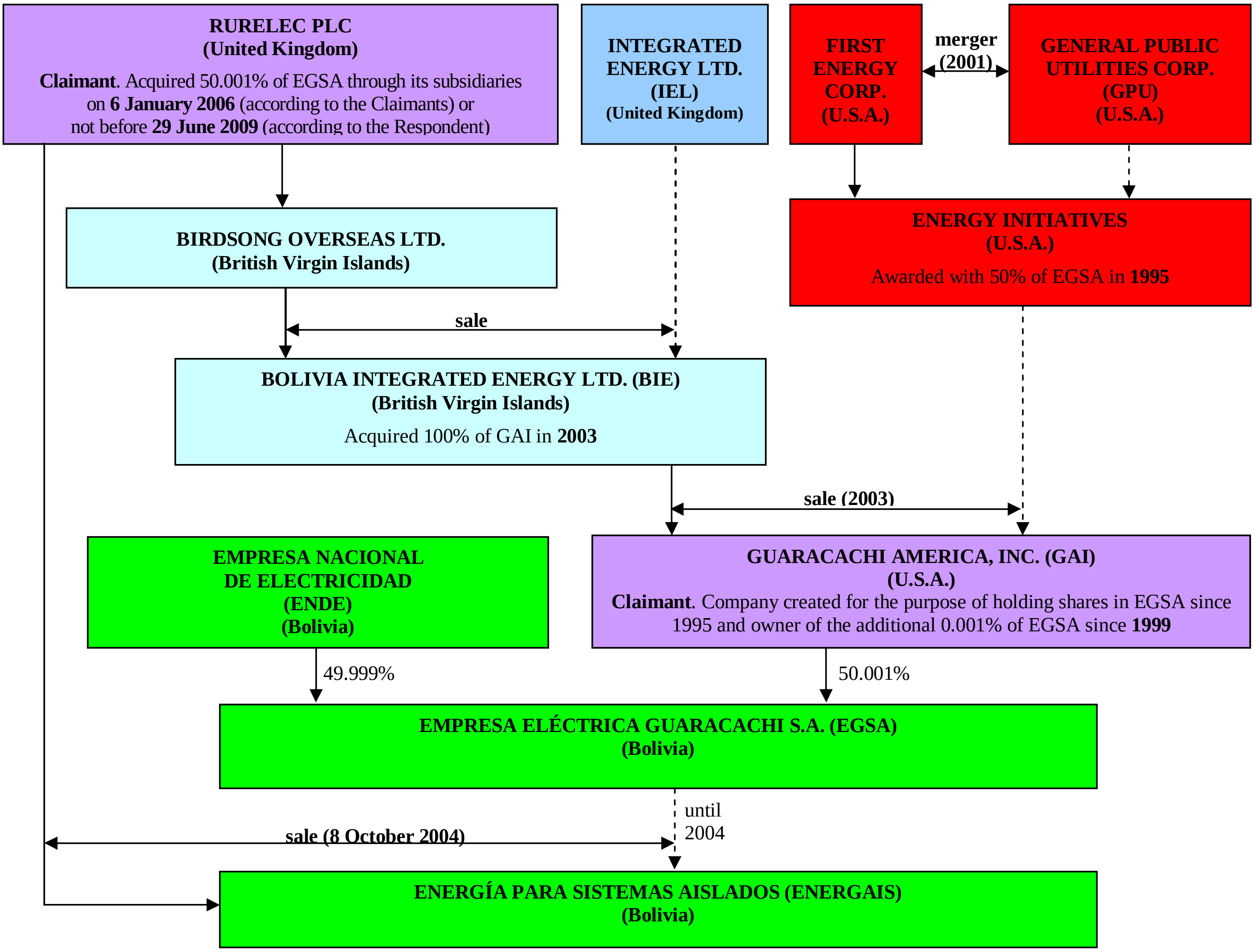
[35] See Purchase and Sale of ESA, by and between.EGSA and Rurelec (Exhibit **C-103**).

[36] Initially, it can be noted that in the Statement of Claim, ¶67, the amount indicated is USD 41.2 million. However, as shown in the Memorial on Jurisdiction, ¶113, the Claimants have rectified such amount in the e-mail dated 12 September 2012. See email (Exhibit **R-2**).

[37] Statement of Claim, ¶67; Claimants' Post-Hearing Brief, ¶¶59-63. See Agreement for the purchase of shares (Exhibit **R-61**); Certificate of Incorporation of Birdsong Overseas Limited (Exhibit **C-30**) and BIE (Exhibit **C-25**); Share certificates evidencing the shares in GAI held by Birdsong Overseas Limited (Exhibit **C-29**) and BIE (Exhibit **C-27**); Share certificate evidencing that Birdsong held 100% of the shares in BIE (Exhibit **C-35**). See Transcript (English), Day 1, 2 April 2013, 48:17-48:21.

documents submitted by the Claimants, that the sale—if there really was any—was not completed before 29 June 2009. Accordingly, the alleged investments by EGSA prior to that date cannot be attributed to Rurelec in any way.[38]

Figure 2: Final Shareholding Structure of EGSA



126. The Claimants state that, with Rurelec as the new major shareholder, EGSA increased its electricity generation capacity by 185MW, investing another USD110 million. In particular, between 2006 and 2008, new technology was incorporated (seven Jenbacher natural gas engines for the Aranjuez plant and a new GE 6FA gas turbine for the Guaracachi plant).[39] In

[38] Memorial on Jurisdiction, ¶34; Respondent's Post-Hearing Brief, ¶36.

[39] Statement of Claim, ¶70; Reply on the Merits, ¶¶41-43. See 2008 Annual Report of EGSA (Exhibit **C-32**, pp. 7, 22 and 25); 2009 Annual Report of EGSA (Exhibit **C-36**, pp.12 and 22). See Transcript (English), Day 1, 2 April 2013, 54:25-56:3.

addition, in 2009, EGSA completed the construction of its fourth electricity generation plant—the second in the city of Santa Cruz—known as the Santa Cruz co-generation plant. The new plant had two turbines, GCH-7 and 8, which had to be moved out of the Guaracachi plant to make space for the Combined Cycle Gas Turbine project (hereinafter, "**CCGT**"). These works involved an additional investment of USD 3.5 million.[40]

127. It bears noting that, following the installation of new Jenbacher engines in the Aranjuez plant, EGSA removed and sold four Worthington engines (which were older and ran on diesel, thereby consuming a larger amount of fuel). Rurelec purchased two of them through the acquisition of EGSA's subsidiary, Energais,[41] for USD 550,000. Once decommissioned, the engines were dismantled and stored in the EGSA's facilities in Sucre. The other two engines were sold to European Power Systems AG.[42]

128. The last technological project undertaken by EGSA was the CCGT. This project began in 2007 and was scheduled to start operations in May 2010. However, it was then postponed to November, which deadline was not met either. The purpose of the project—apart from obtaining better economic and financial results—was to enhance the sustainable development of Bolivia through the development of state-of-the-art combined cycle technology, in accordance with the United Nations Framework Convention on Climate Change. This project resulted in a series of financial benefits for EGSA, which, according to the Claimants, would be shared with the State (through the Vice-Ministry of Environment and Territorial Planning) in 2007, in accordance with the applicable rules.[43]

129. Furthermore, EGSA participated in certain projects to provide electricity to certain portions of the Bolivian population who were not receiving adequate supply (the so-called Rural Electrification Projects[44]). Since 2006, EGSA also subsidized low-income residential

---

[40] Reply on the Merits, ¶44.

[41] Statement of Claim, ¶¶73-74. See Audited Financial Statements of ESA, 27 May 2004 (Exhibit **C-100)**; Audited Financial Statements of ESA, 30 May 2004 (Exhibit **C-102**); Proof of fund transfer from Rurelec to EGSA, 13 October 2004 and 4 March 2005 (Exhibit **C-104**).

[42] Statement of Claim, ¶¶73-74.

[43] Statement of Claim, ¶88. On the CCGT project, consult also Claimants' Post-Hearing Brief, ¶¶39-54.

[44] Statement of Claim, ¶¶83-84; Reply on the Merits, ¶¶51-53. Concerning these projects, the Claimants refer to those performed in San Matías, arguing that the statements made by Mr Paz regarding the fact that at the time of the nationalisation, EGSA had made no improvement whatsoever to the distribution of electricity in the area; it was not their responsibility pursuant to the Agreement for the supply of electricity to rural areas. See Transcript (English), Day 1, 2 April 2013, 56:18-58:10.

consumers by approximately USD 2.7 million through the so-called "Dignity Tariff", which was renewed in 2010 through the Dignity Tariff Agreement.[45]

130. The Respondent alleges that, with the exception of the USD 47 million paid by GAI in 1995 for the capitalization of EGSA, the Claimants have made no capital contribution of their own. Rather, all of the abovementioned investments in new electricity generation capacity were funded either with the resources of EGSA itself or with banking debt incurred by it. Additionally, the Respondent contends that several developments led to the depletion by 2007 of the operating capital of EGSA, leading EGSA to see its value progressively reduced until the date of the nationalisation.[46]

131. In addition, the Respondent maintains that the CCGT project was considerably delayed, over budget, and totally unfinished at the time of the nationalisation.[47] On the other side, the Claimants argue that the amounts invested in this project were in line with the budget approved by the shareholders and directors of EGSA (which was increased in 2008 and approved again) and included a further increase in power with respect to what was initially forecasted. Moreover, the project was 95.1% completed by the time of the nationalisation.[48]

132. The Respondent nevertheless considers that there is witness and documentary evidence proving their assertions which has not been challenged by the Claimants.[49]

[45] Statement of Claim, ¶87; Statement of Defense, ¶¶338-344.

[46] Memorial on jurisdiction, ¶¶122-125; Statement of Defense, ¶¶45-51; Respondent's Post-Hearing Brief, ¶6. The Respondent provides the following as examples for such acts: the distribution of all of EGSA's profits as dividends, the 2001 sale of the turbines GCH-3 and 5 decreasing production capacity by 40 MW, the intent to decapitalize EGSA in 2004 by trying to transfer the 7 engines to the plants in Aranjuez and Karachipampa for the purposes of selling them to Rurelec together with ESA or the intent to dismantle the KAR-1 unit in 2010; Rejoinder on the Merits, ¶50. See Transcript (English), Day 1, 2 April 2013, 157:5-157:9; Transcript (English), Day 6, 9 April 2013, 1420:18-1420:19.

[47] First Witness Statement of Paz, ¶¶64, 68, and 72.

[48] Reply on the Merits, ¶¶47-50. See Progress Report on the Combined Cycle Turbine Project, 26 March 2010 (Exhibit **C-313**). See Transcript (English), Day 1, 2 April 2013, 58:19-58:25, 61:19-62:2.

[49] Rejoinder on the Merits, ¶¶51-92. As examples of EGSA's disinvestment, Respondent refers, *inter alia*, to the following: the sale of the GCH-3 and GCH-5 units (these were the most efficient units, and their sale was not aimed at installing more efficient technology, since the money obtained was distributed as profits among shareholders, and the Jenbacher engines were installed five years later), the attempt to remove the KAR-1 unit (a decision which was reversed by the Board of EGSA after the nationalisation), the sale of the plot in the Santa Cruz industrial complex (challenged by ENDE representatives at the Board of EGSA) or the sale of the engines of the Aranjuez plant to ESA (according to the Respondent, for the purposes of finally selling them to Rurelec). As examples of EGSA's difficult economic situation, the Respondent refers, *inter alia*, to the liquidity issues acknowledged by the Claimants themselves, the problems with payments to suppliers, the lack of generation of "robust" profits between 2005 and 2009, or the distribution of dividends higher than the profits since 2006. Finally, Bolivia denies the fact that EGSA received good ratings by rating agencies (deeming this an attempt to confuse the Tribunal), and also denies that the rates at which EGSA could obtain funds until 2009 reflected a healthy economic condition.

F. REGULATORY AMENDMENTS DURING THE 2007-2008 PERIOD

133. The Claimants assert that GAI invested in EGSA on the basis of the regulatory framework developed since 1990 and the guarantees provided thereby. Later, Rurelec decided to invest (as further detailed below) in EGSA on the basis of the existing regulatory framework and the guarantees, as well as Bolivia's purported commitment (in the 2006 Dignity Tariff Agreement, renewed in 2010) to maintain the regulatory framework described above.[50]

134. Nonetheless, despite this purported commitment, Bolivia proceeded as of 2007 to modify the regulatory framework in respect of the method of compensation and ultimately proceeded with an unexpected total nationalisation of the sector.[51]

135. The Respondent disagrees with the Claimants' view. To start, it denies that there was any creeping expropriation which would have started with the amendment to the regulatory framework and finished with the nationalisation of EGSA.[52] A creeping expropriation is characterized by "*a set of measures that, in isolation, do not have the effect of expropriating the investment, but do have that effect when taken together*" [Tribunal's Translation]. There is no such thing in the present case: the Nationalisation Decree did not constitute the final step of a creeping expropriation.[53]

136. According to the Respondent, the Dignity Tariff Agreement did not contain a stabilization clause[54] and the first owners of GAI had already envisaged the possibility of a nationalisation, given that Power Inc., a company belonging to the GPU Group, took out a policy against expropriations with the Overseas Private Investment Corporation on 27 December 1995.[55] In addition, the nationalisation was included in the 2006-2010 Government Program (in line with the nationalisation policy developed by Evo Morales), was openly discussed by the press, and was addressed in negotiations between EGSA and the Ministry of Hydrocarbons and Energy in early 2009 (and not in 2008, nor lasting until April

---

[50] Statement of Claim, ¶¶9-15. See Transcript (English), Day 1, 2 April 2013, 63:13-64:16.

[51] Statement of Claim, ¶¶9-15; Reply on the Merits, ¶2. See Transcript (English), Day 1, 2 April 2013, 23:7-25:16, 63:3-63:13, 64:17-64:23; Transcript (English), Day 6, 9 April 2013, 1359:21-1360:12.

[52] Reply on the Merits, ¶2. See Transcript (English), Day 6, 9 April 2013, 1407:10-1408:7.

[53] Rejoinder on the Merits, ¶¶130-132. See Transcript (English), Day 1, 2 April 2013, 187:14-187:21.

[54] Statement of Defense, ¶¶342-344, and 384-394; Rejoinder on the Merits, ¶¶293-297.

[55] Statement of Defense, ¶43; Respondent's Post-Hearing Brief, ¶80. See Expropriation Insurance Agreement by and between Power Inc. and OPIC, 27 December 1995 (Exhibit **R-44**).

2010, as the Claimants alleged) in which, among other matters, the possibility that the State obtain a majority interest in EGSA was discussed.[56]

137. Lastly, the Respondent maintains that Bolivia made no guarantee that it would not nationalise the electricity sector[57] and, in any event, the Claimants have not submitted any evidence of such.[58]

1. Modification of the Capacity Price Calculation

138. The first modification of the regulatory framework which allegedly affected the Claimants' investment is that related to the capacity price (hereinafter, "**PBP**").[59]

139. Initially, the calculation method was established by both ROME 1995 and RPT 1995. The starting point for the calculation of the capacity price was the FOB price of a new generation unit, a turbine. Certain additional costs related to its installation, connection, and entry into operation were added to the FOB price. These additional costs could not exceed 50% of the equipment's catalogue value. A "discount rate" ("*tasa de actualización*") established by the Electricity Law was then used to convert this total investment cost for new equipment into a monthly sum per kilowatt of installed capacity.[60]

140. Subsequently, ROME 2001 and RPT 2001 introduced a number of modifications regarding the PBP calculation.[61] Such modifications were developed in Operating Rule

[56] Statement of Defense, ¶8, and Section 2.2.1; Rejoinder on the Merits, ¶¶99, 106, 109-114. See 2006-2010 *Programa de Gobierno del Movimiento al Socialismo-Instrumento Político por la Soberanía de los Pueblos (MAS-IPSP)* 2006-2010 "Bolivia digna, soberana y productiva para vivir bien" published in 2005 (Exhibit **R-52**); *El plan de gobierno más progresista propone: Nacionalizar por etapas*", Bolpress, 11 November 2005 (Exhibit **R-62**); Letter of the Minister of Hydrocarbons and Electricity to EGSA, 21 April 2009 (Exhibit **R-59**). See Transcript (English), Day 1, 2 April 2013, 158:1-158:3, 183:9-184:3.

[57] Statement of Defense, ¶¶69-81; Rejoinder on the Merits, ¶115.

[58] The Claimants mention (at ¶104 of the Statement of Claim) the existence of an e-mail sent by Marie Beatriz Souviron, Bolivian Ambassador in the United Kingdom, stating that she was unaware of the possibility of the expropriation of Rurelec's interest in EGSA. However, Respondent noted that a copy of such e-mail was not submitted by the Claimants and that, if it had been submitted, it would still be insufficient evidence, since it would only prove an officer's unawareness of the nationalisation plans. The Respondent explains how Mr Earl has now changed his story: senior officers of the Ministry of Foreign Affairs of the United Kingdom would have confirmed that the Ambassador was unaware of the nationalisation. Nevertheless, this is not evidence of the purported confirmation and in any case, even if such existed, it would only demonstrate that a Bolivian diplomat in the United Kingdom was not aware of the nationalisation. Similarly, Mr Aliaga states that he received guarantees from members of the Board of ENDE at a barbecue, without giving any names or explaining how such guarantees would amount to commitments by the State (Rejoinder on the Merits, ¶¶116-117).

[59] Set forth in Article 49 e) of the Electricity Law. In accordance with RPT 1995 and RPT 2001, it is defined as the unitary cost of increasing the installed capacity. It is tantamount to the Capacity Marginal Cost.

[60] Article 15 of the RPT 1995. In addition, once the investment cost has been determined one should proceed to carry out a number of operations detailed in the above mentioned order until de PBP is reached. See Transcript (English) Day 1, 2 April 2013, 46:19-46:21.

[61] For a further explanation on the modifications introduced, consult Memorial on Jurisdiction, ¶258.

No. 19/2001, issued by the CNDC (Resolution approved by the SSDE No. 121/2001). Nevertheless, the most relevant aspect to bear in mind in these proceedings is the introduction by means of this Operating Rule of a new "complementary equipment" category to be considered in the calculation of the Total Cost of the Investment (neither of ROME 2001 nor in RPT 2001 having made any provision therefor). This new category entailed a 20% increase on the FOB price,[62] added prior to the application of the 50% factor mentioned above.[63] This implied that the investment cost could reach up to 180% of a certain turbine's FOB price.[64]

141. Following subsequent modifications to Operating Rule No. 19/2001,[65] on 8 February 2007, the CNDC issued Operating Rule No. 19/2007 (Resolution approved by the SSDE No. 040) by which the 20% "complementary equipment" head was eliminated from the PBP calculation.[66]

142. According to the Claimants, this measure resulted in a 17% decrease in capacity prices and had a considerable impact on EGSA's cash flows. The Claimants also allege that the Resolution failed to comply with procedural requirements set forth in the law.[67] However, according to the Respondent, the creation of the "complementary equipment" head was due to certain specific circumstances.[68] The Respondent thus proceeded with its elimination once these specific circumstances had ceased to exist and in accordance with a study performed by the consulting firm Bates White, since there was no longer any economic justification to add a further 20% "complementary equipment" amount to the turbine's FOB price prior to adding the 50% for additional costs.[69]

143. On 22 March 2007, EGSA commenced an administrative proceeding before the Superintendency of Electricity against the abovementioned measure. On 10 May 2007, the motion was denied in Resolution SSDE No. 54/2007. On 31 May 2007, EGSA filed an appeal of this decision before the *Sistema de Regulación Sectorial* (hereinafter, the

[62] Operating Rule No. 19/2001, Rule 7; Statement of Claim, ¶90; Memorial on Jurisdiction, ¶259.

[63] Statement of Claim, ¶90.

[64] Memorial on Jurisdiction, ¶259.

[65] Memorial on Jurisdiction, ¶262.

[66] Statement of Claim, ¶91; Memorial on Jurisdiction, ¶270. See Transcript (English), Day 1, 2 April 2013, 64:23-64:25.

[67] Statement of Claim, ¶91; Reply on the Merits, ¶73; Claimants' Post-Hearing Brief, ¶117; Compass Lexecon Report, ¶¶34-38 and 126-136; Witness Statement of Aliaga, ¶39; Witness Statement of Andrade, ¶¶45-50. See Transcript (English), Day 1, 2 April 2013, 65:8-65:25.

[68] Memorial on Jurisdiction, ¶259.

[69] Memorial on Jurisdiction, ¶¶259-268. See Report prepared by Bates White LLC dated 18 January 2007 on Revision of Operating Rule Nº 19 (Exhibit **R-34**).

"**SIRESE**"). This motion was again denied in Resolution No. 1612. Consequently, on 3 April 2008, EGSA filed an action before the Supreme Court of Bolivia. In parallel, EGSA also commenced a proceeding regarding the alleged procedural defects of Resolution SSDE No. 040, which had been implemented by Resolution CNDC 209/2007. Both proceedings are still pending.[70]

2. Modification of the Spot Price Calculation

144. The second modification having allegedly affected the Claimants' investment is that relating to spot prices. Initially, ROME 1995 and RPT 1995 established the price to be paid to generators for power dispatched in the spot market.[71] The CNDC determined the spot price by calculating the total remuneration for each plant[72] using the integral of the power injected into the Main Interconnection System over an hour's time, multiplied by the Short Term Marginal Cost of Power.[73] The Marginal Cost was in turn established by the Last Marginal Generation Unit.[74]

145. Following the signature in 1999 of the licenses authorizing EGSA to carry out power generation activities for a 30-year term, the CNDC adopted Operating Rule No. 3/1999 (Resolution approved by SSDE No. 266/1999), which established that all thermal units required to cover power demand during peak hours could be deemed the Marginal Generation Unit.[75] Afterwards, with the enactment of ROME 2001 and RPT 2001, the spot price calculation method was adjusted, setting forth a new definition of Marginal Cost which excluded Forced Generation Units, i.e. those which, for technical reasons, were required to

---

[70] Statement of Claim, ¶¶92-94; Memorial on Jurisdiction, ¶272; Reply on the Merits, ¶75; Claimants' Post-Hearing Brief, ¶120. See Transcript (English), Day 1, 2 April 2013, 65:8-65:25.

[71] Article 63, ROME 1995; Article 2, RPT 1995. Pursuant to RPT 1995, the spot market is defined as "the market of short term electricity purchase and sale transactions, not having been contemplated in the supply agreements."

[72] According to the Claimants (at ¶190 of the Statement of Claim), such payments were uniform for all generating units, whereas the Respondent asserts (at ¶228 of the Memorial on Jurisdiction) that such uniformity did not exist.

[73] Article 63, ROME 1995. Pursuant to Article 1 of ROME 1995, the Marginal Cost is defined as "the cost […] to supply one additional kilowatt-hour (kWh) of power, at a certain level of power demand and considering the generation and transmission park to be fixed […]" [Tribunal's Translation].

[74] Statement of Claim, ¶45; Memorial on Jurisdiction, ¶218. Pursuant to Article 1 of ROME 1995, the Marginal Generation Unit is meant to be "the last generation unit capable of meeting a demand increase, dispatched by the CNDC in accordance with the procedures set forth in this Regulation" [Tribunal's Translation. See Transcript (English), Day 1, 2 April 2013, 42:2-42:3.

[75] Operating Rule No. 3/1999, paragraph 4.

dispatch in a specific geographic area despite other lower-cost sources of power supply within the SIN.[76]

146. Following an additional modification made in 2003 in Operating Rule No. 3/1999,[77] in June 2008, the Bolivian Government amended Operating Rule No. 3 again in Supreme Decree No. 29599, which was subsequently adopted by Resolution approved by the SSDE No. 283/2008. This new amendment excluded liquid fuel units (such as diesel units) from consideration as potential Marginal Generating Unit.[78]

147. According to the Claimants, this change caused a reduction in the profit margin of the most efficient companies (such as EGSA).[79] However, from the Respondent's point of view, the main objective of the change (adopted in consultation and with the agreement of electricity sector companies themselves[80]) was to optimize the pricing system in accordance with the principle of supply efficiency (Article 3 of the Electricity Law) and to further environmental policy goals.[81]

148. According to the Respondent, such a change was necessary (as stated by the regulators of the electricity market) in order to put an end to the perverse effect produced by the least efficient units, which distorted the spot price of electricity and produced a windfall profit for all electricity producers to the detriment of consumers. The above change thus created an incentive for generation companies to replace obsolete diesel generators and install new units.[82]

---

[76] Article 1, ROME 2001. In this sense, the concept of "Forced Generation Unit" is introduced, such being understood as the "unit resulting from the generation in a mandatory way due to minimum performance requirements in an area, displacing lower cost generation in the system" [Tribunal's Translation].

[77] Memorial on Jurisdiction, ¶¶226-227.

[78] In this sense, there is disagreement between the Parties. The Claimants consider in their Statement of Claim, ¶191, that until 2008 all thermal units were candidates for selection as the Marginal Generation Unit, a fact that is denied by the Respondent in its Memorial on Jurisdiction, ¶228, and in its Rejoinder on the Merits, ¶271, due to the above mentioned modifications. See Transcript (English), Day 1, 2 April 2013, 66:2-66:23.

[79] Statement of Claim, ¶96; Reply on the Merits, ¶77; Claimants' Post-Hearing Brief, ¶109; Witness Statement of Aliaga, ¶37; Witness Statement of Andrade, ¶¶55-56; Second Witness Statement of Andrade, ¶23. See Transcript (English), Day 1, 2 April 2013, 66:24-68:5.

[80] Statement of Defense, ¶329; Second Witness Statement of Quispe, ¶13. Nevertheless, the Claimants allege in their Reply, ¶¶84-87, that such assertion is misleading. Mr Andrade contested when such modification was proposed and, consequently, EGSA cannot be understood to have approved it, see Second Witness Statement of Andrade, ¶37, and Minutes of Session No. 236 of the CNDC dated 30 June 2008 (Exhibit **R-87**). The Respondent considered that it accepted both in its Statement of Defense, ¶329, as well as in its Rejoinder on the Merits, ¶291, that Mr Andrade voted against such modification. Nevertheless, that is not the relevant issue, but that the CNDC is a self-regulatory authority that adopts rules by simple majority.

[81] Rejoinder on the Merits, ¶273.

[82] Memorial on Jurisdiction, ¶¶230-236; Statement of Defense, ¶¶316-323; Rejoinder on the Merits, ¶274

149. As stated by the Claimants, the inefficient units to which Bolivia refers[83] were inherited by EGSA and subsequently put on sale in 2004 through ESA, but EGSA was prevented from concluding such sale at the last minute. In any case, the Claimants assert that, given the creation in 2003 of the stabilization fund for electricity prices, consumers were not prejudiced by the regulatory framework that was in place prior to the introduction of Resolution No. 283.[84] Moreover, it is also not true that the pre-existing regulatory framework created incentives for the use of inefficient generation units, but quite the contrary.[85]

150. Nevertheless, the Respondent insists that the Claimants are wrong. Even if the stabilization fund was aimed at preventing excessive variations in electricity prices for consumers, the purpose of the spot price modification was very different. It sought to prevent price distortion by excluding certain units from the calculation of marginal costs because they were excessively inefficient. In addition, many other countries have adopted similar measures, which show that this measure is reasonable.[86]

3. Nationalisation of EGSA by Bolivia

151. According to the Claimants' version of events, on 1 May 2010, at about 6:00am, Bolivian military personnel appeared suddenly and without warning and forced their way into EGSA's offices.[87] A banner was put up with the message "*NACIONALIZADO*" ("NATIONALISED") and another one with the acronym of ENDE. In addition, on that same day, President Evo Morales issued Supreme Decree No. 0493 (hereinafter, the "**Nationalisation Decree**"), ordering the nationalisation of the 100% of GAI's shareholding in EGSA and transferring these shares to ENDE.[88]

152. Nevertheless, the Respondent maintains that the nationalisation was foreseeable and "*it was performed in a peaceful and orderly manner*" and military personnel was only used in order

[83] Statement of Defense, ¶305.

[84] Reply on the Merits, ¶¶78-83; Second Witness Statement of Andrade, ¶33. Regarding the stabilization of tariffs, the Claimants hold that such fund did not affect the spot price level received by electricity generators as Bolivia suggests, and likewise, it is also erroneous that EGSA has indefinitely accumulated funds in the Stabilization Fund.

[85] Reply on the Merits, ¶79; Second Witness Statement of Andrade, ¶35.

[86] Rejoinder on the Merits, ¶¶279-280. See Transcript (English), Day 1, Tuesday, 2 April 2013, 253:17-255:5.

[87] Statement of Claim, ¶15; Reply on the Merits, ¶¶95-96; Claimants' Post-Hearing Brieg, ¶3; First Witness Statement of Earl, ¶¶58-59. The Claimants insist that there was no certainty whatsoever to believe that expropriation was going to be imminent. In any event, when Evo Morales was elected and the platform for the nationalisation of hydrocarbons sector was concocted, there were no signals in 2005 that the electricity sector could be subjected to the strict state control. Not until the end did the Claimants realize that EGSA was going to be expropriated. In this regard, see First Witness Statement of Earl, ¶40; Second Witness Statement of Earl, ¶38, and 45; and Second Witness Statement of Aliaga, ¶¶53-57. See Transcript (English), Day 1, 2 April 2013, 21:22-22:22.

[88] Statement of Claim, ¶¶15, and 98; Reply on the Merits, ¶93; Claimants' Post-Hearing Brief, ¶32.

to "*guarantee the peaceful transfer of the company's control and avoid thefts during the transition of materials or information that would prevent EGSA from continuing operations*" [Tribunal's Translation]. In short, it was a normal procedure.[89]

153. Following the facts described above, EGSA's senior staff was called to a meeting, and ENDE proceeded, in accordance with Article 3 of the Nationalisation Decree,[90] with the appointment of a new financial manager and legal advisor, which office was entrusted to Mr Jerges Mercado.

154. Pursuant to the provisions set forth in Article 2(III) of the Nationalisation Decree, ENDE was to pay for the expropriation of GAI. Such compensation was to be determined through a valuation process (carried out by an entity selected by the Government) lasting a maximum of 120 days, after which payment was to be made.[91] Additionally, Articles 2(V) and 5 provided that liabilities incurred by EGSA (including financial, tax, environmental liabilities, etc.) would be deducted from the amount of compensation to be established.[92]

155. Between July 2010 and March 2011, the Claimants assert that four meetings were held between Rurelec and certain Government representatives—including the Minister of Hydrocarbons and Energy, the Vice Minister of Electricity, the Attorney General, and ENDE's General Manager, amongst others—in order to try to reach an agreement and have the Bolivian authorities make an offer of compensation for the expropriation. Nevertheless, according to the Claimants, in only one of the meetings (held on 8 November 2010) the Claimants were informed of EGSA's purported negative value (an assertion which was not repeated in subsequent meetings). In the end, no offer of compensation was made.[93]

156. In response to the Claimants' assertions, the Respondent insists that Bolivia followed the procedure legally set forth for the fixing of fair compensation due to the Claimants. In this vein, it retained an independent consulting firm in July 2010 to perform the statutory audit (which was eventually prepared by PROFIN Consultores S.A. within the 120-day deadline)[94]

---

[89] Statement of Defense, ¶¶85-86, and 89; First witness Statement of Paz, ¶82; Rejoinder on the Merits, ¶¶119-120. See Transcript (English), Day 1, 2 April 2013, 184:24-185:9; Day 6, 9 April 2013, 1412:20-1412:23, 1416:3-1416:4, 1416:12-1416:13, 1431:19-1432:2.

[90] See Nationalisation Decree (Exhibit **C-3**).

[91] Statement of Claim, ¶103; Statement of Defense, ¶101. See Transcript (English), Day 1, 2 April 2013, 184:17-184:23.

[92] Statement of Claim, ¶103; Reply on the Merits, ¶98. The Claimants hold that they did not take part in the valuation process and the results thereof were never disclosed. See Transcript (English), Day 6, 9 April 2013, 1329:4-1329:21.

[93] Statement of Claim, ¶¶106-110; Witness Statement of Aliaga, ¶¶56-58; Witness Statement of Earl, ¶¶61-62; Witness Statement of Andrade, ¶64.

[94] Statement of Defense, ¶¶95-101. See "*Profin valora acciones de Elfec*", Los Tiempos, 13 August 2010 (Exhibit **R-81**). See Transcript (English), Day 1, 2 April 2013, 185:10-186:6; Transcript (English), Day 6, 9 April 2013, 1801:5-1801:24.

and held five (and not four) meetings for the determination of fair compensation.[95] The problem was that EGSA had a negative value and Bolivia therefore had no obligation whatsoever to provide compensation.[96]

157. The Claimants assert that EGSA's profits amounted to USD 5.8 million in 2010, as stated in the financial statements which were approved by the Board of Directors in March 2011 following a positive assessment by PriceWaterhouseCoopers.[97] Despite such approval, on 20 April 2011, Nelson Caballero, head of ENDE, requested a new audit of EGSA's Financial Statements for 2010. According to the Claimants, this new audit sought to reduce EGSA's profits and thereby indirectly reduce the amount of compensation that the Claimants would receive for the expropriation. The second audit reflected a loss of USD 2.3 million.[98] The Respondent does not deny that this second audit took place, but it insists that it was totally unrelated to the nationalisation, and that it did not have the objective that the Claimants allege it had.[99]

158. Following EGSA's nationalisation, Energais requested the release of the Worthington engines so that they could be shipped to its facilities located in Argentina. However, according to the Claimants, such request was denied, since EGSA's Board of Director and its General Manager considered that those assets had also been nationalised pursuant to Decree No. 0493 and thus belonged to the Bolivian State.[100]

159. Given the above, Energais and Rurelec's lawyers sent various letters to the Government requesting the return of the engines, since they considered that they could not have been included within the Nationalisation Decree given that title thereto had been transferred to Energais in 2004.[101]

---

[95] Statement of Defense, ¶104. See Exhibit **R-78**.

[96] See Transcript (English), Day 1, 2 April 2013, 184:7-184:9, 186:10-186:17.

[97] Statement of Defense, ¶¶114-115; Claimants' Post-Hearing Briefs, ¶¶55-58. See EGSA's 2010 Audited Financial Statements, 25 March 2011 (Exhibit **C-209**).

[98] Statement of Defense, ¶¶114-115. See "*Proyecto Ciclo Combinado 'Enredado' en la Situación Contable de EGSA*" *Reporte Energía No. 59*, dated 16-30 June 2011 (Exhibit **C-194**); Witness Statement of Lanza, ¶¶54-55; Witness Statement of Blanco, ¶¶43-44.

[99] Statement of Defense, ¶106; Bejarano's Second Statement, ¶9; Rejoinder on the Merits, ¶¶121-128.

[100] Statement of Claim, ¶¶111-112. See Transcript (English), Day 1, 2 April 2013, 70:5-70:11.

[101] Statement of Claim, ¶113. See Freshfields' note to the Attorney General (*Procurador General del Estado*), dated 25 October 2011 (Exhibit **C-199**); Freshfields' note to the Attorney General (*Procurador General del Estado*), dated 29 November 2011 (Exhibit **C-201**).

160. The Respondent acknowledged during the arbitral proceedings that Bolivia had never expropriated the engines and offered to return them to the Claimants.[102] This offer was subsequently accepted by the Claimants during the hearing. This claim was therefore withdrawn by the Claimants from the present arbitration,[103] as has also been confirmed by the Respondent.[104]

[102] Rejoinder on the Merits, ¶¶416-422. See EGSA's letter to Energais dated 26 February 2013 (Exhibit **R-167**).

[103] See Transcript (English), Day 1, 2 April 2013, 70:13-71:1.

[104] Respondent's Post-Hearing Brief, ¶172. See Transcript (English), Day 1, 2 April 2013, 256:16-257:1.

CHAPTER IV – APPLICABLE PROVISIONS

161. The dispute at issue this arbitration is based on the alleged violation by Bolivia of certain provisions of the US-Bolivia BIT and the UK-Bolivia BIT.

A. US-BOLIVIA BIT

162. The relevant provisions of the BIT are reproduced below in both authentic versions:

ARTÍCULO I	**ARTICLE I**
A efectos del presente Tratado se entiende:	*For the purposes of this Treaty,*
(a) Por "sociedad", cualquier entidad constituida conforme a la legislación pertinente, persiga o no fines de lucro y sea de propiedad o control privado o estatal, lo cual comprende las sociedades anónimas, los fideicomisos, las sociedades colectivas, las empresas individuales, las sucursales, las empresas de riesgo compartido, las asociaciones u otras empresas.	*(a) "company" means any entity constituted or organized under applicable law, whether or not for profit, and whether privately or governmentally owned or controlled, and includes a corporation, trust, partnership, sole proprietorship, branch, joint venture, association, or other organization;*
(b) Por "sociedad de una Parte", una sociedad constituida u organizada conforme a la legislación de esa Parte.	*(b) "company of a Party" means a company constituted or organized under the laws of that Party;*
(c) Por "nacional" de una Parte, una persona física que sea nacional de esa Parte conforme a su legislación pertinente.	*(c) "national" of a Party means a natural person who is a national of that Party under its applicable law;*
(d) Por "inversión" de un nacional o sociedad, cualquier tipo de inversión que posea o controle directa o indirectamente ese nacional o sociedad, lo que comprende las inversiones que adopten las siguientes formas o consistan en ellas:	*(d) "investment" of a national or company means every kind of investment owned or controlled directly or indirectly by that national or company, and includes investment consisting or taking the form of:*
(i) las sociedades;	*(i) a company;*
(ii) las acciones u otras formas de participación en el capital de una sociedad, y los bonos, las obligaciones y otras formas de intereses sobre las deudas de una sociedad;	*(ii) shares, stock, and other forms of equity participation, and bonds, debentures, and other forms of debt interests, in a company;*

(iii) los derechos contractuales, como los contratos llave en mano o de construcción o gerencia, los contratos de producción o de participación en los ingresos, las concesiones u otros contratos parecidos;

(iii) contractual rights, such as under turnkey, construction or management contracts, production or revenue-sharing contracts, concessions, or other similar contracts;

(iv) la propiedad tangible, comprendidos los bienes raíces, y la propiedad intangible, comprendidos los derechos, como los arriendos, las hipotecas, los privilegios de acreedor y las prendas;

(iv) tangible property, including real property; and intangible property, including rights, such as leases, mortgages, liens and pledges;

(v) la propiedad intelectual, que comprende: los derechos de autor y derechos conexos, las patentes, los derechos en las variedades de vegetales, los diseños industriales, los derechos en el diseño de estampados de semiconductores, los secretos comerciales, comprendidos las conocimientos técnicos y la información comercial reservada, las marcas de fábrica y servicio, y los nombres comerciales, y

(v) intellectual property, including: copyrights and related rights, patents, rights in plant varieties, industrial designs, rights in semiconductor layout designs, trade secrets, including know-how and confidential business information, trade and service marks, and trade names; and

(vi) Los derechos conferidos conforme a la ley, como las licencias y los permisos;

(vi) rights conferred pursuant to law, such as licenses and permits;

(La lista de los puntos (i) al (vi) indicada arriba es ilustrativa y no exhaustiva.)

(The list of items in (i) through (vi) above is illustrative and not exhaustive.)

(e) Por "inversión abarcada", la inversión de un nacional o sociedad de una Parte en el territorio de la otra Parte;

(e) "covered investment" means an investment of a national or company of a Party in the territory of the other Party;

(f) Por "empresa estatal", la sociedad que sea propiedad de una Parte o que esa Parte controle por medio de participación en el capital;

(f) "state enterprise" means a company owned, or controlled through ownership interests, by a Party;

(g) Por "autorización de inversión", la autorización concedida por la autoridad de una Parte en materia de inversiones extranjeras a una inversión abarcada o

(g) "investment authorization" means an authorization granted by the foreign investment authority of a Party to a covered investment or a national or

a un nacional o sociedad de la otra Parte;

company of the other Party;

(h) Por "acuerdo de inversión", el acuerdo por escrito entre las autoridades nacionales de una Parte y una inversión abarcada o un nacional o sociedad de la otra Parte,

> *(i) por el que se conceden derechos con respecto a recursos naturales u otros bienes que controlen las autoridades nacionales, y*
>
> *(ii) del que dependen la inversión, el nacional o la sociedad para fundar o adquirir una inversión abarcada.*

(h) "investment agreement" means a written agreement between the national authorities of a Party and a covered investment or a national or company of the other Party that

> *(i) grants rights with respect to natural resources or other assets controlled by the national authorities and*
>
> *(ii) the investment, national or company relies upon in establishing or acquiring a covered investment;*

(i) Por "Convenio del CIADI", el Convenio sobre Arreglo de Diferencias Relativas a Inversiones entre Estados y Nacionales de Otros Estados, hecho en Washington el 18 de marzo de 1965;

(i) "ICSID Convention" means the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, done at Washington, March 18, 1965;

(j) Por "Centro", el Centro Internacional de Arreglo de Diferencias Relativas a Inversiones, fundado por el Convenio del CIADI; y

(j) "Centre" means the International Centre for Settlement of Investment Disputes Established by the ICSID Convention; and

(k) Por "Normas de Arbitraje de la CNUDMI", las normas de arbitraje de la Comisión de las Naciones Unidas para el Derecho Mercantil Internacional.

(k) "UNCITRAL Arbitration Rules" means the arbitration rules of the United Nations Commission on International Trade Law.

ARTÍCULO II

1. Con respecto a la fundación, la adquisición, la expansión, la dirección, la explotación, el funcionamiento y la venta u otra enajenación de las inversiones abarcadas, cada Parte otorgará un trato no menos favorable que el que otorga, en situaciones equivalentes, a las inversiones en su territorio de sus propios nacionales o sociedades (en adelante, "trato nacional") o a las inversiones en su territorio de los nacionales o las sociedades de terceros países (en adelante, "trato de la nación más favorecida"), cualquiera que sea el más

ARTICLE II

1. With respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of covered investments, each Party shall accord treatment no less favorable than that it accords, in like situations, to investments in its territory of its own nationals or companies (hereinafter "national treatment") or to investments in its territory of nationals or companies of a third country (hereinafter "most favored nation treatment"), whichever is most favorable (hereinafter "national and most favored nation treatment"). Each Party shall *favorable (en adelante, "trato nacional y de la nación más favorecida"). Cada Parte garantizará que sus empresas estatales, en el suministro de sus bienes o servicios, otorguen el trato nacional y de la nación más favorecida a las inversiones abarcadas.*

ensure that its state enterprises, in the provision of their goods or services, accord national and most favored nation treatment to covered investments.

2. (a) Cada Parte podrá adoptar o mantener excepciones a las obligaciones contraídas conforme al anterior párrafo 1 en las materias o en los sectores especificados en el Anexo al presente Tratado. Al adoptar dichas excepciones, una Parte no podrá exigir la desinversión total o parcial de las inversiones abarcadas que existan en el momento de la entrada en vigor de cada excepción. (b) Las obligaciones contraídas conforme al párrafo 1 no se aplicarán a los procedimientos previstos en los acuerdos multilaterales concertados bajo los auspicios de la Organización Mundial de la Propiedad Intelectual, relativos a la adquisición o conservación de los derechos de propiedad intelectual.

2. (a) A Party may adopt or maintain exceptions to the obligations of paragraph 1 in the sectors or with respect to the matters specified in the Annex to this Treaty. In adopting such an exception, a Party may not require the divestment, in whole or in part, of covered investments existing at the time the exception becomes effective. (b) The obligations of paragraph 1 do not apply to procedures provided in multilateral agreements concluded under the auspices of the World Intellectual Property Organization relating to the acquisition or maintenance of intellectual property rights.

3. (a) En todo momento, cada Parte otorgará a las inversiones abarcadas un trato justo y equitativo y una protección y seguridad plenas, y en ningún caso les otorgará un trato menos favorable que el que exige el derecho internacional. (b) Ninguna de las Partes menoscabará en modo alguno, mediante la adopción de medidas irrazonables y discriminatorias, la dirección, la explotación, el funcionamiento o la venta u otra enajenación de las inversiones abarcadas.

3. (a) Each Party shall at all times accord to covered investments fair and equitable treatment and full protection and security, and shall in no case accord treatment less favorable than that required by international law. (b) Neither Party shall in any way impair by unreasonable and discriminatory measures the management, conduct, operation, and sale or other disposition of covered investments.

4. Cada Parte proporcionará medios eficaces de hacer valer las reivindicaciones y hacer cumplir los derechos con respecto a las inversiones abarcadas.

4. Each Party shall provide effective means of asserting claims and enforcing rights with respect to covered investments.

5. Cada Parte se encargará de que su ordenamiento jurídico y sus prácticas y procedimientos administrativos de carácter general, así como sus decisiones judiciales, cuando se refieran

5. Each Party shall ensure that its laws, regulations, administrative practices and procedures of general application, and adjudicatory decisions, that pertain to or affect covered investments are promptly *a las inversiones abarcadas o las afecten, se publiquen o pongan a disposición del público con prontitud.*

published or otherwise made publicly available.

ARTÍCULO III

ARTICLE III

1. Ninguna de las Partes expropiará ni nacionalizará directamente una inversión abarcada, ni lo hará indirectamente por la aplicación de medidas equivalentes a la expropiación o nacionalización ("expropiación"), salvo con fines de interés público, sin discriminación, contra el pago de una indemnización pronta, adecuada y efectiva, y de conformidad con el debido procedimiento legal y los principios generales de trato previstos en el párrafo 3 del Artículo II.

1. Neither Party shall expropriate or nationalize a covered investment either directly or indirectly through measures tantamount to expropriation or nationalization ("expropriation") except for a public purpose; in a non-discriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with due process of law and the general principles of treatment provided for in Article II, paragraph 3.

2. La indemnización se pagará sin demora, equivaldrá al valor justo en el mercado de la inversión expropiada inmediatamente antes de que se tomara la acción expropiatoria ("la fecha de expropiación") y será enteramente realizable y libremente transferible. El valor justo en el mercado no quedará afectado por ningún cambio de valor cuando la acción expropiatoria llegue a conocerse antes de la fecha de expropiación.

2. Compensation shall be paid without delay; be equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken ("the date of expropriation"); and be fully realizable and freely transferable. The fair market value shall not reflect any change in value occurring because the expropriatory action had become known before the date of expropriation.

3. En caso de que el valor justo en el mercado se exprese en una moneda libremente utilizable, la indemnización pagadera no será inferior al valor justo en el mercado en la fecha de expropiación, más los intereses devengados desde la fecha de expropiación hasta la fecha de pago, a una tasa comercialmente justificada para esa moneda.

3. If the fair market value is denominated in a freely usable currency, the compensation paid shall be no less than the fair market value on the date of expropriation, plus interest at a commercially reasonable rate for that currency, accrued from the date of expropriation until the date of payment.

4. En caso de que el valor justo en el mercado se exprese en una moneda que no sea libremente utilizable, la indemnización pagadera (convertida en la moneda de pago al cambio que rija en el mercado en la fecha de pago) no será inferior a: (a) El valor justo en el mercado en la fecha de expropiación, convertido en una moneda libremente

4. If the fair market value is denominated in a currency that is not freely usable, the compensation paid--converted into the currency of payment at the market rate of exchange prevailing on the date of payment--shall be no less than: (a) the fair market value on the date of expropriation, converted into a freely usable currency at the market rate of *utilizable al cambio que rija en el mercado en esa fecha, más (b) Los intereses a una tasa comercialmente justificada para dicha moneda libremente utilizable, devengados desde la fecha de expropiación hasta la fecha de pago.*

exchange prevailing on that date, plus (b) interest, at a commercially reasonable rate for that freely usable currency, accrued from the date of expropriation until the date of payment.

ARTÍCULO IX

1. A efectos del presente Tratado, por diferencia relativa a inversiones se entiende una diferencia entre una Parte y un nacional o sociedad de la otra Parte que surja de una autorización de inversión, acuerdo de inversión o supuesta infracción de cualquier derecho conferido, generado o reconocido por el presente Tratado con respecto a una inversión abarcada, o que se relacione con dicha autorización, acuerdo o infracción.

2. El nacional o la sociedad que sea parte en una diferencia relativa a inversiones podrá someterla para su resolución a uno u otro de los procedimientos siguientes:

(a) A los tribunales judiciales o administrativos de la Parte que sea parte en la diferencia, o

(b) Conforme a cualquier procedimiento previamente acordado para la resolución de diferencias, o

(c) Conforme a los términos del párrafo 3.

3. (a) Siempre y cuando el nacional o la sociedad en cuestión no haya sometido la diferencia para su resolución según el inciso a) o el b) del párrafo 2, y hayan transcurrido tres meses a partir de la fecha en que surgió la diferencia, dicho nacional o sociedad podrá someter la diferencia para su resolución mediante el arbitraje vinculante:

(i) Al Centro, si éste está disponible, o

ARTICLE IX

1. For purposes of this Treaty, an investment dispute is a dispute between a Party and a national or company of the other Party arising out of or relating to an investment authorization, an investment agreement or an alleged breach of any right conferred, created or recognized by this Treaty with respect to a covered investment.

2. A national or company that is a party to an investment dispute may submit the dispute for resolution under one of the following alternatives:

(a) to the courts or administrative tribunals of the Party that is a party to the dispute; or

(b) in accordance with any applicable, previously agreed dispute-settlement procedures; or

(c) in accordance with the terms of paragraph 3.

3. (a) Provided that the national or company concerned has not submitted the dispute for resolution under paragraph 2 (a) or (b), and that three months have elapsed from the date on which the dispute arose, the national or company concerned may submit the dispute for settlement by binding arbitration:

(i) to the Centre, if the Centre is available; or

(ii) De no estar disponible el Centro, al Mecanismo Complementario del Centro, o	*(ii) to the Additional Facility of the Centre, if the Centre is not available; or*
(iii) Conforme a las Normas de Arbitraje del CNUDMI, o	*(iii) in accordance with the UNCITRAL Arbitration Rules; or*
(iv) Si convienen en ello las dos partes en la diferencia, a cualquier otra institución de arbitraje o conforme a cualesquiera otras normas de arbitraje.	*(iv) if agreed by both parties to the dispute, to any other arbitration institution or in accordance with any other arbitration rules.*
(b) Un nacional o una sociedad, aunque haya sometido la diferencia al arbitraje vinculante conforme al inciso (a) de este párrafo, podrá pedir el desagravio provisional por mandato, que no signifique el pago de daños y perjuicios, a los tribunales judiciales o administrativos de la Parte que sea parte en la diferencia, antes de que se entable el procedimiento de arbitraje o durante su transcurso, a fin de conservar sus derechos e intereses.	*(b) A national or company, notwithstanding that it may have submitted a dispute to binding arbitration under paragraph 3 (a), may seek interim injunctive relief, not involving the payment of damages, before the judicial or administrative tribunals of the Party that is a party to the dispute, prior to the institution of the arbitral proceeding or during the proceeding, for the preservation of its rights and interests.*
4. Cada Parte consiente por el presente en someter la resolución de cualquier diferencia relativa a inversiones para su resolución al arbitraje vinculante, según la opción del nacional o sociedad conforme a las cláusulas i, ii y iii, inciso a del párrafo 3, o según el acuerdo mutuo entre las dos partes en la diferencia conforme a la cláusula iv del mismo inciso y párrafo. Este consentimiento, y el sometimiento de la diferencia por un nacional o sociedad según el inciso a del párrafo 3, reunirá los requisitos de:	*4. Each Party hereby consents to the submission of any investment dispute for settlement by binding arbitration in accordance with the choice of the national or company under paragraph 3 (a)(i), (ii), and (iii) or the mutual agreement of both parties to the dispute under paragraph 3 (a)(iv). This consent and the submission of the dispute by a national or company under paragraph 3 (a) shall satisfy the requirement of:*
(a) El Capítulo II del Convenio del CIADI (Competencia del Centro) y las Normas del Mecanismo Complementario acerca del consentimiento por escrito de las partes en la diferencia, y	*(a) Chapter II of the ICSID Convention (Jurisdiction of the Centre) and the Additional Facility Rules for written consent of the parties to the dispute; and*
(b) El Artículo II de la Convención de las Naciones Unidas sobre el Reconocimiento y la Ejecución de las Sentencias Arbitrales Extranjeras, hecha en Nueva York el 10 de junio de 1958, acerca del "acuerdo por escrito".	*(b) Article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, June 10, 1958, for an "agreement in writing."*

5. Los arbitrajes según las cláusulas (ii), (iii) o (iv), inciso a del párrafo 3, tendrán lugar en un Estado que sea Parte en la Convención de las Naciones Unidas sobre el Reconocimiento y la Ejecución de las Sentencias Arbitrales Extranjeras, hecha en Nueva York el 10 de junio de 1958.

5. Any arbitration under paragraph 3 (a)(ii), (iii) or (iv) shall be held in a state that is a party to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, June 10, 1958.

6. Las sentencias arbitrales pronunciadas conforme al presente Artículo serán definitivas y vinculantes para las partes en la diferencia. Cada Parte cumplirá sin demora las disposiciones de dichas sentencias y tomará en su territorio las medidas del caso para la ejecución de las mismas.

6. Any arbitral award rendered pursuant to this Article shall be final and binding on the parties to the dispute. Each Party shall carry out without delay the provisions of any such award and provide in its territory for the enforcement of such award.

7. En las actuaciones que atañen a las diferencias relativas a inversiones, ninguna Parte sostendrá como defensa, reconvención, derecho de indemnización ni por ninguna otra razón el hecho de que se haya recibido o vaya a recibirse indemnización u otra compensación total o parcial por los supuestos daños, en virtud de un contrato de seguro o garantía.

7. In any proceeding involving an investment dispute, a Party shall not assert, as a defense, counterclaim, right of set-off or for any other reason, that indemnification or other compensation for all or part of the alleged damages has been received or will be received pursuant to an insurance or guarantee contract.

8. A efectos del inciso b, párrafo 2 del Artículo 25 del Convenio del CIADI y del presente Artículo, la sociedad de una Parte que, justo antes de ocurrir los sucesos que dieran lugar a la diferencia, constituía una inversión abarcada, se tratará como sociedad de la otra Parte.

8. For purposes of Article 25 (2) (b) of the ICSID Convention and this Article, a company of a Party that, immediately before the occurrence of the event or events giving rise to an investment dispute, was a covered investment, shall be treated as a company of the other Party.

ARTÍCULO XII

Cada Parte se reserva el derecho a denegar a una sociedad de la otra Parte los beneficios del presente Tratado si dicha sociedad pertenece a nacionales de un tercer país o está bajo su control, y si:

(a) La Parte denegante no mantiene relaciones económicas normales con el tercer país, o

(b) La sociedad no lleva a cabo

ARTICLE XII

Each Party reserves the right to deny to a company of the other Party the benefits of this Treaty if nationals of a third country own or control the company and:

(a) the denying Party does not maintain normal economic relations with the third country; or

(b) the company has no substantial

actividades comerciales importantes en el territorio de la Parte por cuya legislación está constituida u organizada.

business activities in the territory of the Party under whose laws it is constituted or organized.

B. UK-BOLIVIA BIT

163. The relevant provisions of the BIT are reproduced below in both authentic versions:

ARTICULO I

Definiciones

Para los fines del presente Convenio

(a) el concepto "inversiones" significa toda clase de bienes capaces de producir rentas y en particular, aunque no exclusivamente, comprende:

(i) bienes muebles e inmuebles y demás derechos reales, como hipotecas y derechos de prenda;

(ii) acciones, títulos y obligaciones de sociedades o participación en los bienes de dichas sociedades;

(iii) derechos a fondos o a prestaciones bajo contrato que tengan un valor económico;

(iv) derechos de propiedad intelectual y goodwill;

(v) cualesquiera concesiones de tipo comercial otorgadas por las Partes Contratantes de conformidad con sus respectivas leyes, incluidas las concesiones para la exploración, cultivación, extracción o explotación de recursos naturales.

Un cambio de la forma de inversión de los bienes no afecta su condición de inversiones. Las inversiones realizadas antes de la fecha de entrada en vigor así como las realizadas después de la entrada en vigor se beneficiarán de las

ARTICLE 1

Definitions

For the purposes of this Agreement;

(a) "investment" means every kind of asset which is capable of producing returns and in particular, though not exclusively, includes:

(i) movable and immovable property and any other property rights such as mortgages, liens or pledges;

(ii) shares in and stock and debentures of a company and any other form of participation in a company;

(iii) claims to money or to any performance under contract having a financial value;

(iv) intellectual property rights and goodwill;

(v) any business concessions granted by the Contracting Parties in accordance with their respective laws, including concessions to search for, cultivate, extract or exploit natural resources.

A change in the form in which assets are invested does not affect their characters as investments. Investments made before the date of entry into force as well as those made after entry into force shall benefit from the provisions of this *disposiciones del presente Convenio.*

Agreement;

(b) el concepto "rentas" designa las cantidades que corresponden a una inversión de capital y en particular, aunque no exclusivamente, comprende beneficios, intereses, ganancias de capital, dividendos, cánones y honorarios.

(b) "returns" means the amounts yielded by an investment and in particular, though not exclusively, includes profit, interest, capital gains, dividends, royalties and fees;

(c) el concepto "nacionales" designa;

(c) "nationals" means:

(i) en relación con el Reino Unido: personas naturales que deriven su status como nacionales del Reino Unido en virtud de las leyes vigentes en el Reino Unido;

(i) in respect of the United Kingdom: physical persons deriving their status as United Kingdom nationals from the law in force in the United Kingdom;

(ii) en relación con la República de Bolivia: los bolivianos que tengan tal calidad en virtud de su Constitución Política y demás normas vigentes sobre la materia en su territorio.

(ii) in respect of the Republic of Bolivia: Bolivians who have such status under their political constitution and other provisions in force on the matter in their territory.

(d) el concepto "sociedades" designa:

(d) "companies" means:

(i) en relación con el Reino Unido: corporaciones, firmas, o asociaciones incorporadas o constituidas en virtud de las leyes vigentes en cualquier parte del Reino Unido o en cualquier territorio al que el presente Convenio se extienda conforme a las disposiciones del Artículo Xl;

(i) in respect of the United Kingdom: corporations, firms and associations incorporated or constituted under the law in force in any part of the United Kingdom or in any territory to which this Agreement is extended in accordance with the provisions of Article 11;

(ii) en relación con la República de Bolivia: corporaciones, firmas, o asociaciones incorporadas o constituidas en virtud de las leyes vigentes en cualquier parte de la República de Bolivia;

(ii) in respect of the Republic of Bolivia: corporations, firms and associations incorporated or constituted under the law in force in any part of the Republic of Bolivia.

(e) el concepto "territorio" designa:

(e) "territory" means:

(i) en relación al Reino Unido: Gran Bretaña e Irlanda del Norte y cualquier territorio al que el presente Convenio se extienda conforme a las disposiciones del Artículo XI;

(i) in respect of the United Kingdom: Great Britain and Northern Ireland and any territory to which this Agreement is extended in accordance with the provisions of Article 11;

(ii) en relación con la República de Bolivia: todo el territorio que se encuentra bajo la soberanía y jurisdicción del Estado boliviano.

(ii) in respect of the Republic of Bolivia: all the territory which is under the sovereignty and jurisdiction of the Bolivian State.

ARTICULO II

Fomento y protección de inversiones

(1) Cada Parte Contratante fomentará y creará condiciones favorables para nacionales o sociedades de la otra Parte Contratante para realizar inversiones de capital dentro de su respectivo territorio y, conforme a su derecho de ejercer los poderes conferidos por sus respectivas leyes, admitirá dicho capital.

(2) A las inversiones de capital de nacionales o sociedades de cada Parte Contratante se les concederá en cada ocasión un trato justo y equitativo y gozarán de plena protección y seguridad en el territorio de la otra Parte Contratante. Ninguna de las dos Partes Contratantes de ningún modo podrá perjudicar mediante medidas arbitrarias o discriminatorias, la administraci6n, mantenimiento, uso, goce o enajenación en su territorio de las inversiones de capital de nacionales o sociedades de la otra Parte Contratante. Cada Parte Contratante cumplirá cualquier otro compromiso que haya contraído en lo referente a las inversiones de capital de nacionales o sociedades de la otra Parte Contratante.

ARTICLE 2

Promotion and Protection of Investment

(1) Each Contracting Party shall encourage and create favourable conditions for nationals or companies of the other Contracting Party to invest capital in its territory, and, subject to its right to exercise powers conferred by its laws, shall admit such capital.

(2) Investments of nationals or companies of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party. Neither Contracting Party shall, in any way, impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of nationals or companies of the other Contracting Party. Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party.

ARTICULO III

Trato nacional y cláusula de la nación más favorecida

(1) Ninguna de las Partes Contratantes someterá en su territorio las inversiones de capital y rentas de nacionales y sociedades de la otra Parte Contratante a un trato menos favorable del que se concede a las inversiones de capital y rentas de sus propios nacionales y sociedades, o a las inversiones de

ARTICLE 3

National Treatment and Most-favoured-nation Provisions

(1) Neither Contracting Party shall in its territory subject investments or returns of nationals or companies of the other Contracting Party to treatment less favourable than that which it accords to investments or returns of its own nationals or companies or to investments or returns of nationals or

capital y rentas de nacionales y sociedades de cualquier tercer Estado.

(2) Ninguna de las Partes Contratantes someterá en su territorio a los nacionales y sociedades de la otra Parte Contratante, en cuanto se refiera a la administraci6n, uso, goce o enajenaci6n de sus inversiones de capital, a un trato menos favorable del que se concede a sus propios nacionales y sociedades o a los nacionales y sociedades de cualquier tercer Estado.

companies of any third State.

(2) Neither Contracting Party shall in its territory subject nationals or companies of the other Contracting Party, as regards their management, use, enjoyment or disposal of their investments, to treatment less favourable than that which it accords to its own nationals or companies or to nationals or companies of any third State.

ARTICULO V

Expropiación

(1) Las inversiones de capital de nacionales o sociedades de una de las Partes Contratantes, no podrán, en el territorio de la otra Parte Contratante, ser nacionalizadas, expropiadas o sometidas a medidas que en sus efectos equivalgan a nacionalización o expropiación (en lo sucesivo se denomina "expropiación"), salvo por causas de utilidad pública y por un beneficio social relacionados con las necesidades internas de dicha Parte Contratante y a cambio de una justa compensación efectiva. Dicha compensación deberá responder al valor de mercado de las inversiones de capital inmediatamente antes de la fecha de hacerse efectiva la expropiación o de hacerse pública la inminente expropiación cualquiera que sea la anterior, comprenderá los intereses conforme al tipo normal comercial o legal, cualquiera haya de aplicarse en el territorio de la Parte Contratante que efectuó la expropiación, hasta la fecha en que se efectuara el pago; el pago se efectuara sin demora, será efectivamente realizable y libremente transferible. El nacional o sociedad afectado tendrá derecho de establecer puntualmente, por procedimientos jurídicos, en el territorio de la Parte Contratante que efectúe la expropiación, la legalidad de la expropiación y el monto de la compensación conforme a los principios

ARTICLE 5

Expropriation

(1) Investments of nationals or companies of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as "expropriation") in the territory of the other Contracting Party except for a public purpose and for a social benefit related to the internal needs of that Party and against just and effective compensation. Such compensation shall amount to the market value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier, shall include interest at a normal commercial or legal rate, whichever is applicable in the territory of the expropriating Contracting Party, until the date of payment, shall be made without delay, be effectively realizable and be freely transferable. The national or company affected shall have the right to establish promptly by due process of law in the territory of the Contracting Party making the expropriation the legality of the expropriation and the amount of the compensation in accordance with the principle set out in this paragraph.

establecidos en este párrafo.

(2) En el caso de que una Parte Contratante expropie los bienes de una sociedad, incorporada o constituida conforme a las leyes vigentes en cualquier parte de su territorio y en la que nacionales o sociedades de la otra Parte Contratante tengan acciones, la misma asegurará la satisfacción de las disposiciones prescritas en el párrafo (1) de este Artículo, en lo que respecta a garantizar la puntual, adecuada y efectiva compensación en lo referente a las inversiones de capital de los nacionales o sociedades de la otra Parte Contratante que son propietarios de dichas acciones.

(2) Where a Contracting Party expropriates the assets of a company which is incorporated or constituted under the law in force in any part of its own territory, and in which nationals or companies of the other Contracting Party own shares, it shall ensure that the provisions of paragraph (1) of this Article are applied to the extent necessary to guarantee prompt, adequate and effective compensation in respect of their investment to such nationals or companies of the other Contracting Party who are owners of those shares.

ARTICULO VIII

Arreglo de Diferencias entre un Inversionista y un país Receptor

(1) Las diferencias entre un nacional o una sociedad de una Parte Contratante y la otra Parte Contratante concernientes a una obligación de la última conforme a este Convenio y en relación con una inversión de la primera que no hayan sido arregladas legalmente y amigablemente, pasado un período de seis meses de la notificación escrita del reclamo, serán sometidas a arbitraje internacional si así lo deseara cualquiera de las partes en la diferencia.

(2) En el caso de que la diferencia se refiera a arbitraje internacional, el inversionista y la Parte Contratante en la diferencia podrán consentir en someter la controversia:

(a) al Centro Internacional de Arreglo de Diferencias Relativas a Inversiones (teniendo en cuenta, cuando proceda, las disposiciones del Convenio sobre Arreglo de Diferencias Relativas a Inversiones entre Estados y Nacionales de Otros Estados, abierto a la firma en Washington el 18 de marzo de 1965, y la Facilidad Adicional para la

ARTICLE 8

Settlement of Disputes between an Investor and a Host State

(1) Disputes between a national or company of one Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement in relation to an investment of the former which have not been legally and amicably settled shall after a period of six months from written notification of a claim be submitted to international arbitration if either party to the dispute so wishes.

(2) Where the dispute is referred to international arbitration, the investor and the Contracting Party concerned in the dispute may agree to refer the dispute either to:

(a) the International Centre for the Settlement of Investment Disputes (having regard to the provisions, where applicable, of the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington DC on 18 March 1965 and the Additional Facility for the Administration of

Administración de Procedimientos de Conciliación, Arbitraje e Investigación; o

(b) al Tribunal de Arbitraje de la Cámara de Comercio Internacional; o

(c) a un árbitro internacional o tribunal de arbitraje ad hoc *a ser designado por un acuerdo especial o establecido conforme a las Reglas de Arbitraje de la Comisión de las Naciones Unidas sobre el Derecho Comercial Internacional.*

Si, después de un período de seis meses a partir de la notificación escrita del reclamo, un procedimiento alternativo no hubiese sido acordado, las partes en la diferencia tendrán la obligación de someterla a arbitraje conforme a las Reglas de Arbitraje de la Comisión de las Naciones Unidas sobre el Derecho Comercial Internacional vigentes en ese momento. Las partes en la diferencia podrán acordar por escrito la modificación de dichas Reglas.

Conciliation, Arbitration and Fact-Finding Proceedings); or

(b) the Court of Arbitration of the International Chamber of Commerce; or

(c) an international arbitrator or ad hoc *arbitration tribunal to be appointed by a special agreement or established under the Arbitration Rules of the United Nations Commission on International Trade Law.*

If after a period of six months from written notification of the claim there is no agreement to an alternative procedure, the parties to the dispute shall be bound to submit it to arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law as then in force. The parties to the dispute may agree in writing to modify these Rules.

CHAPTER V – THE PARTIES' ARGUMENTS ON JURISDICTION

A. ALLEGED JOINDER AND/OR CONSOLIDATION OF CLAIMS WITHOUT THE RESPONDENT'S CONSENT

The Respondent's Arguments

164. The Respondent claims it has not provided its consent for investors from the United States and investors from the United Kingdom to join or consolidate claims arising under different BITs into a single arbitration proceeding before a single tribunal. Likewise, it considers that it is for the Claimants to prove such consent on the part of the Respondent.[105]

165. Nevertheless, the Respondent asserts that neither Article IX of the US-Bolivia BIT nor Article 8 of the UK-Bolivia BIT (invoked by the Claimants as providing consent in the context of these proceedings [106]) contain Bolivia's consent to jointly settle disputes between foreign investors and Bolivia on the basis of a treaty other than the one applicable to such foreign investors.[107]

166. In addition, Bolivia deems the dispute settlement provisions in the Treaties to be incompatible, as under the US-Bolivia BIT only the national or company who is a party to a dispute against the State may commence arbitration, while the UK-Bolivia BIT allows either disputing party to do so. This means that Bolivia may file counterclaims against investors under the UK-Bolivia BIT, but lacks such power under the US-Bolivia BIT.[108]

167. Consequently, the Respondent believes that the Tribunal lacks "*rationae voluntatis*" jurisdiction over the present dispute, given the Claimants' failure to provide sufficient evidence of the Respondent's consent thereto. As explained by international case law and legal scholars, and in accordance with the treaty interpretation rules set forth in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (hereinafter, the "**VCLT**"), no two claims may be joined or consolidated into a single proceeding without the express consent of the State.[109]

[105] Memorial on Jurisdiction, ¶17; Respondent's Post-Hearing Brief, ¶¶25-26, 30, and 35. See Transcript (English), Day 1, 2 April 2013, 161:14-162:4; Transcript (English), Day 6, 9 April 2013, 1418:22-1419:7.

[106] Memorial on Jurisdiction, ¶21; Notice of Arbitration, ¶¶57-63; Statement of Claim, ¶¶135-141.

[107] See Transcript (English), Day 1, 2 April 2013, 164:15-165:1.

[108] See Transcript (English), Day 1, 2 April 2013, 168:3-168:12.

[109] Memorial on Jurisdiction, ¶¶23-26.

168. In the Respondent's view, the Claimants draw a distinction between "consolidation" and "joinder" of claims,[110] according to which only consolidation requires the express consent of the State.[111] However, the Claimants fail to explain why such consent is not necessary in the case of a joinder of claims.[112]

169. Thus, the Respondent considers that the scope of State consent under a treaty cannot be unilaterally modified by an investor,[113] but rather, that such consent is determined by the scope of the offer to arbitrate made by the State (Bolivia) under the relevant treaty. Therefore, the investor may only accept what has been offered by the State,[114] and Bolivia has made no offer in these proceedings that would allow the Claimants to choose whether to commence one or two arbitration proceedings.[115]

170. Furthermore, while the Claimants argue that Bolivia has quoted no legal authority whatsoever in support of its objection on lack of consent to consolidation,[116] the Respondent believes that such an assertion entails a "false debate", as it is "absurd" to insist that the requirement of consent to a tribunal's jurisdiction msut be supported by some legal authority.[117]

171. On the other hand, the Respondent considers that the cases on which the Claimants rely are fundamentally distinguishable from this arbitration: in these cases, the States did not object to the tribunal's jurisdiction on the basis of a lack of consent to the joinder of disputes.[118] Therefore, the "implied" State consent in such cases cannot be applied to these proceedings

---

[110] Counter-Memorial on Jurisdiction, ¶6.

[111] Counter-Memorial on Jurisdiction, ¶6. See Transcript (English), Day 1, 2 April 2013, 162:5-162:23.

[112] Reply on Jurisdiction, ¶22. See Transcript (English), Day 1, 2 April 2013, 167:13-168:2.

[113] Reply on Jurisdiction, ¶24.

[114] Reply on Jurisdiction, ¶26. See *ICS Inspection and Control Services Limited (United Kingdom) v. Argentine Republic* (PCA Case No. 2010-9), Award on Jurisdiction, 10 February 2012 (Dupuy, Bernárdez and Lalonde) (Exhibit **RL-29**); *Impregilo S.p.A v. Argentine Republic* (ICSID Case No. ARB/07/17), Dissenting Opinion of Professor Brigitte Stern, 21 June 2011 (Exhibit **RL-119**).

[115] Reply on Jurisdiction, ¶¶27-31. In such regard, the Respondent believes that *Lauder* and *CME* cases illustrate this situation, since, in such cases, investors instituted two different arbitrations against the Czech Republic under two different treaties, as the Czech Republic had only consented thereto. Hence, had investors in such cases wished to consolidate the proceedings, they should have had the express consent of the State, given that the applicable treaties did not contain the consent of the State to the joinder. Likewise, in *Pan American* case, the Respondent maintains that claimants distort its content, since the tribunal never stated that, had claimants chosen to commence a single proceeding instead of two, they would not have needed Argentina's consent.

[116] Counter-Memorial on Jurisdiction, ¶7.

[117] Reply on Jurisdiction, ¶33.

[118] Reply on Jurisdiction, ¶38.

to alter the scope of Bolivia's consent.[119] Likewise, the Respondent submits that in *Duke Energy* the relevant treaties were binding upon the same parties,[120] whereas in these proceedings each Claimant invokes a different consent pursuant to a different Treaty.[121]

172. Similarly, the Respondent contends that Bolivia's consent cannot be presumed, since, as other investment tribunals have held, a State's consent must be "clear and unambiguous".[122] To hold otherwise would suggest that a State party to a treaty consents to everything that is not expressly prohibited therein, which the Respondent describes as "absurd".[123]

173. Lastly, Bolivia submits that its consent cannot be overridden by procedural efficiency considerations. According to the Respondent, the Claimants confuse procedural matters under Article 17(1) of the UNCITRAL Rules with other jurisdictional matters (the non-existence and scope of Bolivia's consent).[124] Accordingly, the UNCITRAL Rules do not allow a tribunal to overlook a State's consent, but rather confirm that such consent is necessary under Article 17(5) thereof. Finally, Bolivia believes that, should only one Party be excluded from the proceedings, such Party should be Rurelec.[125]

The Claimants' Arguments

174. The Claimants allege that that there has been no consolidation of claims in these proceedings. According to the legal authorities and case law submitted by the Claimants, "consolidation" is defined as "a procedural device combining two or more proceedings into one proceeding with the result that the other tribunals cease to function, and therefore express consent is required to consolidate proceedings."[126] From the Claimants' standpoint, however, these proceedings present a different situation involving two investors who have decided to jointly submit several claims in the context of a single proceeding. As a result, the

---

[119] Reply on Jurisdiction, ¶40; Respondent's Post-Hearing Brief, ¶33. See Transcript (English), Day 1, 2 April 2013, 166:1-166:19; Transcript (English), Day 6, 9 April 2013, 1419:25-1420:5.

[120] See *Duke Energy Electroquil Partners & Electroquil S.A. v. Ecuador* (ICSID Case No. ARB/04/19), Award, 18 August 2008 (Kaufmann-Kohler, Gómez Pinzón and van den Berg) (Exhibit **CL-53**).

[121] Reply on Jurisdiction, ¶46(c); Respondent's Post-Hearing Brief, ¶31.

[122] Reply on Jurisdiction, ¶42; Respondent's Post-Hearing Brief, ¶34. See *Plama Consortium Limited v. Republic of Bulgaria* (ICSID Case No. ARB/03/24), Decision on Jurisdiction, 8 February 2005 (Salans, van den Berg and Veeder) (Exhibit **CL-110**). See Transcript (English), Day 1, 2 April 2013, 163:8-163:15.

[123] Reply on Jurisdiction, ¶44.

[124] Counter-Memorial on Jurisdiction, ¶12.

[125] See Transcript (English), Day 1, 2 April 2013, 170:9-170:18.

[126] Counter-Memorial on Jurisdiction, ¶6. See *Canfor Corporation v. United States of America*; *Terminal Forest Products Ltd. v. United States of America* (UNCITRAL), Order on Consolidation, 7 September 2005, (van den Berg, Robinson and L.C de Mestral) (Exhibit **CL-115**).

case law on which Bolivia relies is inapplicable to the present case, as it deals with the consolidation of two separate arbitrations into a single proceeding.[127]

175. Similarly, the Claimants contest Bolivia's argument that the Tribunal lacks jurisdiction over the dispute given the lack of express consent by the State to a joinder of claims in a single proceeding when such claims have been brought by different claimants under different treaties. They argue that the Respondent has failed to invoke any case law or legal authorities in support of its position because there is no precedent in which claims brought by different claimants have been dismissed on the grounds of their joint submission.[128]

176. Instead, the Claimants submit that claims are often submitted jointly in multi-party arbitrations, even under different legal instruments, provided that these are compatible (as the Claimants believe is the case in these proceedings with the US-Bolivia and UK-Bolivia BITs).[129] The Claimants further reject the possibility that a counterclaim could be filed under the UK-Bolivia BIT. In fact, the only incompatibility alleged by Bolivia[130] does not arise, as the Claimants have submitted the dispute under the relevant dispute settlement provisions set forth in each Treaty.[131]

177. Finally, the Claimants consider that, in the interest of justice and efficiency, the Tribunal should settle the dispute in a single proceeding, since a separate filing of claims would require the Claimants to invest much more money and effort and would lead to duplicative

---

[127] As explained by the Claimants at ¶6(a) and (b) of the Counter-Memorial on Jurisdiction, the case *Pan American Energy LLC and BP Argentina Exploration Company v. The Argentine Republic,* (ICSID Case No. ARB/03/13), Decision on Preliminary Objections, 27 July 2006, and the case *CME Czech Republic B.V. v. The Czech Republic* (UNCITRAL), Partial Award, 13 September 2001 (Kuhn, Schwebel y Hándl) (Exhibit **RL-33**, **CL-74**), cited by Bolivia, refer to arbitrations in which the claimants filed two different arbitration proceedings and then requested the consolidation thereof. However, in this case, the Claimants have not filed two different requests for arbitration, but have acted jointly.

[128] Claimants' Post-Hearing Brief, ¶68. See Transcript (English), Day 6, 9 April 2013, 1355:17-1356:1.

[129] Counter-Memorial on Jurisdiction, ¶¶8-9; Claimants' Post-Hearing Brief, ¶¶74, and 76. See *Piero Foresti, Laura de Carli and others v. The Republic of South Africa* (ICSID Case No. ARB(AF)/07/1), Award, 4 August 2010 (Lowe, Brower and Matthews) (Exhibit **CL-134**); *OKO Pankki OYJ, VTB Bank (Germany) AG and Sampo Bank Plc v. Republic of Estonia* (ICSID Case No. ARB/04/6), Award, 19 November 2007 (Wijnen, Fortier and Veeder) (Exhibit **CL-120**); *Itera International Energy LLC and Itera Group NV v. Georgia* (ICSID No. ARB/08/7), Decision on Admissibility of Ancillary Claims, 4 December 2009 (Danelius, Orrego Vicuña and Stern) (Annex **CL-128**); *Sociedad General de Aguas de Barcelona S.A. and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic* (ICSID Case No. ARB/03/17), Decision on Jurisdiction, 16 May 2006 (Salakuse, Kaufmann-Kohler and Nikken) (Exhibit **CL-117**); *Pac Rim Cayman LLC v. Republic of El Salvador* (ICSID Case No. ARB/09/12), Decision on the Respondent's Preliminary Objections, 2 August 2010 (Veeder, Tawil and Stern) (Exhibit **CL-133**); *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan* (ICSID Case No. ARB/05/16), Award, 29 July 2008 (Boyd, Lalonde and Hanotiau) (Exhibit **CL-52**); *Duke Energy Electroquil Partners & Electroquil S.A. v. Ecuador* (ICSID Case No. ARB/04/19), Award, 18 August 2008 (Kaufmann Kolher, Gómez Pinzón and van den Berg) (Exhibit **CL-53**); *Perenco Ecuador Ltd. v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador* (Petroecuador) (ICSID Case No. ARB/08/06), Decision on Jurisdiction, 30 June 2011 (Tomka, Kaplan and Thomas) (Exhibit **CL-137**).

[130] Memorial on Jurisdiction, ¶29.

[131] Counter-Memorial on Jurisdiction, ¶10; Claimants' Post-Hearing Brief, ¶¶72-73.

proceedings and to a possible inconsistency between future awards. Therefore, the Tribunal must allow the Claimants to submit their claims jointly, especially considering that Bolivia has failed to explain how a joint submission of claims would adversely affect the proceedings or to otherwise indicate which of the Claimants should be excluded.[132]

178. The Claimants consider that there is no reason to believe that, upon signing the Treaties, Bolivia did not account for the fact that multiple claims could be heard in a single proceeding. It is undisputed that multiple investors may jointly file claims in the context of a single proceeding without being specifically authorized to do so under the relevant investment treaty, and even if the State opposes such joinder of claims. Likewise, an investor may file arbitration proceedings under different legal instruments, on the basis of the consent which has been provided for each of such legal instruments, and even if such instruments do not expressly provide for this possibility.[133]

179. Additionally, whether the Claimants may be jointly heard in the same proceedings is a procedural rather than a jurisdictional question. In this regard, the Tribunal has broad discretion to rule upon this issue under the UNCITRAL Rules and Procedural Order No. 1. The advantages of a unified proceeding in terms of efficiency and consistency are undisputed and, in any event, Bolivia has not provided a single reason to proceed otherwise.

180. The Claimants consider that Bolivia has abandoned its claim on the argument incompatibility of the BITs[134] as well as its argument that "consolidation" is at issue in these proceedings. By opposing these proceedings, Bolivia only seeks to delay a final award, as it has not even contested the fairness and efficiency of jointly settling claims that have been jointly submitted, nor has it explained how such joinder of claims would adversely affect it.[135]

181. In any event, the Claimants believe that their claims may be analyzed from the standpoint of either of them, as the damages are the same. Should the Tribunal consider these claims from GAI's standpoint, it would find that GAI would have directly lost the market value arising

---

[132] Counter-Memorial on Jurisdiction, ¶¶11-13; Claimants' Post-Hearing Brief, ¶77. See Transcript (English), Day 1, 2 April 2013, 136:16-138:16.

[133] Rejoinder on Jurisdiction, ¶¶5-7. In this regard, the Claimants cite several cases in support of their argument, such as *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador* (UNCITRAL – PCA Case No. 2007-2), Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. Mongolia (UNCITRAL Arbitration), and *Abaclat and others v. The Argentine Republic* (ICSID Case No. ARB/07/5), Decision on Jurisdiction and Admissibility, 4 August 2011 (Tercier, Abi-Saab, van den Berg) (Exhibit **CL-138**). See Transcript (English), Day 1, 2 April 2013, 136:24-137:9; Transcript (English), Day 6, 9 April 2013, 1356:13-1356:15.

[134] See Transcript (English), Day 6, 9 April 2013, 1357:22-1358:21.

[135] Rejoinder on Jurisdiction, ¶11.

out of the spot price and effective means claims, without having to consider any question pertaining to Rurelec, as Rurelec's loss would be entirely compensated by a full damages award in favour of GAI. On the other hand, should the Tribunal decline jurisdiction over GAI's claims, then it might consider analyzing Rurelec's stake in EGSA, which is the same as GAI's. As regards regulatory measures, the losses incurred by both of the Claimants would also be the same. If the Tribunal considers Rurelec's claims, then Rurelec's loss would be the market value of its shareholding in EGSA as of the valuation date, as well as the related loss arising from the effective means and spot price claims. In this context, it would not be necessary to consider any other matter pertaining to GAI, as GAI's loss would have been entirely redressed by a full damages award in favour of Rurelec. If the Tribunal were to decline jurisdiction over Rurelec's claims, it should have to consider GAI's claims. The valuation of GAI's shareholding in EGSA is the same as Rurelec's; hence, the damages calculation for both Claimants would be the same.[136]

B. ALLEGED LACK OF RURELEC'S CAPACITY AS AN INVESTOR, AS WELL AS OF A PROTECTED INVESTMENT

The Respondent's Arguments

182. Bolivia considers Rurelec lacks standing to have its dispute with Bolivia heard in this arbitration, as Rurelec cannot be regarded an "investor" and has not made any "investment" pursuant to the UK-Bolivia BIT. Therefore, Bolivia's alleged consent could not have been provided.

183. First, and relying on international case law and the VCLT, the Respondent claims that Rurelec has the burden of proof with respect to both the alleged existence of an "investment" and its status as an "investor". Rurelec must prove that it acquired a direct ownership interest or, if allowed for under the UK-Bolivia BIT, an indirect ownership interest in EGSA prior to the dispute. However, neither of these points has been proven and the Tribunal should thus decline jurisdiction over the dispute.[137]

---

[136] Claimants' Post-Hearing Brief, ¶¶64-66. See Transcript (English), Day 6, 9 April 2013, 1353:15-1355:6.

[137] Memorial on Jurisdiction, ¶¶35-37; Respondent's Post-Hearing Brief, ¶38. See *Limited Liability Company AMTO v. Ukraine* (SCC Case No. 80/2005), Final Award, 26 March 2008 (Cremades, Runeland and Soderlund) (Exhibit **RL-34**); *Salini Construttori S.P.A. and Italstrade S.P.A v. Jordania* (ICSID Case No. ARB/02/13), Award, 31 January 2006 (Guillaume, Cremades, Sinclair) (Exhibit **RL-35**); *Hussein Nuaman Soufraki v. United Arab Emirates* (ICSID Case No. ARB/02/07), Award, 7 July 2004 (Fortier, Schwebel and El-Khoseri) (Exhibit **RL-37**); *Phoenix Action, Ltd. v. Czech Republic* (ICSID Case No. ARB/06/5), Award, 15 April 2009 (Stern, Bucher and Fernández-Armesto) (Exhibit **RL-38**); *Brandes Investment Partners, LP v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/08/3), Decision on the Respondent's Objection Under Rule 41(5) of the ICSID Arbitration Rules, 2 February 2009 (Briner, Stern and Böckstiegel)

184. Secondly, in the Respondent's view, the documents submitted by the Claimants do not prove an investment by Rurelec in GAI in January 2006. Assuming *arguendo* that such documentation were sufficient, which the Respondent disputes, it would merely prove the possible acquisition of an indirect ownership interest in EGSA on 29 June 2009, the date on which the chain of control between EGSA and Rurelec would have been established.[138] Using this date, the major capital investments in new productive capacity undertaken by EGSA between 2006 and 2008 which the Claimants repeatedly cite, would have taken place before Rurelec held any ownership interest in EGSA. In any event, the date on which the possible acquisition of an indirect ownership stake might have taken place is irrelevant, as there is no document demonstrative actual payment for the investment, and therefore no investment exists.

185. Thirdly, if Rurelec had invested in EGSA, such an investment would be an indirect investment made through Birdsong, BIE, and GAI. BIE and Birdsong Overseas Limited are incorporated under the laws of the British Virgin Islands,[139] a territory to which the provisions of the UK-Bolivia BIT are not applicable. In addition, as an indirect investment, and in contrast to the situation under the US-Bolivia BIT, it would not be protected under the UK-Bolivia BIT. In this regard, Respondent claims that the US-Bolivia BIT contains a broad definition of investment which includes "every kind of investment owned or controlled directly or indirectly by that national or company",[140] whereas the UK-Bolivia BIT makes no reference to a direct or indirect investment holding.

186. On the other hand, according to the Respondent's interpretation of Articles II to V of the US-Bolivia BIT, protected investments must be "of" nationals or companies "of" each Contracting Party, thus requiring a direct ownership relationship between the investment and the national of a Contracting Party for the latter to be considered an investor. This interpretation is supported by the terms "own" and "owner" included in Article V(2) of the US-Bolivia BIT which, according to the Respondent's interpretation, imply ownership or legal right to hold the shares.

(Exhibit **RL-39**); *Inceysa Vallisoletana S.L. v. Republic of El Salvador* (ICSID Case No. ARB/03/26), Award, 2 August 2006 (Oreamuno Blanco, Landy and von Wobeser) (Exhibit **RL-40**).

[138] The Respondent believes that it is such date that should be taken as a reference, rather than the date alleged by the Claimants, as it appears on the Share Certificate that evidences the ownership interests of Birdsong in BIE (Exhibit **C-35**).

[139] Memorial on Jurisdiction, ¶51. See Certificate of Incorporation of BIE (Exhibit **C-25**); Certificate of Incorporation of Birdsong (Exhibit **C-29**).

[140] Memorial on Jurisdiction, ¶62; Article I(4) of the US-Bolivia BIT.

187. Since the UK-Bolivia BIT makes no reference to "direct or indirect" ownership, the case law cited by the Respondent requires that the protected investment be direct.[141] Moreover, the Respondent stresses that 13 out of the 22 BITs signed by Bolivia contain said phrase, whereas 8 do not. Thus, if the parties to the UK-Bolivia BIT had intended to protect indirect—and not just direct—investments, they would have made a specific reference thereto, as was the case in other treaties.

188. Hence, Respondent submits that an indirect investment in EGSA is not protected under the UK-Bolivia BIT.[142] It also considers that the cases cited by the Claimants did not consider the existence of terms confirming the inclusion of indirect investments in the relevant treaties (as is the case, in the Respondent's opinion, under the UK-Bolivia BIT). Nor did such cases consider the State's position upon signing different treaties or the difference between direct and indirect investments.[143]

189. The Respondent further argues that the provisions of the UK-Bolivia BIT only protect "capital" investments.[144] This argument has been upheld by case law and doctrine in light of the inherent meaning of the term "investment".[145] Consequently, a contribution in cash or some other economic contribution is required for an investment to be protected under the UK-Bolivia BIT. As stated by the Respondent, Rurelec made no capital investment in Bolivia pursuant to the UK-Bolivia BIT.

190. Even assuming that Rurelec is an investor and that the UK-Bolivia BIT protects indirect investments, the Respondent submits that Rurelec has made no contribution "within" the territory of Bolivia. It further states that the distinction drawn by the Claimants between

---

[141] Memorial on Jurisdiction, ¶75. See *Aguas del Tunari S.A. v. Republic of Bolivia* (ICSID Case No. ARB/02/3), Decision on Respondent's Objections to Jurisdiction, 21 October 2005 (D. Caron, Alberro-Semerena and C. Alvarez) (Exhibit **RL-28**).

[142] Memorial on Jurisdiction, Section 3.2.2; Reply on Jurisdiction, ¶¶77-82; Counter-Memorial on Jurisdiction, ¶¶22-31.

[143] Reply on Jurisdiction, ¶¶83-87. See *Siemens A.G. v. The Argentine Republic* (ICSID Case No. ARB/02/8), Decision on Jurisdiction, 3 August 2004 (Sureda, Brower and Janeiro) (Exhibit **CL-109**); *Cemex Caracas Investments B.V. and Cemex Caracas II Investments B.V. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/08/15), Decision on Jurisdiction, 30 December 2010 (Guillaume, Abi-Saab and von Mehren) (Exhibit **CL-136**). In this respect, in its allegations on 14 January 2013, the Respondent denies that the case *Teinver S.A. Transportes de Cercanías S.A y Autobuses Urbanos del Sur S.A. v. The Argentine Republic* (ICSID Case No. ARB/90/1), Decision on Jurisdiction, 21 December 2011 (Burgenthal, Alvarez and Hossain) (Exhibit **CL-151**), supports the Claimants' position on this issue since: (i) BITs are not identical in specific aspects which are relevant to these proceedings; and (ii) the Decision applies a pro-investor principle that has not been justified by said tribunal.

[144] Memorial on Jurisdiction, ¶¶85-89; Respondent's Post-Hearing Brief, ¶43.

[145] Memorial on Jurisdiction, ¶¶91-96. See *Romak S.A. v. Uzbekistan* (UNCITRAL – PCA Case No. AA280), Award, 26 November 2009 (Mantilla-Serrano, Rubins and Molfessis) (Exhibit **RL-54**); *GEA Group Aktiengesellschaft v. Ukraine* (ICSID Case No. ARB/08/16), Award, 31 March 2011 (van den Berg, Landau and Stern) (Exhibit **RL-55**); *Alps Finance and Trade AG v. Slovakia* (UNCITRAL), Award, 5 March 2011 (Stuber, Klein and Crivellaro) (**RL-56**).

"capital investment" and "investment" in the different versions of the UK-Bolivia BIT[146] is irrelevant, as Bolivia's objection does not rely on such distinction.

191. Bolivia bases its objection is based on the objective notion of the term "investment", which implies a monetary contribution or input in the host State. Thus, the Respondent challenges the *White Industries*[147] case cited by the Claimants, where the tribunal disregarded the relevance of a monetary contribution or input, but nevertheless deemed it important to confirm that the foreign investor had indeed made such contribution or input in that case.[148] Likewise, in *Romak* and *Alps Finance*[149] (which, according to Bolivia, have been misinterpreted by Claimants as dealing with special circumstances), the tribunal dealt with the facts of the case separately from the inherent meaning of the term "investment", contradicting the Claimants' reading of these cases.[150]

192. In addition, Rurelec would have to prove the monetary or other economic contribution it alleges to have made in the territory of Bolivia.[151] The Respondent argues that the Claimants have failed to show this.[152] The only thing that has been proven is the possible acquisition of an indirect ownership interest in EGSA in 2009 (ten years following the capital contributions in Bolivian territory relating to the capitalization of EGSA). No evidence has been submitted to prove that such an investment was made through a monetary or other economic contribution, or that it was made in Bolivian territory. The Respondent submits that EGSA's shareholders have made no capital contributions since 1999, and that the alleged

[146] Counter-Memorial on Jurisdiction, ¶¶37-41.

[147] See *White Industries Australia Limited v. India* (UNCITRAL), Award, 30 November 2011 (Brower, Lau and Rowley) (Exhibit **CL-73**).

[148] Reply on Jurisdiction, ¶95.

[149] See *Romak S.A. v. Uzbekistan* (UNCITRAL – PCA Case No.AA280), Award, 26 November 2009 (Mantilla-Serrano, Rubins and Molfessis) (Exhibit **RL-54**); *Alps Finance and Trade AG v. Slovakia* (UNCITRAL), Award, 5 March 2011 (Stuber, Klein and Crivellaro) (Exhibit **RL-56**).

[150] See Transcript (English), Day 1, 2 April 2013, 171:9-172:10; Transcript (English), Day 6, 9 April 2013, 1420:19-1421:1.

[151] Reply on Jurisdiction, ¶¶101-102, and 109; Respondent's Post-Hearing Brief, ¶37.

[152] Reply on Jurisdiction, ¶¶103-112. In this regard, the Respondent states that there is no evidence whatsoever that Rurelec has paid USD 35 million for the purchase of the shares in EGSA. Also, the investments in generation equipment were made without the Claimants' own capital contribution. As regards the alleged technical support mentioned by the Claimants in their Counter-Memorial on Jurisdiction, ¶33, no evidence has been submitted and, in any case, the technical support received by EGSA came from abroad, through subcontractors from Independent Power Operation Ltd. (See Exhibit **R-103**). Moreover, at least four out of the seven Jenbacher engines (which Claimants include as Rurelec's contribution) already belonged to EGSA since April 2005, that is, several months prior to Rurelec's alleged investment in Bolivia. Ultimately, the Respondent claims, it is not correct to say that Rurelec's conduct has helped to remedy the difficult financial situation of EGSA, as its indebtedness had been evident since 2008. Fitch Ratings had downgraded EGSA's credit rating and by 2009 it had exhausted all its financing sources, having at its disposal USD 3 millions in cash in 2010. This, coupled with the distribution of dividends qualified as "conservative" by the Claimants, led to a decapitalization of EGSA (See Exhibits **R-104**, **R-105** and **R-106**). See Transcript (English), Day 1, 2 April 2013, 172:11-173:19.

"investments" made by the Claimants in 2006 and 2007 cannot be attributed to the Claimants, as Rurelec did not have an indirect shareholding in EGSA at the time.

193. Lastly, since EGSA's capitalization in 1999 (10 years prior to Rurelec's alleged acquisition of an indirect ownership interest), there have been no capital contributions by EGSA's shareholders. Neither the purchase of the two engines owned by Energais in Bolivia (decommissioned, disassembled, and stored at EGSA), nor Rurelec's interest in Energais can be deemed as investments under the UK-Bolivia BIT.[153]

194. For the foregoing reasons, Rurelec does not qualify as an investor and its alleged investment cannot be considered a "protected investment" under the UK-Bolivia BIT. Therefore, the Tribunal lacks jurisdiction "*rationae personae*" over this dispute.

195. The Respondent asserts that the Claimants' arguments in support of Rurelec's alleged acquisition in EGSA[154] fall short. Bolivia denies Rurelec's acquisition of an indirect shareholding in EGSA in 2006 or 2009[155] for the following reasons:

(a) The Claimants have provided no evidence of any payment for this acquisition. They merely restate the price included in a stock purchase agreement dated 12 December 2005, a share transfer dated 5 January 2006, and a press release issued by Rurelec on 5 January 2006.[156] The conditions under which such payment took place are likewise not proven.[157]

(b) The documents submitted by the Claimants do not prove the shareholding chain linking Rurelec and EGSA since 2006, but rather an alleged indirect investment made by Rurelec in 2009. Only a letter from Nerine Fiduciaries to its Freshfields attorneys dated 26 October 2012 (same date on which Claimants submitted their Counter-Memorial on Jurisdiction) would link Birdsong to EGSA before 2009.[158] No other document from any of the other intervening entities has been submitted to confirm that the BIE shares

153 Memorial on Jurisdiction, ¶¶116-127.

154 Counter-Memorial on Jurisdiction, ¶¶17-19.

155 Reply on Jurisdiction, ¶55. See Transcript (English), Day 6, 9 April 2013, 1420:17-1427:11.

156 Counter-Memorial on Jurisdiction, ¶17.

157 Reply on Jurisdiction, ¶¶59-61; Respondent's Post-Hearing Brief, ¶¶38-41. As regards the agreement (Exhibit **R-61**), Bolivia states that it does not show whether a payment has been made. It provides for some deferred payments but it is uncertain whether they have been made or not. Moreover, the last payment was scheduled for 2008, which makes it impossible for the 2006 Share Transfer (Exhibit **C-214**) to prove any payment (a total of USD 35 millions) in 2006 if the aggregate amount had not yet been paid. The same happens with Rurelec's press release (Exhibit **C-215**).

158 Letter from Nerine Fiduciaries to Freshfields dated 26 October 2012 (Exhibit **C-226**).

were actually owned by Birdsong. Likewise, no explanation has been provided as to why Birdsong (if it really acquired the shares in 2006) waited until 2009 to register them under its name. Nor is there evidence that Birdsong was wholly owned by Rurelec.[159] In any event, such documents are not official documents.[160]

(c) Mr Peter Earl's position as President of EGSA's Board of Directors does not prove that EGSA's shares have been owned, even indirectly, by Rurelec. Moreover, his attendance as President of the Board of Directors at the official opening of EGSA's new facilities is not "exceptional".[161]

196. In light of the above, Bolivia states that the Claimants have failed to provide evidence of Rurelec's payment for the allegedly acquired shares or of an economic contribution made in Bolivian territory. Accordingly, the Respondent claims that there has been no protected investment made under the Treaty, which results in the Tribunal's lack of jurisdiction *rationae personae*.

The Claimants' Arguments

197. Firstly, the Claimants submit that Rurelec acquired its indirect majority stake in EGSA on 6 January 2006,[162] and that Rurelec was already EGSA's majority shareholder during the period of EGSA's investments to improve its electricity generation capacity between 2006 and 2007. The Claimants deny that such stake was acquired at a later date—in June 2009—and assert that (i) Bolivia requested specific documents from the Claimants on this matter on 7 September 2012 and Rurelec submitted said documentation; (ii) as shown by such documents, the execution and delivery of the stock transfer dated 5 January 2005 shows that the transaction was completed on 6 January 2006 with the payment of USD 35 million; (iii) other ancillary documents likewise confirm that Rurelec made its investment in 2006;[163] and (iv) the Respondent became aware of Rurelec's investment in EGSA prior to 2009, as proven by the fact that in March 2007, Bolivian authorities, along with Mr Earl and the United

---

[159] Reply on Jurisdiction, ¶69. The Respondent considers that the Claimants have just established that Birdsong was organized in December 2005 and that Rurelec owned one share at a par value of USD 1 (Exhibits **C-29** and **C-30**). However, said documents fail to show how many shares form Birdsong's capital, which makes it impossible to determine Rurelec's percentage interest thereon.

[160] Reply on Jurisdiction, ¶¶62-65.

[161] Reply on Jurisdiction, ¶71.

[162] Statement of Claim, ¶70; Counter-Memorial on Jurisdiction, ¶15.

[163] Examples of documents include: (i) EGSA's annual reports on stock ownership by Rurelec since the investment, (ii) the position of Peter Earl —Director of Rurelec— as President of the Board of Directors of EGSA in 2006, and (iii) different press releases which mention the investments made in Bolivia for power generation.

Kingdom's Ambassador to Bolivia, attended the inauguration ceremony for EGSA's new GCH-11 unit.[164]

198. The Claimants assert that they have provided sufficient evidence that Rurelec acquired an indirect majority stake in EGSA and claim that Bolivia has not disproven this, such that Bolivia's objection should be dismissed. The Claimants allege that the price of USD 35 million for the purchase of EGSA was fully paid, as shown by the 2006 and 2007 annual reports and the audits performed.[165] Following the acquisition, and until June 2009, BIE's shares were held in escrow by entities designated for the benefit of Birdsong, as per corporate practice.

199. Secondly, the Claimants consider that the UK-Bolivia BIT does protect indirect investments, as it covers "every kind of asset" as well as "any form of participation in a company", and the list of protected investments included therein is non-exhaustive. Indirect shareholdings are an asset and therefore, a form of participation in a company, which makes them protected investments under the UK-Bolivia BIT. This conclusion is supported by extensive arbitral practice,[166] and the cases submitted by Bolivia are inapposite to the case at hand.

200. The Claimants insist that Rurelec's indirect shareholding in EGSA must be deemed an "investment" according to the list of examples provided by the Treaty, since the list includes "*shares in* […] a *company and any other form of participation in a company*." The latter is a broad definition and the absence of more specific language ("directly or indirectly") cannot narrow its scope, as suggested by the Respondent. Bolivia has failed to prove that the UK-Bolivia BIT deliberately excluded indirect investments.[167] According to the Claimants,

---

[164] Counter-Memorial on Jurisdiction, ¶¶17-19; Claimants' Post-Hearing Brief, ¶95. See Transcript (English), Day 1, 2 April 2013, 138:17-140:4.

[165] See Transcript (English), Day 6, 9 April 2013, 1350:22-1353:4.

[166] Counter-Memorial on Jurisdiction, ¶¶23-26. See *Teinver S.A., Transportes de Cercanías S.A and Autobuses Urbanos del Sur S.A. v. The Argentine Republic* (ICSID Case No. ARB/09/1), Decision on Jurisdiction, 21 December 2012 (Buergenthal, Alvarez and Hossain) (Exhibit **CL-151**); *Siemens A.G. v. The Argentine Republic* (ICSID Case No. ARB/02/8), Decision on Jurisdiction, 3 August 2004 (Sureda, Brower and Janeiro) (Exhibit **CL-109**); *Ioannis Kardassopoulos v. Georgia* (ICSID Case No. ARB/05/18), Decision on Jurisdiction, 6 July 2007 (Fortier, Orrego Vicuña and Watts) (Exhibit **CL-119**); *Mobil Corporation, Venezuela Holdings, B.V. and others v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/08/27), Decision on Jurisdiction, 10 June 2010 (Guillaume, Kaufmann-Kohler and El-Kosheri) (Exhibit **CL-131**); *Mr. Tza Yap Shum v. Republic of Peru* (ICSID Case No. ARB/07/6), Decision on Jurisdiction and Competence, 19 June 2009 (Fernández-Armesto, Otero and Kessler) (Exhibit **CL-124**). See Transcript (English), Day 1, 2 April 2013, 140:17-141:9; Transcript (English), Day 6, 9 April 2013, 1368:9-1368:21.

[167] Rejoinder on Jurisdiction, ¶¶20-22.

tribunals consistently interpreted provisions similar to the ones set forth in the UK-Bolivia BIT as covering indirect investments.[168]

201. Bolivia's argument that investments should be made directly by nationals or companies for them to be protected by a BIT is rejected by international case law.[169] In turn, case law and legal scholars cited by the Claimants[170] rebut the theory that the presence of third-party intermediary companies used in order to obtain a stake in EGSA precludes Rurelec from being considered an investor under the UK-Bolivia BIT.

202. Thirdly, the Claimants object to the definition of "investment" suggested by Bolivia, which requires a capital contribution in Bolivian territory ("capital investment"), and also reject the assertion that Rurelec has made no capital investment and consequently cannot be protected under the UK-Bolivia BIT.[171] Said statement applies a rule which has been created exclusively by ICSID case law based on the ICSID Convention, and which is inapplicable to the present dispute.[172]

203. Conversely, the Claimants consider that they have made major investments in Bolivia.[173] In addition, Rurelec and the Government of Bolivia conducted a project aimed at providing electricity to underserved rural areas, and agreed that Rurelec would finance a subsidy to low-income consumers known as the "dignity tariff". This was financed by Rurelec through

[168] Rejoinder on Jurisdiction, ¶¶23-25. The Claimants consider that the *Anglo Iranian Oil Co.* case (*United Kingdom v. Iran*), 1952, I.C.J. Reports 93, 22 July 1952 (Exhibit **RL-44**), cited by the Respondent to support its argument at ¶72 of its Memorial on Jurisdiction, makes no reference to the concept of direct or indirect investment. Moreover, Bolivia's argument that the cases cited by the Respondent should be disregarded because they do not involve the UK-Bolivia BIT or any other treaties executed by Bolivia, should not be accepted since the provisions analyzed in those cases are substantially the same as those under the UK-Bolivia BIT. For more reference to those cases, see Counter-Memorial on Jurisdiction, ¶¶23-26. See also the Claimants' allegations on 2 January 2013 about the case *Teinver S.A., Transportes de Cercanías S.A and Autobuses Urbanos del Sur S.A. v. The Argentine Republic* (ICSID Case No. ARB/09/1), Decision on Jurisdiction, 21 December 2012 (Buergenthal, Alvarez and Hossain) (Exhibit **CL-151**).

[169] Counter-Memorial on Jurisdiction, ¶28. See *Cemex Caracas Investments B.V. and Cemex Caracas II Investments B.V. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/08/15), Decision on Jurisdiction, 30 December 2010 (Guillaume, Abi-Saab and von Mehren) (Exhibit **CL-136**).

[170] Counter-Memorial on Jurisdiction, ¶¶29-30. See C.H. Schreuer, "*Shareholder Protection in International Investment Law*", Transnational Dispute Management, Volume 2, Issue 3, 8 May 2005 (Exhibit **CL-112**); *Inmaris Perestroika Sailing Maritime Services GMBH and others v. Ukraine* (ICSID Case No. ARB/08/08), Decision on Jurisdiction, 8 March 2010 (Alexandrov, Cremades and Rubins) (Exhibit **CL-130**).

[171] See Transcript (English), Day 1, 2 April 2013, 141:19-142:2.

[172] Rejoinder on Jurisdiction, ¶¶27-28.

[173] For example, they also cite the payment of USD 35 million for the acquisition of EGSA in 2006, an estimated investment of USD 110 million to increase EGSA's efficiency (through a 185MW increase), as well as the introduction of a new technology which entailed an increase of EGSA's power generation capacity. See Statement of Claim, ¶¶70-79; Counter-Memorial on Jurisdiction, ¶33. See Transcript (English), Day 1, 2 April 2013, 142:3-142:17.

its returns on investments, deferred dividends, commercial loans, and other financing sources for EGSA.[174]

204. According to the Claimants, Bolivia's interpretation of the definition of "protected investment" is incorrect and distorts the true meaning that the UK-Bolivia BIT intended to give to this term, depriving it of its *effet utile*. The Respondent relies on the Spanish version of the UK-Bolivia BIT and refers to the concept of "returns" (*rentas*) in Article 1(b) thereof.[175] In this version, the concept of "capital investment" (*inversión de capital*) is defined within the concept of "returns". However, the English version of the Treaty only uses the term "investment",[176] which, in the Claimants' opinion, is the concept actually defined by the UK-Bolivia BIT. Under the VCLT, in case of any inconsistency between different versions of the same treaty, the meaning that best reconciles both texts shall prevail, which in this case is the meaning set forth in the English version, since it includes a broad definition of investment which accurately reflects both the drafters' intention and the object and purpose of the UK-Bolivia BIT.

205. The Claimants also insist that the case law submitted by the Respondent to determine the definition of "investment" is inappropriate. On the one hand, Bolivia cites cases where a narrow definition of investment is used in connection with Article 25 of the ICSID Convention, which is inapplicable in this case. On the other hand, the cases under the UNCITRAL Rules cited by Bolivia constitute a minority position distinguishable on their facts from these proceedings.[177]

206. In any event, the Claimants assert that, if Respondent's definition of "investment" were to be applied, Rurelec's investment would still fall within the scope thereof on account of its contributions to the Bolivian economy mentioned above.[178] Based on the report from Bolivia's witness, Marta Bejarano, Bolivia states that Rurelec made no contribution in EGSA using its own funds, but rather drained capital from EGSA and increased its

---

[174] Counter-Memorial on Jurisdiction, ¶34.

[175] Counter Memorial on Jurisdiction, ¶37.

[176] Counter Memorial on Jurisdiction, ¶40. See Article 1(b) of the UK-Bolivia BIT (Exhibit **C-1**).

[177] Counter-Memorial on Jurisdiction, ¶42(a)(b). The Claimants refer here to the cases *Romak S.A. v. Uzbekistan* (UNCITRAL – PCA Case No. AA280), Award, 26 November 2009 (Mantilla-Serrano, Rubins and Molfessis) (Exhibit **RL-54**); *Alps Finance and Trade AG v. Slovakia* (UNCITRAL), Award, 5 March 2011 (Stuber, Klein and Crivellaro) (Exhibit **RL-56**).

[178] Counter-Memorial on Jurisdiction, ¶42 (c)(d).

indebtedness. This latter statement, however, has been rebutted by the Claimants' witness Marcelo Blanco.[179]

207. Furthermore, the Claimants reject the requirement that the investment be made in Bolivian territory. From the Claimants' viewpoint, references to territory relate to the host Contracting Party which would benefit from the investment, not the place where the contribution must take place.[180] If the relevant criterion were the place where the contribution is made, any investor acquiring an interest in a company (as is the case of Rurelec) would be deprived of the protection under the BITs merely because it purchased from the initial investor (in this case, GAI) rather than making a direct capital contribution. However, case law cited by the Claimants states that the BIT protects foreign investors who have acquired a previously existing investment: the investment remains even if the investor changes.[181]

208. In any event, the Claimants consider that Bolivia's additional criterion of a "contribution" in Bolivian territory has been complied with, given that Rurelec paid for the acquisition of its shares in EGSA and thus, such contribution must be deemed an investment in Bolivia.[182] This interpretation would be consistent with the *Quiborax* decision[183] cited by the Respondent. If we apply the facts of *Quiborax* to these proceedings, the payment of USD 35 million made by Rurelec for the acquisition of a controlling interest in EGSA would amount to a "contribution" pursuant to the definition provided in *Quiborax*.[184] As a result, Bolivia's objection should be rejected.

209. In addition, the Claimants allege that Rurelec has made other important contributions in Bolivia, such as the obligations incurred in connection with the USD 20 million loan granted to EGSA by the *Corporación Andina de Fomento* (hereinafter, the "**CAF**"), or the expertise and know-how provided to EGSA's personnel and operations. This important contribution has even been acknowledged by independent third parties, such as the credit rating agency, Fitch.[185]

---

[179] Counter Memorial on Jurisdiction, ¶43; Second Witness Statement of Blanco, ¶¶6 and 21.

[180] Counter-Memorial on Jurisdiction, ¶44. See *Romak S.A. (Switzerland) v. Republic of Uzbekistan* (UNCITRAL – PCA Case No. AA280), Award, 26 November 2009 (Mantilla-Serrano, Rubins and Molfessis) (Exhibit **RL-54**).

[181] Counter-Memorial on Jurisdiction, ¶45. See *Fedax N.V. v. Republic of Venezuela* (ICSID Case No. ARB/96/3), Decision on Jurisdiction, 11 July 1997 (Orrego Vicuña, Meir Helt and Owen) (Exhibit **CL-101**).

[182] Reply on Jurisdiction, ¶114.

[183] See *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplun v. Plurinational State of Bolivia* (ICSID Case No. ARB/06/2), Decision on Jurisdiction, 27 September 2012 (Kaufmann-Kohler, Lalonde and Stern) (Exhibit **CL-132**).

[184] Rejoinder on Jurisdiction, ¶¶30-31; Claimants' Post-Hearing Brief, ¶96.

[185] Rejoinder on Jurisdiction, ¶32.

210. Lastly, the Claimants consider that both Rurelec's shareholding in Energais and the Worthington engines constitute protected investments under the UK-Bolivia BIT. In accordance with Article 5(2) thereof, measures taken by the Respondent in respect of the Bolivian subsidiary of a UK investor (such as its expropriation in this case) require just and effective compensation. Moreover, the Worthington engines constitute movable property under Article 1(a)(i) of the UK-Bolivia BIT, and therefore Rurelec's indirect interest in such movable property is protected.[186]

C. ALLEGED DENIAL OF BENEFITS TO GAI

The Respondent's Arguments

211. According to the Respondent, Article XII of the US-Bolivia BIT allows any of the Contracting Parties (in this case, Bolivia) to deny the benefits therein to a company of the other Contracting Party. For that purpose, two conditions must be complied with, both of which are met by GAI: (i) ownership by nationals of a third State (GAI's shareholder, BIE—an entity created by IEL and later acquired by Birdsong—has always been domiciled in the British Virgin Islands); and (ii) not carrying out any substantial business activities in the territory of the United States. GAI is a "special purpose vehicle" created to acquire and hold the new shares EGSA would issue as a result of its capitalization plan.[187] Since both requirements are met, the Respondent may deny the benefits of the US-Bolivia BIT, which precludes its consent to arbitration under such Treaty from being invoked in these proceedings. Consequently, the Tribunal lacks jurisdiction over GAI's claims.

212. The Respondent explains that it has properly exercised its right to deny the benefits under the US-Bolivia BIT to GAI in accordance with Article XII thereof,[188] as it timely invoked such provision pursuant to the UNCITRAL Rules and International Law in response to the Claimants' Statement of Claim. The Claimants reject such statement and submit that Bolivia purports to apply Article XII of the Treaty retroactively.[189] In turn, Bolivia points out that the Claimants' reasoning is contrary to Article 23(2) of the UNCITRAL Rules and to the case law cited by the Claimants, since in the absence of any special provision in the Treaty limiting the application of the denial of benefits clause, general provisions governing the

[186] Counter-Memorial on Jurisdiction, ¶46.

[187] Memorial on Jurisdiction, ¶¶138-139. See Transcript (English), Day 1, 2 April 2013, 143:7-143:21,174:12-175:1.

[188] Memorial on Jurisdiction, ¶¶130-142.

[189] Counter-Memorial on Jurisdiction, ¶¶51-52.

time limits for the submission of jurisdictional objections —such as Article 23(2) mentioned above—apply and allow these to be raised up until the filing of the Statement of Defence.[190]

213. On the other hand, the Claimants consider that the denial of benefits cannot operate *ex tunc*, as this would breach investors' legitimate expectations.[191] However, the Respondent asserts that such expectations were not violated in GAI's case, since its investment was made in the mid-90s and the US-Bolivia BIT entered into force in 2001. Additionally, Bolivia argues that a legitimate expectation cannot be based on a State's failure to exercise a right to which it is entitled. The future possibility of a denial of benefits was part of the legal framework of the US-Bolivia BIT. Thus, the Claimants were aware of the possibility that Bolivia might exercise such rights following the Treaty's entry into force.[192]

214. As regards the absence of substantial activities in the US, the Claimants allege that the application of the denial of benefits clause on that basis would lead to an unfair result, given that the Respondent required GAI's establishment as part of EGSA's capitalization process.[193] According to the Respondent, such statement is false, since neither the Bidding Rules nor the Capitalization Agreement required that the "subscribing company" for acquiring shares in EGSA be a "special purpose vehicle". Nor they did impose nationality requirements or restrict the commercial activities to be undertaken by such subscribing company.[194]

215. Therefore, GPU was free to choose the company that would participate in the bidding process as the subscribing company to acquire EGSA's shares. However, it decided to create a "vehicle" in the State of Delaware (GAI) without any commercial activity in the United

[190] Reply on Jurisdiction, ¶122-124. See *Ulysseas Inc. v. Republic of Ecuador* (UNCITRAL – PCA Case No. 2009-19), Interim Award, 28 September 2010 (Bernardini, Pryles and Stern) (Exhibit **CL-135**); *Pac Rim Cayman LLC v. Republic of El Salvador* (ICSID Case No. ARB/09/12), Decision on the Respondent's Jurisdictional Objections, 1 June 2012 (Veeder, Twail and Stern) (Exhibit **CL-140**). See Transcript (English), Day 1, 2 April 2013, 178:25-179:3, 179:23-181:2; Transcript (English), Day 6, 9 April 2013, 1428:2-1428:6.

[191] Counter-Memorial on Jurisdiction, ¶52.

[192] Reply on Jurisdiction, ¶¶127-129. See Transcript (English), Day 1, 2 April 2013, 178:12-178:18, 181:3-181:23, 179:12-179:15.

[193] Counter-Memorial on Jurisdiction, ¶56; Respondent's Post-Hearing Brief, ¶53.

[194] Reply on Jurisdiction, ¶¶132-137. The Respondent refers to the Bidding Rules (Exhibit **C-7**), which define "Stock Subscribing Company" as "the company that shall subscribe the Subscription Shares" (Article 1) [Tribunal's Translation]. Moreover, Article 2.1 stated that "the bidding company may be: 2.1.1 Electricity Company […] 2.1.2 Consortium of Related Companies […] 2.1.3 Specific Company. A juridical person constituted exclusively for the purposes of participating in the bid, which could be the Stock Subscribing Company. 2.1.4 Other Consortiums. Article 2.3 provided that "the Qualified Bidder that is declared the winning bidder must constitute, if necessary, prior to the Closing Date, the Stock Subscribing Company" (Article 2.3) and, finally, in the Closing Deed, the Stock Subscribing Company shall subscribe the Subscription Shares (Article 8.3). In turn, the Capitalization Agreement uses a similar definition of Stock Subscribing Company: "the company which subscribes to the shares under the Agreement" (Article 3) and "undertakes to pay to the Company the Subscription Amount" (Article 5.1) [Tribunal's Translation]. See Transcript (English), Day 1, 2 April 2013, 175:21-176:6; Transcript (English), Day 6, 9 April 2013, 1428:22-1429:7.

States. This latter point is contested by the Claimants,[195] but confirmed by the Respondent, who insists that (i) GAI declared zero US dollars in taxes in 2011; (ii) GAI cannot be considered a "traditional holding company,"[196] and (iii) GAI's commercial activities mentioned by the Claimants are either insufficient or non-existent, as they merely met the minimum legal requirements of the State of Delaware.[197] Therefore, in the Respondent's words, "GAI is no more than a mailbox company,"[198] and there are no documents to prove otherwise.[199] Consequently, it meets the two conditions set forth in Article XII of the US-Bolivia BIT for the Treaty benefits to be denied to it.

The Claimants' Arguments

216. According to the Claimants, the application of Article XII of the US-Bolivia BIT would violate the international principle of *pacta sunt servanda* and would contravene the object and purpose of investment treaties (the promotion of investments based on rationality and predictability). According to the case law submitted in these proceedings, the denial of benefits cannot apply retroactively, as sought by the Respondent, that is, once the investment has been made, since the purpose of such provision is to give a State the opportunity to alert investors in advance that they are no longer afforded protection under the relevant treaty, thereby protecting the legitimate expectations such investors may have.[200] Denial of benefits

[195] Counter-Memorial on Jurisdiction, ¶62.

[196] The tribunal in *Pac Rim Cayman LLC v. El Salvador* (ICSID Case No. ARB/09/12), Decision on the Respondent's Jurisdictional Objections, 1 June 2012 (Veeder, Tawil and Stern) (Exhibit **CL-140**), considered that a traditional "holding company" is a company created in order to "own shares in its groups of companies, with attendant benefits as to control, taxation and risk Management for the holding company's group of companies." However, according to said tribunal, the fact that a company is organized in the United States for the sole purpose of holding shares in foreign companies indicates that such company is not a "traditional holding company" and fails to meet the essential condition of carrying out material businesses in its home country.

[197] Reply on Jurisdiction, ¶144. The activities mentioned by the Claimants, which the Respondent considers insufficient and/or non-existent are: (a) maintaining a "registered office" and a "principal office" in Akron, Ohio, as the Delaware General Corporation Law requires having an address in such state (see Exhibit **R-107**). Moreover, the office in Akron does not belong to GAI, but to FirstEnergy; (b) having appointed an agent in the State of Delaware is also a legal requirement under the General Corporation Law; (c) holding shareholders' meetings is also mandatory under the General Corporation Law, and the only meetings held were those prior to FirstEnergy's disinvestment in 2003 (no meeting-related documents have been submitted thereafter); (d) no meetings of the board of directors have been held since 2003 (only an extraordinary meeting of the board of directors was held in 2008 in order to the adopt solutions required by the CAF as a precondition for a credit disbursement); and (e) as regards the appointment of its administrators, the same happens, as since the end of 2003 there has been just one administrator appointed (in 2008) (Exhibit **C-230**).

[198] Reply on Jurisdiction, ¶146; Respondent's Post-Hearing Brief, ¶¶50-53, 58.

[199] See Transcript (English), Day 1, 2 April 2013, 176:15-177:24; Transcript (English), Day 6, 9 April 2013, 1428:8-1428:18.

[200] Counter-Memorial on Jurisdiction, ¶¶52-55. See *Plama Consortium Limited v. Republic of Bulgaria* (ICSID Case No. ARB/03/24), Decision on Jurisdiction, 8 February 2005 (Salans, van den Berg and Veeder) (Exhibit **CL-110**); *Hulley Enterprises Limited (Cyprus) v. The Russian Federation* (PCA Case No. AA226), Award on Jurisdiction and Admissibility, 30 November 2009 (Fortier, Poncet and Schwebel) (Exhibit **CL-125**); *Veteran Petroleum Limited (Cyprus) v. The Russian Federation* (PCA Case No. AA228), Award on Jurisdiction and Admissibility, 30 November 2009 (Fortier, Poncet and Schwebel) (Exhibit **CL-126**); *Yukos Universal Limited (Isle of Man) v. The Russian Federation* (PCA Case No. AA227), Award on Jurisdiction and Admissibility, 30 November 2009, (Fortier, Poncet and Schwebel) (Exhibit **CL-127**). See Transcript (English), Day 6, 9 April 2013, 1362:2-1367:19.

in this case would run contrary to the principles of stability, certainty and good faith, as Bolivia (i) required the establishment of GAI, (ii) was aware of its investment since day one, (iii) included such investment in the Nationalisation Decree, and (iv) now that arbitration proceedings have been initiated and having received all the returns on the investment, purports to deny the benefits of BIT protection to the investment holders. For the foregoing reasons, the Tribunal cannot accept the retroactive application of Article XII of the US-Bolivia BIT.[201]

217. In addition, the Claimants consider that Bolivia cannot deny benefits under Article XII of the US-Bolivia BIT because the conditions set forth therein have not been met, especially the absence of "substantial business activities" in the United States. The Claimants stress that the US-Bolivia BIT does not provide a definition of "*substantial business activities*". If the VCLT were applied, the term "substantial" would not be a synonym of "large", as the decisive question would be the materiality and not the magnitude of the business activity. This is the interpretation provided by arbitral case law. Therefore, GAI has indeed conducted substantial commercial activities in the United States, since it maintains offices in said territory, holds shareholders' meetings in Ohio as well as Board of Directors' meetings, prepares the minutes of said meetings, etc., thereby fulfilling the conditions described in arbitral case law.[202]

218. In addition to the allegations on the prospective application of the denial of benefits,[203] the Claimants consider that such provision cannot be understood, as argued by the Respondent, as "[a] *plea that the arbitral tribunal does not have jurisdiction shall be raised no later than in the statement of defense*," within the meaning of Article 23(2) of the UNCITRAL Rules.[204] Instead, it is an act that forms the basis for such a plea. The UNCITRAL Rules set out the procedural deadline beyond which an existing jurisdictional obstacle will be waived, but the deadline for creating such an obstacle is a matter of substance, governed by international law.[205] In this regard, it is a well-established principle that "jurisdiction is to be determined in light of the situation as it exists on the date the judicial proceedings are

[201] Counter-Memorial on Jurisdiction, ¶¶56-58;. See Transcript (English), Day 1, 2 April 2013, 143:22-144:19; Transcript (English), Day 6, 9 April 2013, 1360:22-1360:25, 1362:2-1367:19.

[202] Counter-Memorial on Jurisdiction, ¶¶61-62; Claimants' Post-Hearing Brief, ¶84. See *Pac Rim Cayman LLC v. Republic of El Salvador* (ICSID Case No. ARB/09/12), Decision on the Respondent's Jurisdictional Objections, 1 June 2012 (Veeder, Tawil and Stern) (Exhibit **CL-140**); *Petrobart Limited v. The Kyrgyz Republic* (SSS Case No. 126/2003), Award, 29 March 2005, (Danelius, Bring and Smets) (Exhibit **CL-111**). See Transcript (English), Day 1, 2 April 2013, 144:19-145:7; Transcript (English), Day 6, 9 April 2013, 1360:20-1361:18.

[203] See Counter-Memorial on Jurisdiction, Section IV.

[204] Reply on Jurisdiction, ¶122.

[205] Rejoinder on Jurisdiction, ¶37.

instituted." Moreover, "once established, jurisdiction cannot be defeated. It simply is not affected by subsequent events."[206]

219. In the Claimants' opinion, the denial-of-benefits clause may affect an investor's claims in two different ways, neither of which can operate retroactively:

(a) The State deprives the claimant of all substantive protections of the BIT, and that measure is in line with the BIT. All claims would thus be inadmissible. However, if the State has not denied benefits at the moment it takes measures on the grounds that the treaty has been violated, then all protections are at that moment in place, and a breach of the Treaty can occur. By later denying the benefits of the Treaty, the State cannot undo the legal reality of a treaty breach—it can only prevent its subsequent actions from violating the Treaty.

(b) The State deprives the claimant of the benefit of its consent to arbitration as set forth in the BIT, preventing claims from being adjudicated by an arbitral tribunal. However, if the State has not denied benefits at the moment when the claimant initiates arbitration, then the State's consent is still in place, and the offer to arbitrate is accepted by the investor and transformed into an irrevocable agreement. By later denying the benefits of the Treaty, the State cannot withdraw a consent that has already been accepted. It can only prevent the investor from initiating arbitrations with respect to future disputes.[207]

220. In this case, the disputed events took place in May 2010. At that time, the Respondent had not invoked the denial-of-benefits clause. Therefore, the full range of substantive protections of the US-Bolivia BIT applied to the Claimants and their investment. Moreover, to the extent that Bolivia's conduct was contrary to the terms of the Treaty, GAI immediately acquired a right to compensation. Similarly, the Claimants initiated this arbitration in November 2010, two years before Bolivia sought to withdraw its treaty benefits. However, Bolivia accepted the offer to arbitrate and, in turn, GAI had long since availed itself of the benefit of the arbitration clause of the US-Bolivia BIT. Additionally, the Respondent was at all times aware of the Claimants' investment in Bolivia.[208]

---

[206] Rejoinder on Jurisdiction, ¶¶38-39. See *Compañía de Aguas Del Aconquija S.A. and Vivendi Universal S.A. (before Compaigne Générale des Eaux) v. The Argentine Republic* (ICSID Case No. ARB/97/3), Resubmitted Case, Decision on Jurisdiction, 14 November 2005 (Kaufmann-Kohler, Bernal Verea and Rowley) (Exhibit **CL-145**).

[207] Rejoinder on Jurisdiction, ¶40.

[208] Rejoinder on Jurisdiction, ¶¶41-42. See Transcript (English), Day 6, 9 April 2013, 1362:2-1367:19.

221. In any case, contrary to the Respondent's arguments,[209] the Claimants state that it is the Respondent who must prove the fulfilment of all necessary conditions to deny the benefits of the Treaty in accordance with Article 27(1) of the UNCITRAL Rules.[210] Since Bolivia has failed to show that GAI is not engaged in any substantial economic activities, the denial-of-benefits clause cannot apply.

D. ALLEGED PRESENTATION OF NEW CLAIMS NOT PROTECTED BY THE TREATIES

The Respondent's Arguments

222. According to the Respondent, the Claimants have filed New Claims in the Statement of Claim, which had not been included in the Notice of Dispute or in the Notice of Arbitration. The New Claims refer to violations of the Treaties on the part of Bolivia in connection with: (i) electricity spot prices; (ii) capacity payments; and (iii) the two Worthington engines. The Respondent alleges that, by way of this submission—which it describes as "untimely"—the Treaties were violated in two respects (Article IX of the US-Bolivia BIT and Article 8 of the UK-Bolivia BIT):

(a) The conditions necessary for the notice of New Claims have not been fulfilled. The term "dispute" in the Notice of Arbitration and the term "dispute" in the Statement of Claim are used differently, and the New Claims are included in the latter, despite not having been included in the former (neither in the Notices dated 13 May 2010 nor in those invoked in the same document).[211]

(b) The cooling-off period established in the Treaties for the possible amicable settlement of the dispute was not fulfilled. This breach would have occurred even if the New Claims had been included in the Notice of Arbitration, since the Respondent would still not have had an opportunity to avail itself of the period of amicable consultations. Furthermore, during the meetings held between July 2010 and March 2011, the compensation to be granted to the Claimants due to the nationalisation was discussed, but not the New Claims.[212]

[209] Reply on Jurisdiction, ¶140.

[210] Rejoinder on Jurisdiction, ¶40.

[211] Memorial on Jurisdiction, ¶¶159-165; Respondent's Post-Hearing Brief, ¶60. See Transcript (English), Day 6, 9 April 2013, 1429:14-1430:1.

[212] Memorial on Jurisdiction, ¶170.

223. According to the Respondent, the Claimants are asking the Tribunal to hear new claims, and forcing Bolivia to respond to them in too short a period of time considering their costs and complexity. Pursuant to recent case law, these New Claims should be dismissed by the Tribunal, which lacks jurisdiction to hear them because the conditions established by the Treaties in this regard have not been met.[213]

224. In its Reply on Jurisdiction, the Respondent states that the Claimants have failed to prove two points in connection with the New Claims: (i) prior notification of such claims to Bolivia, and (ii) that such claims were mentioned during negotiations between the Parties. Therefore, the Tribunal must decide whether Bolivia gave its consent to arbitrate these New Claims and whether the conditions concerning notification of disputes and cooling off were met.

225. In response to the statements made by the Claimants concerning Article IX of the US-Bolivia BIT,[214] the Respondent holds that, in addition to its prior arguments[215] and based on *Murphy*,[216] a dispute arises at the time that an investor alleges a treaty violation. Thus, the period of three months required under the US-Bolivia BIT starts running on the date of such allegation, which the investor must prove. Hence, GAI has the burden of proving that Bolivia became aware of a dispute under the Treaty concerning the New Claims at least three months before the commencement of this proceeding. However, this evidence has not been submitted.[217]

226. Furthermore, the Respondent argues that the Claimants contradict themselves in regards to the requirement of prior notification under the US-Bolivia BIT. Although they initially acknowledged its mandatory nature when giving written notice to Bolivia of the dispute regarding expropriation,[218] they now deny the application of this requirement in respect of the New Claims, alleging that the notice and cooling off requirements are not mandatory or

[213] Memorial on Jurisdiction, ¶¶171-175. See *Burlington Resources Inc. v. Republic of Ecuador* (ICSID Case No. ARB/08/5), Decision on Jurisdiction, 2 June 2010 (Kaufmann-Kohler, Stern and Orrego Vicuña) (Exhibit **RL-17**); *Murphy Exploration and Production Company International v. Republic of Ecuador* (ICSID Case No. ARB/08/04), Award on Jurisdiction, 15 December 2010 (Oreamuno Blanco, Grigera Naón and Vinuesa) (Exhibit **RL-60**); *Argentine Republic v. BG Group PLC, Decision on Annulment of the U.S. Court of Appeals in and for the District of Columbia*, 17 January 2012 (Judge Rogers) (Exhibit **RL-61**); *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic* (ICSID Case No. ARB/01/3), Decision on Jurisdiction, 14 January 2004 (Orrego Vicuña, Gros Espiell and Tschanz) (Exhibit **RL-16**).

[214] See ¶236 *infra*.

[215] Memorial on Jurisdiction, ¶155.

[216] See *Murphy Exploration and Production Company International v. Republic of Ecuador* (ICSID Case No. ARB/08/4), Award on Jurisdiction, 15 December 2010 (Oreamuno Blanco, Grigera Naón and Vinuesa) (Exhibit **RL-60**).

[217] Respondent's Post-Hearing Brief, ¶63. See Transcript (English), Day 1, 2 April 2013, 244:8-245:12.

[218] Statement of Claim, ¶138; Notice of Arbitration; GAI's Notice of Claim to President Evo Morales, 13 May 2010 (Exhibit **C-39**).

jurisdictional in nature. Based on the VCLT and the *Burlington* and *Murphy* cases[219], as well as on recent precedents[220] that in its view outweigh the precedents invoked by the Claimants,[221] the Respondent asserts that the statement above goes against Articles 8 of the UK-Bolivia BIT and IX of the US-Bolivia BIT.

227. Therefore, should the Tribunal find that the notification and cooling off conditions are of a procedural nature, it must nevertheless construe them such that they have full effect, since otherwise the text of the Treaties would lose its *effet utile*, and the rule of good faith interpretation would be thus breached.[222]

228. On the basis of *ICS Inspection and Control Services*,[223] the Respondent argues that the Tribunal does not have the power to set aside the notification and cooling off requirements, even if these were futile. In any case, futility has not been demonstrated by the Claimants either.[224] Therefore, there is no evidence (i) that Bolivia would not have amicably resolved the disputes concerning the New Claims if notified thereof prior to the Statement of Claim;

[219] Reply on Jurisdiction, ¶¶158-163. See *Burlington Resources Inc. v Republic of Ecuador* (ICSID Case No. ARB/08/5), Award on Jurisdiction, 2 June 2010 (Kaufmann-Kohler, Stern and Orrego Vicuña) (Exhibit **RL-17**); *Murphy Exploration and Production Company International v. Republic of Ecuador* (ICSID Case No. ARB/08/4), Award on Jurisdiction, 15 December 2010 (Oreamuno Blanco, Grigera Naón and Vinuesa) (Exhibit **RL-60**).

[220] Reply on Jurisdiction, ¶167. See *Daimler Financial Services AG v. Argentine Republic* (ICSID Case No. ARB/05/1), Award, 22 August 2012 (Dupuy, Brower and Janeiro) (Exhibit **RL-118**); *Iberdrola Energía, S.A. v. Republic of Guatemala* (ICSID Case No. ARB/09/5), Award, 17 August 2012 (Zuleta, Oreamuno Blanco and Derains) (Exhibit **RL-22**); *ICS Inspection and Control Services Limited (United Kingdom) v. Argentine Republic* (UNCITRAL – PCA Case No. 2010-9), Award on Jurisdiction, 10 February 2012 (Dupuy, Bernárdez and Lalonde) (Exhibit **RL-29**); *Abaclat et al v. Argentine Republic* (ICSID Case No. ARB/07/5), Dissenting Opinion of Professor Georges Abi-Saab, 28 October 2011 (Exhibit **RL-121**); *Impregilo S.p.A v. Argentine Republic* (ICSID Case No. ARB/07/17), Dissenting Opinion of Professor Brigitte Stern, 21 June 2011 (Exhibit **RL-119**); *Noble Energy, Inc. and Machalapower CIA. LTDA v. Ecuador and Consejo Nacional de Electricidad* (ICSID Case No. ARB/05/12), Decision on Jurisdiction, 5 March 2008 (Kaufmann Kohler, Cremades and Alvarez) (Exhibit **RL-20**).

[221] See Transcript (English), Day 1, 2 April 2013, 245:13-246:16; Transcript (English), Day 6, 9 April 2013, 1429:14-1430:1.

[222] Reply on Jurisdiction, ¶168. In addition, the Respondent relies on various precedents supporting its argument: *Eduardo Vieira v. Republic of Chile* (ICSID Case No. ARB/04/7), Award, 21 August 2007 (Wobeser, Zalduendo and Reisman) (Exhibit **RL-125**); *Asian Agricultural Products Ltd. v. Sri Lanka* (ICSID Case No. ARB/87/3), Award, 27 June 1990 (El-Kosheri, Goldman and Asante) (Exhibit **CL-10**).

[223] Reply on Jurisdiction, ¶169. See *ICS Inspection and Control Services Limited (United Kingdom) v. Argentine Republic* (UNCITRAL – PCA Case No. 2010-9), Award on Jurisdiction, 10 February 2012 (Dupuy, Bernárdez and Lalonde) (Exhibit **RL-29**).

[224] The Respondent notes that in their Counter-Memorial on Jurisdiction, ¶¶64, 72, and 73, the Claimants have only affirmed that Bolivia made no attempt to amicably settle the New Claims, that negotiations on nationalisation were unsuccessful and that Bolivia's stance in this arbitration confirms the scarce possibilities that an agreement would have been reached. See ¶236 *infra*. Additionally, the Respondent considers in its allegations of 14 January 2013 that *Teinver S.A., Transportes de Cercanías S.A y Autobuses Urbanos del Sur S.A v. Argentine Republic* (ICSID Case No. ARB/90/1), Decision on Jurisdiction, 21 December 2012 (Buergenthal, Alvarez and Hossain) (Exhibit **CL-151**), reinforces Bolivia's stance in this respect. This is so because the circumstances of such case and of this case are very different: here, there has been no kind of negotiation on the New Claims (unlike in the mentioned case). Therefore, the prior negotiation requirement has not been observed. See Transcript (English), Day 1, 2 April 2013, 246:17-247:15.

or (ii) that negotiations on the New Claims would not have succeeded because the negotiations on nationalisation did not succeed.[225]

229. Lastly, the Respondent argues that considerations of cost and "dilatory nature" cannot justify ignoring limitations on Bolivia's consent under the Treaties.[226]

230. Next, Bolivia asserts that the Claimants "*opportunistic*" allegations were made "*for the first time in this arbitration*" that the measures giving rise to the New Claims were preliminary steps that culminated in the nationalisation, such that the New Claims were subsumed within the notification regarding the nationalisation.[227] The Respondent considers that such allegations are unsustainable for the following reasons:

(a) Both the Notice of Dispute and the definition of "dispute" in the Notice of Arbitration demonstrate the limited nature of the single dispute notified to the Respondent.[228]

(b) The Claimants acknowledge that the notifications of May 2012 referred to "[t]he dispute [that] arises out of the Bolivian Government's nationalisation of Rurelec's indirect shareholding in [EGSA] by means of Supreme Decree No. 0493 dated 1 May 2010."[229] Nonetheless, the New Claims concerning the PBP and spot prices cannot "arise out of" the 2010 Supreme Decree, since they stem from measures adopted in 2007 and 2008, respectively.[230]

(c) The Claimants have not submitted any evidence that the measures that gave rise to the New Claims were preliminary to the nationalisation of their investment.[231] In any case, this argument contradicts the terms in which they present their claims, since they have never alleged an indirect expropriation.[232]

[225] Respondent's Post-Hearing Brief, ¶¶64-65.

[226] Reply on Jurisdiction, ¶¶176-177. See ¶236 *infra*.

[227] Counter-Memorial on Jurisdiction, ¶¶63, 73, and 78. See ¶234 *infra*. In this regard, in its allegations of 14 January 2013, the Respondent contradicts the position of Claimants concerning *Teinver S.A. v. Argentine Republic*. According to the Respondent, what is decisive in this concern is for the claims to relate to the same object; without the tribunal defining what should be considered as such. In any case, the New Claims have no relation whatsoever to nationalisation. See Transcript (English), Day 6, 9 April 2013, 1430:1-1430:9.

[228] Reply on Jurisdiction, ¶179. See Transcript (English), Day 1, 2 April 2013, 248:20-248:22.

[229] Counter-Memorial on Jurisdiction, ¶70. See ¶234 *infra*.

[230] Reply on Jurisdiction, ¶180; Respondent's Post-Hearing Brief, ¶66. See Transcript (English), Day 1, 2 April 2013, 248:24-249:11.

[231] Reply on Jurisdiction, ¶181.

[232] Reply on Jurisdiction, ¶182.

(d) The argument according to which the Claimants reserved the right to add facts and arguments to support their claim is "absurd". If the cases that define the notion of "dispute" or "controversy"[233] are considered, it is clear that the New Claims would not be considered as related to the dispute on nationalisation.[234] In any case, no relationship between the facts, applicable law, and the chronology underlying the New Claims and nationalisation has been established.[235]

(e) The Claimants' have also included in their New Claims the claim for the Worthington engines, and both Parties agree that these engines were not within the scope of application of the Nationalisation Decree.[236]

231. According to the Respondent, the Claimants suggest that negotiations on compensation for the nationalisation were "amicable" and provided an opportunity to negotiate on the New Claims. However, the New Claims were never discussed in the consultations and meetings held on the assessment of EGSA's equity for the calculation of the compensation owed for the nationalisation.[237] This is confirmed by the Claimants themselves in their Statement of Claim[238] and Counter-Memorial on Jurisdiction.[239] Moreover, the Respondent adds that it only became aware of the New Claims after the submission of the Statement of Claim, months after the amicable consultations concluded. The Claimants themselves acknowledged that they have "raised these specific issues for the first time during the legal and quantification exercise that the filing of a Statement of Claim entails,"[240] so that it is impossible for these to have been negotiated beforehand.[241]

232. In light of the foregoing, the Respondent reaffirms that the Tribunal has no jurisdiction to hear the New Claims raised by the Claimants.

[233] See *Empresas Lucchetti, S.A. and Lucchetti Peru, S.A. v. Republic of Peru* (ICSID Case No. ARB/03/4), Award, 7 February 2005 (Buergenthal, Cremades and Paulsson) (Exhibit **RL-126**).

[234] Reply on Jurisdiction, ¶186. See Transcript (English), Day 1, 2 April 2013, 247:23-248:20.

[235] Reply on Jurisdiction, ¶187.

[236] Reply on Jurisdiction, ¶188; Statement of Claim, ¶254.

[237] Reply on Jurisdiction, ¶191.

[238] Statement of Claim, ¶¶105-110.

[239] Counter-Memorial on Jurisdiction, ¶¶79-80, and 192.

[240] Counter-Memorial on Jurisdiction, ¶79.

[241] Reply on Jurisdiction, ¶193.

The Claimants' Arguments

233. In the Claimants' view, the "New Claims" have been properly submitted within this arbitration and, thus, no Treaty provisions have been breached, since such claims are encompassed within the same dispute (*i.e.*, nationalisation).[242]

234. Concerning the amicable consultations period invoked by the Respondent, the Claimants conclude that (i) the US-Bolivia BIT does not require prior notification of the dispute, so that the argument in relation to GAI would not hold;[243] (ii) the amicable consultation period is a procedural and not a jurisdictional matter (as found in the case law cited), such that non-observance of this requirement does not alter the Tribunal's jurisdiction;[244] and (iii) in any event, the Claimants have actually fulfilled such obligation, since all "New Claims" relate to the notified nationalisation. In addition, in the notification letter and in the Notice of Arbitration itself, the Claimants reserved the right to add facts and legal issues regarding the claims made.[245]

235. The Claimants' cite certain precedents to support the conclusion that it is not compulsory to send a separate notice or apply the period of amicable consultations when claims relate to the same dispute.[246] The cases relied upon by the Respondent are irrelevant, because they deal with situations in which (i) the claimant had not sent a notice of arbitration (a situation not faced in this arbitration), or (ii) the tribunal classified the claims as "inappropriate" because

---

[242] See Transcript (English), Day 1, 2 April 2013, 145:11-145:12; Transcript (English), Day 6, 9 April 2013, 1359:21-1360:12.

[243] The UK-Bolivia BIT establishes that once an agreement has not been reached after the amicable consultation period and six months have passed since one of the parties notified the other of the existence of the dispute, the relevant arbitration may be commenced. On the contrary, the US-Bolivia BIT simply refers to the lapse of three months for any of the parties to submit the dispute to mandatory arbitration, with no additional requirements.

[244] Counter-Memorial on Jurisdiction, ¶¶68-71. See *Abaclat and others v. Argentine Republic* (ICSID Case No. ARB/07/5), Decision on Jurisdiction and Admissibility, 4 August 2011 (Tercier, Abi-Saab and van den Berg) (Exhibit **CL-138**); *Biwater Gauff (Tanzania) Ltd. v. Tanzania* (ICSID Case No. ARB/05/22), Award, 24 July 2008 (Born, Landau and Hanotiau) (Exhibit **CL-51**); *Bayindir Insaat Turizm Ticaret ve Sanayi A.S v. Islamic Republic of Pakistan* (ICSID Case No. ARB/01/13), Decision on Jurisdiction, 14 November 2005, (Kaufmann-Kohler, Berman and Böckstiegel) (Exhibit **CL-116**); *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/01/13), Decision on Jurisdiction, 6 August 2003, (Feliciano, Faurès and Thomas) (Exhibit **CL-107**); *Ronald S. Lauder v. Czech Republic* (UNCITRAL), Award, 3 September 2001 (Briner, Klein and Cutler) (Exhibit **CL-23**); *Link-Trading Joint Stock Company v. Consumer Control Department of the Republic of Moldavia*, Award on Jurisdiction, 16 February 2001 (Hertzfeld, Buruiana and Zykln) (Exhibit **CL-105**); *Wena Hotels Limited v. Republic of Egypt* (ICSID Case No. ARB/98/4), Summary of the Tribunal´s Minutes, 25 May 1999 (Leigh, Fadlallah and Haddad) (Exhibit **CL-103**); *Frank J. Sedelmayer v. Russian Federation*, Award, 7 July 1998 (Exhibit **CL-102**); *Ethyl Corporation v. Government of Canada*, Award on Jurisdiction, 24 June 1998 (Böckstiegel, Brower and Lalonde) (Exhibit **RL-5**). See Transcript (Spanish), Day 1, 2 April 2013, 1359:1-1359:4.

[245] Counter-Memorial on Jurisdiction, ¶¶73-75.

[246] Counter-Memorial on Jurisdiction, ¶¶75-76. See *Generation Ukraine, Inc. v. Ukraine* (ICSID Case No. ARB/00/9), Award, 16 September 2003 (Salpius, Voss and Paulsson) (Exhibit **RL-24**); *Swisslion DOO Skopje v. Former Yugoslav Republic of Macedonia* (ICSID Case No. ARB/09/16), Award, 6 July 2012 (Guillaume, Price and Thomas) (Exhibit **CL-142**); *CMS Gas Transmission Company v. Argentine Republic* (ICSID Case No. ARB/01/8), Decision on Jurisdiction, 17 July 2003 (Orrego Vicuña, Lalonde and Rezek) (Exhibit **CL-83**).

they were made out of context, in an untimely manner, or related to different legislation than the one that had been invoked.[247]

236. Ultimately, the Claimants consider that they have complied with the amicable consultation period, since they have attempted to reach an agreement with Bolivia in order to obtain fair compensation for the nationalisation of their investments. Nonetheless, after four meetings held to that effect, no compensation was offered. It makes no sense for Bolivia to require the Claimants to undergo an amicable consultation period after having qualified the purported "New Claims" as "frivolous" and "not even claims under the Treaties or international law". This would force the Claimants to start new negotiations in which Bolivia would not participate, making it necessary to start a new arbitration, convene a new tribunal, and debate the same issues again.[248] Requiring futile amicable conversations prior to the arbitration would be unnecessarily stringent, formalist, and it would not serve the interests of the Parties. This vision is in accordance with Article 32 of the VCLT.[249]

237. Therefore, it would be unreasonable to deprive the Tribunal of its jurisdiction to hear three claims based on a purportedly defective notification, especially given that they are part of a wider claim, with respect to which negotiations were not successful and which Bolivia has shown no intention to settle. In any event, and as previously explained by the Claimants,[250] there would be no use in requiring negotiations concerning claims connected to the spot prices, PBP and Worthington engines, considering the attitude and the statements made by Bolivia in the course of the proceedings.[251]

---

[247] Counter-Memorial on Jurisdiction, ¶77. See *Murphy Exploration and Production Company International v. Republic of Ecuador* (ICSID Case No. ARB/08/4), Award on Jurisdiction, 15 December 2010, (Oreamuno Blanco, Grigera Naón and Vinuesa) (Exhibit **RL-60**); *Burlington Resources Inc. v. Republic of Ecuador* (ICSID Case No. ARB/08/5), Decision on Jurisdiction, 2 June 2010 (Kaufmann-Kohler, Stern and Orrego Vicuña) (Exhibit **RL-17**).

[248] Counter-Memorial on Jurisdiction, ¶¶80-83. In this respect, see the allegations of the Claimants concerning *Teinver S.A., Transportes de Cercanías S.A and Autobuses Urbanos del Sur S.A. v. Argentine Republic* (ICSID Case No. ARB/09/1), Decision on Jurisdiction, 21 December 2012 (Buergenthal, Alvarez and Hossain) (Exhibit **CL-151**), since according to Claimants it supports their stance. See Transcript (English), Day 1, 2 April 2013, 146:7-146:19.

[249] Counter-Memorial on Jurisdiction, ¶¶49-50. See, *inter alia*, *Ronald S. Lauder v. Czech Republic* (UNCITRAL), Final Award, 3 September 2001 (Briner, Klein and Cutler) (Exhibit **CL-23**); *Abaclat et al v. Argentine Republic* (ICSID Case No. ARB/07/5), Decision on Jurisdiction and Admissibility, 4 August 2011(Tercier, Abi-Saab and van den Berg) (Exhibit **CL-138**); *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania* (ICSID Case No. ARB/05/22), Award, 24 July 2008 (Born, Landau and Hanotiau) (Exhibit **CL-51**) or *Teinver S.A., Transportes de Cercanías S.A and Autobuses Urbanos del Sur S.A. v. Argentine Republic* (ICSID Case No. ARB/09/1), Decision on Jurisdiction, 21 December 2012 (Buergenthal, Alvarez and Hossain) (Exhibit **CL-151**).

[250] Statement of Claim, ¶¶106-110, and 167-171.

[251] Statement of Defense, ¶¶19-20, 24, 136, 231, 296, and 616. See, *Teinver S.A., Transportes de Cercanías S.A and Autobuses Urbanos del Sur S.A. v. Argentine Republic* (ICSID Case No. ARB/09/1), Decision on Jurisdiction, 21 December 2012 (Buergenthal, Alvarez and Hossain) (Exhibit **CL-151**).

238. Hence, the Claimants' efforts to settle their dispute with the Respondent have been both lengthy and unsuccessful. Under these circumstances, the Treaties do not impose additional requirements, and the Tribunal must accept its jurisdiction over the claims at issue. In any event, the Claimants consider that they have complied with the notification and amicable consultation requirements. Thus, based on the Respondent's own arguments, since the measures relating to the spot prices, PBP and Worthington engines were implemented in the context of the nationalisation of the electricity sector, there should be no need for a separate notification of such claims, since these would be included within the nationalisation itself.[252]

E. PURPORTED DOMESTIC NATURE OF THE NEW CLAIMS

The Respondent's Arguments

239. According to the Respondent, the New Claims fall within the exclusive scope of Bolivian law, and cannot be considered international disputes under the Treaties. The Tribunal should thus find that, as per the VCLT' rules of interpretation and Articles IX(1) and 8(1) of the US-Bolivia BIT and the UK-Bolivia BIT, respectively, the Respondent has not given its consent to have such domestic claims heard in these proceedings.[253]

240. On the basis of *Iberdrola v. Guatemala*,[254] Bolivia argues that it has not given its consent to arbitrate any investment-related dispute, but only disputes "*concerning an obligation* [of Bolivia] *under this Agreement*" in accordance with Article 8(1) of the UK-Bolivia BIT.[255] Furthermore, it interprets Article IX(1) of the US-Bolivia BIT accordingly, including disputes "*arising out of an* […] *alleged breach of any right conferred, created or recognized by this Treaty*", as well as those arising out of an "*investment authorization*" or an "*investment agreement*" (none of which exist in the present case). Once more, the consent granted by Bolivia is limited to disputes regarding the obligations set forth in the Treaties.

241. In any case, Bolivia considers that the Tribunal must undertake its own characterization of the legal nature of the New Claims in accordance with the international case law cited[256] and

---

[252] Rejoinder on the Merits, ¶¶53-57. See, *Teinver S.A., Transportes de Cercanías S.A and Autobuses Urbanos del Sur S.A. v. Argentine Republic* (ICSID Case No. ARB/09/1), Decision on Jurisdiction, 21 December 2012 (Buergenthal, Alvarez and Hossain) (Exhibit **CL-151**).

[253] Respondent's Post-Hearing Brief, ¶¶68-69.

[254] See *Iberdrola Energía, S.A. v. Republic of Guatemala* (ICSID Case No. ARB/09/5), Award, 17 August 2012 (Zuleta, Oreamuno Blanco and Derains) (Exhibit **RL-22**). See Transcript (English), Day 6, 9 April 2013, 1431:1-1431:6.

[255] Memorial on Jurisdiction, ¶¶185-187; Respondent's Post-Hearing Brief, ¶74.

[256] Memorial on Jurisdiction, ¶¶195-206. See *Pantechniki S.A. Contractors & Engineers v. Albania* (ICSID Case No. ARB/07/21), Award, 28 July 2009, (Paulsson) (Exhibit **RL-18**); *Societé Générale de Surveillance S.A. v. Republic of Philipines* (ICSID Case No. ARB/02/6), Tribunal´s Decision on Objections to Jurisdiction, 29 January 2004 (El Khoseri,

the principle that a true "treaty claim" requires investors to demonstrate through clear and precise reasoning which acts and conduct are attributable to the State and constitute violations of the relevant treaty or customary international law.[257]

242. As regards the New Claim concerning the spot price, the Respondent alleges that the Claimants seek a determination from the Tribunal on whether the price to be applied to electricity generators should be (i) the one set forth in Supreme Decree No. 26099 of 2 March 2001 or (ii) the one set forth in Supreme Decree No. 29599.[258] Ultimately, the Respondent considers that the Tribunal is being requested to determine whether the modification is compatible with the previously existing regulatory framework.

243. After outlining the evolution of the regulations governing the electricity sector,[259] the Respondent alleges that the reform implemented by Supreme Decree No. 29599 sought to mitigate the effect of the formula set forth in the prior rules and regulations:[260] in peak hours, the most inefficient generation units (in terms of costs and environmental damage), which contributed very little power to the system, became the Marginal Generation Unit[261] and set the price that all generators would receive for each kW/h contributed to the system. Thus, the price of electricity would increase dramatically at peak production times, out of proportion with the true cost of electricity produced by the other generation units. This was detrimental to consumers and resulted in a "windfall profit" for generators. The previous system also did not encourage companies to acquire more efficient equipment, as in the case of EGSA, which had the most inefficient equipment in Bolivia.

244. Supreme Decree No. 29599 removed from the spot price calculation formula all generation units that distorted such calculation, provided that they met two requirements: (1) using liquid fuel and (2) having a power below 1% of the maximum power registered in 2007.[262]

Crawford and Crivellaro) (Exhibit **RL-19**); *Noble Energy, Inc. and Machalapowe CIA. LTDA v. Ecuador and Consejo Nacional de Electricidad* (ICSID Case No. ARB/05/12), Decision on Jurisdiction, 5 March 2008 (Kaufmann-Kohler, Cremades and Alvarez) (Exhibit **RL-20**); *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. (former Compaigne Générale des Eaux) v. Argentine Republic* (ICSID Case No. ARB/97/3), Decision on Annulment, 3 July 2002, (Fortier, Crawford and Fernández Rozas) (Exhibit **CL-26**).

[257] Reply on Jurisdiction, ¶¶197-198; Respondent's Post-Hearing Brief, ¶69. See *Total S.A. v. Argentine Republic* (ICSID Case No. ARB/04/1), Decision on Jurisdiction, 25 August 2006 (Sacerdoti, Marcano and Alvarez) (Exhibit **RL-127**); *Iberdrola Energía, S.A. v. Republic of Guatemala* (ICSID Case No. ARB/09/5), Award, 17 August 2012 (Zuleta, Oreamuno Blanco and Derains) (Exhibit **RL-22**).

[258] See ¶¶144-146 *supra*.

[259] Memorial on Jurisdiction, ¶¶210-228.

[260] Memorial on Jurisdiction, ¶¶217-218.

[261] ROME 1995, Article 1, "Marginal Generation Unit. The last Generation Unit in the condition to satisfy a rise in demand, dispatched by the [CNDC] in accordance with the procedures established in these Regulations" [Tribunal's Translation].

[262] Text of Supreme Decree No. 29 599 available in the Memorial on Jurisdiction, ¶235.

Bolivia explains that this variation did not mean that companies owning such generation units would stop charging for the electricity that they were contributing to the system, but rather, that they would receive the monetary value of their variable unit costs, as per Operating Rule No. 3/2008.

245. The Claimants also allege that the modification is contrary to their legitimate expectations. However, this allegation does not transform a matter of Bolivian law into an international matter, especially when the purported legitimate expectations stem from Bolivian regulations on spot prices.[263] Ultimately, the Claimants seek to have the Tribunal determine whether Bolivia has breached Bolivian law.[264]

246. This New Claim is thus of a domestic nature, pertaining to Bolivian law. Consequently, Bolivia considers that it has not breached its obligations under the Treaties (fair and equitable treatment, full protection and security, and impairment of the investment through the adoption of unreasonable measures).[265] Moreover, it adds that the Claimants purport to have the Tribunal act as an administrative authority or last instance regulator of the electricity sector, superseding Operating Rule No. 3/2008 and deciding on the correct formula for the determination of the spot price, which powers exceed the scope of arbitration tribunals' jurisdiction, as stated by relevant case law.[266]

247. Concerning the New Claim on the PBP, the Respondent alleges that Claimants intend that the Tribunal rule on what the PBP should be, (i) the one set forth in Operating Rule No. 19 of 2001, adopted through Resolution SSDE No. 121/2001, or (ii) the one set forth in the new Operating Rule No. 19 of February 2007, adopted through Resolution SSDE No. 040/2007.[267]

248. After outlining the most important provisions regarding the calculation of the PBP,[268] Bolivia holds that the modification made through Operating Rule No. 19/2007 was made as a consequence of the independent technical study conducted by Bates White on the values that form part of the PBP calculation. Such study concluded that there was no economic reason to

---

[263] Reply on Jurisdiction, ¶202(a).

[264] See footnote on p. 193 of the Reply on Jurisdiction.

[265] Memorial on Jurisdiction, ¶¶239-242 and 246-251.

[266] Memorial on Jurisdiction, ¶¶244, 245, and 251; Respondent's Post-Hearing Brief, ¶70. See *Iberdrola Energía, S.A. v. Republic of Guatemala* (ICSID Case No. ARB/09/5), Award, 17 August 2012, (Zuleta, Oreamuno Blanco and Derains) (Exhibit **RL-22**); *Generation Ukraine Inc. v Ucraine* (ICSID Case No. ARB/00/9), Award, 16 September 2003, (Paulsson, Salpius and Voss) (Exhibit **RL-24**).

[267] See ¶¶138-141 *supra*. Respondent's Post-Hearing Brief, ¶72.

[268] Memorial on Jurisdiction, ¶¶253-267.

add to the FOB price of the turbine an additional 20% for "ancillary equipment" before adding the 50% amount for additional costs.[269] This additional 20% was therefore eliminated.[270]

249. Against such backdrop, the Claimants challenged the validity of Operating Rule No. 19/2007 both before both administrative authorities and courts.[271] Now, in this arbitration, they request access to effective means of asserting these claims, beyond those available in the Bolivian court system. From the Respondent's standpoint, the Claimants want the Tribunal to decide whether there was a valid justification for the modification made to Operating Rule No. 19/2001, superseding any future ruling on this matter by the Bolivian courts. Once more, this is a domestic law conflict which falls beyond the scope of the Tribunal's jurisdiction.[272] Even when the Claimants assert that they seek compensation for the "delay" in the ruling of Bolivian courts, their expert's quantification reveals that the Claimants seek damages calculated on the basis of a hypothetical, retroactive annulment by the Bolivian judiciary of the Operating Rules.[273]

250. Finally, concerning the New Claim regarding the Worthington engines, the Respondent considers that the Claimants' request seeks to have the Tribunal decide a matter which is exclusively commercial in nature[274] between Energais and EGSA.[275] Moreover, these New Claims were not included in the Nationalisation Decree and, thus, no measure related to them can be attributed to the Respondent. In fact, Bolivia considers that the Claimants have not submitted sufficient evidence of any acts which could be tantamount to expropriation under international law. In any event, the statements made by ENDE's Manager (that the Claimants use to support the existence of a claim under the Treaties) do not engage Bolivia's

[269] Memorial on Jurisdiction, ¶268.

[270] See ¶142 *supra*.

[271] See ¶143 *supra*.

[272] In this regard, the Respondent mentions the case of *Iberdrola v. Guatemala* again, where the arbitration tribunal considered that the investor was making claims, basing them on a treaty, concerning matters that were actually utterly regulatory in relation to the tariffs applicable to the electricity sector. Thus, it considered that the claims were not protected under the treaty.

[273] Memorial on Jurisdiction, ¶¶275-277; Reply on Jurisdiction, ¶202(b).

[274] The Respondent argues, relying on *Joy Mining Machinery Limited v. Arab Republic of Egypt* (ICSID Case No. ARB/03/11), Decision on Jurisdiction, 6 August 2004 (Orrego Vicuña, Laurence Craig and Weeramantry) (Exhibit **RL-11**), that such merely commercial claims do not give rise to claims under the investment treaties.

[275] See ¶¶127, 158-160 *supra*.

international responsibility, since the latter is not a State officer empowered to carry out an expropriation.[276]

251. Therefore, the New Claims do not relate to Treaty violations, but instead relate to the scope of Bolivian domestic law. The Tribunal thus lacks jurisdiction over this matter. Otherwise, it would be exercising powers that properly belong to Bolivian administrative and judicial authorities.[277]

The Claimants' Arguments

252. According to the Claimants, the claims the Respondent characterizes as "New Claims" are based on the Treaties and are not of a merely contractual or commercial nature, nor do they pertain to Bolivian law, as the Respondent alleges.[278] The Claimants hold that if the facts presented could *prima facie* give rise to a violation of the Treaties, these would fall within the Tribunal's jurisdiction. Thus, for each of their three claims, the Claimants present a situation in which *prima facie* Bolivia breached the Treaties.[279]

253. First, as regards the claim relating to the spot price, the Tribunal is not expected to determine the price that should be applied to the generators, but rather to determine whether the modification by Bolivia of the regulatory framework in relation to spot prices frustrated the Claimants' legitimate expectations in breach of the fair and equitable treatment standard, the full protection and security standard, and the obligation not to impair investments by arbitrary and unreasonable measures.[280]

254. Even if the Claimants' legitimate expectations had been formed by reference to Bolivian law, that does not transform them into purely domestic ones. Arbitral tribunals have considered that frustration of legitimate expectations based on the legal framework of a State gives rise to treaty violations.[281] The same happens with the calculation of damages resulting

---

[276] Memorial on Jurisdiction, ¶¶290-291; Reply on Jurisdiction, ¶202(c).

[277] See Transcript (English), Day 6, 9 April 2013, 1430:11-1430-14.

[278] See ¶¶239-251 *supra*.

[279] See Counter-Memorial on Jurisdiction, ¶86(a), and Statement of Claim, ¶¶189-209, for the measure relating to spot prices; Counter-Memorial on Jurisdiction, ¶86(b), and Statement of Claim, ¶¶210-220, for the measure relating to the PBP; Counter-Memorial on Jurisdiction, ¶86(c), and Statement of Claim, ¶¶111-113, and 254-259, for the measure relating to the Worthington engines.

[280] Counter-Memorial on Jurisdiction, ¶86(a).

[281] See *Total S.A. v. The Argentine Republic* (ICSID Case No. ARB/04/1), Decision on Responsibility, 27 December 2010 (Sacerdoti, Alvarez and Marcano) (Exhibit **CL-69**).

from the spot price calculation, since this is a matter of fact, assessed in accordance with principles of international law on compensation for breaches of international obligations.[282]

255. Second, the Claimants are not requesting the Tribunal to determine the PBP, but to determine whether, following the Bolivian judicial system's ineffectiveness and the four and a half year delay to resolve EGSA's claim, Claimants have not had access to effective means to obtain compensation for their claims, all of which would lead to a breach of the Treaties. Therefore, this is a question of international law.[283] In addition, given that the effective means standard applies both to judicial as well as administrative claims, it is difficult for the Claimants to understand Respondent's argument. Likewise, quantification of damages in this case is a question of international law.[284]

256. Ultimately, the Claimants consider that should the Tribunal accept that these questions may imply a breach of the Treaties, the Tribunal would necessarily also have jurisdiction to decide on the merits of the claims in accordance with the case law and legal authorities cited.[285] Bolivia's argument should be rejected as the case law on which it relies is inapplicable to these proceedings,[286] since the Claimants do not request that the Tribunal render an opinion on Bolivian law, but rather that it decide whether Bolivia fulfilled its obligations under the Treaties.

257. According to the Claimants, Bolivia has not challenged the existence of facts supporting such claims. On the contrary, Bolivia submits arguments on the merits alleging that its conduct does not amount to a breach of the Treaties, disguising such arguments as jurisdictional objections. Finally, the *Iberdrola v. Guatemala* case invoked by Bolivia is not applicable to this case, since the Claimants are not requesting the Tribunal to fix spot and PBP prices, but to find that their modification gave rise to a breach of international obligations.

---

[282] Rejoinder on Jurisdiction, ¶61.

[283] Rejoinder on Jurisdiction, ¶86(b).

[284] Rejoinder on Jurisdiction, ¶62.

[285] Rejoinder on Jurisdiction, ¶87. See *Oil Platforms* (*Islamic Republic of Iran v. United States of America*) (International Court of Justice), Justice Higgins' Separate Opinion dated 12 December 1996, ICJ Reports 1996 847 (Exhibit **CL-100**).

[286] Rejoinder on Jurisdiction, ¶88. The Respondent used the *Iberdrola v. Guatemala* case as a support of its argument. Nevertheless, the Claimants allege that case has no relation whatsoever with the case at issue, since in that arbitration claimant failed to prove that the claims submitted were of international nature. The tribunal in that case determined that whether the State had violated or not its obligations under the treaty was not in debate, therefore everything ended up in the fact that it was a question relating to the law of Guatemala.

F. ALLEGED EXERCISE OF THE FORK-IN-THE-ROAD CLAUSE

The Respondent's Arguments

258. According to the Respondent, in the event the Tribunal considers it has jurisdiction over the New Claims, it must take into account the fact that the Claimants have previously resorted to the court system to obtain a decision on the PBP. In accordance with Articles IX(2) and IX(3)(a) of the US-Bolivia BIT, selection of one of the possible options for dispute resolution by the Claimants (in this case, resort to the court system) precludes the possibility of resorting to the other options (such as the arbitration) to seek a decision with respect to the same claim. Likewise, the Respondent considers that the Claimants are "treaty shopping" and "cherry picking" when they argue that this objection would only affect GAI, since Rurelec cannot invoke the effective means standard in the US-Bolivia BIT while ignoring the fork-in-the-road clause in the latter. In the Respondent's view, the above demonstrates the abusive nature of the joinder of treaties and claimants in this arbitration without the State's consent, which the Tribunal should thus reject. [287]

259. According to the Respondent, Article IX(3)(a) is a "fork-in-the-road" clause. Thus, once the investor chooses one of the possible options, this choice is irrevocable and exclusive of the other options. According to the authorities cited, the purpose of this kind of clause is to prevent investors from simultaneously submitting the same dispute to multiple different fora at the same time (as in the case at hand) in an attempt to increase their chances of success.[288]

260. In any event, the Respondent holds that it is for the Tribunal to decide whether the claim relating to the PBP that Claimants have submitted is like the one previously submitted before the Bolivian courts. By means of a table contrasting the Claimants' allegations and arguments before the Supreme Court with those submitted before this Tribunal,[289] Bolivia explains how in both fora the Claimants submit the same claim for compensation for the alleged losses incurred (as well as for the revenue forgone) as a result of the modifications introduced with respect to the PBP. [290] Therefore, should the Tribunal be seized of this New Claim, it would be "prejudging" the subsequent decision to be rendered by the Bolivian Supreme Court, as if it had "supervisory jurisdiction" or was an "appellate instance" of the

[287] Reply on Jurisdiction, ¶204; Statement of Claim, ¶211; Counter-Memorial on Jurisdiction, section 2 and footnote 193.

[288] Memorial on Jurisdiction, ¶299. See Z. Douglas, "The Hybrid Foundations of Investment Treaty arbitration", 74 BYIL, 2005, p. 275 (Exhibit **RL-66**).

[289] Memorial on Jurisdiction, ¶307.

[290] Memorial on Jurisdiction, ¶307; Reply on Jurisdiction, ¶209.

Bolivian judicial system. [291] The foregoing considerations reinforce the Respondent's arguments as to the domestic nature of this claim.

261. In response to the Claimants' argument that claims must satisfy the triple identity test (identity of parties, cause of action, and subject matter) to be considered as the same dispute under the articles cited above (which is not met in this case according to the Claimants),[292] the Respondent asserts that this test is criticised by case law and legal scholars as excessively formalistic and liable to leave the fork-in-the-road clause without any purpose.[293] According to the Respondent, the excessive formalism of the triple identity test is shown by its third requirement, since the Claimants' position[294] would render it impossible for claims to ever have the same cause of action giving rise to the application of the fork-in-the-road clause. Therefore, the Tribunal must reject this argument and decline its jurisdiction with respect to this New Claim.

262. Lastly, a proper analysis of the "identity of the parties" requires consideration of the companies' corporate reality instead of a nominal test. The Claimants assert that it was not the same legal entity which submitted both claims, which, according to the Respondent, would make this requirement impossible to meet.[295] Moreover, in accordance with the case law provided, it is possible to examine the "group of companies" in order to determine whether an "identity of parties" exists.[296] Finally, the Claimants' assertion according to which Bolivia's objection would deprive the effective means provision clause of its *effet utile* by preventing the investor from pursuing domestic remedies is incorrect. According to

[291] Reply on Jurisdiction, ¶210; Statement of Claim, ¶219. See Transcript (English) Day 1, 2 April 2013, 258:21-259:8.

[292] Response to the Request for Bifurcation of 27 August 2012, ¶36; Reply on Jurisdiction, ¶205; Counter-Memorial on Jurisdiction, ¶¶95-96. According to the Respondent, the Claimants argue the existence of a triple identity test that in this case would not have been confirmed and, in addition, Bolivia's objection would deprive the US-Bolivia BIT's effective means protection from its *effet utile*.

[293] Memorial on Jurisdiction, ¶¶313-316; Reply on Jurisdiction, ¶206. See *Chevron Corporation and Texaco Petroleum Corporation v. Republic of Ecuador [II]* (PCA Case No. 2009-23), Third Provisional Award on Jurisdiction, 27 February 2012, (Veeder, Grigera Naón and Vaughan Lowe) (Exhibit **RL-23**); *Pantechniki S.A. Contractors & Engineers v. Albany* (ICSID Case No. ARB/07/21), Award of 28 July 2009, (Paulsson) (Exhibit **RL-18**). See Transcript (English) Day 1, 2 April 2013, 257:12-258:20.

[294] Counter-Memorial on Jurisdiction, ¶¶94-95. The Respondent, in its Reply on Jurisdiction, ¶207, copies textually from the Counter-Memorial the arguments presented thereby: "*the fork in the road clause applies only when an investment treaty arbitration and a domestic court litigation have* […] *(iii) the same legal basis for the claim* […] *although* [EGSA] *relied on Bolivian Law, GAI is suing for breach of the effective means provision (Article II.4) of the US Treaty*."

[295] Reply on Jurisdiction, ¶211. The Respondent considers that GAI, not having been incorporated in Bolivia or performing energy activities at its own risk, lacks standing to commence administrative proceedings. Likewise, the company is controlled, mostly, by Bolivian investors. At the time of submitting a request for arbitration, EGSA could not be regarded as an investor from the United States.

[296] See *Alex Genin, Eastern Credit Limited, INC. and A.S. Baltoil v. Republic of Estonia* (ICSID Case No. ARB/99/2), Award, 25 June 2001 (Fortier, Heth and van den Berg) (Exhibit **RL-128**).

the Respondent, that argument overlooks the existence of the requirement of an "identity of dispute" as a pre-condition for application of the fork-in-the-road clause.[297]

263. Therefore, the Respondent concludes the Tribunal must reject the claim relating to the PBP, since in accordance with Article IX(2) of the US-Bolivia BIT, it is one same claim submitted before two different *fora*.

The Claimants' Arguments

264. The Claimants assert that the above objection should be rejected. For the fork-in-the-road clause to be invoked it is necessary that the dispute be the same and, therefore, the triple identity test be met as to parties, subject matter, and cause of action.[298] The Claimants consider that (i) there is no identity of parties, since the domestic proceedings were pursued by EGSA and Bolivia was not a party thereto; (ii) in the arbitration at issue, GAI claims compensation for economic harm, whereas in the domestic proceedings a number of administrative resolutions are sought to be revoked; and, (iii) the cause of action is different. Although EGSA based its remedy on Bolivian law, GAI commenced this arbitration alleging a violation of the effective means standard under the US-Bolivia BIT.

265. In short, GAI needs to prove the ineffectiveness of the means available in the Bolivian court system. In the *Pantechniki* case cited by the Respondent,[299] the arbitrator compared the legal basis of the claims and applied the triple identity test to determine whether the fork-in-the-road clause should operate or not, concluding that the test was actually met, since the parties, the subject matter and the cause of action were the same. Nevertheless, the arbitrator found that the claimant's claim relating to denial of justice should be heard, since this claim had not been addressed in the domestic sphere. Therefore, the Claimants consider that the Tribunal should afford the same treatment to its claim on effective means (*i.e.*, consider that it could not have been submitted to the domestic courts). Should the arguments stated by Bolivia in

---

[297] Reply on Jurisdiction, ¶213. The Respondent holds that the Claimants' assertion would make it impossible for the fork-in-the-road and the effective means clauses to coexist. Nevertheless, this is not true, since an American investor, in accordance with the US-Bolivia BIT, can submit a claim before the domestic courts, when being affected by ineffective means, and submit a claim under the BIT itself that is not affected by the fork-in-the-road clause. This would actually occur when there is no dispute unity.

[298] Counter-Memorial on Jurisdiction, ¶94. See, *inter alia*, *Yukos Universal Limited (Isle of Man) v. Russian Federation* (PCA Case No. AA227), Award on Jurisdiction and Admissibility, 30 November 2009, (Fortier, Poncet and Schwebel) (Exhibit **CL-127**); *Desert Line Projects LLC v. Republic of Yemen* (ICSID Case No. ARB/05/17), Award, 6 February 2008 (Tercier, Paulsson and El-Kosheri) (Exhibit **CL-140**); *Occidental Exploration and Production Company v. Republic of Ecuador* (LCIA Case No. UN 3467), Final Award of 1 July 2004 (Orrego Vicuña, Brower and Sweeney) (Exhibit **CL-31**).

[299] See *Pantechniki S.A. Contractors & Engineers (Greece) v. Republic of Albany* (ICSID Case No. ARB/07/21), Award, 28 July 2009 (Paulsson) (Exhibit **RL-18**).

that respect be accepted,[300] Article II(4) and other BIT provisions would be rendered meaningless, since any lack of effective means or denial of justice claims in respect of the conduct of the Bolivian courts would be automatically excluded by the mere fact of having resorted to such courts in the first place.

266. In response to the Respondent's arguments as to the application of the fork-in-the-road clause to the claim under the UK-Bolivia BIT,[301] the Claimants assert that it is possible to bring in another treaty's substantive standard through the MFN clause without needing to comply with the provisions on dispute resolution of that other treaty. In any event, such clause can only be triggered if the triple identity test is met, which is not the case in the present arbitration. Contrary to Respondent's assertions,[302] there is no identity of parties, since the judicial actions were brought by EGSA and not by GAI or Rurelec. Additionally, the wording of the US-Bolivia BIT refers to a single company (not to a group of companies), and GAI did not take part in the Bolivian proceedings.[303]

267. According to the Claimants, it is not the same dispute either. Nor do the parties pursue the same relief in both proceedings. The existence of an interest in a dispute does not determine the nature thereof. EGSA requested that the Bolivian Supreme Court revoke the administrative regulations that introduced a regulatory change under Bolivian law, whereas GAI requested that the Tribunal award compensation for Bolivia's violation of the US-Bolivia BIT arising from the Supreme Court's inaction. Thus, both the subject matter and cause of action in each proceeding is different.[304]

268. Lastly, the Claimants explain that the coexistence of a domestic proceeding and the present arbitration would not result in double recovery, as Bolivia suggests.[305] Should the Supreme Court find for EGSA, such decision would only benefit the currently nationalised EGSA and not the Claimants. Finally, the Claimants do not accept that the triple identity test renders the fork-in-the-road clause meaningless, since the goal is to prevent the same investor from submitting the same dispute before both the domestic courts as well as an arbitral tribunal.[306]

---

[300] See ¶¶259-262 *supra*.

[301] Reply on Jurisdiction, footnote 202.

[302] Rejoinder on Jurisdiction, ¶211.

[303] See Transcript (English), Day 1, 2 April 2013, 147:14-147:22.

[304] See Transcript (English), Day 1, 2 April 2013, 147:23-147:25.

[305] Reply on Jurisdiction, ¶208

[306] Rejoinder on Jurisdiction, ¶¶74-75.

G. ALLEGED PREMATURE NATURE OF THE CLAIMS RELATING TO THE SPOT PRICE AND WORTHINGTON ENGINES

The Respondent's Arguments

269. In the Respondent's view, should the Tribunal decide to hear the New Claims relating to the spot price and the Worthington engines, these should be declared inadmissible by virtue of being prematurely presented, since Bolivia has had no chance to review its conduct and potentially correct it. In similar situations, arbitral case law has considered that claims are premature[307] when the investor has not undertaken reasonable efforts to achieve the revocation of the act the investor deems illegal before domestic instances, and distinguished this principle from the requirement of exhaustion of local remedies referred to by the Claimants.[308] The host State of the investment cannot be held liable for an international wrongful act, absent the opportunity to remedy its conduct.

270. The Respondent submits, on the basis of the explanation provided by Dr Carlos Quispe, that the Claimants have failed to exhaust the different administrative and judicial channels to challenge the decisions relating to the spot price modification.[309]

271. In its Reply, the Respondent holds that the Claimants made "*no effort whatsoever*" to oppose the measure relating to spot prices, and that reasonable efforts to obtain the restitution of the engines were lacking.[310] Additionally, the Respondent considers that the Claimants confuse this objection with the exhaustion of local remedies requirement. In any event, the premature nature of the claims is not a procedural requirement, but an element affecting the substance of international wrongful act.[311]

272. In turn, the Claimants have not denied not having made use of the administrative and judicial remedies available to challenge the measures relating to the spot price and the Worthington

---

[307] Memorial on Jurisdiction, ¶¶321-325. See *Jan de Nul N.V. and Dredging International N.V. v Arab Republic of Egypt* (ICSID Case No. ARB/04/13), Decision on Jurisdiction, 16 June 2006 (Kaufmann-Kohler, Mayer and Stern) (Exhibit **RL-12**); *Loewen Group. Inc. and Raymond L. Loewen v. United States of America* (ICSID Case No. ARB(AF)/98/3), Award on the merits, 26 June 2003 (Mason, Mikva and Mustill) (Exhibit **RL-68**); *Generation Ukraine, Inc. v. Ukraine* (ICSID Case No. ARB/00/9), Decision, 16 September 2003 (Paulsson, Salpius and Voss) (Exhibit **RL-24**).

[308] Memorial on Jurisdiction, ¶320.

[309] Memorial on Jurisdiction, ¶329. Dr Carlos Quispe is "responsible for responding the administrative remedies filed against the energy authorities' decisions and representing the Bolivian State in the judicial proceedings against such decisions." [Translation by the Tribunal].

[310] Reply on Jurisdiction, ¶¶215-216.

[311] Reply on Jurisdiction, ¶217; Counter-Memorial on Jurisdiction, ¶¶99, 101-103.

engines. In Bolivia's view, this opportunity goes to the substance of the claims and must not be mistaken with the rule of exhaustion of local remedies.[312]

273. In addition, the Respondent considers that the Claimants' interpretation of the *Jan de Nul* and *Loewen* cases is erroneous.[313] First, the *Loewen* Tribunal,[314] in spite of hearing a denial of justice claim, set forth the rule that "the State should be afforded the opportunity of redressing, through its legal system, the inchoate breach of international law". Such rule, according to the Respondent, should not only be applied to denial of justice cases, but also to national treatment, minimum standard of treatment and expropriation claims. Secondly, the *Jan de Nul* Tribunal,[315] making no distinction whatsoever regarding the disputed measure, determined that there is a "*clear trend of cases requiring an attempt to seek redress in domestic courts before bringing a claim for violation of BIT standards, irrespective of any obligation to exhaust local remedies.*"

274. Lastly, the Respondent deems the Claimants' criticisms of the *Generation Ukraine* case off the mark when they cite to the *Helnan* annulment,[316] since although the *Helnan* committee[317] asserted that the tribunal's decision[318] stands "*somewhat outside the jurisprudence constante*", it also explained that "*on its facts, the decision of the Generation Ukraine tribunal is understandable*".[319]

275. In Bolivia's view, it cannot be ignored that both in the *Generation Ukraine* case as well as in this arbitration, the alleged wrongful acts were decisions of first instance authorities. The

[312] See *Generation Ukraine Inc. v. Ukraine* (ICSID Case No. ARB/00/9), Award, 16 September 2003 (Salpius, Voss and Paulsson) (Exhibit **RL-24**); *Saluka Investments BV (The Netherlands) v. Czech Republic* (UNCITRAL – PCA Case), Partial Award, 17 March 2006 (Watts, Fortier and Behrens) (Exhibit **CL-36**). See Transcript (English) Day 1, 2 April 2013, 250:2-250:21.

[313] Counter-Memorial on Jurisdiction, ¶102. In this regard, the Claimants assert that both cases were claims based on the denial of justice and, therefore, in this case the exhaustion of local remedies would indeed be required. See ¶276 *infra*.

[314] See *Loewen Group, Inc. and Raymond L. Loewen v. United States of America* (ICSID Case No. ARB(AF)/98/3), Award on the Merits, 26 June 2003 (Mason, Mikva and Mustill) (Exhibit **RL-68**).

[315] See *Jan de Nul N.V and Dredging International N.V. v. Republic of Egypt* (ICSID Case No. ARB/04/13), Decision on Jurisdiction, 16 June 2006 (Kaufmann-Kohler, Mayer and Stern) (Exhibit **RL-12**).

[316] Counter-Memorial on Jurisdiction, ¶102. See ¶276 *infra*.

[317] See *Helnan International Hotels A/S v. Egypt* (ICSID Case No. ARB/05/19), Annulment Proceeding, Decision of the *ad hoc* Committee, 14 June 2010 (Schwebel, Ajibola and McLachlan) (Exhibit **CL-132**).

[318] See *Generation Ukraine Inc. v. Ukraine* (ICSID Case No. ARB/00/9), Award, 16 September 2003 (Paulsson, Salpius and Voss) (Exhibit **RL-24**).

[319] Reply on Jurisdiction, ¶222.

Tribunal should take this into account, as the *Helnan* committee and tribunal did when considering the *Generation Ukraine* case.[320]

The Claimants' Arguments

276. According to the Claimants, the claims are neither premature nor inadmissible. In any event, the Treaties do not require that a dispute be heard by domestic or administrative courts before a party may resort to an arbitration tribunal. In addition, the exhaustion of local remedies is unnecessary in the investment treaty context, except in connection with denial of justice claims.[321] This view is consistently upheld by the case law submitted by the Claimants, unlike that cited by Bolivia, which is inapplicable to this case, as it refers to (i) denial of justice claims (which do require exhaustion of local remedies),[322] and (ii) the *Generation Ukraine* case, which was later criticized by the *Helnan* tribunal.[323]

277. In their Rejoinder on Jurisdiction, the Claimants also state that the argument put forward by Bolivia stands in contradiction to their previous jurisdictional objection concerning the fork-in-the-road clause. The Respondent now asserts that claims concerning the spot price and the Worthington engines were required to have been previously submitted to Bolivian courts.[324] In other words, such claims would be premature, due to the Claimants failure to invoke or exhaust the local remedies available to them in accordance with the case law submitted by the Respondent.[325] Nonetheless, the Respondent has omitted relevant parts of those cases in which domestic remedies were not required to be exhausted.[326] Therefore, the objection is groundless and should be dismissed.

---

[320] Reply on Jurisdiction, ¶223.

[321] Counter-Memorial on Jurisdiction, ¶101. See *CME Czech Republic BV v. Czech Republic* (UNCITRAL), Partial Award, 13 September 2001 (Kuhn, Schwebel and Hándl) (Exhibit **RL-33**, **CL-74**)); *Mytilineos Holdings S.A. v. State Union of Serbia & Montenegro and Republic of Serbia* (UNCITRAL), Partial Award on Jurisdiction, 8 September 2006 (Reinisch, Koussolis and Mitrović) (Exhibit **CL-94**). See Transcript (English), Day 1, 2 April 2013, 148:8-148:19.

[322] Counter-Memorial on Jurisdiction, ¶102. See *Jan de Nul NV and Dredging International N.V. v. Republic of Egypt* (ICSID Case No. ARB/04/13), Award, 6 November 2008 (Kaufmann-Kohler, Mayer and Stern) (Exhibit **CL-56**); *Loewen Group, Inc. and Raymond L. Loewen v. United States of America* (ICSID Case No. ARB(AF)/98/3), Award on the merits, 26 June 2003 (Mason, Mikva and Mustill) (Exhibit **RL-68**); *Waste Management, Inc. v. United Mexican States* (No.2) (ICSID Case No. ARB(AF)/00/3), Award, 30 April 2004 (Crawford, Civiletti and Magallón Gómez) (Exhibit **RL-99**); *Parkerings-Compagniet A.S. v. Republic of Lithuania* (ICSID Case No. ARB/05/8), Award, 11 September 2007 (Lew, Lalonde and Lévy) (Exhibit **RL-13**).

[323] Counter-Memorial on Jurisdiction, ¶102. See *Generation Ukraine, Inc, v. Ukraine* (ICSID Case No. ARB/00/9), Award, 16 September 2003 (Paulsson, Salpius and Voss) (Exhibit **RL-24**); *Helnan International Hotels A/S v. Republic of Egypt* (ICSID Case No. ARB/05/19), Annulment Proceeding, Decision of the *ad hoc* Committee, 14 June 2010 (Schwebel, Ajibola and McLachlan) (Exhibit **CL-132**).

[324] Memorial on Jurisdiction, ¶318.

[325] Reply on Jurisdiction, ¶¶220-223; Counter-Memorial on Jurisdiction, ¶¶102-103.

[326] Rejoinder on Jurisdiction, ¶79, and footnotes 163 and 164.

CHAPTER VI – THE PARTIES' RELIEF SOUGHT ON JURISDICTION

A. THE RESPONDENT'S RELIEF SOUGHT

278. Bolivia requests that the Tribunal declare that:

(a) in accordance with the US-Bolivia BIT and the UK-Bolivia BIT, Bolivia did not consent to the submission of claims filed jointly by the Claimants under both Treaties in a single international arbitration proceeding, and that the Tribunal therefore lacks jurisdiction over the claims brought by the Claimants;

(b) alternatively, it has no *rationae personae* jurisdiction over the claims filed by Rurelec under the UK-Bolivia BIT;

(c) it has no jurisdiction over GAI, as Bolivia has denied it the benefits of the US-Bolivia BIT;

(d) alternatively, it has no jurisdiction over the New Claims, since they fail to meet the conditions set forth in the Treaties;

(e) alternatively, it has no *rationae materiae* jurisdiction over the New Claims, due to the fact that they fall within the ambit of Bolivian law and are not admissible under the Treaties;

(f) alternatively, it has no jurisdiction over the PBP claim pursuant to the fork-in-the-road clause contained in the US-Bolivia BIT; and

(g) alternatively, the Claimants' claims concerning the spot price are premature and inadmissible.

279. Bolivia requests that the Tribunal order:

(a) that the Claimants grant a bank guarantee to cover the relevant costs of the arbitration;[327]

(b) that the Claimants reimburse the State in full for the costs incurred in order to defend its interests in the context of this arbitration, plus interest accrued at a commercial rate

[327] Reply on Jurisdiction, ¶233(2)(b).

deemed reasonable by the Tribunal, from the date on which the State incurred such costs until the date of actual payment thereof; and

(c) Any other remedy to the State which the Tribunal deems fit.[328]

B. THE CLAIMANTS' RELIEF SOUGHT

280. The Claimants request that the Tribunal:

(a) declare that it has jurisdiction to decide this dispute in its entirety;

(b) award the Claimants attorneys' fees and costs for this phase of the arbitration, plus interest;

(c) award such other relief as the Tribunal may consider appropriate.[329]

[328] Memorial on Jurisdiction, ¶337.

[329] Counter-Memorial on Jurisdiction, ¶110; Rejoinder on the Merits, ¶85.

CHAPTER VII – ARGUMENTS OF THE PARTIES ON THE MERITS

A. CLAIM FOR EGSA'S ALLEGED UNLAWFUL EXPROPIATION

1. The Claimants' Arguments

(i) Bolivia Made an Unlawful Expropriation

281. The Claimants argue that, pursuant to Article III of the US-Bolivia BIT and Article 5(1) of the UK-Bolivia BIT, for an expropriation to be lawful, a series of conditions must be met, namely:[330]

(a) Promptness of Compensation. The Claimants assert that this is a principle internationally recognized by various international tribunals. Therefore, based on various scholarly pieces, they consider that payment of the compensation must be contemporaneous with the expropriation, and must be made as soon as practicable without undue delay.[331]

(b) Adequacy and/or Fairness of Compensation. The Claimants consider that compensation must be equivalent to the aggregate value of the expropriated asset, which is equivalent to the fair market value (hereinafter, "**FMV**") of the expropriated investment.[332] Therefore, based on ample case law, Claimants consider that a nationalisation is always unlawful if the compensation offered by the government is below the FMV of the investment.[333]

(c) Due Process. The Claimants argue, based on ample case law, that due process requires that a nationalisation be carried out in a manner that allows the investor to exercise its

[330] Statement of Claim, ¶¶146-148.

[331] Statement of Claim, ¶¶151-154. See *Norwegian Shipowners' Claims* (*Norway v. United States of America*), Award, 13 October 1922, United Nations Reports of International Arbitral Awards, Vol. I (Anderson, Vogt and Valloton) (Exhibit **CL-1**); *Goldenberg Case (Germany v. Romania)*, Award, 27 September 1928, United Nations Reports of International Arbitral Awards , Vol. II (Fazy) (Exhibit **CL-3**). See K. J. Vandevelde, "U.S. International Investment Agreements" (2009) (Exhibit **CL-59**); L. B. Sohn and R. R. Baxter, "Responsibility of States for Injuries to the Economic Interests of Aliens", American Journal of International Law (1961) (Exhibit **CL-4**).

[332] Claimants' Post-Hearing Brief, ¶7.

[333] Statement of Claim, ¶¶156-161. See *CME Czech Republic BV v. Czech Republic* (UNCITRAL), Final Award, 14 March 2003 (Kuhn, Schwebel and Brownlie) (Exhibit **CL-27**); *Biloune and Marine Drive Complex Ltd v. Ghana Investments Centre and the Government of Ghana*, Award on Jurisdiction and Liability, 27 October 1989, in (1994) 95 International Law Reports (Schewebel, Wallace and Leigh) (Exhibit **CL-8**); *Amoco International Finance Corporation v. The Islamic Republic of Iran* (Iran-US Claims Tribunal, Case No. 56), Partial Award, 14 July 1987 (Virally, Three and Brower) (Exhibit **CL-6**, **RL-76**); *Rumeli Telekom A.S. and Telsom Mobil Telekomikasyon Hizmetteri A.S. v. Republic of Kazakhstan* (ICSID Case No. ARB/05/16), Award, 29 July 2008 (Hanotiau, Boyd and Lalonde) (Exhibit **CL-52**). See Transcript (English), Day 1, 2 April 2013, 73:4-74:17.

rights, in particular with respect to the calculation of proper compensation. The Claimants consider that the requirement of due process should apply to the expropriation process as a whole, including the calculation of compensation. Therefore, they believe that a violation arises whenever the government exercises its powers to deny proper compensation or to unduly delay the process.[334]

282. The Claimants assert that, in spite of the above, Bolivia offered them no compensation following the nationalisation. To the contrary, the Claimants argue that Bolivia took a series of "*fundamentally unfair measures to ensure that the Claimants would receive no compensation for their assets.*"[335] The Claimants assert a lack of due process for the following reasons:

(a) The Nationalisation Decree provided for a non-transparent valuation process, unilaterally performed by the Government, without the Claimants' participation. The result of the valuation, in the Claimants' view, was clearly predetermined given that EGSA was in a good financial situation at the moment of the nationalisation;

(b) The Claimants were merely informed that some companies had been requested to perform the analysis, without any further explanation;

(c) The audits ordered by the Government *a posteriori* reflect the use of unconventional accounting criteria with the sole purpose of reducing EGSA's apparent value;

(d) The Respondent did not submit to the Claimants any report on the valuation process performed, or a formal conclusion on the amount of the compensation;

(e) Finally, no compensation whatsoever was offered.[336]

(ii) Claimants are Entitled to Compensation for the Nationalisation

283. The Claimants affirm that the Respondent committed an internationally wrongful act and, therefore, must redress the damage caused to the Claimants' investment in Bolivia. The

---

[334] Statement of Claim, ¶¶162-165; Reply on the Merits, ¶110. See *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary* (ICSID Case No. ARB/03/16), Award, 2 October 2006 (Kaplan, Brower and van den Berg) (Exhibit **CL-38**); *Ioannis Kardassopoulos and Ron Fuchs v. Georgia* (ICSID Cases Nos., ARB/05/18 and ARB/07/15), Award, 3 March 2010 (Fortier, Orrego Vicuña and Lowe) (Exhibit **CL-65**); *Mohammad Ammar Al-Bahloul v. Republic of Tajikistan* (SCC Case No. V (064/2008)), Partial Award on Jurisdiction and Liability, 2 September 2009 (Hertzfeld, Happ and Zykin) (Exhibit **CL-64**).

[335] Statement of Claim, ¶¶166-168.

[336] Statement of Claim, ¶169. See Transcript (English), Day 1, 2 April 2013, 74:21-77:8; Transcript (English), Day 6, 9 April 2013, 1329:4-1329:21.

Claimants argue that they are entitled to receive adequate compensation so as to restore them to the situation, in economic terms, as it was before the expropriation, as described in the two Compass Lexecon Valuation Reports prepared by Dr Abdala (hereinafter, the "**Compass Lexecon**").

284. The Claimants affirm that both Treaties embody a special legal regime on compensation in case of expropriation, which follow the main elements of customary international law and the "Hull Formula" of prompt, adequate and effective compensation for expropriation that reflects the FMV of the expropriated asset. Therefore, given that no compensation has been paid and the expropriation was unlawful, the applicable standard is now that under customary international law, which imposes a broader compensation standard, including full compensation and lost profits, to the extent they are verified in accordance with the case law.[337] Moreover, a standard of proof to be applied to all claimed damages is that of "balance of probabilities". Thus, a respondent State cannot "*invoke the burden of the proof as to the amount of compensation for such loss to the extent that it would compound the respondent's wrongs and unfairly defeat the claimant's claim for compensation.*"[338]

285. In addition, the Claimants consider that compensation must be assessed using the FMV as of the date of the deprivation of rights (1 May 2010), taking into account future profitability given that it was a company with income generating assets (a "going concern") and, ultimately, this is the formula used by market players to calculate the value of companies.[339] The Claimants further consider that the most appropriate method to calculate FMV is by using the Discounted Cash Flow method (hereinafter, "**DCF**"), pursuant to international law

[337] Statement of Claim, ¶¶228-229; Reply on the Merits, ¶¶165-167. See, *inter alia*, *Chorzów Factory* (Merits), Decision, 13 Septmeber 1928, PCIJ, Series A, No. 17, 1928 (Exhibit **CL-2**); *Sempra Energy International v. The Argentine Republic* (ICSID Case No. ARB/02/16), Award, 28 September 2007 (Orrego Vicuña, Lalonde and Rico) (Exhibit **CL-46**); *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. (formerly, Compagnie Générale des Eaux) v. The Argentine Republic* (ICSID Case No. ARB/97/3), Decision on Annulment, 3 July 2002 (Fortier, Crawford and Fernández Rozas) (Exhibit **CL-26**); International Law Commission, "Draft Articles on Responsibility of States for Internationally Wrongful Acts (with comments)", 2001 (Exhibit **CL-21**). See Transcript (English), Day 1, 2 April 2013, 77:13-77:23.

[338] Reply on the Merits, ¶172. See *Sapphire International Petroleums Ltd. v. National Iranian Oil Co.* (1963) 35 ILR 136 (Exhibit **CL-152**); *Gemplus S.A. v. The United Mexican States* (ICSID Case No. ARB(AF)/04/3 & ARB(AF)/04/4), Award, 16 June 2010 (Fortier, Magallón Gómez and Veeder) (Exhibit **CL-67**). See Transcript (English), Day 1, 2 April 2013, 94:11-94:15.

[339] Statement of Claim, ¶¶230-231. See *Compañía del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica* (ICSID Case No. ARB/96/1), Award, 17 February 2000 (Fortier, Lauterpacht and Weil) (Exhibit **CL-19**); *CMS Gas Transmission Company v. The Argentine Republic* (ICSID Case No. ARB/01/8), Award, 12 May 2005 (Orrego Vicuña, Lalonde and Rezek) (Exhibit **CL-35**); *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. (formerly, Compagnie Générale des Eaux) v. The Argentine Republic* (ICSID Case No. ARB/97/3), Decision on Annulment, 3 July 2002 (Fortier, Crawford and Fernández Rozas) (Exhibit **CL-26**).

and case law. Claimants note that they have used the Weighted Average Cost of Capital (hereinafter, "**WACC**") as the discount rate.[340]

286. The Claimants clarify that Compass Lexecon, in determining this FMV, omitted the losses sustained upon modification of the regulatory framework as regards spot prices and PBP. According to the Claimants, this means that its estimate of EGSA's FMV as of 1 May 2010 does not reflect the losses caused to the Claimants by the aforementioned measures. Consequently, the losses sustained in connection with those measures are calculated separately.[341] In that vein, a DCF model was created for EGSA as of May 2010, based on the assumption that the measures before nationalisation would remain effective until the completion of the valuation period.[342]

287. Below, the Claimants list and explain the key assumptions made by Compass Lexecon in calculating the compensation owed:[343]

(a) Timeframe: The DCF projection is based on the fact that EGSA's Generation Licenses are effective until 2038. Thus, cash flows are projected (on an annual basis) from May 2010 through December 2038.[344]

(b) Revenue Forecasts:

(i) Revenues for Sale of Electricity: Using the information available to a potential buyer on the day of the nationalisation, with support of the independent firm specialized in engineering, *Mercados Energéticos Consultores* (hereinafter, "**MEC**"), Compass Lexecon developed a simulation of the amount of electricity dispatched by EGSA and the electricity spot prices based on the evolution of the supply and demand of electric energy in Bolivia over time. Thus, using the same software used by CNDC, known as Stochastic Dual Dynamic Programming (hereinafter, "**SDDP**"), two different periods are projected: one between May 2010 and December 2018 (using the dispatch simulation created by MEC), and a second period from 2019 through 2038, using the spot prices projected by MEC for 2018

[340] Statement of Claim, ¶¶233-235. See Compass Lexecon Report, ¶69.

[341] See Section B.

[342] Statement of Claim, ¶237. See Compass Lexecon Report, ¶65.

[343] Statement of Claim, ¶252.

[344] Compass Lexecon Report, ¶71.

and, from that date, remaining constant in real terms and adjusting in nominal terms by the U.S. Producer Price Index (hereinafter, "**PPI**").[345]

(ii) Revenues for capacity: Compass Lexecon utilized MEC's electricity dispatch calculations and corroborated that all of EGSA's units could have continued to receive PBP payments given the great increase foreseen in the electricity demand. With respect to the evolution of the PBP, Compass Lexecon adjusted it annually by the "Turbine US PPI" (a special index which is more appropriate than the general one).[346]

(iii) Revenues for Sale of Carbon Credits: The Claimants incorporate in EGSA's forecasted revenues those revenues resulting from the sale of EGSA's certificates of reduction of greenhouse gas emission through the installation of the CCGT.

(c) Operating Expenses (hereinafter, "**OPEX**"): Energy costs are, according to the Claimants, the main variable costs that must be taken into account. Thus, Compass Lexecon uses the maximum regulated price of natural gas as of May 2010, considering that it remains constant in real terms, and adjusted by the PPI.

(d) Capital Expenditures (hereinafter, "**CAPEX**"): The Claimants include the expenses foreseen to complete the CCGT, based on EGSA's financial statements for 2009.

(e) Net Cash Flows: Compass Lexecon uses the aforementioned variables to calculate EGSA's free cash flows between 2010 and 2018.

(f) WACC (Discount Rate): As explained by Claimants, the estimated WACC is designed to reflect all the risks a WB would have taken into account when acquiring the Claimants' equity interest in EGSA. In addition, the Claimants consider that even if the WACC might not provide for all the assets' risks where there is a likely cash flow shortage, there was no risk of bankruptcy for EGSA in this case. The average used by Compass Lexecon is 10.63%, which is produced by assessing EGSA's debt and equity and the relative weight between them.[347] This average is consistent with investment law

[345] Compass Lexecon Report, ¶72, footnote 53.

[346] Reply on the Merits, ¶¶185-186; Compass Lexecon Report, ¶¶110-119, and 121-125; Compass Lexecon Rebuttal Report ¶¶169-170. Claimants explain, for instance: (a) the SDDP from May 2010 to April 2014 was incomplete and therefore was lower; (b) the 2010 POES reflects information that would have been available at the market in May 2010 and which has proven more accurate than other forecasts; (c) MEC did not use the 2011-2022 long-term electricity programming of the SIN, but the 2010 POES for the same previous reasons. See Transcript (English), Day 1, 2 April 2013, 112:5-117:12; Transcript (English), Day 6, 9 April 2013, 1398:22-1401:18.

[347] Compass Lexecon Report, ¶¶140-143.

practice as tribunals typically apply the WACC without adjusting it upwards on account of the existence of "hidden" risks.[348]

There are particular differences of opinion on this topic among the Parties' experts, which, in the Claimants' view, cause Econ One's Valuation Reports prepared by Mr. Flores (hereinafter, "**Econ One**") to apply an incorrect discount rate of around 20%: (a) it introduces a "size premium" of 6.28% on the value of EGSA shares, despite such amount being unreasonable in the valuation of generation companies in Latin American countries. EGSA's market share and its low risk lead the Claimants to deem the "size premium" advocated for by Econ One to be inappropriate;[349] (b) Econ One multiplies the country risk premium, which reflects the ratio between price volatility of Bolivian stock and bonds, by 1.5, leading to a country risk premium of 10.53%,. The use of this multiplier deviates from the recommendations of Professor Damodaran (who Econ One relies upon) and is practically unheard of in investment treaty cases.[350]

(g) Interest: The Claimants submit that interest constitutes a component of full reparation of the damage caused by the unlawful expropriation, and therefore is not to be considered a penalty separate from reparation.[351] The Claimants assert that the determination of the applicable type of interest must be based in the Claimants' opportunity cost of the losses suffered and argue that the proper measure for such lost opportunity is EGSA's WACC, this is, 10.63%, rather than a risk-free rate. This rate of interest must be applied from the date of the expropriation to the date of the award, as well as from that date until that of the full payment by Bolivia of the compensation determined in the award.[352]

---

[348] Reply on the Merits, ¶¶179, and 182; Compass Lexecon Rebuttal Report, ¶¶58, 60-67, 70-74, 80-103, and 147. See *Siemens A.G. v. The Argentine Republic* (ICSID Case No. ARB/02/8), Award, 6 February 2007 (Sureda, Brower and Bello Janeiro) (Exhibit **CL-41**); *Enron Corporation and Ponderosa Assets, L.P. v. The Argentine Republic* (ICSID Case No. ARB/01/3), Award, 22 May 2007 (Orrego Vicuña, van den Berg and Tschanz) (Exhibit **CL-42**); *Sempra Energy International v. The Argentine Republic* (ICSID Case No. ARB/02/16), Award, 28 September 2007 (Orrego Vicuña, Lalonde and Morelli Rico) (Exhibit **CL-46**); *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. The Argentine Republic* (ICSID Case No. ARB/03/23), Award, 11 June 2012 (Kaufmann-Kohler, Remón and Park) (Exhibit **RL-141**).

[349] Claimants' Post-Hearing Brief, ¶¶136-145. See Transcript (English), Day 1, 2 April 2013, 100:24-101:6, 101:22-105:6; Transcript (English), Day 6, 9 April 2013, 1380:7-1386:23, 1387:23-1388:2.

[350] Reply on the Merits, ¶180; Claimants' Post-Hearing Brief, ¶¶146-149; Compass Lexecon Rebuttal Report, ¶¶7, 55, 60-67, 70-73, and 80-102. See Transcript (English), Day 1, 2 April 2013, 100:24-101:6, 105:15-107:18. See Transcript (English), Day 6, 9 April 2013, 1388:12-1398:8.

[351] Statement of Claim, ¶238.

[352] Statement of Claim, ¶¶240-245; Reply on the Merits, ¶¶214-220; Claimants' Post-Hearing Brief, ¶176; Compass Lexecon Rebuttal Report, ¶175. See Gotanda, *A study of Interest* (Exhibit **CL-44**); *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. (Formerly, Compagnie Générale des Eaux) v. The Argentine Republic* (ICSID Case No. ARB/97/3), Decision on Annulment, 3 July 2002 (Fortier, Crawford and Fernández Rozas) (Exhibit **CL-26**); *Alpha Projektholding GmbH v. Ukraine* (ICSID Case No. ARB/07/16), Award, 8 November 2010 (Robinson, Alexandrov and Turbowicz) (Exhibit **CL-68**); *France Telecom v. Lebanon* (UNCITRAL), Award, 31 January 2005 (Audit, Lalonde and Akl) (Exhibit **CL-34**);

(h) Taxes: As regards taxes, the Claimants request that the Tribunal declare that: (i) the award establishes a net amount, free of any Bolivian taxes; (ii) the Respondent may not levy or attempt to levy its taxes on the amount of the award. Otherwise, the Claimants would be taxed twice on the same income. Moreover, the Claimants request compensation from Bolivia for any adverse effect resulting from the imposition of taxes by UK or US authorities, in the event that the declaration considered in the Tribunal's award is not accepted as evidence equivalent to payment.[353]

288. In their Statement of Claim, the Claimants determined the FMV of its participation in EGSA as of 1 May 2010 at USD 80.9 million, which amount they reduced to USD 77.5 million in their Reply on the Merits. In said Reply, the Claimants added to this amount USD 15.8 million in interest from the date of nationalisation to 29 February 2012, date of the filing of the Claim, resulting in a compensation of USD 93.3 million for damages and losses from the nationalisation.[354]

***

289. In sum, for the Claimants, unless the Tribunal considers that a potential buyer would have paid nothing for EGSA prior to the nationalisation, the expropriation made by Bolivia should be considered unlawful and in violation of the Treaties, given that it did not respect due process and offered no compensation.[355]

Funnekotter & Ors v. Republic of Zimbabwe (ICSID Case No. ARB/05/6), Award, 22 April 2009 (Guillaume, Cass and Zafar) (Exhibit **CL-61**); *Continental Casualty Company v. The Argentine Republic* (ICSID Case No. ARB/03/9), Award, 5 September 2008 (Griffith, Söderlund and Ajibola) (Exhibit **CL-54**). See Transcript (English), Day 1, 2 April 2013, 130:21-133:16.

[353] Reply on the Merits, ¶¶221-223.

[354] Statement of Claim, ¶¶247-251; Reply on the Merits, ¶188. The numerical data were corrected, as shown in the Reply on the Merits, ¶188; Compass Lexecon Rebuttal Report, ¶¶27, 30-52, and 142. See Transcripts (English), Day 1, 2 April 2013, 117:13-126:19.

[355] Statement of Claim, ¶171; Reply on the Merits, ¶¶110-112; Claimant's Post-Hearing Brief, ¶¶100, and 106. See *Mohammad Ammar Al-Bahloul v. Republica of Tajikistan* (SCC Case No. V (064/2008)), Partial Award on Jurisdiction and Liability, 2 September 2009 (Hertzfeld, Happ and Zykin) (Exhibit **CL-64**); *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary* (ICSID Case No. ARB/03/16), Award, 2 October 2006 (Kaplan, Brower and van den Berg) (Exhibit **CL-38**). See Transcript (English), Day 1, 2 April 2013, 75:2-77:8.

2. The Respondent's Arguments

(i) Bolivia Did Not Effect an Unlawful Expropriation

290. The Respondent states that the alleged illegality of the nationalisation is merely a matter of quantum.[356] With an equity interest of zero dollars held by the Claimants in EGSA as of the nationalisation date, Bolivia has no duty to compensate given that the Treaties do not provide for payment of compensation in the event of nationalisation of assets with no value.[357] The Respondent has never denied (nor denies) that compensation should be paid following nationalisation, but only in an amount equivalent to the FMV of the investment and nothing more.[358]

291. As regards the requirements considered by the Claimants, the Respondent submits as follows:

(a) With respect to the "promptness", the Respondent asserts having met such condition, as the valuation process of the equity interest was conducted within the 120 business days specified under the Nationalisation Decree. Moreover, Bolivia took the necessary measures to compute the FMV without any delay, while informing the Claimants of the negative value of their investment.[359]

(b) Determining what amounts to "fair" and "adequate" compensation under the Treaties depends on the economic and financial calculation of the FMV of the investment, that is, what PROFIN did—according to the Respondent—pursuant to the Nationalisation Decree and what the Econ One later did in this arbitration as well. Therefore, upon calculation of such amount, payment must be made without delay. However, if the FMV is negative, the State has no obligation to pay such compensation, and the nationalisation is not thereby rendered unlawful.[360]

---

[356] Statement of Defense, ¶115; Rejoinder on the Merits, ¶¶147-149; Respondent's Post-Hearing Brief, ¶¶81-83. See Transcript (English), Day 1, 2 April 2013, 188:6-188:8.

[357] Statement of Defense, ¶117.

[358] Statement of Defense, ¶121; Respondent's Post-Hearing Brief, ¶82. See Transcript (English), Day 1, 2 April 2013, 195:14-196:10.

[359] Statement of Defense, ¶¶126-134. See Transcript (English), Day 1, 2 April 2013, 186:9-186:10.

[360] Statement of Defense, ¶¶124, 136-139. See *Amoco International Finance Corporation v. The Government of the Islamic Republic of Iran* (Iran-US Claims Tribunal, Case No. 56), Partial Award, 14 June 1987 (Virally, Three and Brower) (Exhibit **CL-6**, **RL-76**); *Goetz and others v. Burundi* (ICSID Case No. ARB/95/3), Award, 10 February 1999 (Weil, Bedjaoui and Bredin) (Exhibit **RL-70**). See Transcript (English), Day 1, 2 April 2013, 187:22-188:8.

(c) Bolivia *did* comply with due process given that: (i) the condition of due process refers to the expropriation measure but not to the subsequent investment valuation process;[361] (ii) the Claimants themselves failed to allege that the Nationalisation Decree had violated due process;[362] (iii) there is no provision in the Treaties requiring the Claimants' participation in the valuation process in order for the expropriation to be lawful, and thus Bolivia is would be held liable for an obligation that does not exist;[363] and (iv) the Claimants fail to specify which provisions of the Treaties have been allegedly violated.[364]

In any event, (i) the call for consulting services was published by ENDE in June 2010, clearly defining the process to be followed; (ii) there were clear rules on how to perform the valuation pursuant to such call; (iii) indeed, said rules were consistent with the methodology specified by the Treaties and followed by both valuation experts, that is, by the DCF method; (iv) Claimants were informed of the publication of the call, and the hiring of PROFIN was also published in the media; and (v) the Respondent *did* inform the Claimants that EGSA's FMV was negative, and thus there was no obligation to compensate.[365]

In addition, the result of the calculation of EGSA's value was clearly not pre-determined. To the contrary, PROFIN also calculated the FMV for the shares of Corani and Valle Hermoso, which *did* have a positive value and for which Bolivia paid the relevant compensation.[366] If the Claimants did not have PROFIN's report, it was because they never requested it from Bolivia, possibly with a view to alleging the non-existence of a "proper valuation process". In any case, for the avoidance of doubt, Bolivia distributed PROFIN's report during this arbitral proceeding.[367] The new audit performed in March 2011 of EGSA's accounting statements has no relevance in determining the FMV, as the respective experts have not based their calculations on the

[361] Statement of Defense, ¶150; Rejoinder on the Merits, ¶¶161-168. See Transcript (English), Day 1, 2 April 2013, 190:2-190:4.

[362] Statement of Defense, ¶154; Rejoinder on the Merits, ¶160. See Transcript (English), Day 1, 2 April 2013, 189:21-189:24.

[363] Statement of Defense, ¶¶155-158, 160-162; Rejoinder on the Merits, ¶128. See Transcript (English), Day 1, 2 April 2013, 190:10-190:17.

[364] Statement of Defense, ¶159. See Transcript (English), Day 1, 2 April 2013, 190:19-190:21.

[365] Statement of Defense, ¶¶166-171; Rejoinder on the Merits, ¶¶123-128, and 172. See Minutes of the Meeting held by Bolivia, Rurelec and GAI, dated 5 July 2010 (Exhibit **C-187**); "*Profin valora acciones del Elfec*", Los Tiempos, 13 August 2010 (Exhibit **R-81**). See Transcript (English), Day 1, 2 April 2013, 185:10-185:15, 185:17-185:19, 186:2-186:4, 186:9-186:10, 190:10-190:17.

[366] Statement of Defense, ¶¶8(c), and 135; Rejoinder on the Merits, ¶¶11, 127, and 152.

[367] PROFIN Report (Exhibit **R-154**).

theoretical accounting value of EGSA. The Claimants also fail to explain how such audit could have reduced a valuation already performed by PROFIN. Instead, it was justified by technical reasons, as stated by Lic. Bejarano.[368]

(ii) The Claimants are not Entitled to Receive any Compensation

292. The Respondent agrees that the FMV must be calculated after the nationalisation, and the valuation date used by the parties is 1 May 2010. Similarly, the Parties agree that the FMV can be calculated applying the DCF and that, as of the valuation date, EGSA had a financial debt of USD 92.7 million and a considerable amount of bills to be paid. The Respondent describes EGSA's situation as an economic crisis[369] and disagrees with the Claimants on the following three key issues.[370]

293. First, the standard applicable to the compensation: The Respondent affirms that, as a precondition to obtain compensation, the Claimants must prove beyond a doubt that they suffered damage resulting from the expropriation. The Respondent denies that there is any practical difference between the full reparation standard under customary international law and the standard under the Treaties. Also, the Respondent does not believe that the standard of "balance of probabilities" is appropriate, as it applies only to damages that cannot be established with absolute certainty, that is, future damages. The nationalisation is lawful under both Bolivian and international law, since the failure to pay compensation for assets with no value does not amount to an international wrong.[371] Finally, the Respondent explains that the Claimants have used two alternative methods to calculate the FMV—book value and market multiple benchmarks/comparables—whose application cannot be justified in this case.[372]

294. Secondly, EGSA's cash flow forecast: The Respondent underscores that Compass Lexecon made a fundamental mistake, since instead of using the latest available information as of the

[368] Statement of Defense, ¶¶143-144.

[369] Statement of Defense, ¶¶174 (f)(g), and 185-193; Respondent's Post-Hearing Brief, ¶¶92-93. See Econ One Report, ¶¶7, 41, and 95. See Transcript (English), Day 1, 2 April 2013, 198:20-206:5; Transcript (English), Day 6, 9 April 2013, 1435:11-1435:18, 1436:14-1441:13.

[370] Statement of Defense, ¶175.

[371] Statement of Defense, ¶¶177-184, 199-200; Rejoinder on the Merits, ¶¶176-182. See *The Mavrommatis Palestine Concessions (Greece v. United Kingdom)*, PCIJ Series A, No. 5 (1925) (Exhibit **RL-81**); *Martini Case*, 2 U.N.R.I.A.A 554, Award, 8 May 1930 (Exhibit **RL-82**). See Transcript (English), Day 1, 2 April 2013, 193:12-193:17, 196:6-196:10.

[372] Rejoinder on the Merits, ¶¶186-205. See Transcript (English), Day 1, 2 April 2013, 236:13-242:1; Transcript (English), Day 6, 9 April 2013, 1471:9-1473:24.

nationalisation date, it used information that was not available as of 1 May 2010.[373] The Respondent describes how it calculated the FMV to conclude that such value is nil, so the Respondent was under no obligation to pay any compensation. Econ One shows that, even though both parties have used the same method (DCF) and the same valuation date, they both started from different premises and therefore obtained different results.[374] Based on Econ One's report, Respondent lists the most serious mistakes made by Compass Lexecon as follows:[375]

(a) EGSA's Revenue Forecast. Econ One considers that the calculation made by Compass Lexecon in relation to the three main sources of income—the sale of energy at the spot market, the PBP, and the carbon credits resulting from the combined cycle project—is erroneous.[376]

(i) Sale of energy in the spot market. Compass Lexecon's calculation is erroneous because it has used information that was not available at the valuation date, has inflated the spot price by applying an excessive inflation factor, and has not allowed for price stabilization.

Econ One looks at two fundamental mistakes.[377] The first relates to the supply and demand projections, for which Compass Lexecon has used the studies conducted by MEC and later by *Estudios de Infraestructura* (hereinafter, "**EdI**"), and information that was either outdated or unavailable at the valuation date. By way of example, Bolivia cites the following mistakes:

a. MEC and EdI rely upon CNDC's study on mid-term programming (hereinafter, "**MTP**"), published in 2009, despite the existence of a study on the same topic of March 2010;

[373] Statement of Defense, ¶¶202-203. See *Lighthouses Concession Case* (1956), Claim No. 27 (Exhibit **RL-84**); *Philips Petroleum Company Iran v. The Islamic Republic of Iran* (Iran-US Claims Tribunal), Award No. 425-39-2, 29 June 1989 (Exhibit **RL-85**); *American International Group Inc. and American Life Insurance Company v. Iran* (Iran-US Claims Tribunal), Award No. 99-2-3, 19 December 1983 (Exhibit **RL-86**); *Thomas Earl Payne v. The Government of the Islamic Republic of Iran* (Iran-US Claims Tribunal), Award No. 245-335-2, 8 August 1986 (Exhibit **RL-87**); *Saghi v. The Islamic Republic of Iran* (Iran-US Claim Tribunal), Award No. 544-298-2, 22 January 1993 (Exhibit **RL-88**).

[374] Statement of Defense, ¶206; Econ One Valuation Report, ¶¶13-14.

[375] Statement of Defense, ¶207.

[376] Statement of Defense, ¶208.

[377] Statement of Defense, ¶209.

b. MEC and EdI use a study published in July 2011, that is, more than one year after the nationalisation date, to forecast the electric energy demand since 2011; and

c. MEC and EdI use the *Plan Óptimo de Expansión del Sistema Interconectado 2011-2012* (hereinafter, "**POES**"), published in December 2010 (that is, after the nationalisation), despite the availability of the 2010-2011 POES, published in November 2009, to project the electric energy generation supply.[378]

The second mistake is the calculation of natural gas and diesel prices. Claimants assumed that such prices would rise based on the general inflation rate since 2010. Accordingly, they applied an inflation factor to the energy price, which is incorrect, because Bolivia has specific r on the regulation of gas and diesel prices.[379] In any case, they would not rise since they have remained unchanged for nine and five years, respectively. Therefore, it would be most reasonable to assume that they would remain unaltered until 2018 and that they would start to rise from then onwards. Moreover, Compass Lexecon has not allowed for stabilization of the electricity tariff in force in Bolivia since 2003, and consequently the price forecast has not been adjusted to the potential effect of stabilization.[380]

(ii) Calculation of PBP. Econ One considers that it is erroneous for the following reasons:

The Claimants do not use an actual forecast of power generation supply, unlike Econ One,[381] as they include units that would not receive any remuneration in the future as EGSA's available capacity. This mistake is caused by using incorrect data provided by MEC and EdI, which have not performed any projection of power generation supply to calculate EGSA's available capacity. They only consider that

---

[378] Statement of Defense, ¶¶214-218; Rejoinder on the Merits, ¶¶234-243. See First Witness Statement of Paz, ¶¶91-92, 95-100, and 102-105. See Transcript (English), Day 1, 2 April 2013, 207:14-208:22, 214:10-219:6; Transcript (English), Day 6, 9 April 2013, 1449:3-1454:3.

[379] Statement of Defense, ¶223; Econ One Report, ¶20.

[380] Statement of Defense, ¶¶224-227; Econ One Report, ¶¶20-21, and 123; First Witness Statement of Paz, ¶¶113-115. In this regard, Respondent explains that since Claimants have disregarded stabilization when preparing their reports, so has Respondent when preparing its.

[381] Statement of Defense, ¶¶236-237; First Witness Statement of Paz, ¶¶129-130, and 132.

the generation units existing in 2010 would be fully available in the future, without taking into account any other ongoing projects of new power generation.[382]

The Claimants inflate the future PBP by applying an extremely high inflation rate based on the annual compound growth rate of the U.S. PPI-Turbines and Power Generation Tools, from 2000 to 2010. That period was characterized by an increase in the price of turbines higher that the general cost inflation. Consequently, Econ One considers that it is preferable to index income by PBP based on the general PPI.[383]

(iii) Carbon Credits Revenues Forecast. In its first report, Compass Lexecon failed to take into account that EGSA was required to share part of those revenues with the State. This mistake was corrected in its second report.[384]

(b) EGSA's Future Operating Costs. In its first report, Compass Lexecon did not correctly calculate the payment of Corporate Income Tax. This mistake had to be rectified in its second report. [385]

(c) Depreciation Expenses. Compass Lexecon has erroneously applied hourly rates of depreciation for the combined cycle project (which was expected to start operating in November 2010), including the first ten months of the year, which causes the FMV to be higher as of 1 May 2010.[386]

(d) Working Capital. Compass Lexecon did not take into account EGSA's need to reduce its high commercial debts, which artificially increased its cash flow.[387]

(e) Capital Expenditure (CAPEX). Econ One complains Compass Lexecon included only USD 12.4 million of capital expenditures in 2010 for the combined cycle project without including any capital expenditure for other generation units or projects of

[382] Statement of Defense, ¶¶232-235; First Witness Statement of Paz, ¶¶127-128. See Transcript (English), Day 6, 9 April 2013, 1456:22-1457:12.

[383] Statement of Defense, ¶¶238-239. See Transcript (English), Day 6, 9 April 2013, 1457:13-1458:17.

[384] Statement of Defense, ¶¶243-246; Aliaga, ¶32; First Witness Statement of Paz, ¶79; Econ One Report, ¶¶32-33. See Transcript (English), Day 1, 2 April 2013, 222:10-222:22.

[385] Statement of Defense, ¶¶248-250; First Witness Statement of Paz, ¶137; Econ One Report, ¶38. See Transcript (English), Day 1, 2 April 2013, 223:9-223:21.

[386] Statement of Defense, ¶¶251-252; Compass Lexecon Report, ¶¶39-40. The Respondent explains that the mistake in this case does not necessarily benefit Bolivia. See Transcript (English), Day 1, 2 April 2013, 223:22-224:3.

[387] Statement of Defense, ¶¶253-254; Econ One Report, ¶¶44-45. See Transcript (English), Day 1, 2 April 2013, 224:5-224:24.

EGSA through until 2038. Therefore, the result obtained is higher than its real FMV. In addition to the above, the age of EGSA's power generation infrastructure should be taken into account, given that in May 2010, six out of the 21 units had been in operation for more than 28 and 30 years. So, it is unrealistic to expect that such old units would operate normally for another 28 years (until 2038). Consequently, Compass Lexecon should have included an estimated sum of USD 2.5 million per unit as necessary work to extend the service life of each of those units, which would amount to a total of USD 17.5 million.[388]

295. Third, the discount rate. Compass Lexecon calculates WACC at 10.63% as at the valuation date, and uses this value as the discount rate. In Respondent's opinion, this rate is insufficient, and any economist, or legal valuation expert would see that.[389]

296. Econ One concludes that the rate that should be used is 19.85%,[390] *inter alia*, on the following grounds: (a) it is similar to the rate used by Claimants and EGSA when they presented the combined cycle project before the United Nations to obtain funding;[391] (b) the rate calculated by Econ One is consistent with the rate used by other companies in Bolivia, including the one managed by Mr Earl for power generation projects;[392] (c) Econ One's discount rate has been calculated in accordance with internationally accepted methodology, and the Claimants' criticism of the inclusion of the multiplier of sovereign risk premium and the size premium is unfounded;[393] and (d) contrary to the Claimants' allegations[394] Econ One's discount rate is reasonable according to arbitral case law and the recommendations of Professor Damodaran.[395]

---

388 Statement of Defense, ¶¶255-261; First Witness Statement of Paz, ¶¶134-136; Econ One Report, ¶48. See Transcript (English), Day 1, 2 April 2013, 225:4-226:7.

389 Statement of Defense, ¶¶262-269; Econ One Report, ¶51. See *SEDCO, Inc. v. National Iranian Oil Company and the Islamic Republic of Iran* (Iran-US Claims Tribunal), Award No. 309-129-3, 2 July 1987 (Exhibit **RL-91**); *Himpurna California Energy Ltd. v. PT (Persero) Perusahaan Listruik Negara*, Award, 4 May 1999 (Paulsson, Fina and Setiawan) (Exhibit **RL-92**).

390 Statement of Defense, ¶¶270-278; Econ One Report, ¶¶52-84.

391 See Transcript (English), Day 1, 2 April 2013, 232:2-232:4, 233:10-233:17.

392 See Transcript (English), Day 1, 2 April 2013, 232:4-232:9, 234:9-234:12, 235:5-235:15.

393 See Transcript (English), Day 1, 2 April 2013, 227:16-231:18; Transcript (English), Day 6, 9 April 2013, 1459:15-1468:19.

394 Rejoinder on the Merits, ¶¶210-233.

395 See *Himpurna California Energy Ltd. v. PT (Persero) Perusahaan Listruik Negara*, Award, 4 May 1999 (Paulsson, Fina and Setiawan) (Exhibit **RL-92**); *Patuha Power Ltd. v. PT (Persero) Perusahaan Listruik Negara*, Award, 4 May 1999 (Exhibit **RL-137**); *Mobil Cerro Negro, Ltd. v. Petróleos de Venezuela, S.A. and PDVSA Cerro Negro, S.A.* (ICC Case No. 15416/JRF/CA), Award, 23 December 2011 (Exhibit **RL-138**); *Joseph Charles Lemire v. Ukraine* (ICSID Case No. ARB/06/18), Award, 28 March 2011 (Fernández-Armesto, Paulsson and Voss) (Exhibit **CL-70**); *Railroad Development*

297. Lastly, the interest rate: The Respondent considers that the use of WACC as the interest rate applied to the amount of compensation owed for the expropriation is not in conformity with the standard provided for in the Treaties.[396] First, WACC is not a "commercial interest rate", which is the criterion followed by the Treaties to determine the type of interest. Moreover, it incorporates various risk premiums that compensate the risk inherent in the future cash flows of EGSA, until 2038, which discount determines its market value. To the extent that the expropriation of the Claimants' participation in EGSA eliminated such risks, they should not now be compensated for risks that they have no longer faced since May 2010. The Respondent considers that a commercial interest rate should be, at the most, equal to LIBOR + 2%, and that the Tribunal should apply a simple interest rate, rather than a compound rate, pursuant to the case law it cites and in conformity with Bolivian law.[397] The fact that there are arbitral precedents that support the application of compound rates does not mean that this must necessarily be applied. A compound interest rate need not be applied if it is found to be inappropriate under the circumstances, as in the instant case.[398]

298. According to the above, the Respondent considers that, once the mistakes made by Compass Lexecon in its report are corrected, the FMV of the shareholding claimed by the Claimants in this arbitration is nil.[399] Therefore, Bolivia is not obligated to compensate the Claimants.

B. CLAIM FOR BREACH OF THE STANDARDS PROVIDED FOR IN THE TREATIES

299. The Claimants consider that the two following measures prior to 1 May 2010 have led to the reduction of their investment: (i) the amendment to the regulatory framework in terms of the spot price; and (ii) the amendment concerning the PBP. Both measures have breached the Treaties and, thus, compensation should be paid.[400]

Corporation (RDC) v. Guatemala (ICSID Case No. ARB/07/23), Award, 29 June 2012 (Sureda, Eizenstat and Crawford) (Exhibit **RL-139**).

[396] Statement of Defense, ¶280.

[397] Statement of Defense, ¶¶288-290. See *Desert Line Projects LLC v. Republic of Yemen* (ICSID Case No. ARB/05/17), Award, 6 February 2008 (Tercier, Paulsson, El-Kosheri) (Exhibit **RL-140**); *Autopista Concesionada de Venezuela, C.A. ("Aucoven") v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/00/5), Award, 23 September 2003 (Kauffman-Kohler, Böckstiegel and Cremades) (Exhibit **CL-29**).

[398] Rejoinder on the Merits, ¶¶254-261.

[399] Statement of Defense, ¶278; Rejoinder on the Merits, Section 2.5; Econ One Report, ¶¶87-88.

[400] Statement of Claim, ¶260.

1. Fair and Equitable Treatment Standard

The Claimants' Arguments

300. According to the Claimants, the fair and equitable treatment standard is recognized as a flexible concept, affording protection when State action is considered unfair.[401] The investor is entitled to demand justice in its relations with the host State. Furthermore, according to the case law invoked by the Claimants, both bad faith and malicious intent are not required for a breach of the fair and equitable treatment standard to arise, which coincides with the goals of the Treaties: to promote and protect the investments, the Tribunal being responsible for having regard to all relevant circumstances.[402]

301. Thus, the Claimants hold that such standard requires that investors be accorded a stable and foreseeable investment environment, in accordance with the case law the Claimants invoke.[403] In this regard, the tribunal in *CME v. Czech Republic*[404] found that regulatory and legislative amendments adopted by the respondent had wrongfully damaged CME's investment; the tribunal in *Azurix v. Argentina*[405] as well as the tribunal in *Siemens v. Argentina*[406] affirmed that a chief element of the breach of the fair and equitable treatment standard is the frustration of the legitimate expectations held by the investor at the time the

[401] Statement of Claim, ¶¶174-175. See, *inter alia*, *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt* (ICSID Case No. ARB/04/13), Award, 6 November 2008 (Kaufmann-Kohler, Mayer and Stern) (Exhibit **CL-56**); P. Muchlinski, MULTINATIONAL ENTERPRISES AND THE LAW (Blackwell, Oxford: 1999) (Exhibit **CL-18**); R. Dolzer, "Fair and Equitable Treatment: A Key Standard in Investment Treaties" (2005) 39 The International Lawyer 87 (Exhibit **CL-17**).

[402] Statement of Claim, ¶¶180-183. See *Azurix Corp v. Argentine Republic* (ICSID Case No. ARB/01/12), Award, 14 July 2006 (Sureda, Lalonde and Martins) (Exhibit **CL-37**); *MTD Equity Sdn. Bhd and MTD Chile S.A. v. Republic of Chile* (ICSID Case No. ARB/01/7), Award, 25 May 2004 (Sureda, Lalonde and Oreamuno Blanco) (Exhibit **CL-30**); *Saluka Investments BV (The Netherlands) v. Czech Republic* (UNCITRAL – PCA Case), Partial Award, 17 March 2006 (Watts, Fortier and Behrens) (Exhibit **CL-36**); *PSEG Global Inc. and Konya Ilgin Elektrik Uretim ve Ticaret Limited Sirketi v. Republic of Turkey* (ICSID Case No. ARB/02/5), Award, 19 January 2007 (Orrego Vicuña, Fortier and Kaufmann-Kohler) (Exhibit **CL-40**). See Transcript (English), Day 1, 2 April 2013, 78:10-78:20.

[403] Statement of Claim, ¶184. See *Bayindir Insaat Turizm Ticaret Ve Sayani A.S. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/03/29), Award, 27 August 2009 (Kaufmann-Kohler, Berman, Böckstiegel) (Exhibit **CL-63**, **CL-170**); *Joseph Charles Lemire v. Ukraine* (ICSID Case No. ARB/06/18), Award, 28 March 2011 (Fernández-Armesto, Paulsson and Voss) (Exhibit **CL-70**); *Técnicas Medioambientales TECMED S.A. v. United Mexican States* (ICSID Case No. ARB (AF) 00/2/), Award, 29 May 2003 (Grigera Naón, Fernández Rozas and Bernal Verea) (Exhibit **CL-28**). See Transcript (English), Day 1, 2 April 2013, 78:21-79:6.

[404] See *CME Czech Republic BV v. Czech Republic* (UNCITRAL), Partial Award, 13 September 2001 (Kühn, Schewebel and Hándl) (Exhibit **RL-33**, **CL-74**).

[405] See *Azurix Corp v. Argentine Republic* (ICSID Case No. ARB/01/12), Award, 14 July 2006 (Sureda, Lalonde and Martins) (Exhibit **CL-37**).

[406] See *Siemens A.G. v. Argentine Republic* (ICSID Case No. ARB/05/3), Award, 6 February 2007 (Sureda, Brower, Janeiro) (Exhibit **CL-41**).

investment is made. This standard is breached when fundamental conditions relied upon by investors at the time of making an investment are altered.[407]

302. The Claimants invested in Bolivia in reliance upon a series of fundamental principles that were paramount to the economic feasibility of the investment, and which were enshrined in the regulatory framework governing spot prices at that time. Nonetheless, these fundamental principles were modified in 2008, undermining the stability and foreseeability of the legal framework, and thus frustrating the legitimate expectations of the Claimants. The Claimants explain that, before 2008, all thermal units could be selected as marginal units. However, Resolution SSDE No. 283 excluded liquid fuel units as potential marginal units. This change meant that spot prices were artificially reduced when these turbines were dispatched, and the most efficient companies (such as EGSA) lost a considerable part of their profit margin.[408]

303. Moreover, although the existence of a stabilization commitment is not necessary a precondition for finding a breach of this standard, the Claimants allege that Article 5 of the Dignity Tariff Agreement is a clear indication of the commitment by Bolivia not to alter the spot price regime without first consulting stakeholders and ensuring sustainable income levels. In any case, investors are entitled to fair and equitable treatment throughout the life of the investment in this case, from the year 2006 onwards. Hence, the Claimants could in fact have a legitimate expectation based on such provision. Furthermore, Claimants did not show acceptance when signing the 2010 Dignity Tariff agreement; on the contrary, EGSA refused to execute the agreement despite the threats made by Government officials. Finally, EGSA gave in and executed the agreement in an attempt to avoid being nationalised.[409]

304. In addition, it is irrelevant whether the regulatory modification of the spot price was reasonable and justified. When a protected investor has based its actions on a regulatory framework, the alteration of the rules need not be arbitrary or unreasonable in order to be unfair.[410] In any event, Compass Lexecon has demonstrated that the decision to exclude liquid fuel units from the calculation of the spot price does not create a more efficient market, but rather the opposite. In addition, the Claimants consider that regulatory

---

[407] Reply on the Merits, ¶¶124-125. See *CMS Gas Transmission Company v. Argentine Republic* (ICSID Case No. ARB/01/8), Award, 12 May 2005 (Orrego Vicuña, Lalonde and Rezek) (Exhibit **CL-35**); *Total S.A. v. Argentine Republic* (ICSID Case No. ARB/04/1), Decision on Responsibility, 27 December 2010 (Sacerdoti, Alvarez and Marcano) (Exhibit **CL-69**). See Transcript (English), Day 1, 2 April 2013, 81:10-81:20.

[408] Statement of Claim, ¶¶189-191; Claimants' Post-Hearing Brief, ¶¶107, and 109.

[409] Reply on the Merits, ¶¶128-130. See Transcript (English), Day 1, 2 April 2013, 68:7-70:4, 81:22-82:8.

[410] See *National Grid PLC v. Argentine Republic* (UNCITRAL), Award, 3 November 2008 (Garro, Kessler and Sureda) (Exhibit **CL-55**).

amendments that reduced the value of a company that the Government was seeking to acquire was convenient for the latter, but barely "rational" from a political perspective.[411]

The Respondent's Arguments

305. According to Bolivia, the Claimants interpret this standard too broadly. The object of the protection afforded by such standard is the legitimate expectations of the foreign investor, but with a limited scope. Thus, in the absence of a prior commitment by the State, the investor cannot hold a legitimate expectation that the State will not exercise its power to modify the legal framework applicable to the investment and no violation of the standard arises.[412]

306. The absence of such commitment is evident in the instant case, since, in the Respondent's opinion and in accordance with the international case law it has invoked: (i) policy statements create no legitimate expectation whatsoever; (ii) general statements included in a treaty or law, which by nature may evolve, cannot be regarded as commitments undertaken vis-à-vis the investor; and (iii) a commitment may be specific in nature if "*its very purpose was to offer the investor an actual stability guarantee*"[413] [Tribunal's Translation]. Bolivia considers that the Claimants have failed to show the existence of such commitment because such commitment does not exist. What is more, in the Respondent's view, the laws, licenses and agreements between the Parties confirm the absence thereof.[414] Moreover, it is for the Claimants to demonstrate why excluding diesel turbines from the calculation of the spot price is a measure that breaches of the fair and equitable treatment standard as set forth in the Treaties.

307. The Respondent argues that the alleged commitment executed in 2006 to which the Claimants refer cannot have led the Claimants to invest in Bolivia in 1995 and 2006. It is absurd to suggest that, had the above clause never existed, the Claimants would not have

---

[411] Reply on the Merits, ¶¶131-133.

[412] Statement of Defense, ¶¶348-350, 353-365, and 395-400. Rejoinder on the Merits, ¶¶300-312. See, *inter alia, Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania* (ICSID Case No. ARB/05/22), Award, 24 July 2008 (Born, Landau and Hanotiau) (Exhibit **CL-51**); *Ulysseas Inc. v. Ecuador* (UNCITRAL – PCA Case No.2009-19), Award, 12 June 2012 (Bernardini, Pryles and Stern) (Exhibit **RL-94**); *Parkerings-Compagniet AS v. Republic of Lithuania* (ICSID Case No. ARB/05/8), Award, 11 September 2007 (Lévy, Lew and Lalonde) (Exhibit **RL-13**); *El paso Energy International Company v. Argentine Republic* (ICSID Case No. ARB/03/15), Award, 31 October 2011 (Caflisch, Bernardini and Stern) (Exhibit **RL-96**).

[413] Statement of Defense, ¶366. See *Continental Casualty Company v. Argentina* (ICSID Case No. ARB/03/9), Award, 5 September 2008 (Griffith, Söderlund and Ajibola) (Exhibit **CL-54**); *El Paso Energy International Company v. Argentine Republic* (ICSID Case No. ARB/03/15), Award, 31 October 2011 (Caflisch, Bernardini and Stern) (Exhibit **RL-96**); *White Industries Australia Limited v. Republic of India* (UNCITRAL), Award, 30 November 2011 (Brower, Lau SC and Rowley) (Exhibit **CL-73**).

[414] Statement of Defense, ¶¶369-392. See Transcript (English), Day 1, 2 April 2013, 252:4-252:10.

contributed capital or other assets (which the Claimants call an "investment") to EGSA after March 2006, or that all statutory amendments must always be favourable to the investor. In any case, the guarantees offered by a State in its regulatory framework can only play a persuasive or dissuasive role in the investor's decision whether or not to invest in a country. Furthermore, the Respondent denies that the Claimants were unwilling to sign the 2010 Dignity Tariff Agreement or that they did so against their will. Seeing as a total of 19 companies from the electricity sector executed said agreement, it would be impossible to explain how Bolivia could have forced all of them to do so.[415]

308. On the other hand, in order to find a breach of the fair and equitable treatment standard under the Treaties and international law, the Claimants must show that Bolivia adopted drastic, unreasonable, unjustified or discriminatory measures.[416] Nevertheless, the Claimants mention no such characteristics. In addition, Respondent believes that asserting (as the Claimants do) that a reasonable and justifiable modification of the "rules of the game" [Tribunal's Translation] by the State is an unfair measure contrary to the Treaties is a ridiculous position from a legal standpoint. The Tribunal may not replace the State in its regulatory task and determine whether or not such measure complied with the Electricity Law and the efficiency principle. Besides, Econ One demonstrated that such measure had promoted efficiency and that such efficiency had not been curtailed.[417] Nor is it true that Operating Rule No. 3/2008 was aimed at reducing EGSA's value; such Rule is still in force and continues to govern EGSA's present operations. If the purpose of such Rule were that stated by the Claimants, it would have already been repealed by Bolivia.[418]

2. Full Protection and Security Standard

The Claimants' Arguments

309. According to the Claimants, the full protection and security standard requires exercising reasonable care and actively protecting the Claimants' investments, that is to say, it is an "*objective*" standard of "*vigilance*" which is violated by the "*mere lack or want of*

[415] Rejoinder on the Merits, ¶¶315-324. See Letter from EGSA to the Minister of Hydrocarbons and Energy of 7 April 2010 (Exhibit **R-149**) and Agreement entered into by and between the Minister of Hydrocarbons and Energy and the Companies from the Electricity Sector – "Dignity Tariff" Strategic Alliance Agreement dated 11 March 2010, Section 2, Article 2.3 (Exhibit **R-89**). See Transcript (English), Day 1, 2 April 2013, 253:4-253:16.

[416] Statement of Defense, ¶¶415-419. See, *inter alia*, *Waste Management Inc. v. United Mexican States* (No. 2) (ICSID Case No. ARB(AF)/00/3), Award, 30 April 2004 (Crawford, Civiletti and Magallón Gómez) (Exhibit **RL-99**); *Thunderbird v. United Mexican States* (UNCITRAL), Award, 26 January 2006 (van den Berg, Ariosa and Wälde) (Exhibit **RL-100**).

[417] Rejoinder on the Merits, ¶325; Econ One Second Report, ¶¶222-228. See Transcript (English), Day 1, 2 April 2013, 253:17-255:5.

[418] Rejoinder on the Merits, ¶¶332-333.

diligence".[419] Likewise, it is a standard requiring the active conduct of the host State in taking "*all measure of precaution to protect the investments*." Moreover, the Claimants believe that the withdrawal by the host State of the legal protection and security previously granted to an investment constitutes a violation of such standard, and that this has been recognized in international case law.[420]

310. Therefore, in the Claimants' view, such standard includes Bolivia's duty to actively protect the investments that the Claimants had made, while applying the legal, regulatory and contractual framework that had been established so as to ensure the viability and legal and economic protection of the Claimants' investments, without limiting such protection to mere physical security.[421] However, the Respondent did the exact opposite, altering the regulatory framework, in disregard of the full protection and security standard provided for in the Treaties. The reasonableness or justification of the modification is irrelevant and the modification was in any event not based on rational policy motives.[422]

The Respondent's Arguments

311. In the Respondent's opinion, a modification of the regulatory framework may not give rise to a violation of the full protection and security standard even according to the case law cited by the Claimants themselves, especially as it was a change introduced in accordance with the regulatory framework applicable to the investment. It was a reasonable and justified measure.[423] Hence, Bolivia considers that the Claimants' interpretation of the case law simply equates the standard to the fair and equitable treatment standard, such that, if the Tribunal finds that Bolivia did not breach the fair and equitable treatment standard, it also could not have violated the full protection and security standard.[424] The Respondent highlights that the above-cited cases constitute a "*minority*" position that has been criticized by other case law, which holds that the full protection and security standard is intended to

---

[419] Statement of Claim, ¶197.

[420] Statement of Claim, ¶¶199-200; *CME Czech Republic BV v. Czech Republic* (UNCITRAL), Partial Award, 13 September 2001 (Kühn, Schwebel and Hándl) (Exhibit **RL-33**, **CL-74**); *Azurix Corp. v. Argentine Republic* (ICSID Case No. ARB/01/12), Award, 14 July 2006 (Sureda, Lalonde and Martins) (Exhibit **CL-37**); *Asian Agricultural Products Ltd v. Sri Lanka* (ICSID Case No. ARB/87/3), Final Award, 27 June 1990 (El-Kosheri, Goldman and Asante) (Exhibit **CL-10**). See Transcript (English), Day 1, 2 April 2013, 82:11-82:16.

[421] Reply on the Merits, ¶¶136-138. See *Biwater Gauff (Tanzania) Ltd. v. Unified Republic of Tanzania* (ICSID Case No. ARB/05/22), Award, 24 July 2008 (Born, Landau and Hanotiau) (Exhibit **CL-51**); *National Grid PLC v. Argentine Republic* (UNCITRAL), Award, 3 November 2008 (Garro, Kessler and Sureda) (Exhibit **CL-55**).

[422] Statement of Claim, ¶¶201-205; Reply on the Merits, ¶¶140-141.

[423] Statement of Defense, ¶¶436, and 439-441. See *Azurix Corp. v. Argentine Republic* (ICSID Case No. ARB/01/12), Award, 14 July 2006 (Sureda, Lalonde and Martins) (Exhibit **CL-37**); *CME Czech Republic BV v. Czech Republic* (UNCITRAL), Partial Award, 13 September 2001 (Kühn, Schwebel and Hándl) (Exhibit **RL-33**, **CL-74**).

[424] Statement of Defense, ¶¶427-428.

ensure the physical protection and integrity of the investor and its property within the territory of the host State, entailing a duty of due diligence rather than an obligation of result.[425]

312. The Respondent insists that it never agreed not to alter the regulatory framework. In fact, the opposite can be inferred. In any event, such modification had exerted a significant impact nor curtailed the investment made by the Claimants. Therefore, such statutory amendment cannot be deemed to have violated the full protection and security standard provided for in the Treaties.[426]

3. Adoption of Unreasonable Measures

The Claimants' Arguments

313. The Claimants maintain that, as with the two standards described above, the standard of reasonableness of the conduct of the host State also constitutes a flexible and broad standard to which a similar analysis applies as above. Hence, the Claimants state that Respondent cannot be said to have acted reasonably when it altered a key aspect of the regulatory framework such as the calculation of spot prices. This is not a behaviour that the parties to a treaty could have anticipated or expected in light of the provisions and goals of such instruments to promote and protect investments.[427]

314. In addition, the Claimants argue that the standard applicable to the provisions of both Treaties is identical, though their drafting may differ: an unreasonable measure is illegal regardless of whether it is also discriminatory. Despite the lack of an express reference to the term "arbitrary", the terms "arbitrary" and "unreasonable" are used interchangeably in investment treaties, and arbitral tribunals have drawn no distinction between them. Lastly, on the basis of all the evidence furnished, such measure was neither reasonable nor justified.[428]

***

[425] Statement of Defense, ¶¶429-435. See *El Paso Energy International Company v. Argentine Republic* (ICSID Case No. ARB/03/15), Award, 31 October 2011 (Caflisch, Bernardini and Stern) (Exhibit **RL-96**); *Asian Agricultural Products Ltd v. Sri Lanka* (ICSID Case No. ARB/87/3), Final Award, 27 June 1990 (El-Kosheri, Goldman and Asante) (Exhibit **CL-10**); *Saluka Investments BV (The Netherlands) v. Czech Republic* (UNCITRAL – PCA Case), Partial Award, 17 March 2006 (Watts, Fortier and Behrens) (Exhibit **CL-36**).

[426] Statement of Defense, ¶¶442-443.

[427] Statement of Claim, ¶¶208-209.

[428] Reply on the Merits, ¶¶143-146. See *Saluka Investments BV (Netherlands) v. Czech Republic* (UNCITRAL – PCA Case), Partial Award, 17 March 2006 (Watts, Fortier and Behrens) (Exhibit **CL-36**); *Biwater Gauff (Tanzania) Ltd. v. Unified Republic of Tanzania* (ICSID Case No. ARB/05/22), Award, 24 July 2008 (Born, Landau and Hanotiau) (Exhibit **CL-51**).

315. In view of all the allegations made as to the spot price measure adopted in violation of the standards presented so far, the Claimants assert that a significant portion of EGSA's profit margin was eliminated, since such measure "*affected* […] *revenues and resulted in financially assessable damage*" by excluding liquid fuel units from the calculation.[429] In fact, the spot price was EGSA's primary source of income. The Claimants also affirm that EGSA was obliged, given the high spot prices, to deposit a proportion of its revenues in the stabilization fund. Such revenues were recorded as accounts receivable that were accessible (with interest) when spot prices decreased. In any case, such revenues continued to belong to EGSA.[430]

316. The damages calculated as of 29 February 2012, based on data published by the CNDC, for the "actual scenario" (EGSA's actual revenues as a result of the spot price modification) and the calculations made by MEC for the so-called "but-for scenario" (the revenues that EGSA would have obtained had the foregoing modification not been adopted), using the average WACC of 10.63% in relation to the Claimants' stake in EGSA (50.001%), amount to USD 5.1 million. According to the Claimants, the calculation made by Econ One is incorrect for the following reasons: (a) the CNDC study produces a much less accurate estimate than that carried out by MEC, because the CNDC study did not use actual dispatch conditions from September 2008 to May 2010, but rather simulated conditions according to mid-2008 estimates; (b) Econ One's failure to use a "but-for" dispatch simulation to calculate post-nationalisation spot-price revenues has the effect that demand growth and capacity additions are ignored in its calculations.[431]

The Respondent's Arguments

317. The Respondent believes that the articles relied upon should be interpreted pursuant to Article 31 of the VCLT. It then goes on to state what, in its opinion, should be the correct interpretation of such articles in accordance with the case law cited, concluding that, in order to find a breach of this standard, the measure disputed must be both unreasonable and

---

[429] Statement of Claim, ¶261; Claimants' Post-Hearing Brief, ¶109.

[430] Reply on the Merits, ¶204; Compass Lexecon Rebuttal Report, ¶¶135-136, and 125.

[431] Statement of Claim, ¶¶263-265; Reply on the Merits, ¶¶206-207; Compass Lexecon Report, ¶¶121, 118-119, and 124-125; Corrections made to Compass Lexecon Rebuttal Report, ¶175. See Transcript (English), Day 1, 2 April 2013, 128:2-129:11; Transcript (English), Day 6, 9 April 2013, 1406:2-1407:9.

discriminatory (in the terms of the US-Bolivia BIT) or both arbitrary and discriminatory (in the terms of the UK-Bolivia BIT).[432]

318. However, the Claimants have not alleged that the measure is either discriminatory or arbitrary, but only unreasonable. Consequently, in the absence of such categories, the standard of non-impairment of the investment cannot be deemed to have been breached.[433] In fact, the Claimants argued that Operating Rule No. 3/2008 had been unreasonable from an economic standpoint, but failed to describe it as arbitrary, requesting that the Tribunal consider both terms (unreasonable and arbitrary) as interchangeable and, thus, that the meaning of the term "arbitrary" contained in the UK-Bolivia BIT be supplanted with a different notion. However, the term "arbitrary" is not a synonym of "unreasonable".

***

319. By virtue of the foregoing analysis of the relevant standards, the Respondent considers that the Claimants have failed to demonstrate that the spot price modification has had any effect on their investment. On the contrary, as far as the Respondent is concerned, it provided sufficient evidence that such measure was not unreasonable and that the alleged economic impact thereof upon the Claimants is inaccurate and, in any case, excessive, since, according to Econ One, EGSA's losses amounted to USD 2.2 million.[434] Nor have the Claimants taken into consideration the impact of the tariff stabilization in effect in Bolivia since 2003. In Econ One's opinion, this circumstance renders the scenario proposed by the Claimants impossible.[435]

320. The Respondent points out that the funds mentioned by the Claimants are deposited indefinitely and only recovered in the event of the reduction of spot prices, as a consequence of which they do not have the same value as if they were EGSA's liquid assets. Even if the stabilization funds were EGSA's accounts receivable, the damage would be prospective and

---

[432] Statement of Defense, ¶¶449-451. See *AIG Capital Partners, Inc. and CJSC Tema Real Estate Company v. Republic of Kazakhstan* (ICSID Case No. ARB/01/6), Award, 7 October 2003 (Nariman, Bernardini and Vukmir) (Exhibit **RL-103**); Ronald S. *Lauder v. Czech Republic* (UNCITRAL), Award, 3 September 2001 (Briner, Klein and Cutler) (Exhibit **CL-23**).

[433] Statement of Defense, ¶¶445-448, 450-452, and 455.

[434] Statement of Defense, ¶¶420-423, and 473-483; Econ One Report, ¶¶121, and 124. See Compass Lexecon Report, ¶121, and 123; Econ One Report, ¶¶115-119. See Transcript (English), Day 1, 2 April 2013, 253:17-255:5.

[435] Statement of Defense, ¶¶460-462, 463-466, and 468-469; Rejoinder on the Merits, ¶¶357-367. See, *inter alia*, *Chorzów Factory* (merits), Judgment, 13 September 1928, PCIJ Ser A No. 17, 1928 (Exhibit **CL-2**); *Nykomb Synergetics Tech. Holding A.B. v. Republic of Latvia* (SCC Case), Award, 16 December 2003 (Haug, Schütze and Gernandt) (Exhibit **RL-106**); *S.D. Msyers, Inc. v. Government of Canada* (UNCITRAL), Partial Award, 13 November 2000 (Schwartz, Rae and Hunter) (Exhibit **RL-107**). See Transcript (English), Day 1, 2 April 2013, 255:18-256:7; Transcript (English), Day 6, 9 April 2013, 1447:19-1447:22.

subject to the relevant discount. Moreover, the accounts of EGSA and other electricity generators in the stabilization fund have been historically increasing and are expected to continue rising in the future.[436]

4. Failure to Provide Effective Means to the Claimants

The Claimants' Arguments

321. As the Claimants explain, and in accordance with the case law presented, the effective means clause requires that the host State's legal and judicial system work effectively. Unjustified delay by the host State's courts dealing with an investor's claim may amount to a breach of such standard. The Claimants draw attention to the fact that Article II(4) of the US-Bolivia BIT makes no reference whatsoever to denial of justice. Nor does the provision refer to customary international law or link "effective means" with denial of justice. Therefore, the standard applicable in the instant case is not one that prohibits particularly egregious conduct only. The applicable standard is nothing other than what the Treaty itself establishes: Bolivia must provide effective means of asserting claims and enforcing rights. Furthermore, the Claimants argue that this standard can be imported into the UK-Bolivia BIT by way of the MFN clause without giving rise to any abuse, since, as confirmed by case law, this clause is specially designed to harmonize all the standards of investment protection.[437]

322. In light of the foregoing, the Claimants believe that the Bolivian judicial system has not worked effectively, since their claims in connection with the modification of the PBP are still pending, in breach of the effective means standard, and thus, in violation of the Treaties.[438] This conclusion is reached regardless of the comparison the Bolivian judicial system with other legal systems in terms of delays, as it is irrelevant whether Bolivian courts are equally slow for everyone or whether other countries also lack effective means. The obligation to

[436] Rejoinder on the Merits, ¶374.

[437] Statement of Claim, ¶¶210-215; Reply on the Merits, ¶¶150, and 152; Claimants' Post-Hearing Brief, ¶¶117-119. See *White Industries Australias Limited v. Republic of India* (UNCITRAL), Final Award, 30 November 2011 (Brower, Lau and Rowley) (Exhibit **CL-73**); *EDF International S.A., SAUR International S.A. and Leon Participaciones Argentinas S.A. v. Argentine Republic* (ICSID Case No. ARB/03/23), Award, 11 June 2012 (Kaufmann-Kohler, Remón and Park) (Exhibit **CL-141**); *Bayindir Insaat Turizm Ticaret ve Sanayi A.S. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/03/29), Award, 27 August 2009 (Kaufmann-Kohler, Berman and Böckstiegel) (Exhibit **CL-63**, **CL-170**); *MTD Equity Sdn. Bhd and MTD Chile S.A. v. Republic of Chile* (ICSID Case No. ARB/01/7), Award, 25 May 2004 (Sureda, Lalonde, Oreamuno Blanco) (Exhibit **CL-30**). See Transcript (English), Day 1, 2 April 2013, 85:24-88:7.

[438] Statement of Claim, ¶¶216-220; Claimants' Post-Hearing Brief, ¶¶120, and 128. See Transcript (English), Day 1, 2 April 2013, 88:18-89:10, 89:20-90:15, 90:16-91:9; Transcript (English), Day 6, 9 April 2013, 1373:9-1374:20.

ensure effective means is objective. In any event, the delays that the Claimants have faced have been for the most part caused by institutional defects.[439]

323. Likewise, the Claimants argue that it is up to Respondent to demonstrate that the situation would have been mitigated if certain domestic remedies had been used. Nonetheless, provisional measures are only available in civil proceedings, and not in contentious-administrative cases. In any event, the Supreme Court was dormant, and there is consequently no basis to conclude that such application could have given rise to interim relief that would have protected EGSA. Nor would such measures have been effective, given that the nationalisation nullified the Claimants' interest in May 2010. Lastly, the fact that the Claimants' litigation before the Supreme Court could have been unsuccessful should not affect the Tribunal's consideration as to whether or not Bolivia complied with the Treaties. In any event, the causal link has been duly proven in accordance with the balance of probabilities standard, and it can be concluded that EGSA's appeal was more likely than not to have succeeded if the Bolivian court system had worked properly.[440]

***

324. With regard to the compensation due on account of the PBP measure, Compass Lexecon once again draws a distinction between an "actual scenario" (EGSA's actual revenues as a result of the modification) and a "but-for scenario" (the revenues EGSA would have obtained had the PBP never been modified). In addition, the period from May 2007 to 2038 was divided between the pre- and post-nationalisation decree periods for the sake of clarity, as different data are used for these two periods (CNDC's information for the pre-nationalisation period and MEC studies for the post-nationalisation period). Thus, by correcting the mistakes made by Econ One in relation to the application of a very high discount rate as well as other technical errors, the Claimants' expert concluded that the compensation due amounts to a total of USD 38 million as of 29 February 2012.[441]

The Respondent's Arguments

325. From Bolivia's viewpoint, this is the only claim brought by the Claimants with respect to the PBP, an obligation enshrined in the US-Bolivia BIT only. Accordingly, and together with the

---

439 Reply on the Merits, ¶¶153-154; Claimants' Post-Hearing Brief, ¶122. See Transcript (English), Day 1, 2 April 2013, 90:16-92:1.

440 Reply on the Merits, ¶¶156-157. See Transcript (English), Day 6, 9 April 2013, 1374:21-1376:2.

441 Statement of Claim, ¶¶268-270; Compass Lexecon Report, ¶¶128, 132, and 139; Reply on the Merits, ¶¶210-211; Compass Lexecon Rebuttal Report, ¶¶154-157, 160, 175, and footnote 199. See Transcript (English), Day 1, 2 April 2013, 129:12-130:20.

arguments already put forward on its jurisdictional objections, the Respondent points out that it was EGSA that lodged the appeals and that it is not a party to this arbitration, as a consequence of which the Claimants' reliance on a legal action to which they are not a party only confirms that the Claimants have already chosen domestic courts as the appropriate forum to hear the PBP dispute. As a result, in order for the Tribunal to reject the application of the fork-in-the-road clause, it need to distinguish between the Claimants and EGSA, such that the Tribunal should also carefully consider whether the Claimants have standing to bring a claim on account of a court delay affecting a proceeding in which they are not a party.[442]

326. Secondly, the Respondent asserts that the effective means standard may not be imported into the United-Kingdom-Bolivia BIT by way of the MFN clause, as this would also require the relevant negotiation process to be incorporated and applied to investors from the United Kingdom. Therefore, the effect of the negotiation prerequisite cannot be escaped merely by resorting to the MFN clause, especially where the purpose of such clause is to avert discriminatory treatment by reason of investors' nationality.[443]

327. Should the Tribunal not accept the above argument, the Respondent argues that the Claimants err when establishing the relevant time periods, seeing as they ceased to hold an interest in EGSA's operations on 1 May 2010, which means that as of that date the alleged delay would be two years in relation to the appeal lodged against SSDE Resolution No. 40 and two years and one month with respect to that lodged against CNDE Resolution No. 209/2007.[444]

328. In addition, according to Bolivia's interpretation, for a breach of the standard to exist, the Claimants must show the following:

(a) The existence of particularly egregious conduct on the part of the Bolivian judiciary, while also taking into account that the establishment of an international wrong requires that all domestic remedies must have been previously exhausted, which has not occurred in the case at hand, given that the Claimants could have requested the provisional suspension of the measures in the contentious-administrative forum. Hence, they have themselves contributed to the delay;[445] and

[442] Statement of Defense, ¶¶491-492.

[443] Statement of Defense, ¶¶529-531. See Transcript (English), Day 1, 2 April 2013, 259:24-260:6.

[444] Statement of Defense, ¶523.

[445] Statement of Defense, ¶¶535, and 564-571. Third Witness Statement of Dr Quispe, ¶¶19, and 21. See Transcript (English), Day 1, 2 April 2013, 261:11-261:16.

(b) The undue or unjustified nature of the periods during which the claims brought before the Supreme Court were pending, taking into account the reasonable amount of time that a State court might take in order to settle the dispute.[446] In this sense, the duration of the legal proceedings before the Supreme Court does not entail a denial of effective means in accordance with the international case law invoked by both Parties.[447] These were usual periods even in comparison with other States, as the Claimants' witnesses acknowledged.[448] It is also not true that the reforms of the court system have produced delays in contentious-administrative matters, but quite the opposite. In addition, the statistics of cases admitted and adjudicated by the Supreme Court show more cases admitted than adjudicated, which explains the backlog that accrued.[449]

329. Further, there is no causal link between the duration of the legal proceedings and EGSA's alleged loss of profits. The Respondent argues that, even if the Supreme Court decided to compensate EGSA as the Claimants anticipate, such compensation would not benefit them, since they no longer hold any interest whatsoever in EGSA's operations, as they have admitted themselves. Moreover, there is no reason to predict a favourable ruling by the court, when all signs indicate otherwise. In any case, compensation is not due for speculative damages; it is not sufficient to establish the likelihood of the damage to be subject to compensation.[450] By virtue of the foregoing, Respondent maintains that the Claimants' claim fails on account of a fact that they have not disputed: the Operating Rule's consistency with Bolivian law. Therefore, this aspect not having been questioned, the Claimants cannot request that the Tribunal award compensation for hypothetical claims.[451]

---

[446] Statement of Defense, ¶¶537-538. See *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador* (ICSID Case No. ARB/04/19), Award, 18 August 2008 (Kaufmann-Kolher, Gómez Pinzón and van den Berg) (Exhibit **RL-109**); *Chevron Corporation and Texaco Petroleum Company v. Republic of Ecuador* (UNCITRAL – PCA Case No. 2007-2), Partial Award on the Merits, 30 March 2010 (Böckstiegel, Brower and van den Berg) (Exhibit **CL-66**).

[447] Statement of Defense, ¶¶545-546, and 549. See *White Industries Australia Limited v. Republic of India* (UNCITRAL), Final Award, 30 November 2011 (Brower, Lau SC and Rowley) (Exhibit **CL-73**); *Chevron Corporation and Texaco Petroleum Company v. Republic of Ecuador* (UNCITRAL – PCA Case No. 2007-2), Partial Award on the Merits, 30 March 2010 (Böckstiegel, Brower and van den Berg) (Exhibit **CL-66**).

[448] Statement of Defense, ¶¶557-560, and 562-563. See Transcript (English), Day 1, 2 April 2013, 259:24-260:23.

[449] Third Witness Statement of Quispe, ¶¶14-15. See 1992 Statistics (Exhibit **R-161**); 1994 Statistics (Exhibit R-162); 1995 Statistics (Exhibit **R-163**); 1996 Statistics (Exhibit **R-164**); 2007 Statistics (Exhibit **R-165**); 2009 Statistics (Exhibit **R-166**). See Transcript (English), Day 1, 2 April 2013, 261:1-261:4.

[450] Statement of Defense, ¶¶575-576. See, *inter alia*, *Elettronica Sicula S.p.A (ELSI)* (United States v. Italy), ICJ Reports 1989, Judgment, 20 July 1989 (Exhibit **RL-83**); *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/05/22), Award, 21 November 2007 (Cremades, Rovine and Siqueiros) (Exhibit **CL-47**); *Gami Investments Inc. v. United Mexican States* (UNCITRAL (NAFTA) Case), Final Award, 15 November 2004 (Reisman, Muró and Paulsson) (Exhibit **RL-105**). See Transcript (English), Day 1, 2 April 2013, 261:17-262:11.

[451] Statement of Defense, ¶¶577-582.

***

330. Once again, the compensation requested by the Claimants is excessive, since apart from resorting to Operating Rule No. 19/2007 in order to calculate the FMV, they also ignored the impact of the tariff stabilization in effect in Bolivia since 2003. Accordingly, the study prepared by Compass Lexecon corresponds to that conducted by Econ One as regards the effect quantified for the first period, *i.e.*, from May 2007 to April 2010. Nevertheless, they differ in relation to the second period, *i.e.*, from May 2010 onwards. According to Compass Lexecon, the Claimants should receive USD 27.9 million, whereas Econ One estimates that the Claimants should be awarded USD 12 million. Compass Lexecon presents a calculation inflated by the impact of the projections made by MEC/EdI and applies the wrong interest rate of 10.63%, while that used by Econ One is around 20%.[452]

[452] Statement of Defense, ¶¶587-596; Compass Lexecon Report, ¶¶129-130; Econ One Report, ¶¶130-131.

CHAPTER VIII – THE PARTIES' RELIEF SOUGHT ON THE MERITS

A. THE CLAIMANTS' RELIEF SOUGHT

331. The Claimants request that the Tribunal:

(a) Declare that Bolivia has breached the Treaties and international law, and in particular, that it has:

(i) expropriated the Claimants' investments without prompt, just, adequate and effective compensation, in violation of Article III of the US-Bolivia BIT, Article 5 of the UK-Bolivia BIT, and international law;

(ii) failed to accord the Claimants' investments fair and equitable treatment and full protection and security, and impaired them through unreasonable and discriminatory measures, in violation of Article II.3 of the US-Bolivia BIT and Article 2(2) of the UK-Bolivia BIT; and

(iii) failed to provide the Claimants with effective means of asserting claims and enforcing rights with respect to covered investments, in violation of Article II.4 of the US-Bolivia BIT and Article 3 of the UK-Bolivia BIT.

(b) Order Bolivia to compensate the Claimants for Bolivia's breaches of the Treaties and international law in the amount of USD 136.4 million,[453] plus interest until full payment of the award is made;

(c) Award such other relief as the Tribunal considers appropriate; and

(d) Order Bolivia to pay the costs of these arbitration proceedings, including the fees and expenses of the Tribunal, the fees and expenses of the institution selected to provide appointing and administrative services and assistance to this arbitration, the fees and expenses relating to the Claimants' legal representation, and the fees and expenses of any expert appointed by the Claimants or the Tribunal, plus interest.[454]

[453] The original amount of USD 142.3 million is recalculated by Claimants in their Reply, and produces a result of USD 136.4 million. Moreover, they request post-award interest once again. For greater clarity, see damages summary table in Reply, ¶224.

[454] Statement of Claim, ¶274; Reply on the Merits, ¶227; Claimants' Post-Hearing Brief, ¶178.

B. THE RESPONDENT'S RELIEF SOUGHT

332. In turn, the Respondent requests that the Tribunal:

(a) Declare that Bolivia's conduct has been in compliance with its obligations under the Treaties and international law;

(b) Reject each and every claim and petition made by the Claimants;

(c) Order that the Claimants reimburse Bolivia in full for the costs in which it may have incurred in order to defend its interests in the context of this arbitration, plus interest accrued at a commercial rate deemed reasonable by the Tribunal, from the date on which the State incurred such costs to the date of actual payment thereof; and

(d) Order such other measures in favour of the State as the Tribunal may deem fit.[455]

[455] Statement of Defense, ¶628; Rejoinder on the Merits, ¶428.

CHAPTER IX – DECISION ON JURISDICTION

333. The Tribunal will now proceed to examine the Respondent's objections to its jurisdiction as follows:

(a) Whether joinder or consolidation of distinct claims may be allowed in the absence of specific consent from the Respondent;

(b) Whether Rurelec is an investor and holds a protected investment;

(c) Whether Bolivia is entitled to exercise the right of denial of benefits against GAI;

(d) Whether the Tribunal has jurisdiction in respect of the alleged New Claims;

(e) Whether the alleged New Claims are domestic in nature;

(f) Whether the alleged exercise of the fork-in-the-road clause bars the New Claims; and

(g) Whether the claims regarding the *spot* price and Worthington engines are premature.

A. JOINDER OR CONSOLIDATION OF DISTINCT CLAIMS IN THE ABSENCE OF SPECIFIC CONSENT FROM THE RESPONDENT

334. The Tribunal considers that the submission by the Claimants of identical claims based on the alleged violation of two different BITs in a single arbitration proceeding is not subject to the qualified express consent of the Respondent.

335. It is undisputed that, in the BITs concluded by Bolivia with the United Kingdom and United States, the Respondent gave its consent to the arbitration of investment disputes with investors from the UK and the US. Following a widespread treaty practice, this consent was given through an open offer to submit to arbitration, expressed in Article 8 of the UK-Bolivia BIT and in Article IX of the US-Bolivia BIT. It is also undisputed that each of the Claimants duly accepted this offer of arbitration made by the Respondent in the Treaties, giving rise to the "matching of consents" indispensable for the Tribunal's jurisdiction *rationae voluntatis* over these disputes.

336. The offers of arbitration contained in the BITs were not subject to any condition or limitation in their scope that would prevent the two Claimants from submitting a single, joint arbitration case against the Respondent. Nor were they subject to any condition that

claimants in arbitration proceedings must ground their claims in just one BIT. Each of the Claimants accepted the offer of arbitration in the precise terms in which it was given by the Respondent, notably, providing consent by the Respondent that disputes over the application of the Treaties were to be settled by recourse to arbitration.

337. One cannot therefore interpret the Treaties—using the well-known rules of treaty interpretation of Article 31 of the VCLT—as if they contained some limitation of scope preventing a claimant from submitting an arbitral claim together with another claimant when both claims are based on the same alleged facts and on the same alleged breaches although brought under different BITs, provided that each claimant provides its own independent matching consent to arbitration.

338. In the Tribunal's view, the issue raised by the Respondent of whether express consent regarding the form of the present arbitration is required is also not an issue of "consolidation of proceedings". Indeed, in the instant case, the Claimants did not commence two separate arbitrations in respect of two independent arbitral claims that have subsequently been consolidated. The Claimants submitted, *ab initio* and in the same arbitration, two claims by two claimants against one respondent, regarding the same dispute and involving the same set of facts, albeit allegedly in violation of two different BITs concluded by the Respondent with the UK and the US, respectively. It is clear that the object of both claims is the same, since the allegedly unlawful action by Bolivia was also a single one, notwithstanding the fact that, in practice, the present case concerns two identical and overlapping claims by two claimants against the same respondent in the same arbitration proceeding.

339. On the other hand, in cases of consolidation of proceedings, the matching of consents with respect to each of the arbitrations has already occurred. As such, the case law and literature hold—as both Parties in this proceeding have also affirmed—that consent is required from all parties involved in order to allow the merger of the two arbitrations into one. The Tribunal considers that there is, therefore, no valid analogy to be made between this case and cases of consolidation of proceedings.

340. The Tribunal therefore considers that, even if it would have been possible for the Claimants to submit separate arbitral proceedings, nothing precludes them—given the obvious link between both Claimants and the identity of the facts alleged—from deciding to jointly submit a single arbitration case, albeit invoking different BITs.

341. The Tribunal disagrees with Respondent's interpretation of the silence of the Treaties concerning the possibility of multi-party arbitration. In the Tribunal's opinion, this is not a

case where jurisdiction is being granted without the explicit consent of the parties. On the contrary, the consent given by the Respondent is explicit and covers disputes involving investors from each of those two States. The parties to the Treaties could have limited such consent and, by extension, the jurisdiction of the Tribunal; but they did not do so. In this case, the Tribunal considers that the silence in the Treaties concerning the explicit possibility of joint arbitrations plays against the Respondent's point of view, since one cannot use silence to limit the scope of the consent given.

342. The argument that there must be a specific consent in each of the BITs to the possibility of joining different claims in the same arbitral proceeding ultimately goes too far. Were such specific consent necessary, it would be impossible to accept, as the Respondent has argued, that all prior multi-party arbitrations were only allowed to proceed because of the implicit consent provided by the respondent States through their failure to raise any jurisdictional objection in this regard.

343. The Tribunal fully agrees with the opinion expressed by the tribunal in *Ambiente Ufficio v. Argentina*,[456] holding that "*it is evident that multi-party arbitration is a generally accepted practice in ICSID arbitration, and in the arbitral practice beyond that, and that the institution of multi-party proceedings therefore does not require any consent on the part of the respondent Government beyond the general requirements of consent to arbitration*."[457]

344. With respect to the Claimants' argument that the Tribunal's discretion over the conduct of the proceedings should be exercised to avoid unnecessary delay and expense (Article 17(1) of the UNCITRAL Rules), the Tribunal finds that this is a rule governing questions of procedure and is not (necessarily) applicable to the determination of the existence or not of its jurisdiction.

345. The Tribunal, while cognisant of the differences between the present case and *Noble Energy v. Ecuador* (in which there was more than one claimant, alleging different disputes and invoking more than one cause of action—even if based on the same facts), agrees with that tribunal's statement that "[i]*n the further course of this arbitration, the parties and the Tribunal will have to distinguish each dispute under its own applicable rules, even though facts, evidence and arguments may be common to all or some of them*."[458] Hence, the

[456] *Ambiente Ufficio v. Argentine Republic*, Decision on Admissibility and Jurisdiction, 8 February 2013, ¶¶111-147.

[457] *Ambiente Ufficio v. Argentine Republic*, Decision on Admissibility and Jurisdiction, 8 February 2013, ¶141.

[458] *Noble Energy, Inc and Machalapower Cia, Ltda v. The Republic of Ecuador and Consejo Nacional de Electricidad* (ICSID Case No. ARB/05/12), Decision on Jurisidction, 5 March 2008, (Kaufmann-Kohler, Cremades and Alvarez) (Exhibit **RL-20**) ¶206.

Respondent's assertion that differences exist between both BITs is irrelevant, given that the Tribunal is prepared to analyse each Claimant's claims—which are in essence one and the same claim—in accordance with the applicable BIT invoked by each Claimant. The same rationale would also apply to any possible counter-claims brought by the Respondent. There is no fundamental incompatibility between the consents to arbitration in the two BITs that would result in one or the other consent being violated by the mere fact of the claims being heard together.

346. Thus, on the grounds that the consent to arbitration provided by the Respondent in the Treaties contains no limitation that would preclude the joint submission by two or more Claimants of identical claims under different BITs, the Tribunal finds that the Respondent has given its consent to the jurisdiction of this Tribunal to hear the claims submitted jointly by GAI and Rurelec in accordance with Article IX of the US-Bolivia BIT and Article 8 of the UK-Bolivia BIT.

347. Consequently, the Tribunal will proceed to analyse the remainder of the objections to its jurisdiction raised by the Respondent in relation to each of the Claimants and in accordance with the Treaties invoked by each of them.

B. RURELEC'S STATUS AS AN INVESTOR AND ITS OWNERSHIP OF A PROTECTED INVESTMENT

348. In regard to the Respondent's objection that Rurelec is not a protected investor under the UK-Bolivia BIT, the Tribunal considers that Rurelec has provided sufficient evidence that it has acquired GAI and has therefore made an indirect investment in Bolivia—even though it has not provided any documentary evidence to prove that the payment for that acquisition was made.

349. Evidence has been provided of the purchase of BIE on 12 December 2005 and that Rurelec therefore indirectly owns shares in EGSA.[459] High-level Bolivian entities have consistently accepted and recognized that Rurelec is the ultimate owner of these shares.

350. The Respondent cited the case of *Quiborax v. Bolivia*[460] in support of the contention that no investment exists through a shareholding if there is no payment for those shares. The Tribunal notes, however, that *Quiborax v. Bolivia* was an ICSID case where the tribunal

[459] Rejoinder on Jurisdiction, ¶¶14-18, and documents referred thereto. See Exhibit **R-61**.

[460] *Quiborax S.A. Non Metalic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia* (ICSID Case No. ARB/06/2), Decision on Jurisidction, 27 September 2012 (Kaufmann-Kohler, Lalonde and Stern) (Exhibit **RL-132**).

decided to analyse whether the "investor" had an investment under Article 25 of the Washington Convention. In fact, as regards the applicable BIT, the *Quiborax* tribunal concluded without further elaboration that "*Bolivia does not contest that the Claimants have made an 'investment' within the meaning of the BIT*".[461]

351. Furthermore, the Tribunal need not decide if the indirect acquisition of the shares of EGSA took place in 2006 or 2009 since the critical date is the date of the nationalisation, and the Tribunal is convinced that the indirect acquisition of EGSA's shares took place before the date of the nationalisation. By acquiring the shares previously owned by other entities, Rurelec also acquired and benefits from protection for investments made prior to said acquisition. Therefore, the Tribunal considers that Rurelec effectively acquired the shares of BIE through Birdsong and thereby made an indirect investment in Bolivia.

352. As regards the Respondent's argument that indirect investments are not protected under the UK-Bolivia BIT, the Tribunal notes that Article 1 contains—as the majority of BITs do—a very broad definition of "investment". Article 1 defines "investment" as "*every kind of asset which is capable of producing returns*," which would naturally include "indirect investments" through the acquisition of shares in a company. In addition, the non-exhaustive list of protected investments described in the BIT explicitly includes the example of "*shares in and stock and debentures of a company and any other form of participation in a company*". Finally, in its broadest example, Article 1(a)(iii) of the BIT provides that any "*claims to money or to any performance under contract having a financial value*" are considered to be protected investments under the BIT.

353. In the Tribunal's opinion, all of the above mentioned examples contribute to the conclusion that indirect investments were intended to be protected by the UK-Bolivia BIT. Moreover, given that the purpose of the BIT is to promote and protect foreign investment, the Tribunal considers that the BIT would require clear language in order to exclude coverage of indirect investments—language that the BIT does not contain.

354. According to the Tribunal, the fact, invoked by the Respondent, that other BITs concluded by Bolivia explicitly include indirect investments, is insufficient to support an *a contrario sensu* interpretation that only those BITs containing such an explicit reference cover indirect investments, since it is well accepted that this kind of argument is not on its own strong enough to justify a particular interpretation of a rule of law. The mere absence of an explicit

[461] *Quiborax S.A. Non Metalic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia* (ICSID Case No. ARB/06/2), Decision on Jurisidction, 27 September 2012 (Kaufmann-Kohler, Lalonde and Stern) (Exhibit **RL-132**), ¶210.

mention of the different categories of investment (direct and indirect) cannot be interpreted as narrowing the definition of investment under the BIT to only direct investment.

355. The Tribunal therefore agrees with the Claimants and concludes that terms employed in the UK-Bolivia BIT are broad enough on their own to include indirect investments, even without employing further qualifications that would only reinforce what is already clear from the text of the BIT.

356. The Tribunal has also considered the case law cited by both Parties on this issue and agrees with the decision in *Cemex v. Venezuela*,[462] whose rationale the Tribunal also finds to be applicable to the present case:

> "*The Tribunal further notes that, when the BIT mentions investments 'of' nationals of the other Contracting Party, it means that those investments must belong to such nationals in order to be covered by the Treaty. But this does not imply that they must be 'directly' owned by those nationals. Similarly, when the BIT mentions investments made 'in' the territory of a Contracting Party, all it requires is that the investment itself be situated in that territory. It does not imply that those investments must be 'directly' made in such territory.*
>
> *Thus, as recognized by several arbitral tribunals in comparable cases, the Claimants have* jus standi *in the present case. The Respondent's objection to the Tribunal jurisdiction under the BIT cannot be upheld.*"[463]

The line of comparable cases cited by the *Cemex* tribunal includes *Siemens v. Argentina*,[464] *Ioannis Kardassopoulos v. Georgia*,[465] *Tza Yap Shum v. Peru*,[466] and *Mobil v. Venezuela*.[467]

---

[462] *Cemex Caracas Investments, B.V. and Cemex Caracas II Investments B.V. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/08/15), Decision on Jurisdiction, 30 December 2010 (Guillaume, Abi-Saab and von Mehren) (Exhibit **CL-136**), ¶¶152-158.

[463] *Cemex Caracas Investments, B.V. and Cemex Caracas II Investments B.V. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/08/15), Decision on Jurisdiction, 30 December 2010 (Guillaume, Abi-Saab and von Mehren) (Exhibit **CL-136**), ¶¶157-158.

[464] *Siemens A.G. v. Argentina* (ICSID Case No. ARB/02/8), Decision on Jurisdiction, 3 August 2004 (Sureda, Brower and Janeiro) (Exhibit **CL-109**), ¶137: "*[T]here is no explicit reference to direct or indirect investment as such in the [German/Argentine BIT]. The definition of 'investment' is very broad. An investment is any kind of asset considered to be under the law of the Contracting Party where the investment has been made. The specific categories of investment included in the definition are included as examples rather than with the purpose of excluding those not listed. The drafters were careful to use the words 'not exclusively' before listing the categories of 'particularly' included investments. One of the categories consists of 'shares, rights of participation in companies and other type of participation in companies'. The plain meaning of this provision is that shares held by a German shareholder are protected under the Treaty. The Treaty does not require that there be no interposed companies between the investment and the ultimate owner of the company. Therefore a literal reading of the Treaty does not support the allegation that the definition of investment excludes indirect investments.*"

357. The Tribunal notes that the UK-Bolivia BIT was (according to its preamble) designed to "*create favourable conditions for greater investment by nationals and companies of one State in the territory of the other State*". Furthermore, the parties agreed in Article 2 of the said BIT that "*each contracting party shall encourage and create favourable conditions for nationals or companies of the other Contracting party to invest in its territory, and, subject to its right to exercise powers conferred by its laws, shall admit such capital*."

358. As for the Respondent's argument that Rurelec's investment was not made in the territory of Bolivia, the Tribunal considers that the reference in the BIT to the territory of a Contracting Party (as found, for example, in Article 2) cannot be interpreted in such a manner to exclude indirect investments, as long as the ultimate investment that was allegedly expropriated is located in the territory of a Contracting Party, in this case Bolivia.

359. The eligibility of indirect investments under the BIT is shown *inter alia* by the Contracting Parties' express agreement in Article 1(a)(ii) that "*shares in and stock and debentures of a company and any other form of participation in a company*" constitute protected investments. Hence, it must follow that the acquisition of said shares may also take place outside the territory of the Contracting Party.

360. The Tribunal thus concludes that the best interpretation of Article 2(2) of the BIT, when it refers to "investments of nationals", is the one that considers that the investments may belong to nationals of one Contracting Party, both directly or indirectly through equity ownership of the companies that own the ultimate investment in Bolivia, in this case EGSA. The Tribunal consequently finds itself in agreement with the decision in the case of *Quiborax v. Bolivia* where it was held that "*the evidence shows that Quiborax paid for 51% of the shares of NMM. Regardless of where the payment was made, this qualifies as a contribution of money because the object of the payment and* raison d'être *of the transaction –the mining concessions– were located in Bolivia.*"[468]

---

[465] *Ioannis Kardassopoulos v. Georgia* (ICSID Case No. ARB/05/18), Decision on Jurisdiction, 6 July 2007, ¶¶123–124, interpreting the Greece-Georgia BIT.

[466] *Tza Yap Shun v. Republic of Peru* (ICSID Case No. ARB/07/6), Decision on Jurisdiction, 19 June 2009, ¶¶106–111, where the tribunal based its decision on the text of Article 1 of the Peru-China BIT, the intention of the Contracting States to promote and protect investments, and the absence of an express limitation in the BIT.

[467] *Mobil Corporation and Others v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/27), Decision on Jurisdiction, 10 June 2010, ¶¶ 162-66.

[468] *Quiborax S.A. Non Metalic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia* (ICSID Case No. ARB/06/2), Decision on Jurisidction, 27 September 2012 (Kaufmann-Kohler, Lalonde and Stern) (Exhibit **RL-132**), ¶229.

361. The Tribunal rejects the argument put forward by the Respondent restricting the application of Article 5(2) of the BIT to direct investments in a company that is incorporated or constituted under the laws in force in the territory of the host State. If one accepts that the ownership of shares can be direct or indirect through the ownership of other shares in other companies, the fact that Rurelec does not *directly* own the shares of EGSA does not mean that it does not own those shares within the meaning of the BIT, indirectly through intermediate companies such as Birdsong, BIE, and GAI.

362. The Tribunal further considers that the fact that the companies Birdsong and BIE are incorporated in the British Virgin Islands—in whose territory the BIT is not applicable—is not relevant, since none of them is a claimant in this arbitration and, according to the BIT, only the Claimants need to be nationals of a Contracting Party.

363. The Tribunal does not deem it necessary to carry out a comparative interpretation between the Spanish and the English versions of the BIT concerning the definition of "returns" as necessarily coming from an investment of capital. The Tribunal considers that the acquisition of EGSA's shares, directly or indirectly, represents *per se* an investment of capital in the territory of Bolivia and is consequently protected by both versions of the BIT.

364. The Tribunal also considers that it is not appropriate to import "objective" definitions of investment created by doctrine and case law in order to interpret Article 25 of the ICSID Convention when in the context of a non-ICSID arbitration such as the present case. On the contrary, the definition of protected investment, at least in non-ICSID arbitrations, is to be obtained only from the (very broad) definition contained in the BIT concluded by Bolivia and the United Kingdom. The Tribunal agrees with the Claimants that *Romak*[469] and *Alps Finance*[470] are very "fact-specific" cases that can partially explain their reasoning, which remains exceptional in the case law outside the ICSID system.

365. For all the above reasons, and based on the proper textual interpretation of the UK-Bolivia BIT, the Tribunal concludes that Rurelec's indirect investments in EGSA should be considered as "investments" within the meaning of that term as defined in Article 1 of the UK-Bolivia BIT.

---

[469] *Romak S.A. (Switzerland) v. The Republic of Uzbekistan,* Award, 26 November 2009.

[470] *Alps Finance v. The Slovak Republic*, Award, 5 March 2011.

C. BOLIVIA'S RIGHT OF DENIAL OF BENEFITS AGAINST GAI

366. In accordance with Article XII of the US-Bolivia BIT, "[e]*ach party reserves the right to deny to a company of the other Party the benefits of this Treaty if nationals of a third country own or control the company and* […] *(b) the company has no substantial business activities in the territory of the Party under whose laws it is constituted or organized.*"

367. Considering the requirements of Article XII, the Tribunal must determine whether the denial is valid *rationae materiae*, which requires that the Tribunal be convinced that GAI is owned or controlled by a national of a third country (other than the US) and that GAI has no substantial business activities in the US. Further, the Tribunal must also determine whether the denial of benefits is valid *rationae temporis*, which requires that the Tribunal be convinced as to the timeliness of the denial of benefits.

368. The Claimants stated that Bolivia had required the establishment of a single purpose vehicle ("**SPV**") as a condition for the public tender of EGSA, which allegation is disputed by the Respondent. The Claimants also assert that GAI has "substantial business activities" in the USA and cannot, therefore, be considered a shell company under the control of the British Virgin Islands' company.

369. After examining of all the available evidence, the Tribunal concludes that it has not been shown that Bolivia imposed, whether in the terms of reference for the privatisation of EGSA[471] or afterwards, any requirement that GAI must be an SPV, let alone an American one, nor has it been shown that this company was not allowed to own any assets other than EGSA shares.

370. The Tribunal is also convinced that GAI is a company that, for the purposes of Article XII of the US-Bolivia BIT, "*has no substantial business activities in the territory of the Party under whose laws it is constituted or organized.*" Insufficient evidence has been provided to prove that GAI carried on substantial business activities in the US at any point in time. Finally, GAI is owned and controlled by nationals of a third country, namely, BIE, Birdsong Overseas, and ultimately Rurelec, none of them being a US company.

371. Since the initial hurdle in order to invoke the denial of benefits has been overcome, the Tribunal will now examine its timeliness. The Tribunal is cognizant of the fact that the Respondent only denied the benefits of the BIT in its Statement of Defence, after both

---

[471] See Exhibit **C-7**.

parties had already given their consent to arbitration. Nevertheless, the denial of benefits cannot be equated to the withdrawal of prior arbitral consent, which is only permissible prior to the acceptance of the host State's consent by the investor.

372. Whenever a BIT includes a denial of benefits clause, the consent by the host State to arbitration itself is conditional and thus may be denied by it, provided that certain objective requirements concerning the investor are fulfilled. All investors are aware of the possibility of such a denial, such that no legitimate expectations are frustrated by that denial of benefits.

373. No one can accept more than what is being offered. In this case, what was offered by both Bolivia and the US, in the BIT concluded between them, was a package of benefits to investors of both countries, including the benefit of being able to submit disputes to arbitration, coupled with an express prior reservation of the right to deny those benefits if and when the Respondent so decides (subjective requirement) and if the investor's company is or becomes a "shell company" controlled by a company incorporated in a third country (objective requirement). The reservation of the right of denial of benefits contained in Article XII operates on the Contracting Parties' offer of consent to arbitration as much as every other benefit conferred by the BIT. Hence, any US investor who invests in Bolivia already knows in advance of the possibility of a denial of benefits by Bolivia—as long as the Article XII requirements are met—and, if it decides to accept the offer of arbitration made by Bolivia in the BIT, it accepts it at face value.

374. Without prejudice to the fact that an investor (irrespective of whether the investment has been made before or after the entry into force of the BIT) is in principle protected by the BIT, it also bears noting that GAI (and its shareholders) did not enjoy the protection of the investment treaty when they decided to bid in the privatization process. Evidence has also been submitted that GAI and Rurelec had been worried about the risk of nationalisation since at least 2006.

375. This being the case, following the signature and final ratification of the BIT, the Claimants were fully aware of the denial of benefits clause and could have acted in such a way as to preclude the Respondent from being able to invoke that clause, and thereby avoid the risk of a denial of benefits, by having GAI undertake substantial activities in the USA or through some other equivalent solution. That did not happen. The Tribunal therefore finds that the Claimants' reliance on the *pacta sunt servanda* principle is misplaced since the denial of benefits clause is part of the "*pactum*" agreed by the Contracting Parties.

376. The same must be said in relation to the supposedly retroactive application of the clause. The Tribunal cannot agree with the Claimants when they argue that the Respondent is precluded from applying the denial of benefits clause retroactively. The very purpose of the denial of benefits is to give the Respondent the possibility of withdrawing the benefits granted under the BIT to investors who invoke those benefits. As such, it is proper that the denial is "activated" when the benefits are being claimed.

377. The Contracting Parties to the BIT could have agreed otherwise, but they decided not to do so. Instead they agreed that a Contracting Party could deny benefits (including the benefit of having a dispute decided by an arbitral tribunal) subject to meeting certain conditions, none of which entails that such denial is only effective in relation to disputes arising after the notification of such denial or imposes any other limitation period that would occur before the Respondent's submission of its Statement of Defence.

378. On the contrary, the Tribunal agrees that the denial can and usually will be used whenever an investor decides to invoke one of the benefits of the BIT. It will be on that occasion that the respondent State will analyse whether the objective conditions for the denial are met and, if so, decide on whether to exercise its right to deny the benefits contained in the BIT, up to the submission of its statement of defence.

379. As a matter of fact, it would be odd for a State to examine whether the requirements of Article XII had been fulfilled in relation to an investor with whom it had no dispute whatsoever. In that case, the notification of the denial of benefits would—*per se*—be seen as an unfriendly and groundless act, contrary to the promotion of foreign investments. On the other side, the fulfilment of the aforementioned requirements is not static and can change from one day to the next, which means that it is only when a dispute arises that the respondent State will be able to assess whether such requirements are met and decide whether it will deny the benefits of the treaty in respect of that particular dispute.

380. The Tribunal further notes that in this particular case (contrary to what occurred in the *Plama* case) the investment did not follow the entry into force of the BIT but was made prior to the BIT's entry into force. The benefits contained in the BIT thus did not play any role in the decision of the investor to make this investment. In the *Plama* case, the tribunal emphasized

the fact that the investor had relied on the protection afforded by the BIT when deciding whether to invest in the respondent State.[472]

381. The consequence of the denial of benefits is that the Tribunal (which forms part of the package of benefits afforded under the BIT) will be deprived of jurisdiction over the present dispute. Accordingly, as a jurisdictional issue, it must be raised at the latest in the respondent's statement of defence, as it was here. Although it is perhaps unusual for both the fact that leads to a lack of jurisdiction and the submission of the related jurisdictional objection to arise at the same time, nothing prevents both (the act that forms the basis of the plea and the plea itself) from coinciding as they do here.

382. The Tribunal therefore considers that the objection to jurisdiction was made in good time, taking into account Article 23(2) of the UNCITRAL Rules. The Tribunal agrees with the decision of the *Ulysseas Inc. v. Ecuador*[473] when it states that "[a]*ccording to the UNCITRAL rules, a jurisdictional objection must be raised not later than the statement of defence (Article 21(3)* [equivalent to Article 23(2) of the UNCITRAL Rules 2010]*). By exercising the right to deny Claimant the BIT's advantages in the Answer, Respondent has complied with the time limit prescribed by the UNCITRAL Rules. Nothing in Article I(2) of the BIT excludes that the right to deny the BIT's advantages be exercised by the State at the time when such advantages are sought by the investor through a request for arbitration.*"

383. The Tribunal is cognisant that this puts the investor in something of a fragile position, since the investor will never know if there might be a denial of benefits exactly when the investor needs them the most. At the same time, one cannot say that such a denial will come as a total surprise for the investor, since the BIT is not secret and we are dealing in this case with an investor who has opted to use an investment vehicle controlled by a company of a third country, which has no substantial business activities in the territory of the Contracting Party under whose laws it is constituted or organized.

384. For all the above reasons, the Tribunal concludes, in accordance with Article XII of the US-Bolivia BIT, that it has no jurisdiction to entertain GAI's claims against the Respondent.

[472] *Plama Consortium Limited v. Bulgaria* (ICSID Case No. ARB/03/24), Decision on Jurisdiction, 8 February 2005 (Salans, van den Berg and Veeder) (Exhibit **CL-110**), ¶161. See also *Ulysseas Inc. v. Ecuador* (UNCITRAL – PCA Case No. 2009-19), Interim Award, 28 September 2010 (Bernardini, Pryles and Stern) (Exhibit **CL-135**), ¶¶172-173.

[473] *Ulysseas Inc. v. Ecuador* (UNCITRAL – PCA Case No. 2009-19), Interim Award, 28 September 2010 (Bernardini, Pryles and Stern) (Exhibit **CL-135**), ¶172.

D. JURISDICTION IN RESPECT OF THE ALLEGED NEW CLAIMS

385. The Tribunal observes that the UK-Bolivia BIT contains a typical "cooling off period" clause. In fact, Article 8 of the BIT determines that "[d]*isputes between a national or company of one Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement in relation to an investment of the former which have not been legally and amicably settled shall after a period of six months from written notification of a claim be submitted to international arbitration if either party to the dispute so wishes*" [emphasis added].

386. The Tribunal is mindful that the particular circumstances of the present case might allow one to surmise that applying the general "cooling off" period envisaged in the BIT to the so-called "New Claims" would be a waste of time. Indeed, the fact that Bolivia has expropriated Rurelec's[474] investment leads the Tribunal to believe that the practical effects sought to be achieved by the cooling off theory and rule would in the end have been non-existent. Nevertheless, Rurelec was fully aware of the rule at play here and it would not have been difficult to comply with the cooling off period, which did not in fact occur. The Tribunal has no mandate to "rewrite" the BIT.

387. The Tribunal considers that the "New Claims" are distinct and separate from the "main claim" for compensation for the nationalisation of EGSA. However, this does not mean that the Tribunal will not examine the issue of capacity payments and spot prices when deciding on the substantive aspects of the expropriation: it will do so, but only to check whether those measures could be construed, as alleged by Rurelec, as the initial steps of a "creeping expropriation".

388. The explicit wording requiring a written notification and the expiry of a period of six months from that notification leads the Tribunal to consider that the "cooling off period" narrows the consent given by the Contracting Parties to international arbitration.

389. It is not up to the Tribunal to evaluate the importance or effect of such a condition, but simply to acknowledge that it was agreed by the two Contracting Parties as a condition precedent to the availability of an arbitral forum which is, and must be, based on consent. The fact is that the Contracting Parties only gave their consent to arbitration subject to the

[474] Given its decision that it lacks jurisdiction over GAI, and for simplicity's sake, this Award will from now on refer only to the remaining single Claimant, Rurelec, unless explicitly stated otherwise.

existence of a *written notification of a claim* and subject to the passing of six months' time between such notification and any request of arbitration.

390. The Tribunal thus concludes that, at least in this case, the "cooling off period" is a jurisdictional barrier conditioning the jurisdiction of the Tribunal *rationae voluntatis*, since it is not up to a claimant to decide whether and when to notify the host State of the dispute, just as it is not up to such claimant to decide how long they must wait before submitting the request for arbitration.

391. The Tribunal agrees with the Respondent that no explicit notification has been made in relation to the so-called "New Claims" and thus the cooling off period has been breached. The Tribunal notes that Rurelec has acted in accordance with this very interpretation of the BIT in respect of its claim regarding the nationalisation, as is mentioned by the Respondent in its Memorial on Jurisdiction.[475] In particular, in its Notice of Arbitration, Rurelec states that the applicable waiting periods found in the Treaties had already passed[476] and "[a]*ccordingly, the Dispute is validly submitted to arbitration under UNCITRAL Rules pursuant to Article IX.3(iii) of the US Treaty and Article 8(2), final paragraph, of the UK Treaty respectively*"[477] [emphasis added].

392. It is irrelevant for the issue at hand whether it could be anticipated—by Rurelec or even by this Tribunal—that nothing would happen during said six-month period and that the Respondent would not react to the notification and take advantage of the chance to negotiation a resolution. The "cooling off period" clause imposes an obligation of means and not an obligation of result. All clauses of the BIT must be given equal effect and, if the Contracting Parties gave their consent subject to those conditions, Rurelec could only accept the offer of arbitration as it was presented and not as it would have liked to receive it.[478] The Tribunal thus feels no need to elaborate any further on what it believes the Respondent's behaviour would have been if it had been properly notified.

---

[475] Memorial on Jurisdiction, ¶155.

[476] Notice of Arbitration, ¶¶61-62.

[477] Notice of Arbitration, ¶63.

[478] The Tribunal also agrees with the decision of the *Ambiente Ufficio v. Argentina* case, Decision on Admissibility and Jurisdiction, 8 February 2013, ¶¶570-585, and the decision of *ICS v. Argentina* case, Award on Jurisdiction, 10 February 2012, ¶¶263-273. According to the latter decision: "[t]*he Tribunal cannot therefore create exceptions to treaty rules where these are merely based upon an assessment of the wisdom of the policy in question, having no basis in either the treaty text or in any supplementary interpretive source, however desirable such policy considerations might be seen to be in the abstract*" (¶267).

393. The Tribunal's analysis is in line with the decision of the tribunal in *ICS v. Argentina*[479] where it stated as follows:

> "*At the time of commencing dispute resolution under the treaty, the investor can only accept or decline the offer to arbitrate, but cannot vary its terms. The investor, regardless of the particular circumstances affecting the investor or its belief in the utility or fairness of the conditions attached to the offer of the host State, must nonetheless contemporaneously consent to the application of the terms and conditions of the offer made by the host State, or else no agreement to arbitrate may be formed*".

394. Moreover, the notification of the dispute and the "cooling off period" were requirements that could easily have been met by Rurelec, since there exists no obligation to reach an amicable agreement. Thus, Rurelec cannot bemoan the fact that it is inefficient and costly to submit a new request for arbitration concerning those claims; it was within their control to act differently and in accordance with the BIT's conditions in respect of the New Claims.

395. Another line of argument put forward by Rurelec was that the notifications submitted to Bolivia in respect of the initial claim for nationalisation were broad enough to cover and include the New Claims. The Tribunal will therefore turn to the content of those notifications of the dispute in order to determine whether, as they were made, they encompass all the claims subsequently submitted to this Tribunal, including the supposedly "New Claims".

396. According to Rurelec, "*the claims regarding spot prices, capacity payments and the Worthington engines are all related to the notified nationalization dispute and therefore the Claimants complied with any requirements the Treaties may impose.*"[480] The Tribunal cannot agree with Rurelec's position regarding the spot prices and capacity payments, since it considers that it has not been demonstrated that those regulatory changes—made years before the nationalisation—were connected to the nationalisation dispute, let alone that they formed part of that dispute. The Tribunal thus cannot accept Rurelec's allegation that the "New Claims" "*arise out of the same dispute.*"[481]

[479] *ICS v. Argentina*, Award on Jurisdiction, 10 February 2012, ¶272.

[480] Counter-Memorial on Jurisdiction, ¶73.

[481] Counter-Memorial on Jurisdiction, ¶64.

397. The Tribunal observes that, according to the definition of the "Dispute" provided in Rurelec's request for arbitration, disputes concerned only the nationalisation decree and its consequences:[482]

> "*4. As described in more detail in Section II below, this dispute concerns the Government's 1 May 2010 expropriation of the Claimants' investments in the power generation sector in Bolivia, specifically Rurelec's 50.001% shareholding in Empresa Electrica Guaracachi S.A. (Guaracachi), held through Guaracachi America, without the payment of prompt, adequate and effective compensation in violation of the Treaties and international law (the Dispute).*
>
> […]
>
> *6. The Dispute arose on 1 May 2010, the date of the expropriation of the Claimants' investments. Bolivia has been formally on notice of the Dispute since 13 May 2010, the date on which the Claimants submitted notifications of the Dispute under the Treaties to the Government (the Notices of Dispute). The amicable negotiation periods of three months pursuant to US Treaty Article IX.3(a) and six months pursuant to UK Treaty Article 8(1) have elapsed. Despite the Claimants' intensive efforts, the parties have been unable to reach an amicable settlement of their Dispute.*"

398. Therefore, when Rurelec stated in its Notice of Dispute[483] that "*nothing in this letter should be considered as limitation of any kind on issues of fact or law, which Rurelec may invoke before an international arbitral tribunal*," that disclaimer can only be understood as comprising the possibility of new claims related to that dispute and not new claims from new (albeit factually older) disputes. Furthermore, the Tribunal notes that Rurelec never claimed that there had been a *creeping expropriation* but rather that there was a direct expropriation/nationalisation, which leads to the conclusion that, even for Rurelec, the prior events they invoke should be characterized as representing different disputes that were only for the first time asserted in the Statement of Claim.

399. The Tribunal recalls that, in *CMS v. Argentina*, cited by Rurelec,[484] the notification of the dispute related to a claim that was followed (after the notification) by a new, further claim which was not individually notified (because it did not exist at the time of the notification).

---

[482] Notice of Arbitration, ¶¶4, 6.

[483] See Exhibit **CL-40** (the same wording has been used in the Notice of Arbitration).

[484] *CMS Gas Transmission Company v. Argentine* (ICSID Case No. ARB/01/8), Decision on Jurisdiction, 17 July 2003 (Orrego Vicuña, Lalonde and Rezek) (Exhibit **CL-83**), ¶¶92-126.

Meanwhile, in the present case, the facts are quite different, or more correctly, exactly the opposite. The notification of a claim cannot be interpreted as incorporating previous potential claims that were not asserted in the notification even though they were already in existence (and known by Rurelec) at the time of such notification.

400. As to the Worthington engines, the Tribunal considers that the issue could be more complicated and deserve further analysis. However, seeing as the parties have already settled that part of the dispute, it is not necessary to address it further.

401. As opposed to the UK-Bolivia BIT, the US-Bolivia BIT seems not to impose a duty of notification on GAI and only stipulates, in Article IX 3(a), that the dispute may be submitted to arbitration after "*three months have elapsed from the date on which the dispute arose*." If the Tribunal had not already concluded that it lacked jurisdiction in respect of the claims of GAI, the Tribunal would have had to carefully analyse how that provision should be applied, and would have had to determine the point at which that dispute arose in the context of Article IX(3)(a) of the BIT. However, the Tribunal does not have to decide this issue given its decision accepting Bolivia's denial of benefits towards GAI.

E. THE DOMESTIC NATURE OF THE ALLEGED NEW CLAIMS

402. The Tribunal finds that, for jurisdictional purposes, the characterization of the claims should in principle be accepted *prima facie* as put forward by Rurelec. In this case, it seems that the New Claims could be accepted as treaty claims for jurisdictional purposes.

403. The Tribunal, however, sees no need to decide this issue since it has already decided that it does not have jurisdiction over said claims due to the fact that the "cooling off period" was not complied with by Rurelec and due to the fact that it has found Bolivia's denial of benefits towards GAI to be valid and effective.

F. THE ALLEGED EXERCISE OF THE FORK IN THE ROAD CLAUSE

404. The Tribunal notes that an analysis of the claims submitted to the Bolivian courts would be necessary in order to compare it with the claim submitted before this Tribunal in order to make a decision concerning whether the "fork in the road" clause precluded arbitration of the latter claims. In addition, the Tribunal notes that the UK-Bolivia BIT does not contain a "fork in the road" clause analogous to Article IX(3)(a) of the US-Bolivia BIT.

405. In any event, given the Tribunal's decision concerning Rurelec's non-compliance with the "cooling off period" and Bolivia's denial of benefits to GAI, which result in a lack of jurisdiction to hear the New Claims, the Tribunal need not decide on the alleged effect of the "fork in the road" clause.

G. ALLEGED PREMATURE EXERCISE OF SPOT PRICE AND WORTHINGTON ENGINES

406. The Tribunal considers that the New Claims were not *prima facie* premature since there was no obligation to submit those claims to Bolivia's domestic courts as a condition precedent to recourse to an international tribunal. Nonetheless, for the same reasons given in the preceding paragraphs, the Tribunal need not decide this particular issue either.

CHAPTER X – DECISION ON THE MERITS

A. THE SITUATION OF THE BOLIVIAN ELECTRICITY INDUSTRY AND ENDE BEFORE THE PRIVATIZATION PROCESS

407. The description of the evolution of Bolivia's economy, ENDE's financial situation until the start of the privatization of the electricity sector, and the reasons behind Bolivia's strategy in respect of these issues are not fully agreed between the Parties. However, this difference of opinion is not material to the outcome of this arbitration. Irrespective of the situation and the motivation for commencing the process, the privatization and liberalization of the electricity sector, together with the capitalization rules, occurred in accordance with then-existing rules and commitments; and an international investor (later setting up a SPV, GAI) acquired, in two stages, shares in EGSA. The Tribunal therefore does not deem it necessary to undertake any particular analysis or form any conclusions regarding the period before June 1995, except as specifically required by particular circumstances regarding discrete issues.

B. THE DATE OF THE INVESTMENTS MADE BY GAI AND RURELEC'S INDIRECT ACQUISITION OF GAI

408. The same applies to the issue of whether the investments made by GAI were made before or after the acquisition by Rurelec of indirect control of EGSA and the actual date of such acquisition. The issue of the indirect acquisition by Rurelec of the controlling stake in EGSA—as a matter of jurisdiction—has already been examined and decided. However, irrespective of the investment being made when Rurelec was already or was not yet the indirect owner of 50.001% of EGSA's stock capital, the Tribunal's conclusion remains that said investment is protected under the relevant BIT.

C. EGSA'S FINANCIAL SITUATION PRIOR TO THE NATIONALISATION

409. The Tribunal also considers that the issue of EGSA's dividend policy and divestments that have provoked much debate between the Parties is immaterial to the outcome of this case. The inflation index (UFV), EGSA's decisions about dividends, and the respective distributions to its shareholders—undertaken with the approval and for the benefit of Bolivian minority shareholders as well—were made in accordance with the law and are a normal practice for companies all over the world. The same is the case for divestment of

assets no longer considered necessary for generation by EGSA,[485] as well as the debates surrounding EGSA's credit rating and all the elements to confirm its accuracy. Therefore, the Tribunal will not undertake any analysis or decisions regarding these issues, except as specifically required by particular circumstances regarding discrete issues.

410. Much of the Parties' efforts related to the points mentioned above are deemed irrelevant by the Tribunal, if only because the Parties agreed that the main approach to the valuation of EGSA (and the compensation, if any, to be paid after nationalisation) should be the FMV, as determined on the date of the nationalisation using the DCF method, which is forward-looking. The Tribunal agrees with the Respondent (and Rurelec also appears to agree) that this case concerns quantum.[486] Irrespective of what may have happened before May 2010, if a notional willing buyer (WB) would have agreed to pay a positive amount for the shares of EGSA, compensation is due; otherwise, no compensation would be due.

411. The Tribunal will now turn to one issue that has been the subject of much debate between the Parties during the proceedings: EGSA's liquidity situation prior to its nationalisation.

412. The existence in EGSA of acute liquidity problems prior to its nationalisation has been amply demonstrated by the Respondent by means of contemporaneous evidence, including the views expressed by EGSA's finance director in internal communications. But the most relevant controversy pertains to the explanation of such financial difficulties and its relevance for the valuation of EGSA.

413. For the Respondent those liquidity problems were a clear indication of fundamental weaknesses in EGSA's finances which cast a dark shadow on its future, since they were, in the Respondent's view, one of the fundamental reasons for the delay in the implementation of the CCGT project and exposed EGSA to the catastrophic risk of being denied access to gas supplies. Thus, the Respondent portrays EGSA's liquidity problems as consistent with the negative value which PROFIN assigned to its shares immediately following its nationalisation.

414. Rurelec, after recognizing the reality of such liquidity problems, has consistently attempted to portray them as the result of the Respondent's hostility towards EGSA and, more specifically, of the change in the regulatory environment, of some *bona fide* measures like

[485] In any event the decommissioning and future sale could not occur, at least in practical terms, without the agreement of the regulator.

[486] Rejoinder on the Merits, ¶133; Claimants' Opening Statement, 2 April 2013; Transcript (English), Day 1, 2 April 2013, 92:1-92:4.

the Rural Electrification Projects (*Proyectos de Electrificación Rural*) and Dignity Tariff (*Tarifa Dignidad*), and of Bolivia's lack of interest in facilitating a rapid sale by EGSA of its carbon credit rights—a transaction which, by injecting new money into the company, might have helped the company overcome its liquidity squeeze.

415. The Tribunal rejects both the Respondent's story of the nationalisation as the "rescue" of a cash-strapped utility on the brink of bankruptcy and Rurelec's story of EGSA's liquidity problems as the result of a "creeping expropriation" strategy pursued by the Bolivian authorities.

416. In the Tribunal's view, EGSA's liquidity problems can be seen as the cumulative result of a complex set of circumstances, which cannot be traced either to a lack of management skills in EGSA, fundamental weaknesses in its balance sheet or business model, or deliberate attempts by the Bolivian authorities to bring the company to its financial knees.

417. The Tribunal considers that the capital expenditures in the CCGT, the Rural Electrification Projects, and the Dignity Tariff drained financial resources, reduced EGSA's liquidity, and constrained the pay-out of dividends to EGSA's shareholders. Together with the modification of the regulatory environment regarding capacity payments and spot prices,[487] these circumstances largely explain the liquidity problems actually faced by EGSA. It is true that, while some of those circumstances had a sudden and unexpected impact on EGSA—for example, the reduction of capacity payments by 17% without any gradual phasing-in—others were predictable and developed over the years, such that EGSA and its shareholders could have anticipated them and have taken measures to prevent the ensuing liquidity squeeze.

418. The Tribunal has not found any grounds to conclude that a lack of management skills was the relevant reason for this liquidity problem. The CCGT project experienced cost overruns, but this was due to an increase in generation capacity which was in the interest of Bolivia and its consumers, and the need for additional investment obviously necessitated new financial resources that would only be paid back later on.[488] The liquidity problems might arguably have prompted EGSA shareholders to provide EGSA with additional funding to avoid major difficulties with its suppliers and, more particularly, with its gas supplier

[487] In the latter case, had the regulatory environment not been changed, the additional funds would have gone into the Stabilization Fund and, therefore, would not have created a positive cash flow in time (Rejoinder on the Merits, ¶371). This would nonetheless have had a positive impact on the economic fundamentals of EGSA, thereby increasing its capacity to obtain third party funding.

[488] Mr Earl and Mr Lanza expected that, once in operation, the CCGT would double the EGSA EBIDTA (see, for instance, Earl's Cross-Examination, Transcript (English), Day 1, 2 April 2013, 25:20-25:22).

(YPFB). However, no evidence has been provided that the gas supplier was considering, let alone had decided upon, charging interest, cancelling the supply of gas, or instituting legal proceedings in order to obtain payment on the outstanding invoices.

419. No evidence has been provided that a prospective buyer would not also have benefitted from that situation of coerced supplier-financing, particularly bearing in mind that the gas supplier had, at that time, a production surplus and was not able to export any more than it already was. Moreover, no reason would have existed to refuse to the prospective buyer what had been tolerated to EGSA.

420. Rurelec notably refers to justify the liquidity problems, to the fact it did not have access to the carbon credits before the nationalisation as a result of the Respondent's attitude and lack of cooperation in getting the United Nations' clearance. The Tribunal disagrees with Rurelec. This situation was not materially due to the acts or omissions of Bolivia,[489] which did not have any responsibility in this respect.

421. Evidence has been provided that the CCGT project was near completion in May 2010 (95.1%),[490] such that it was clearly feasible to start production later that year.[491] Thus, delays in the implementation of the project were limited and it is not necessary for the Tribunal to ascertain in detail to what extent they were caused by EGSA's liquidity constraints or the relatively long time required to obtain the necessary authorizations from the Municipality of Santa Cruz and Bolivia's regulatory authorities.

422. In conclusion, as indicated above, EGSA's liquidity problems resulted from a complex set of circumstances and were neither the result of fundamental weaknesses in the company's balance sheet, business model, or economic prospects, nor of a deliberate attempt by the Bolivian authorities to prepare its subsequent nationalisation. Yet, in the Tribunal's view, EGSA's liquidity problems, even if arguably of a short-term nature, are not totally immaterial to EGSA's valuation, since they could influence to a certain extent the risk perception of a WB and affected, at least marginally, the discount factor or WACC applied in its valuation.

[489] Although it is true that some delays could have been avoided in the licensing phase, the main reasons for the lack of credits before nationalisation were not related to these delays, but to the complexity of the process.

[490] First Witness Statement of Paz, Annex 29; "Pacific Credit Ratings Report on Empresa Eléctrica Guaracachi S.A., September 2010", p. 3 (Exhibit **C-188**), and "2009 Audited Financial Statements of Empresa Eléctrica Guaracachi S.A.", notes 26, 15, and 4, 22 March 2010, p.32, note 26 (Exhibit **C-183**). The Tribunal also notes that by the end of the year the physical completion reached 99.9% ("Progress Report for Combined-Cycle Project GCH 12" December 2010 (Exhibit **C-321**)) even without the benefit of Mr Jerry Blake and IPOL's cooperation (Claimants' Closing Statement, 9 April 2013, Slides 29-32; Lanza's Direct Examination, Transcript (English), Day 3, 4 April 2013, 609:19-609:22.

[491] Compass Lexecon Rebuttal Report, ¶20 and note 4.

D. The Regulatory Modifications, Alleged Creeping Expropriation, and the Dignity Tariff

423. It is still necessary to examine the issue of the potential effects of modifications of capacity payments and spot prices on the FMV of EGSA as at the date of nationalisation as well as certain other events which transpired in the years leading up to May 2010. Having already decided that it has no jurisdiction over the so-called "New Claims", the Tribunal will refrain from dealing with any alleged BIT violations concerning the modification of spot price or capacity payments in their own right. The Tribunal may nevertheless take these measures into account to the extent that they could be construed, as alleged by Rurelec, as the initial steps of a "creeping expropriation". Despite acknowledging that these measures had a very strong impact on the liquidity and/or the accounts of EGSA, however, the Tribunal concludes that it has not been demonstrated that these measures formed part of a creeping expropriation or a discriminatory one, even if it is clear that Bolivia was fully aware that such regulatory decisions would affect EGSA's and other energy companies' market values.

424. It is undisputed that the 1994 Electricity Law constitutes the framework to be taken into account in defining the rights of international investors in the electricity sector, notably the principles of efficiency, transparency, quality, continuity, adaptability, and neutrality. At the time of nationalisation, ROME 1995 (specifically Article 63 thereof) was the applicable rule and it had been amended more than once,[492] for instance by ROME 2001 (Supreme Decree 26,093, in particular Article 67 thereof). One of the modifications consisted of disregarding, in the calculation of the marginal cost, the so-called forced supply ("*generación forzada*" or "*despacho forzado*"[493]) and the cold reserve ("*reserva fría*") which was remunerated at 50% of PBP until the reserve of the system reaches 17.5%.[494]

425. Stability and predictability are values generally applicable to tariffs. But that does not and cannot preclude modifications, which modifications, to the Tribunal's knowledge, EGSA did not in fact react to in any way until the last one (in 2008). The price-setting mechanisms established for the electricity sector in each period were no more than possibilities and clearly did not form part of the programme proposed to investors as a condition for investment (the so-called "stable and predictable regulatory framework"), even if Bolivia

[492] Rejoinder on Merits, ¶270.

[493] Llarens' Cross-Examination, Transcript (English), Day 5, 8 April 2013, 1022:15-1022:17.

[494] For the definition of "*reserva fría*", see Paz's Cross-Examination, Transcript (English), Day 4, 5 April 2013, 869:6-869:13.

accepted, notably in the "Sector Policy Letter",[495] that tariffs would "*reflect the economic and financial supply costs*".

426. In addition, the modifications did not constitute "*the setting of prices that do not remunerate the investment made nor allow reasonable profit to be gained*", nor was this their intent.[496] The changes in fact still allowed for reasonable profit to the point that even dividends were possible. Therefore, after reviewing the relevant documents and witness testimony regarding this matter, the Tribunal does not consider that Bolivia acted, in relation to the capacity payment and the method for calculation of the spot price, in a way that, from a global viewpoint, violated this rule: investment returns remained, reasonable profits were obtained, and "*economic and financial supply costs*" were covered. The Tribunal is also not convinced that GAI's investment—in relation to Bolivia—relied on that previous regulatory environment. Consequently, and contrary to Rurelec's assertion,[497] the Tribunal is not persuaded that the regulatory changes formed part of a scheme leading up to the nationalisation of EGSA.

427. Moreover, to reach this conclusion, the Tribunal does not need to enter into the question of the independence (or lack thereof) of the decision-maker, CNDC.[498] It is clear that regulators, even when formally independent, are close to governments and do not usually act in a way that is unnecessarily detrimental to national strategies, but rather act in the opposite fashion.

428. In particular, with respect to the capacity payments, evidence has been provided that the capacity price increase of 20% constituted compensation for additional costs related to a special situation arising in 2001.[499] Therefore, there was no justification for this measure to be maintained any longer—and especially to be maintained, not as compensation for costs, but rather as a guarantee of reasonable profits/returns—after these conditions had changed,

---

[495] Joint UNDP/World Bank Energy Sector Management Assistance Programme, "Bolivia: Restructuring and Capitalization of the Electricity Supply Industry–An Outline for Change", Report No. 21520, 12 September 1995 (Exhibit **C-61**); Joint UNDP/World Bank Energy Sector Management Assistance Programme, "ESMAP Country Paper: Bolivia," Report No. 10498, December 1991 (Exhibit **C-50**); Bolivia: Reglamento de Operación del Mercado Eléctrico Mayorista, 28 June 1993 (Exhibit **R-27**); Statement of Claim, ¶¶190, 128; Electricity Law (Exhibit **C-5**); Supreme Decree No. 26,093/2001, 2 March 2001 (Exhibit **C-85**).

[496] *Total S.A. v. Argentine Republic* (ICSID Case No. ARB/04/1), Decision on Liability, 27 December 2010, (Sacerdoti, Álvarez, and Marcano) (Exhibit **CL-69**).

[497] Reply on the Merits, ¶¶131, 133-134.

[498] Rejoinder on Merits, ¶291.

[499] Statement of Claim, ¶89.

as had in fact occurred prior to 2007 when Resolution SSDE 040 eliminated the complementary 20% equipment head.

429. The Tribunal is also not convinced that the exclusion of the marginal liquid fuel units in the calculation of the spot prices up to 2008 was arbitrary or unreasonable or jeopardized the economic viability of EGSA.[500] As such, the 2008 modification did not affect said viability. The Tribunal does not agree with Rurelec.[501] Even though consumers were financially protected under Supreme Decree 27302 (stabilization of tariffs through a Stabilization Fund to the benefit of end users[502]), the fact is that sooner or later this excessive burden would fall on the general public.[503]

430. Furthermore, while evidence has been provided that CNDC did not allow the older units to be decommissioned[504] (EGSA was "*forced to retain*" them, in Rurelec's words[505]), the simple fact that decommissioning was requested is strong evidence that these units were not essential to EGSA's profitability. The argument thus seems to backfire against Rurelec. However, even if decommissioning had not been requested by EGSA, the Tribunal considers that no justification exists to consider the measures regarding spot prices to be unjust *per se*, let alone part of a creeping expropriation scheme.

431. The regulatory framework was first implemented in 1994/5, as is accepted by both sides.[506] Such framework, defined in the 1994 Electricity Law, referred to the "*costo marginal del sistema*" (Article 45), to be determined by CNDC, and to the "*precios de nodo*" as "*costos marginales de corto plazo de energía del sistema*" (Article 49), to be determined by Superintendencia de Electricidad.[507] To prevent Bolivia from introducing non-arbitrary technical adjustments in the definition of the electricity system's marginal cost would be an excessive limitation of Bolivia's rights, especially when it has not been shown that such regulatory changes formed part of a nationalisation scheme.[508]

---

[500] Statement of Claim, ¶192.

[501] Reply on the Merits, ¶79.

[502] Statement of Defence, ¶330; Reply on Merits, ¶76.

[503] Reply on the Merits, ¶¶82-83.

[504] Resolution SSDE No. 185/2009, 25 September 2009 (Exhibit **C-176**).

[505] Claimants' Closing Statement, 9 April 2013, Slide 18.

[506] Statement of Claim ¶¶37-38; Statement of Defence, ¶302.

[507] Later "Autoridad de Electricidad". For the evolution of the legal and regulatory framework since 1994, see Respondent's Opening Statement, 2 April 2013, Slide 245.

[508] Statement of Defence, ¶¶352-355 et seq.

432. In any event, as calculated by the two expert witnesses, and irrespective of the differences between them, the marginal discount value associated with the spot price modification was minimal.[509] The legality or illegality of the measure is therefore a matter of national administrative law and the Tribunal will not take it into consideration in the determining the FMV of EGSA.[510]

433. As for the Dignity Tariff (2006), this was clearly accepted by EGSA and its shareholders as a way of increasing goodwill through social responsibility and cooperation, and thereby averting or forestalling any nationalisation. It is also undisputed that, since at least 2006,[511] if not 2005,[512] nationalisation was on the political agenda.

434. However, the Dignity Tariff agreement cannot be construed as a safety net against future changes. Article 5 is a best efforts clause ("*agotar esfuerzos*") and not an abdication of Bolivia's right to modify the pricing system. Nor did it expand from a legal point of view the investment protection already in existence. In fact, "*ensuring that* [electricity sector companies'] *income allows them to ensure the sustainability and reliability of supply*" (C-119, Article 5) means what it says and nothing more. No explicit legal commitment against modifications was made, except to the extent of endeavouring to ensure that such modifications would not affect the supply of electricity.

435. As to quantum, the Tribunal considers, therefore, that such value ought to be calculated "*taking into account all the existing regulations in place (or expected) as of May 1, 2010*".[513] This is not only because of the Tribunal's declared lack of jurisdiction over the so-called "New Claims", but also on the grounds that, in the Tribunal's view:

(a) The 2007 decision to remove the 20% additional cost, added for the purpose of calculating capacity payments, was not arbitrary or discriminatory and had been taken on the basis of adequate professional advice. Thus, there is no reason for a WB to consider it likely that such decision might have been reverted in the future.

(b) Similarly, the technical change introduced in 2008 by SSDE Resolution No. 283/08 in the determination of spot prices—i.e. the exclusion, for the purposes of calculating the

---

[509] Reply on the Merits, ¶167, notably as to interest rate.

[510] Albeit that the Tribunal is convinced that causation and harm has been proven —see Reply on the Merits, ¶200 et seq.

[511] Claimants' Opening Statement, 2 April 2013, Slide 60, and Aliaga's Cross-Examination, Transcript (English), Day 2, 3 April 2013, 465:20-465:24.

[512] Earl's Cross-Examination, Transcript (English), Day 2, 3 April 2013, 365:22-366:20.

[513] Compass Lexecon Report, ¶78.

system's "marginal price", of the exceptionally high price of the energy produced by diesel fuel units—was not arbitrary or discriminatory, or part of a strategy of rampant or creeping expropriation. Thus, in estimating the value of EGSA the Tribunal will assume that said Resolution remained in force throughout the life of the project.

E. THE ILLEGALITY OF THE EXPROPRIATION

436. The right to expropriate is a sovereign right recognized by international law, subject to certain conditions. Both Parties agree with that statement, which is uncontroversial. Legality at the international level, and under Article 5(1) of the UK-Bolivia BIT, is dependent upon the existence of a "*public purpose*" and the payment at the time of the expropriation of "*just and effective compensation*".

437. If the expropriation had not been made "*for a public purpose and for a social benefit related to the internal needs of that Party*" it would have then been illegal *per se*. However, the precise contours of public purpose and social benefit lie with the internal constitutional and legal order of the State in question, and in this case the conditions are evidently met,[514] and are not disputed between the Parties.

438. As for "*just and effective compensation*", Bolivia decided that the value of the assets was less than zero and, therefore, no compensation was due. Had this been true, the expropriation would have been legal. This Tribunal, after an adversarial process with the benefit of very professional advocacy and expert testimony, has concluded, however, that EGSA had a positive value, as explained further below. However, irrespective of Bolivia's failure to properly assess and understand why and how EGSA did not have a negative value, the facts presented by Rurelec were insufficient to convince the Tribunal that Bolivia acted wilfully and intentionally to obtain an expert valuation setting forth such negative value for EGSA.[515]

439. Rurelec also alleged that the expropriation was illegal because the Respondent has not complied with its obligation to provide due process of law by refusing to allow Rurelec to participate in the valuation process to assess the fair value of compensation.[516] The Tribunal does not agree. As opposed to the US-Bolivia BIT, which prohibits expropriation "*except* […] *in accordance with due process of law*", the UK-Bolivia BIT does not explicitly

[514] Statement of Defence, ¶54.

[515] It is true that PROFIN's valuation had been considered as "un elemento estratégico en la negociación con GA" (PROFIN Consultores, S.A. "Estimación del valor de la empresa eléctrica Guaracachi S.A." (Exhibit **R-154**)) but this does not mean that the conduct of Bolivia was wilful—see Claimants' Post-Hearing Brief, ¶5.

[516] Reply on the Merits, ¶111.

establish due process as a precondition for the expropriation of an investment. Moreover, the Tribunal considers that Article 5(1) of the UK-Bolivia BIT, which states that "[t]*he national or company affected shall have the right to establish promptly by due process of law in the territory of the contracting party making the expropriation, the legality of the expropriation and the amount of the compensation in accordance with the principle set out in this paragraph*", does not impose upon the expropriating State an obligation to assess the value of compensation through a process in which the expropriated national or company must necessarily participate. Further, the Tribunal also does not consider it possible to derive from the cases cited by Rurelec[517] (which, moreover, concern radically different facts than the present case) the existence of a rule of customary international law obliging expropriating States to grant to the expropriated national or company a right to participate in such valuation process.

440. Rather, the investor's recourse, if it disputes the valuation performed by the expropriating State, is to seek review through procedures made available in that State's internal law in accordance with Article 5(1) or to submit the matter to international arbitration in accordance with Article 8. However, no evidence has been provided that the internal expropriation procedure was illegal *per se* under Bolivian law, and Rurelec itself did not seek the annulment of the expropriation.

441. The issue of illegality is thus mostly objective: if EGSA had a positive value, Bolivia should have indemnified Rurelec, providing just and effective compensation, since any State which carries out an expropriation is expected to accurately and professionally assess the true value of the expropriated assets. Bolivia did not actually compensate (or intend to compensate) Rurelec as it did not make an accurate assessment of EGSA's value at the time. In fact, it did quite the opposite, and if the Tribunal finds the valuation to be "*manifestly inadequate*", this is Bolivia's responsibility. As will be explained further below, this is in fact the case and the expropriation was therefore illegal.[518]

442. The Respondent does not appear to disagree: the heading of chapter 2.4.2[519] of the Respondent's Rejoinder reads, "*The Nationalization was not illegal because no compensation was due in the present case*" ("*La Nacionalización no fue illegal porque en el*

---

[517] See *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary* (ICSID Case No. ARB/03/16), Award, 2 October 2006 (Kaplan, Brower and van den Berg) (Exhibit **CL-38**); *Ioannis Kardassopoulos and Ron Fuchs v. Georgia* (ICSID Cases Nos. ARB/05/18 and ARB/07/15), Award, 3 March 2010 (Fortier, Orrego Vicuña and Lowe) (Exhibit **CL-65**).

[518] Reply on the Merits, ¶¶101, 106.

[519] Rejoinder on the Merits, p. 50.

presente caso ninguna compensación era debida”). Therefore, given the Tribunal’s decision that compensation was indeed due, the nationalisation must be illegal with respect to the requirement of compensation.

443. As the Respondent acknowledges,[520] both sides agree on the principle to be used for the calculation of the value of EGSA: FMV as assessed using the DCF method in accordance with the WBS. Given the above, the standard of compensation does not seem to differ whether the expropriation is deemed legal or not. The Parties do not appear to differ on this point either.[521]

444. International investment arbitration is often the land of ideological confrontation and moral judgments. However, this Tribunal considers that it should restrict itself to ruling on the relief sought and, as such, to pass directly to the quantum part of this Award, to assess regardless of whether EGSA had a positive value at the date of the nationalisation. Since the Tribunal concludes below that this was the case, “*just and effective compensation*” should have been paid, along with interest on such value accruing from the date of the nationalisation at an appropriate rate to be determined by this Tribunal.

F. ALTERNATIVE VALUATION METHODS

445. As to quantum, both sides agree, and the Tribunal concurs, that the main principle guiding the determination of the value of EGSA should be FMV as assessed using the DCF method in accordance with the WBS. Rurelec has, however, drawn the Tribunal’s attention to two alternative valuation methods—Book Value (BV) and EBIDTA multiple comparables—as benchmarks for its valuation and to demonstrate that the result of their DCF calculations were reasonable, while the Respondent’s were not. Furthermore, during the arbitration proceedings an additional benchmark indirectly came up: the actual price paid for EGSA’s shares in its 2003 purchase by IEL—where the seller, First Energy, sold at a price well below book value—and, subsequently, in its indirect purchase by Rurelec in 2006, which paid USD 35 million. Since the Tribunal believes that those alternative benchmarks have very limited value, it will just highlight below the main claims made by the Parties, before embarking in a far more detailed, substantive analysis of the main valuation method agreed by the Parties and the Tribunal, i.e. the DCF method.

[520] Statement of Defence, ¶175.

[521] Respondent’s Closing Statement, 9 April 2013, Slide 35.

446. In its first expert report, Compass Lexecon excluded other alternative valuation methods (net capital contribution, comparable transactions, etc.), but benchmarked its DCF valuation of EGSA against its Enterprise Value (EV)/EBITDA ratio. In order to do so it estimated at 9.74 the median value of such multiple, as of April 30, 2010 for a sample of 30 comparable electric companies in emerging economies. It further estimated at USD 24.5 million EGSA's EBITDA in 2011, the first complete year with the CCGT in operation, which resulted in an EV for EGSA of USD 238.6 million, which, after subtracting its debt, worked out to some USD 73 million for Rurelec's 50.001 stake in EGSA.[522]

447. Econ One criticized such valuation on several counts: the market multiple comparables approach is only applicable to firms with an unlimited time-horizon, rather than EGSA's 28-year horizon; the sample selected by Econ One was not fully comparable to EGSA; no allowance had been made for EGSA's huge outstanding commercial arrears; and, last but not least, the right EBITDA to use was the one obtained in 2009, not the expected one in 2011[523].

448. In its rebuttal report, Compass Lexecon addressed at length those criticisms and offered an additional alternative benchmark, namely EGSA's book value, which according to its 2009 financial statements—the last audited annual report before its nationalisation—amounted to USD 133 million, i.e. some USD 66 million for Rurelec's 50.001% stake. It stressed that Econ One's zero DCF valuation implied a price to book value ratio of zero, a result both surprising in a company such as EGSA with a solid history and prospects of profitability and at odds with the typical ratios for other traded companies.[524]

449. In its rejoinder report, Econ One not only responded to Compass Lexecon's arguments on market multiples, but discussed at length EGSA's book value. It recalled that, in past transactions, EGSA's shares had always been sold at a discount on book value: in 2003, First Energy had taken a USD 33 million book loss and in 2006 IEL had reportedly sold EGSA to Rurelec with a discount of 20% on book value[525].

450. In the Respondent's view, EGSA's book value had become increasingly detached from its market value as a result of two new accounting policies introduced in 2007 and 2009. First, starting in 2007, EGSA had applied a new accounting rule in Bolivia requiring the price of

[522] Compass Lexecon Report, ¶¶284-287.

[523] Econ One Report, ¶¶89-98.

[524] Compass Lexecon Rebuttal Report, ¶¶25-29.

[525] Econ One Second Report, ¶¶50-73.

assets to be indexed to a domestic inflation index (the so-called "*Unidad de Fomento de Vivienda*" or "UFV"). To the extent that during those years the Bolivian peso had strongly appreciated in real terms vis-à-vis the US dollar—because the dollar had depreciated in nominal terms vis-à-vis the peso, while Bolivia had experienced significant inflation—the book value of EGSA's turbines was now overvalued (in dollar terms), thereby artificially inflating not only the company's net equity (expressed in dollar terms), but also its reported profits. Secondly, starting in 2009, EGSA had started to capitalize (i.e. amortize over some years) maintenance costs which until then had been classified as current operational expenditures.

451. Even if a significant part of the hearing was devoted to further discussions on the alternative valuation methods issues described above, there is no need for further elaboration here since they do not have any bearing on the Parties' and the Tribunal's method of choice for evaluating EGSA: the DCF method, to which we now turn.

G. THE APPROACH TO DAMAGES

452. As previously stated, this Tribunal agrees with the Parties that this case is mostly about quantum. This Award now arrives at the part of the case that is the most relevant and clearly the most difficult to resolve, even if the Tribunal's work has been made substantially easier by the quality of the advocacy and of the experts' reports and authorities which were provided.

453. The Parties are in agreement on several relevant points, which are also accepted by the Tribunal. They include the following:

(a) The 2010-2038 timeframe for the analysis;

(b) FMV as the standard for defining compensation, if any;

(c) FMV to be determined, by reference to the WBS[526] as at the date of the nationalisation, by the DCF method;

(d) The DCF method's five main components of value:[527] "*revenues, operating expenses (OPEX) (including sales, general and administrative expenses), capital expenditures*

[526] Claimants' Closing Statement, 9 April 2013, Slide 5; Respondent's Opening Statement, 2 April 2013; Transcript (English), Day 1, 2 April 2013, 194:1-194:3.

[527] With the relevant exceptions of "size premium" and "country risk premium multiplier", to be addressed below.

(CAPEX), taxes and discount rate"[528] (albeit that the Parties do not agree on the actual figures and the grounds for them);

(e) The use of the WACC[529] as the appropriate discount rate;

(f) The cost of debt to be used in the calculation of the WACC; and

(g) A "standard of proof", that assumes that assessing values for compensation is not an exact science, rather than "*an exercise in certainty* […] *an exercise in sufficient certainty*".[530]

454. In spite of the general agreements described above, the Parties differ (based on the expert reports submitted) on the specifics of some underlying assumptions,[531] mostly in relation to revenue projections, CAPEX, and the discount rate,[532] the other differences between them being irrelevant or agreed by the experts following their discussions and cross-examination. These differences must be addressed in detail by the Tribunal.

455. In relation to revenues, the Parties disagree as to the projections for capacity and energy dispatch and capacity price forecasts. In relation to the discount rate, they disagree about the optimal capital/debt ratio, the country risk premium and its multiplier, and the size premium. These discrepancies create a huge difference in the WACC to be used to determine the discount rate (10.63% vs. 19.85%) and it is therefore the major reason for their differing conclusions concerning compensation.

---

528 Compass Lexecon Report, ¶66.

529 "*The appropriate risk-adjusted discount factor is the WACC of an efficiently managed firm in a similar market, contractual and institutional environment. The WACC is a firm's (or a project's) cost of raising funds from both shareholders (equity) and lenders (debt) in an efficient proportion, otherwise known as the optimal capital structure*" (Compass Lexecon, Report, ¶¶68, 93). "*El WACC representa la mínima tasa de rentabilidad que una empresa tiene que ofrecer a sus proveedores de capital para que inviertan en ella. Para una empresa que se financia con deuda y con capital propio, el WACC se calcula como el promedio ponderado del costo de la deuda (neto de impuestos) y el costo del capital propio*" (Econ One Report, ¶51).

530 *Gemplus S.A. v The United Mexican States* (ICSID Case Nos. ARB(AF)/04/3 & ARB(AF)/04/4), Award, 16 June 2010 (Fortier, Magallón Gómez, and Veeder), ¶13.91 (Exhibit **CL-67**).

531 "*This difference is explained primarily by Econ One's … assessments of the discount rate, spot energy price forecasts and capacity revenues*" (Compass Lexecon Rebuttal Report, ¶4), meaning Revenues and Discount Rate, corresponding almost to 95% of the difference between the two experts positions (Compass Lexecon Rebuttal Report, ¶4 and ¶10). See also Compass Lexecon Rebuttal Report, ¶53; Econ One Second Report, ¶111; Respondent's Opening Statement, 2 April 2013, Slide 107; Claimants' Opening Statement, 2 April 2013, Slides 101-104.

532 Compass Lexecon Rebuttal Report, ¶53.

H. Revenue Side

456. To estimate EGSA's expected revenue during the 2010-2038 period, it is necessary to make a number of assumptions.[533] The revenue is mostly produced by three streams: sale of energy, capacity payments and carbon credits. Only the first two are subject to disagreement between the Parties.[534]

457. The projected sale of energy is, in turn, the result of two factors:

- the price per kWh of electricity produced by each production unit; and
- the amount of energy dispatched by each production unit.

458. Both factors are dependent upon the projected demand for electricity and the supply available in the market during the years 2010-2038.

459. The optimal scenario for each of the Parties would be either higher demand and lower supply or lower demand and higher supply, respectively, as this would slant profitability towards the position of each side.

460. In order to estimate those variables, both Parties agree with the use of the "*Stochastic Dual Dynamic Programming*" (SDDP), used by CNDC to simulate the future evolution of various factors that influence energy demand and supply, and mathematically determine the optimal distribution of energy dispatched from the various units in the system and the system's marginal cost of production, as defined by the applicable regulations.

461. The use of the SDDP is not at issue between the Parties, although they are in disagreement on the evolution of two key variables during the period 2010-2038:

- the evolution of electricity demand; and
- the evolution of investments in new capacity.

462. As expected, the Parties tend to look to the future with different eyes. Rurelec sees a bright future for the revenue streams, a depressed future for new investments, and therefore higher profitability for the installed units of production. The Respondent sees the opposite: a lower

[533] Compass Lexecon Rebuttal Report, ¶106 et seq. These assumptions, which relate to future needs for energy and the actual structure of production, provide a huge variety of results. It is therefore necessary to select which one to retain. See Llarens' Cross-Examination, Transcript (English), Day 5, 8 April 2013, 1019-1022.

[534] In relation to Carbon credits (Compass Lexecon Report, ¶83 and Econ One Report, ¶29) both experts calculate the sales value of the credits the same way. However, Compass Lexecon did not initially deduct the 30% that should revert to Bolivia in the first report. See the explanations and corrections of Dr Abdala (Abdala's Cross-Examination, Transcript (English), Day 5, 8 April 2013, 1188).

revenue stream for EGSA, a bright future for new investments, and therefore a lower profitability for EGSA. The Parties' perspectives are a very important aspect of due process, as they provide the Tribunal with contrasting views which make it easier for the Tribunal to look at the facts with independent and impartial eyes and to see what the most likely outcome actually is.

463. One important assumption in this kind of valuation is the WB's attitude regarding the future. Since the WB assumes that all the relevant entities will act rationally, it will anticipate that: (i) the supervisory and regulatory bodies from Bolivia will do their utmost to prevent significant electricity shortages; and (ii) GDP increases will entail an increase in electricity demand.

464. This being the case, a WB would regard as highly improbable that Bolivia's GDP will grow and entail additional needs for electricity but that no new investments would take place to meet those needs. The opposite would also be true: if GDP does not increase and the demand for electricity stagnates, no impetus would exist for significant new investments.

465. Another important aspect of the WB is even more evident: a prospective rational buyer will try to obtain the maximum available information with which to make a decision and, in particular, will do adequate due diligence rather than following a passive approach that just looks at official documents projecting the future. A WB tries to collect all the information possible at the time.[535] Mr Paz agreed that "*due diligence*", and gathering "*all the available market information*"[536] and "*technical studies*" is part of the expected standard efforts of a WB.[537] As Rurelec stated[538], both experts agreed that "*all information available to the market as of the valuation date should be taken into account*".[539] This may include, but is not be limited to, CNDC information: it will also encompass any other information resulting from the buyer's due diligence.

[535] Including the expectations of the willing seller and the way it fulfilled or not what it had expected.

[536] Paz's Cross-Examination, Transcript (English), Day 4, 5 April 2013, 936:18-936:21. See also Abdala's Cross-Examination, Transcript (English), Day 5, 8 April 2013, 1183:12-1184:8; Flores's Cross-Examination, Transcript (English), Day 5, 8 April 2013, 1277:13-1278:1.

[537] See, for instance, Paz's Cross-Examination, Transcript (English), Day 4, 5 April 2013, 936:5-936:21; Transcript (English), Day 4, 5 April 2013, 935:5-935:21; Transcript (English), Day 4, 5 April 2013, 954:3-954:8.

[538] Claimants' Post-Hearing Brief, ¶165.

[539] See for instance Abdala's Cross-Examination, Transcript (English), Day 5, 8 April 2013, 1183:11-1183:18; Transcript (English), Day 5, 8 April 2013, 1077:21-1077:24.

466. The Respondent argues, however, that Rurelec makes selective use of information and that Compass Lexecon "*cherry picked*" what it deemed helpful for its report from post-nationalisation publicly available information, while disregarding what was unhelpful.[540]

467. In the Tribunal's view, a WB would have used all the information available at the time of nationalisation, irrespective of whether: (i) it was already in the public domain or was just the result of the buyer's own due diligence; and (ii) it resulted in a higher or lower valuation of EGSA.

468. The Respondent's argument regarding the selective use of available information, "*cherry picking*", and use of hindsight is a different issue. The Tribunal would obviously disagree with a biased use of non-official information available at the nationalisation date. Nor would the Tribunal accept that information which was not available at the date of the nationalisation, even when a proper due diligence was carried out, could be used in determining the FMV. However, the Tribunal would also disagree with the idea that only official information available at that date could be considered relevant, regardless of the possibility that such information might have been deemed inaccurate or that new facts had already clearly arisen and would therefore have been known to the WB. Thus, the Tribunal's task is to act as if it were the WB and to determine, on the basis of available evidence as to facts and likely future events, and exercising judgment and a sense of proportionality, the relevant information which, as of the date of the nationalisation, such WB would have likely taken into account in estimating EGSA's FMV.

1. Electricity demand

469. For the forecast of the electricity demand, Rurelec drew on two documents: (i) the "*Informe de la Programación de Mediano Plazo*" (PMP) covering the period between November 2009 and October 2013 and published by CNDC in September 2009, in order to estimate the demand for electricity in 2010; and (ii) CNDC's "*Proyección de la demanda de energía eléctrica de largo plazo del SIN 2011/2021*" for projections of demand in subsequent years. This latter report specifically envisaged that the Tarija and Chaco sub-systems would become part of the Interconnected National System (SIN), thereby increasing the demand for electricity in 2012. Rurelec's resulting estimates of electricity demand were as follows:[541]

Year	Demand (GWh)	Annual Growth (%)

[540] Respondent's Post Hearing Brief, ¶111 et seq.

[541] Compass Lexecon Report, Appendix C ("Mercados Energéticos's Report on Dispatch Run Assumptions").

2010	5,782	7.9
2011	6,308	9.1
2012	6,968	10.5
2013	7,806	12.0
2014	8,665	11.0
2015	9,346	7.8
2016	9,989	6.9
2017	10,624	6.4
2018	11,256	5.9

470. The Respondent argues that, on March 15, 2010 (i.e. before the nationalisation), CNDC had already published its new PMP, so that the one used by Rurelec was already outdated.[542] It further claims that the CNDC's report "*Proyección de la demanda de energía eléctrica de largo plazo del SIN 2011/2021*" used by Rurelec was not published until July 2011. Consequently, it would not have been available as of the nationalisation date. The Respondent also notes that, in said report, CNDC made its highest projections ever for the demand of electricity.

471. The Respondent instead relies on the figures in the March 15, 2010 PMP report for the period from May 2010 to April 2014. After April 2014—albeit without saying so explicitly—the Respondent seems to project a 5% annual growth in electricity demand.

472. In response to the Respondent's criticisms, Rurelec's expert points out that he used the last PMP of September 2009 for his projections, rather than the PMP published in March 2010, because the latter did not contain enough operating information on the January-April 2010 period, as would be necessary to produce a complete electricity production forecast from January 2010 to December 2018. He adds that, if he had used the March 2010 PMP report, the amount of the compensation requested would have dropped by only USD 0.2 million.[543]

473. Rurelec's expert also points out that he made an inadvertent error in his first expert report regarding the source of electricity demand in the long term projections. MEC, the consulting firm used by Compass Lexecon, did not actually use the CNDC study "*Proyección de la demanda de electricidad de largo plazo del SIN 2011/2021*", but rather the electricity demand projections set forth in the 2010 POES. He points out that the use of this latter source is particularly appropriate, because the POES projects both expected demand and capacity increases for the generation system. The POES demand forecasts also took into account the new power demand arising from the Huanuni and Karachipampa mining

[542] First Witness Statement of Paz, ¶¶96-97.

[543] Compass Lexecon Rebuttal Report, ¶¶110, 112, and footnote 122.

projects, which were expected to start operations in 2012. Following that period of exceptional growth, subsequent inter-annual demand growth rates slowed, gradually decreasing to 5.9% in 2018.

474. Rurelec's expert likewise criticises the underlying assumption of 5% growth in electricity demand in Bolivia used in the Respondent's forecasts, since it is not consistent with the increase in generation units forecasted by the CNDC in the 2009 POES, the report which the Respondent itself uses for its long-term supply forecasts.

475. The Tribunal finds that Rurelec's demand forecast is reasonable in light of all the evidence provided as well as the Respondent's general optimism as to the future of emerging countries in general, and in particular Bolivia itself. This is confirmed by the fact that Rurelec's forecast is based on the POES 2011-2021, prepared by CNDC and publicly available by the end of 2010.[544] This forecast takes into account not only the normal expected evolution of Bolivia's GDP and its relation with electricity demand, but also some "special events", notably the huge Karachipampa and Huanuni mining projects and the incorporation into the SIN of the Chaco, Trinidad and Tarija systems, among other developments.

476. It is true that the 2011-2021 POES was released in December 2010, i.e. several months after EGSA's nationalisation. However, in the Tribunal's view, this slight difference does not mean that the use of such information constitutes an undue resort to hindsight (a methodological defect to which the Respondent made repeated references during the witness and expert examinations, and rightly so):

(a) The information contained in the POES was not confidential, nor was it subject to a special duty of secrecy which would have made it unlikely to be disclosed prior to its release by the CNDC.

(b) As with other CNDC reports, there was, logically, a certain delay between the time the data on which the POES is based was collected and became known, and the publication of the POES itself.

(c) A prospective buyer of EGSA would have had a clear financial incentive to obtain the most updated information possible on the variables that could influence the demand for and price of electricity in Bolivia and, as such, Rurelec's assertion that it already had at

[544] First Witness Statement of Paz, Annex 39 (CNDC, "Plan Óptimo del Sistema de Interconectado Nacional, 2011-2021, Diciembre 2010"), p. 32.

its disposal in May 2010 information similar to that published by the CNDC in December of that same year is plausible.

477. The electricity demand growth forecasts used by the Respondent, and included in Mr Paz's witness statement, are not fully consistent with the 2010-2020 POES that the CNDC published in November 2009. The forecasts included in that POES are, as the Respondent points out, lower than those of the POES published in December 2010. For instance, in 2018 it forecasts an aggregate demand of 9,963 GWh, as compared to 11,256 GWh in the aforementioned December 2010 POES. However, this is due to the fact that—as the report explains in its paragraph 4.2—it merely extrapolates from the historic relation between the GDP and electricity demand, and takes "megaprojects" into account only as a determining factor for GDP growth, but not as a factor leading to specific increases in electricity demand. Even so, the POES published in November 2009 forecasted, for the 2015-2018 period, inter-annual electricity demand increase rates of 7.5% (2015), 6.8% (2016), 7.3% (2017), and 7.3% (2018), values significantly higher than those tacitly assumed in the Respondent's projections.

478. In short, the Tribunal does not find merit in the Respondent's objections to the electricity demand growth projections used by Rurelec, and it accepts such projections as the basis for EGSA's valuation.

2. Electricity supply

479. As already explained, in the Tribunal's view a WB would have used a consistent approach: a bullish view of Bolivia's economic future would have translated into an assumption of both high demand for electricity and significant new investments in capacity. Conversely, a more pessimistic view of Bolivia's future would have translated into expectations of both a more subdued demand for electricity and sluggish investment in new capacity. Thus, the Tribunal rejects as inconsistent both Rurelec's high demand/low supply scenario and the Respondent's low demand/high supply scenario.

480. In its analysis of the demand for electricity, the Tribunal has accepted as reasonable Rurelec's scenario of a buoyant growth for Bolivia, which entailed a sustained increase in the demand for electricity. Consequently, it should apply now a consistent view of supply decisions and new investments and, more specifically, of the expectations that a WB would have been likely to hold regarding the future of Karachipampa, the prospects for the

construction of the Rositas hydroelectric dam, and the future of the ARJ 1 to 3 units of Sucre's plant.

481. When estimating the future supply of electricity, Rurelec started out from CNDC's POES 2011-2021, published in December 2010, but introduced two changes:

(a) It pushed back the date when EGSA's new combined cycle came on stream to November 2010, since such delay had already been foreseen by EGSA before its nationalisation, even if it was not reflected in the POES forecast.

(b) It dismissed the POES forecast that the Rositas dam would commence operations in 2018.

482. Rurelec's expert used the POES published in December 2010, rather than the one published in November 2009, because he considered that the information set forth in the latter was outdated. He supports that assertion on the basis that the November 2009 POES forecasted the coming into operation between December 2009 and May 2010 of five new thermal units—four in the Entre Ríos plant in Cochabamba, and EGSA's combined cycle in Santa Cruz—which were actually several months delayed in commencing operations. He holds that a rational buyer would not have relied on the information set forth in that version of the POES and would have instead gathered more recent information similar to that subsequently published in the December 2010 POES.

483. Rurelec argues that the Rositas power plant is a huge project that has been studied and analysed for more than 40 years.[545] While it recognizes that the 2010-20 POES considered that Rositas would be built and be in operation by January 2018,[546] it points out that none of the money budgeted for the project in 2010 had been spent in the first four months of the year,[547] and that CNDC had regularly included Rositas in its projections even if initial investments and studies required to start the project had never materialized.[548] The huge size of the project and these historical precedents lead Rurelec and Compass Lexecon to consider it highly improbable, if not impossible, that Rositas would come on stream by 2018.[549]

---

[545] Reporte Energía, Magazine No. 07, January 2009 (Exhibit **C-294**), p. 12.

[546] First Witness Statement of Paz, Annex 40 (CNDC, "*Plan de Expansión del Sistema Interconectado Nacional*").

[547] And assuming that a WB could have anticipated 9 years for the construction. See First Witness Statement of Paz, Annex 29, p. 104.

[548] Abdala's Cross-Examination, Transcript (English), Day 5, 8 April 2013, 1083:7-1083:19.

[549] Abdala considers this opinion his "judgement call", albeit the CNDC inputs and lack of budget confirm his point of view (Abdala's Cross-Examination, Transcript (English), Day 5, 8 April 2013, 1080:22-1080:23; 1082:18-1082:21).

484. The Respondent and Mr Paz assert the opposite and, therefore, include the Rositas power plant in the projections as a unit able to dispatch.

485. The Tribunal considers that the size of an investment is certainly an important issue: it is easier to bet on a brighter future for new investments when the amounts needed are smaller than when they are more substantial. However, a rational decision is based upon general optimism or pessimism regarding the future. If the dominant attitude is negative, investment is less probable than if the trend is the opposite. The Tribunal tends to agree with Rurelec: in May 2010, without taking into account the nationalisation of EGSA, a WB having done the necessary due diligence would have harboured optimism regarding the future and, therefore, would have expected demand to increase in the coming years, as anticipated by the Compass Lexecon report based upon MEC's projections.

486. A rational and consistent WB having done the necessary due diligence would had also been optimistic regarding the near future for emerging economies[550] (China's investment in energy-related companies in particular is a good example). Therefore, such WB would have anticipated that the necessary funding for Rositas would materialize, if not in accordance with the POES 2010-20's timetable, then not much later. This conclusion is reinforced by the fact that the POES emphasized the risk of potential electricity shortages if Rositas was not available by 2019 and was actively considering the possibility of building it initially on a smaller scale,[551] to be subsequently enlarged, say in 2019/2020.[552] For these reasons, the Tribunal will assume that Rositas would have been built by 2018 and become operational at the beginning of 2019.[553]

487. By the same token, a WB with bullish views on Bolivia's economic future and having done the necessary due diligence would have considered it unlikely that Karachipampa would be decommissioned,[554] at least until Rositas came online.[555] It is true that EGSA had requested

[550] As the 2012 international bond issue of Bolivia would confirm.

[551] First Witness Statement of Paz, Annex 40 (CNDC, "*Plan de Expansión del Sistema Interconectado Nacional*"), p. 17; Flores' Cross-Examination, Transcript (English), Day 5, 8 April 2013, 1208-1210.

[552] First Witness Statement of Paz, Annex 39 (CNDC, "Pl*an Óptimo del Sistema de Interconectado Nacional, 2011-2021, Diciembre 2010*"), p. 103; Paz's Cross-Examination, Transcript (English), Day 4, 5 April 2013, 993:12-994:16.

[553] If Rositas commenced production in 2018, the value of the damages, in accordance with Compass Lexecon's valuation, would be USD 900,000 (Abdala's Cross-Examination, Transcript (English), Day 5, 8 April 2013, 1079). This figure has not been subject to any comment from Mr Flores or the Respondent.

[554] The same reasoning shall be applied to ARJ 1, ARJ 2 and ARJ 3.

[555] First Witness Statement of Paz, Annex 8 (CNDC, "*Informe de Precios de Nodo, Período Mayo-Octubre 2010*"), p. 10; Paz's Cross-Examination, Transcript (English), Day 4, 5 April 2013, 944-947. PROFIN Consultores, S.A. "Estimación del valor de la empresa eléctrica Guaracachi S.A." (Exhibit **R-154**); First Witness Statement of Paz, Annex 4 (ENDE, "Memoria Anual 1991") (assuming Karachipampa would still be active in 2020).

authorization in January 2010 to shut it down[556] because, as stated by Messrs Aliaga and Andrade, EGSA was not making money from it.[557] However, this would not have been the first time that CNDC refused or postponed a decommissioning request. Indeed, Bolivian regulatory bodies had shown in the past a very conservative and prudent approach towards the electricity supply, as there was a strong risk of shortages[558] and in a number of similar cases CNDC had postponed or refused requests for decommissioning.[559] This trend is still true: even if such could not have been known by a WB in 2010, Karachipampa remains available for dispatch today. Thus, the Tribunal agrees with Rurelec that Karachipampa must be included in the dispatch calculations.[560]

488. In conclusion, the scenarios on Rositas and Karachipampa are closely linked, since a WB with optimistic views on Bolivia's demand for electricity would have expected both that the former would be built according to schedule and the latter would not be decommissioned until Rositas came on stream.

3. Price of Electricity

489. Differences between the Parties as to their respective expectations of the growth of demand for electricity and the increase in generation units result in differences regarding the two main factors which make up EGSA's revenues from electricity sales: (i) the unit price per MWh produced and (ii) the total physical amount of electricity dispatched to the SIN by EGSA's units.

490. The differences between electricity prices forecasted by Rurelec and by the Respondent are relevant, as illustrated in the following figure:

---

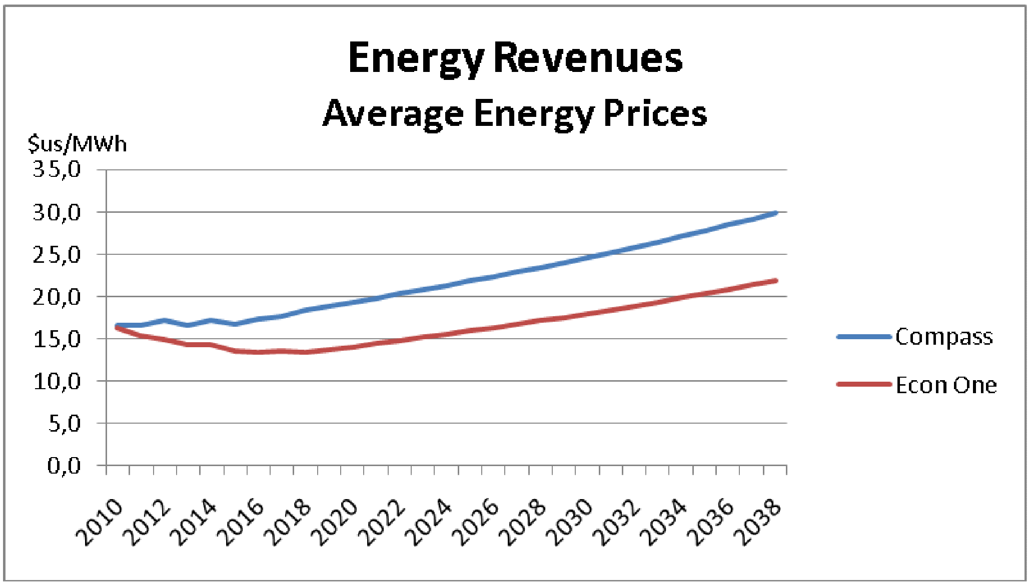
[556] 01/2010 Acta de Reunión de Directorio de la "Empresa Guaracachi S.A." 27 January 2010 (**Exhibit R-83**).

[557] Aliaga's Cross-Examination, Transcript (English), Day 2, 3 April 2013, 441:7-441:12; Andrade's Cross-Examination, Transcript (English), Day 2, 3 April 2013, 471:21-472:3.

[558] Compass Lexecon Rebuttal Report, ¶¶119-120.

[559] See, for example, in relation to the decommissioning of units ARJ 5 and ARJ 6, Resolution SSDE No. 107/2007, 2 April 2007 (Exhibit **C-136**); Resolution SSDE No. 341/2007, 8 November 2007 (Exhibit **C-141**); and Resolution SSDE No. 185/2009**,** 25 September 2009 (Exhibit **C-176**).

[560] In any case, the difference at stake in relation to Karachipampa is of USD 1.1million (Compass Lexecon Rebuttal Report, ¶120).



491. As can be observed in the above figure, Rurelec forecasts a slight initial decline in the price of electricity, with nominal prices ranging from USD 16.6 to USD 18.4 for the various nodes as of 2018. From 2018 onwards, Rurelec anticipates that the price will be stable in real terms, and thus adjusts it in nominal terms using the expected US PPI.

492. The Respondent argues otherwise and anticipates a lower nominal price for the coming years.

493. Those differences are completely aside from the Parties' differences regarding Resolution SSDE No. 283/08, which excluded units using liquid fuel for the determination of the system's marginal cost, since Rurelec made a clean separation between its expropriation and "spot price" claims, and assumed for the former calculations that Resolution SSDE N0 283/08 remained in force.

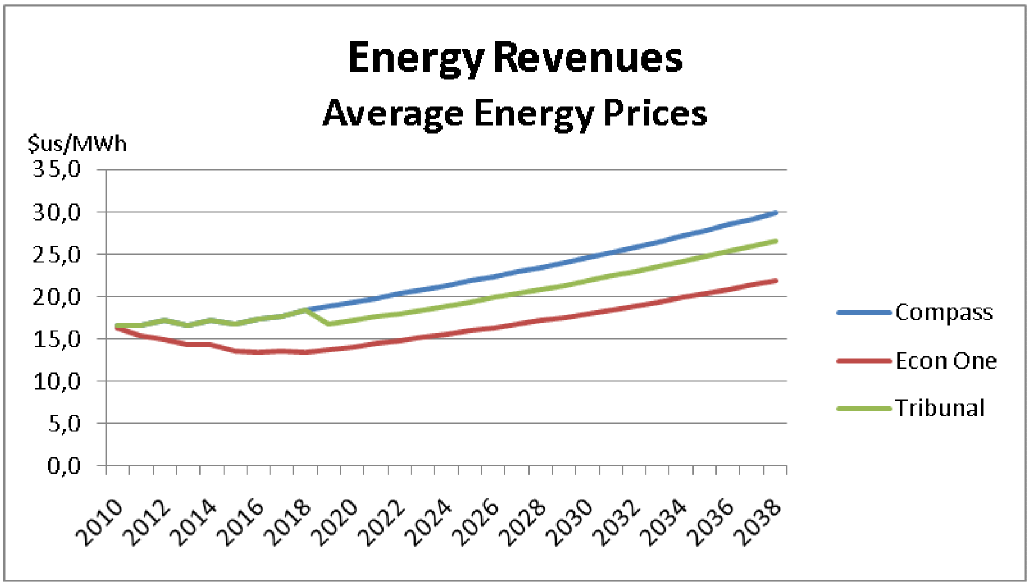
494. The Tribunal in this case is therefore more convinced by Rurelec's forecast as to electricity prices. However, given that Rositas shall be assumed to enter into production in 2019, it is necessary to adjust the forecasts accordingly, not only as to EGSA's electricity dispatch, but also in relation to the price for electricity from 2019 onwards.

495. Even if Rurelec assumed in its own calculations that the Rositas dam would never be built, they estimated in exhibit C-359 the consequences of assuming that it was built and became operational as of 2018. To the extent that document C-359 includes both the physical amount of electricity dispatched by EGSA in 2018—i.e. assuming Rositas was already in operation—and EGSA's revenue from energy sales that year, it allows the Tribunal, after

inferring the electricity prices that, according to Rurelec, would have prevailed in 2018 assuming that Rositas entered in operation that year, to adapt these for 2019.

496. In order to estimate electricity prices from 2019 onwards, the Tribunal has applied to the 2018 prices in exhibit C-359 the PPI inflation estimate—i.e. a cumulative 2.5% rate—used generally by both sides to index all dollar figures after that year.

497. In summary, the Tribunal decides to accept Rurelec's forecast of electricity prices up to 2018, and reject the Respondent's. However, it has decided to reflect, starting in 2019, the impact of Rositas' entry in operation on the price of electricity. The following figure compares the Tribunal's forecast of electricity prices with those of the Parties:



4. Revenues from capacity payments

498. The forecast of EGSA's revenues for capacity payments depends on two main factors:

- The prevailing unit price in each period for every kW of installed capacity with a right to payment ("capacity price"); and
- The aggregate capacity of EGSA's units that, at each moment in time, were part of the "firm capacity" and were consequently entitled to payment.

(i) Capacity Prices ("Precio Básico por Potencia")

499. The capacity price (PBP) is, as already discussed above, the payment obtained by generators for putting their generation capacity at the system's disposal, regardless of whether they actually dispatch energy or not, provided that the corresponding unit forms part of the so-

called "firm capacity" and has not been relegated because of its economic inefficiency to the category of "cold reserve".

500. PBP has been forecast by the Parties in the same way and with similar reasoning as for spot prices. For different reasons, the Parties made their calculation based on the rules in force in May 2010 and, therefore, without using the 20% increase that had been cancelled by the *Norma Operativa Nº 19/2007* (*Resolución aprobada por la SSDE Nº 040*).

501. This being so, the main issue between the Parties is the inflation index to be used in the calculation of the PBP. Rurelec, based upon the reports of Compass Lexecon, uses the "US Producer Prices Index – Turbine and Turbine Generator Set Units" (Turbine Index),[561] using a reference period of 2000-10. As a consequence, Rurelec assumes that the unit price would grow at a rate of 3.47% annually in nominal terms.

502. The Respondent, based on the reports of Econ One, prefers to use the standard US PPI—i.e. a 2.5% annual rate—and insists that, if the Turbine Index is used, the reference period should be a longer one (1990-2010) during which turbine prices grew at a cumulative annual rate of only 2.27%.[562]

503. The Tribunal agrees with the Respondent. The explanations provided by Compass Lexecon were not strong enough to eliminate the impression that the reference period that they used—i.e. 2000-2010—was not representative of long-term trends, since it was distorted by an exceptional increase in turbine prices in 2007-2008.[563] Mr Abdala accepted that the Turbine Index used by him was high[564] or at least that "*probably* […] *over the long term, there shouldn't be that much of a difference*" between the two indexes.[565] In response to the Tribunal, he was also unable to explain the logic of his assumption that the relative price of turbines would increase for the foreseeable future, particularly since there are no specific barriers to entry in the market for turbines which could explain that sustained trend in a market economy.

504. The only doubt for the Tribunal was whether to accept the standard US PPI or the Turbine Index available for a longer period. Mr Flores stated in his direct examination presentation

[561] Compass Lexecon Report, ¶80; Compass Lexecon Rebuttal Report, ¶123; Econ One Second Report, ¶194.

[562] Respondent's Closing Statement, 9 April 2013, Econ One Report, ¶7, Table 1.

[563] Respondent's Closing Statement, 9 April 2013, Slide 74, quoting Lanza's Cross-Examination, Transcript (English), Day 3, 4 April 2013, p. 642:25-643:9.

[564] Respondent's Post-Hearing Brief, ¶¶129-132.

[565] Abdala's Cross-Examination, Transcript (English), Day 5, 8 April 2013, 1201:7-1201:21.

(Slide 9) that both experts use the Turbine Index.[566] However, the Tribunal, faced with this discrepancy and the challenge of selecting the appropriate period, prefers to use the standard US PPI, and therefore will use the 2.5% value for its calculations.

(ii) Eligible installed capacity

505. Compass Lexecon assumes, from its very first expert report, that EGSA's aggregate installed capacity, present and future, would be entitled to capacity payments, such that they merely multiply that aggregate capacity by the unit PBP forecasted in each period.

506. The Respondent points out, on the contrary, that EGSA's firm capacity entitled to collect capacity payments is lower than that indicated by Rurelec, since the latter only forecasted the generation capacity EGSA would have had in 2012—i.e., once the combined cycle came on stream—as if it were all firm capacity, failing to take into account that some of EGSA's oldest thermal units would fall out of the "firm capacity" category, and would become "cold reserve" units not entitled to collect the PBP, as a result of the installation of new competitive hydroelectric power plants.[567] Thus, in the Respondent's view, Rurelec has overestimated EGSA's firm capacity by 21 Mw in 2011, 42 Mw in 2012, 86 Mw in 2013, and 99 Mw from 2014 onwards.[568] The Respondent points out that Rurelec's expert has clearly not conducted any simulation of the future firm capacity, but has simply used EGSA's whole installed capacity, including the least efficient units thereof (such as Guaracachi 1, 2 and 6, Santa Cruz 1 and 2 and Aranjuez 1, 2 and 3).

507. In his third witness statement submitted by the Respondent, dated 1 March 2013, Engineer Paz deemed this a serious error, especially in respect of the abovementioned three Aranjuez units following Rositas' entry in operation, because Rositas would be within the same circuit as the Aranjuez plant and would displace the production of those inefficient thermal power stations, whose production cost is two times that of the more modern turbines belonging to EGSA itself.[569]

508. Rurelec rejects this counter-argument on the basis that, given the forecasted growth in demand for electricity—ranging between 7% and 12% per year during the 2011-2018 period—the new hydroelectric power plants would have been unlikely to displace EGSA's

[566] Flores' Direct Examination Presentation, Slides 9-14 (albeit that Slide 13 shows as "Indexación Econ One" the standard index that is less favourable to the Respondent than that accepted by the Tribunal).

[567] First Witness Statement of Paz, ¶¶126-132.

[568] First Witness Statement of Paz, ¶131 (Table).

[569] Third Witness Statement of Paz, ¶¶55-56.

thermal units. In addition, the need for SIN to maintain an appropriate capacity reserve margin reinforces Rurelec's hypothesis. In any event, Rurelec asserts that the Respondent overestimates the new hydroelectric generation capacity.[570]

509. The Tribunal, in keeping with the abovementioned principle of consistency between the forecasted growth in demand for electricity and the expansion of installed capacity in the SIN, considers Rurelec's forecast until 2018 to be justified, because the strong growth in demand is likely to force the authorities to deem all of EGSA's generation facilities to form part of the firm capacity.

510. However, as pointed out by the Respondent, the foreseeable entry into operation of the Rositas power plant—that Rurelec has disregarded, but which the Tribunal considers should be included as part of the forecasts (as of 2019)—would probably relegate EGSA's most inefficient units to mere "cold reserve", in particular those of the Aranjuez plant. Consequently, the Tribunal understands that units ARJ-1, 2, and 3 as well as the Karachipampa power plant should be withdrawn from EGSA's capacity revenue forecasts for the 2019-2038 period.

5. Conclusion about Revenues

511. As a result of the foregoing conclusions, the Tribunal has decided to introduce into Rurelec's forecast of EGSA's revenues the following modifications:

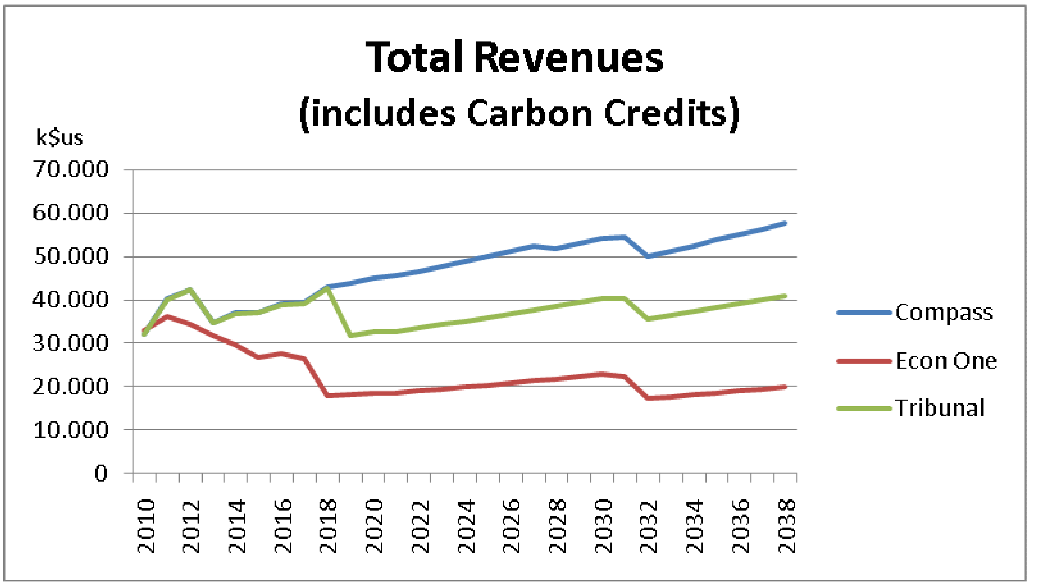
(a) those resulting from a WB's expectation that Rositas would start operating in 2019 and, as a consequence,

- the electricity dispatched by EGSA would be reduced;
- the spot price would also be similarly reduced; and
- EGSA's installed capacity eligible to received capacity payments would also be reduced.

(b) the reduction in the rate of inflation on the PBP is reduced from 3.47% to 2.5%.

512. The following figure compares the result of the Tribunal's decisions with the Parties' forecasts of EGSA's revenues:

[570] Compass Lexecon Rebuttal Report, ¶¶169-173, 179.



513. As a consequence, modifications have been made to Rurelec's valuation model and the conclusions are presented at the Excel table attached to this Award as Annex A.

I. COST SIDE

514. After looking at the revenue side, it is now time to look in detail at the cost side. The relevant items are (i) OPEX, including cost of energy (natural gas and diesel), and (ii) CAPEX.[571]

1. OPEX

515. The biggest part of OPEX, by far (90%[572]), is energy costs. The Parties are in agreement on energy costs. The prices in Bolivia have been fixed since 2001 at 1.30$/Tcf for natural gas and 0.526$/litre for diesel. The minor discrepancy between the Parties relates to what inflation should be added: Econ One considers that prices would remain flat until 2018 and so applied inflation only to the remaining 10% of the total costs. Compass Lexecon decided to assume price inflation from 2010 to 2038 and so it applied the US PPI to the total amount of costs. The PPI is accepted by Econ One, but applied only from 2019 to 2038. The Tribunal sees no reason to apply a different approach before and after 2018 on this particular issue, as no explanation has been given to justify doing so. Therefore, the Tribunal accepts Rurelec's approach.

[571] Tax has been considered as an issue, but Compass Lexecon agreed in its Rebuttal Report (Compass Lexecon Rebuttal Report, ¶140) with Econ One's remarks (Econ One Report, ¶34).

[572] Econ One Report, ¶20.

516. Some differences also arise in relation to administrative costs.[573] In their initial reports, both experts projected these costs as a fixed percentage of EGSA's revenues, drawn from figures for the 2005-2009 period.[574] However, in its rebuttal report,[575] Compass Lexecon claimed that it had made an error and decided instead to assume that administrative costs would remain constant in real terms and thus grow "*in nominal terms, with growth in* overall *inflation*". Econ One criticized Compass' change of criterion and noted that it increased EGSA's value. The Tribunal agrees, however, with Rurelec's solution, which it regards as more logical, since EGSA's administrative costs were limited, and can largely be regarded as a recurrent fixed cost, unrelated to the actual level of electricity produced.

517. Other minor discrepancies between the Parties (albeit in regard to very small amounts) relate to depreciation, namely the start date for CCGT depreciation[576] and working capital.[577] Here, the Tribunal thinks that CCGT depreciation should start in November 2010 and accepts Rurelec's view as to working capital.

518. The Tribunal was therefore able to reach the conclusion in relation to OPEX shown in Annex A.

2. CAPEX

519. Compass Lexecon considered that the only investment to be included for the purposes of the cost calculation is the CCGT expansion project.[578] The reasons for not assuming additional CAPEX are as follows:

(a) no new investments were predicted or predictable in May 2010; and

(b) all maintenance costs were included in the maintenance, materials, spare parts, and supplies components of the OPEX.[579]

520. Econ One strongly disagrees,[580] and asserts, on the basis of Mr Paz's statement,[581] that EGSA's equipment could not remain operational without major replacements with a cost of

[573] Econ One Second Report, ¶219.

[574] Econ One Second Report, ¶¶219-221.

[575] Compass Lexecon Rebuttal Report, ¶141.

[576] Econ One Report, ¶39.

[577] Econ One Report, ¶¶41-45; Compass Lexecon Rebuttal Report, ¶¶126-131; Econ One Second Report, ¶¶204-210.

[578] Compass Lexecon Report, ¶90.

[579] Compass Lexecon Report, ¶91; Transcript (English), Day 5, 8 April 2013, 1070 et seq.

[580] Econ One Report, ¶¶46-48.

at least USD 2.5 million for each of the 21 units, being USD 52.5 million in total. The Respondent interprets a statement from Mr Abdala,[582] when cross-examined, as an example of inconsistency related to this issue.[583]

521. The Tribunal agrees with the Respondent that, after more than 30 years of operation, major replacements to be included under CAPEX would need to be made. However, taking into account that operations would end in 2038 (28 years after the expropriation), this factor will only apply to the units that had reached 30 years of operation by that year. Therefore, it is assumed no CAPEX would be necessary or justified for units that would not yet have reached more than 30/31 years of operation by 2038.

522. The Tribunal will also assume that the situation where the unit is expected to work for a few more years past the 30 year mark is not the same as the situation in which the operations are expected to continue for many more years. So, while the Tribunal accepts the USD 2.5 million value as the basis for the calculation of required CAPEX per unit on the basis that the new investment would allow the unit to operate for another 28 years, it will adjust that value according to the number of additional years of operation expected from each unit.

523. For all these assumptions and calculations, the Tribunal will refer to the table provided by Mr Paz:[584]

---

[581] First Witness Statement of Paz, ¶¶134-135.

[582] Abdala's Cross-Examination, Transcript (English), Day 5, 8 April 2013, 1065:11-1065:23.

[583] Respondent's Post-Hearing Brief, ¶¶133-136.

[584] First Witness Statement of Paz, ¶135.

CENTRAL (Ubicación)	UNIDAD N°	FECHA PUESTA EN SERVICIO (día/mes/año)	POTENCIA EFECTIVA (MW)	AÑOS DE SERVICIO	HORAS DE OPERACIÓN
Guaracachi Santa Cruz de la Sierra	GCH-1	23/06/1975	22.2	35	121,755
	GCH-2	20/06/1977	19.8	33	118,911
	GCH-4	16/03/1980	20.3	30	99,175
	GCH-6	20/06/1988	21.4	22	64,990
	GCH-9	3/05/1999	63.4	11	76,250
	GCH-10	15/05/1999	63.4	11	71,851
	GCH-11	14/04/2007	63.4	3	23,744
Planta Santa Cruz	SCZ 1	6/04/1990	21.7	20	92,149
	SCZ 2	23/12/1992	21.6	18	104,047
Alto Aranjuez Sucre	ARJ-1	06/1974	2.7	36	66,334
	ARJ-2	06/1974	2.7	36	65,070
	ARJ-3	06/1974	2.7	36	63,657
	ARJ-8	12/06/1994	18.49	16	122,799
	ARJ-9	21/08/2007	1.6	3	28,281
	ARJ-10	21/08/2007	1.6	3	28,862
	ARJ-11	21/08/2007	1.6	3	28,337
	ARJ-12	21/08/2007	1.6	3	21,588
	ARJ-13	13/08/2008	1.6	2	13,381
	ARJ-14	13/08/2008	1.6	2	10,753
	ARJ-15	13/08/2008	1.6	2	1,479
Karachipampa Potosí	KAR-1	1982	13.91	28	91,325

524. In accordance with the Tribunal's decision and this table,

(a) GCH-11 and ARJ-9 to ARJ-15 will not need new CAPEX;

(b) ARJ-1 to ARJ-3 will need new CAPEX for a period of 8 years and Karachipampa for a period of 6 years;

(c) GCH-1, GCH-2, and GCH-4 will need new CAPEX for 28 years, GCH-6 for a period of 20 years, and GCH-9/10 for 9 years;

(d) SCZ-1 will need new CAPEX for 18 years and SCZ-2 for a period of 16 years; and

(e) ARJ-8 will need new CAPEX for a period of 15 years.

525. This leads to CAPEX costs, summarized as follows:

- in 2011: USD 9,642,958 (USD 2.5 million for each of GCH-1, GCH-2, and GCH-4, and USD 714,286 for each of ARJ-1 to ARJ-3);
- in 2013: USD 535,714 (for KAR-1);

- in 2019: USD 1,785,714 (for GCH-6);
- in 2021: USD 1,607,143 (for SCZ-1);
- in 2023: USD 1,428,571 (for SCZ-2);
- in 2024: USD 1,339,286 (for ARJ-8); and
- in 2030: USD 1,607,142 (USD 803,571 for each of GCH-9/10).

3. Conclusions about Costs

526. The Tribunal overall conclusions in relation to costs are shown in Annex A.

J. DISCOUNT RATE

527. The parties and their experts agree on a few things concerning the discount rate, but they disagree on the specific value of most of its components and on whether some additional risk factors should be added when calculating EGSA's cost of equity, namely:

(a) a multiplier to be applied to Bolivia's sovereign risk, to take into account the special volatility of equity investments in emerging economies; and

(b) a "size premium", to account for EGSA's small size.

528. The specific disagreements are illustrated in the following table, taken from Econ One:[585]

Table 2 - Weighted Average Cost of Capital (WACC) for EGSA as at 1 May 2010: Comparison between Compass Lexecon and Econ One

	Compass Lexecon	**Econ One**
1. Risk-Free Rate	**3.58%**	**4.36%**
2. Market Risk Premium	**5.00%**	**6.70%**
3. *Raw* Beta	0.57	1.34
4. Debt-Equity Ratio in the US	80.69%	133.27%
5. Marginal Tax Rate in the US	40.00%	40.00%
6. Unlevered and Adjusted Beta	0.48	0.68
7. Debt-Equity Ratio in Bolivia	80.69%	56.04%
8. Marginal Tax Rate in Bolivia	25.00%	25.00%
9. Levered Beta [Row 6 x (1 + (1 - Row 8) x Row 7)]	**0.77**	**0.97**
10. Country Risk Premium (bps)	**701.73**	**1,052.60**
11. Size Premium	**-**	**6.28%**

[585] Econ One Report, ¶52.

12. Cost of Equity [Row 1 + Row 2 x Row 9 + (Row 10 / 10,000) + Row 11]	**14.45%**	**27.66%**
13. Cost of Debt	7.88%	7.88%
14. **After-Tax Cost of Debt** [Row 13 x (1 - Row 8)]	**5.91%**	**5.91%**
15. Debt-Capital Ratio [Row 7 / (1+ Row 7)]	44.66%	35.92%
16. Equity-Capital Ratio [1 - Row 15]	55.34%	64.08%
17. **WACC (nominal)** [Row 14 x Row 15 + Row 12 x Row 16]	**10.63%**	**19.85%**

529. Under the Capital Asset Pricing Model ("**CAPM**") methodology the cost of debt and the cost of equity are external parameters introduced in the model as independent variables. However, Rurelec argues that there should be consistency between their relative values, since the degree of riskiness of a company affects both its creditors and its shareholders, even if the latter are subordinated to the former and bear the company's "residual risk". In Rurelec's words, an excessive difference "*between the cost of debt and cost of equity suggests that creditors do not care about risks that are causing equity-holders to demand high returns.*"[586] More specifically, Rurelec insists that "*Dr Flores' cost-of-debt/cost-of-equity ratio of 3.51 is out of proportion with the 1.53 median ratio for the Santander sample, while Dr Abdala's ratio, 1.83, is much closer both to reality and to the sample's median ratio*".[587]

530. As it may be seen below, the Tribunal will determine a cost of equity for EGSA whose ratio with EGSA's commonly agreed cost of debt is higher than the one suggested by Rurelec, but lower than the Respondent's.

531. However, the Tribunal will not factor in, in the determination of the Discount Rate, the actual ratio between equity and debt cost that would result from the Tribunal's conclusions. The Tribunal considers that it is more important to look directly at the actual costs, and notes that the Parties have agreed on the cost of debt irrespective of their disagreement in relation to equity costs. As such, the Tribunal concludes that it would not be appropriate to simply calculate the cost of equity as a multiple of the cost of debt, as Compass Lexecon suggests. The Tribunal will therefore analyse below each of the parameters whose value the parties disagree on.

[586] Claimants' Post-Hearing Brief, ¶152.

[587] Claimants' Post-Hearing Brief, ¶152.

1. Risk-free rate

532. The first discrepancy is related to the risk-free rate. Both experts agree that the maturity of the bond should be consonant with the life of EGSA's cash flows to be discounted, but disagree on the practical application of such criterion.

533. Compass Lexecon uses the yield of the 10-year US Treasury bond (i.e. 3.58%) and Econ One the 20-year bond's (i.e. 4.36%). According to Econ One, despite the 10-year bond's higher liquidity and lower volatility against changes in inflation,[588] the 20-year bond is more appropriate to the timeframe being used.[589] However, Compass Lexecon insists on the appropriateness of its choice because the average "duration" of the cash flows for EGSA is 11 years, closer to the "duration" of the 10-year bond (i.e. approximately 9 years) than that of the 20-year bond (i.e. approximately 14 years).[590] Econ One retorts that the investment bank's reports (i.e. Banco Santander's) cited by Compass Lexecon used in 2010 a yield of 4.2%, which seems closer to Econ One's proposal.[591] Mr Abdala asserts that his choice is "*not a question of hindsight*",[592] since he used these reports mostly just for context, and the evolution of Banco Santander's estimates from 2009 to 2010 confirms his position.[593]

534. The Tribunal agrees with Econ One that the risk-free rate used by Banco Santander's seems closer to the yield of the 20-year bond than the 10-year bond. Yet, the Tribunal grants more weight to Compass Lexecon's argument that the choice of the relevant bond tenor should be made on the basis of the "duration" of cash flows. The "duration" of EGSA's cash flows (in discounted terms) would in fact be even shorter—and even closer to that of the 10-year bond—if a higher discount factor than Compass Lexecon's 10.63% is used for discounting purposes, since that will significantly diminish the discounted present value of EGSA's most distant cash flows. The Tribunal thus concludes that the yield of the 10-year US Treasury Bonds should be used.

[588] Compass Lexecon Report, ¶152.

[589] Econ One Report, ¶¶54-56; Econ One Second Report, ¶¶153-159.

[590] Compass Lexecon Rebuttal Report , ¶81. An argument made in this last report about investment bank**s** (¶82) appeared to be wrong (Econ One Second Report, ¶155).

[591] Econ One Second Report, ¶159.

[592] Abdala's Cross-Examination, Transcript (English), Day 5, 8 April 2013, 1105:7.

[593] Abdala's Cross-Examination, Transcript (English), Day 5, 8 April 2013, 1110-1112.

2. Market risk or equity premium

535. The next discrepancy relates to the market risk premium—commonly described in the literature as the "equity premium"—which represents the additional return over the risk-free rate that an investor expects from holding a market portfolio of riskier securities, such as shares in a company.

536. Even if the market premium is usually defined as an "expected" supplementary return—i.e. as a forward-looking assessment of market risks during the years ahead—both sides and their experts (in particular the Respondent), rely on the common procedure of equating such "expected" value to the "historical" value of the premium during some past reference period. Despite this simplification, three methodological issues arise on which the Parties' responses differ:

- the reference period from which the historical market premium is calculated;
- whether historical averages should be calculated as "arithmetic averages" or as "geometric averages" of historical values; and
- the influence of the 2008-2009 international and US financial crisis on historical an "expected" market premiums;

537. Compass Lexecon relies on Professor Damodaran, whose views on the appropriate value of the market risk premium have changed several times as a result of the ups and downs of the US equity market in the wake of the 2008 financial crisis. Up to the onset of the crisis, Professor Damodaran had traditionally used a 4% market premium. However, in early 2009, reflecting on the damage inflicted by the crisis to US equity portfolios during the last quarter of 2008, he wrote: "[2008] *has been a year that has shaken our faith in mean reversion and using long term averages, especially when it comes to equity risk premiums and default spreads. I have done my annual update for historical equity risk premiums for the United States but 2008 has changed the numbers dramatically. The geometric average risk premium for stocks over treasury bonds, going back to 1928, was 4.79% at the end of* [2008]*, has dropped to 3.88%, with premiums over shorter periods (10 years) becoming negative. The implied equity risk premium, which was 4.37% at the end of 2007, jumped to 6.43% at the end of* [2008].[594] *In the datasets that compute cost of equity and capital, I have abandoned my practice of using historical risk premiums and used*[595] *a higher value (5%). Even that*

[594] For all the respect that Professor Damodaran commands among practitioners and financial experts, his texts are not always fully polished. Professor Damodaran's text literally refers to 2009, which seems to be an obvious mistake,as the document was actually written in early 2009.

[595] Context suggests that Professor Damodaran did not mean "used" in the past, but rather "have now used" in the annual update he is referring to.

may be too low a number. I would suggest that you up that number towards the current implied equity risk premium, if you want a cost of equity and capital today."[596]

538. A few months later, in October 2009, Professor Damodaran struck a slightly less sombre note: "*Though I believe that mean reversion is a powerful force, I think that the banking and financial crisis of 2008 was unlike other market fevers and downturns in terms of exposing weaknesses in developed capital markets. When* valuing *emerging markets prior to September 2008, I used 4% as my mature market equity risk premium and based the estimate on the average implied equity risk premium over time (1960-2007). Since October of 2008, I have moved to a 5-6% mature market equity risk premium and will continue to use this higher premium until I am convinced otherwise.*"[597]

539. Only four months later still, in February 2010, probably influenced by the recovery in US equity markets, Professor Damodaran supplanted his last sentence in the above quote with the following: "*After the crisis, in the first half of 2009, I used equity risk premiums of 5-6% in my valuations. Having watched the reversion of historical averages in 2009, my valuations in 2010 will be based upon equity risk premiums of 4.5-5%. While some may view this shifting equity risk premium as a sign of weakness, I would frame it differently. When valuing individual companies, I want my valuations to reflect my assessments of the company and not assessments of the overall equity market.*"[598]

540. As indicated, Compass Lexecon draws on Damodaran's views and uses a 5% premium, which, while at the low end of Damodaran's views in October 2009 (as pointed out by Econ One), was nonetheless at the high end of Damodaran's estimate by February 2010, right before EGSA's nationalisation (as pointed out by Compass Lexecon).

541. Compass benchmarks its 5% estimate against the market premiums used in a "sample" of "Investment Banks' Reports", which Rurelec submitted as document C-300. According to Compass, the average market premium used in those reports is 5.8%, while the median is 5.5%.[599]

---

[596] A. Damodaran, "The year that was and hopefully will not see again for a while…Thoughts on 2009", 2009, p.1 (Exhibit **C-168**).

[597] A. Damodaran, "Equity Risk Premium (ERP): Determinants, Estimation and Implications - A Post-Crisis Update", Stern School of Business, October 2009, p. 67 (Exhibit **C-177**).

[598] A. Damodaran, "Equity Risk Premium (ERP): Determinants, Estimation and Implications - The 2010 Edition", Stern School of Business, February 2010, p. 68 (Exhibit **E0-29**).

[599] In the Tribunal's view, it bears noting that the indication made by the Respondent that all the reports at Exhibit C-300 come from the Latin American Equity Research Department of just one single bank (Banco Santander). Moreover, even if Exhibit C-300 was dated 27 August 2009 by the Claimants, it still contains reports dated in Santiago de Chile at three

542. Econ One correctly argues that Compass's estimates are partially based on reports made public by Santander after EGSA's nationalisation: the correct figure for the market risk estimates in the "Informes de Analistas Financieros" should have been 6.5%.

543. Econ One's own estimate of market risk, 6.7%, relies not on Damodaran, but on the equity risk premiums calculated by Ibbotson/Morningstar in March 2010, as the arithmetic average for equity premiums in the US market during the period 1926-2009.

544. After carefully considering the parties' positions, the Tribunal has decided to accept an equity premium of 5%, as suggested by Claimant.

3. Beta

545. In the CAPM methodology, "*the market risk premium is weighted by the beta coefficient, which measures a security's (or a group of securities') exposure to general market risk.*"[600] This is not contested. However some discrepancies remain as to the calculation of the Beta:

- the universe of US listed electricity companies from which the "unlevered beta" of electric companies comparable to EGSA should be extracted; and
- the optimal debt-equity financial structure of a Bolivian electricity company like EGSA.

(i) Unlevered beta of US electricity companies comparable to EGSA

546. Compass Lexecon says it used "*the industry beta of US-based firms in the electric power generation, transmission, or distribution industry calculated by Morningstar (formerly Ibbotson Associates) that corresponds to the SIC code 4911*"[601], and then explains the procedure to adjust that "raw beta" to obtain a final figure of 0.77.[602]

547. Econ One disagrees and states that the criterion used to select the comparable companies used by Ibbotson/Morningstar for its report is unclear and does not correspond to SIC code 4911. In any event, Econ One suggests that instead of using SIC code 4911, Compass Lexecon should have requested a custom report.[603] Following its criticism, Econ One explains how it selected the 5 companies which it considers most comparable to EGSA.

---

different times, showing a series of market premiums in its WACC estimates for Argentina, Chile, Colombia and Peru (namely: August 27, 2009: 6.5%; June 8, 2010: 5.50%; October 25, 2010: 5.50%).

[600] Compass Lexecon Report, ¶155.

[601] Compass Lexecon Report, ¶156.

[602] Compass Lexecon Report, ¶¶157-159.

[603] Econ One Report, ¶¶62-65.

After de-leveraging the 1.34 raw beta of this set of comparable companies, it arrives at an "unlevered adjusted beta" of 0.68. In its second report, Econ One further comments on and criticizes Compass Lexecon's analysis and maintains its figures.[604]

548. In its second report, Compass Lexecon clarifies what it actually requested from Morningstar and why it also criticizes Econ One's sample of 5 US-based power generators and maintains its figures.

549. The Tribunal has considered Compass Lexecon's position that too small a sample may make for unreliable beta valuations that are subject to a large margin of error, as well as Econ One's stance that the precision of the sample—and its focus on energy generation, the sole activity of EGSA—is much more important than its size. In the end, the Tribunal has decided to give precedence to the precision of the sample over its size, and thus accepts Econ One's unlevered and adjusted beta, i.e. 0.68, as applicable to a notional unlevered Bolivian electric generator like EGSA.

(ii) EGSA's optimal capital structure

550. After determining the "unlevered adjusted beta" of comparable US electricity companies, it is now necessary, in keeping with the CAPM methodology, to determine the optimal leverage ratio to apply to a Bolivian company like EGSA, with a view to calculate its "levered beta", i.e. the specific factor to apply to the general "market" or "equity premium" discussed above.

551. Both parties and their experts agree that, in the absence of market figures on optimal leverage ratios for Bolivian companies, there is a need to rely on proxies from other emerging economies.

552. Compass Lexecon posits a "raw beta" of 0.57 and a leverage ratio of 80.69%, and arrives at an "unlevered and adjusted" beta of 0.48 for what it claims is the relevant sample of US electric companies comparable to EGSA, while Econ One starts from a "raw beta" of 1.34 and a leverage ratio of 133.27%, which results in an "unlevered and adjusted" beta of 0.68 for the limited sample of US electric utilities that it considers comparable to EGSA.

553. Compass Lexecon uses as a proxy "*the average capital structure observed for the same comparables in the US SIC 4911 sample used in the* calculation *of the raw beta*" and this

[604] Econ One Second Report, ¶¶167-173.

results in an optimal debt-to-equity ratio of 80.69%.[605] Econ One criticizes Compass Lexecon's approach, since access to financial markets is more difficult for a Bolivian company like EGSA than for an equivalent US one. As a proxy, it prefers the debt-equity ratio for energy companies in emerging countries published by Professor Damodaran, 56.04%.[606] Econ One's approach is, in turn, criticized by Compass Lexecon, which refers in its Rebuttal Report[607] to EGSA's debt-raising ability, as demonstrated by its actual debt-equity ratio of 71.24% as at the end of 2009, a ratio significantly higher than Econ One's estimate.[608]

554. After carefully considering the divergent views of the Parties and their experts, the Tribunal has come to the conclusion that the use of proxies from other markets to calculate EGSA's optimal capital structure is fraught with practical difficulties, since it is not easy to select a sample of non-Bolivian companies with similar financial options to those available to EGSA.

555. The Tribunal has thus decided to simplify the calculation of EGSA's optimal capital structure and, rather than attempt to identify an elusive proxy, to use instead EGSA's actual debt/equity ratio as of the end of 2009, namely 71.24%, on the reasonable assumption that EGSA's actual debt-equity ratio was close, if not identical, to its "optimal" one. The ratio ultimately taken also coincidentally falls in between the Parties' estimated proxies. It shall be used to re-lever the "unlevered adjusted beta" of US electricity companies comparable to EGSA. This debt-equity ratio translates arithmetically into debt/capital and equity/capital ratios of 41.60% and 58.40%, respectively, which will be used later on to calculate EGSA's "weighted" average cost of capital or WACC.[609]

(iii) EGSA's specific beta and equity premium

556. As explained in previous paragraphs, the Tribunal considers 0.68 to be the relevant "unlevered adjusted beta" of electricity companies comparable to EGSA. It further considers

[605] Compass Lexecon Report, ¶167.

[606] Econ One Report, ¶¶83-85.

[607] Compass Lexecon Rebuttal Report, ¶¶100-102.

[608] Econ One Second Report, ¶¶176-178.

[609] As indicated in line 15 of Table 2 above, the debt to capital ratio (41.60%) is the result of dividing the debt/equity ratio by (1 + debt/equity), i.e. 0.7124/1.7124=0.4160. The difference between this number and 1 is the ratio equity/capital (0.5840).

0.7124 to be EGSA's optimal debt-equity ratio. Using the latter ratio to re-lever the 0.68 unlevered beta results in a 1.047 final beta for EGSA.[610]

557. In keeping with the above, the resulting equity premium to be applied by a "willing buyer" considering the purchase of EGSA would be 1.047 times the general 5% equity premium, i.e. 5.23%.

4. Country risk premium

558. The country risk premium is "*the incremental return demanded by investors for an investment in a country or location where the* investment *is exposed to greater risk than would be the case in a more stable economy, like the U.S.*"[611]. Such "country" or "sovereign risk" premium is typically calculated by looking at the spread implicit in the market yield of sovereign bonds of the country traded in the international financial markets. However, since no such Bolivian bonds existed as of the date of expropriation both parties were again obliged to use a proxy.

559. To calculate it, Compass Lexecon considers it appropriate to construct "*an EMBI* [Emerging Market Bond Index] *proxy in* accordance *to the Sovereign Rating given to Bolivia by Standard & Poor's, Fitch Ratings and Moody's. To construct Bolivia's EMBI proxy I computed the average EMBI for countries with the same rating as Bolivia*"[612], and settles upon a premium of 7.017%. Econ One accepts this methodology, subject to its views on the 1.5 multiplier to be discussed below.

560. The Tribunal agrees that it is appropriate to calculate country risk—as both parties have done—using an index of emerging market bonds, and shall apply the resulting premium of 7.017%.

5. Should additional equity risk factors be added?

561. Rurelec considers that the CAPM model, with the addition of a country risk premium for Bolivia, duly captures all the relevant factors necessary to calculate the cost of equity for an electricity company like EGSA and arrives, thus, at a cost of capital of 14.45%. On the other

---

[610] This number is the consequence of "re-levering" the "unlevered beta" according to the formula at line 9 of Table 2 above: 0.68226 (1 + (1-0.25) x 0.7124).

[611] Compass Lexecon Report, ¶160. See also Abdala's Cross-Examination, Transcript (English), Day 5, 8 April 2013, 1054:2-1054:7, and Flores' Cross-Examination, Transcript (English) Day 5, 8 April 2013, 1256:13-1256:20.

[612] Compass Lexecon Report, ¶161.

hand, the Respondent claims that two additional add-ons should be included in EGSA's cost of capital, to reflect risks still not captured by Rurelec's model:

- The additional risk of equity investments in emerging economies, not fully captured by its sovereign country risk. In the Respondent's view, this warrants the application of a 1.5 multiplier (i.e. a 50% increase) to the sovereign risk of the emerging country where the company is located.
- The additional risk associated with small companies (the "size premium"), which in the Respondent's view would amount in EGSA's case to 6.28%.

562. In the Tribunal's views there are two issues to consider: first, whether the standard CAPM model—as applied by Compass Lexecon—fully captures all the relevant risks for a willing buyer considering the purchase of EGSA; and secondly, assuming a negative response to the first question, which specific additional risks should be applied to the standard CAPM model.

563. On the first question, the Tribunal shares the Respondent's view that the standard CAPM—at least as applied by Compass Lexecon—does not fully capture all the relevant risks for a willing buyer considering the purchase of EGSA. The reasons for this view are explained below.

564. Since the Tribunal has retained a beta-weighted equity premium for EGSA that is higher than Compass Lexecon's, the resulting equity cost would amount to 15.83% (i.e. 3.58% + 5.23% + 7.02%) if no additional risks factors were to be taken into account, as argued by Compass Lexecon. Yet, in the Tribunal's view that 15.83% rate still underestimates the likely equity cost that would be used by a willing buyer of EGSA.

565. First, as recognized by Rurelec itself, when on September 3, 2008 the Board of Directors of EGSA discussed Mr Lanza's progress report on the new combined cycle project, the calculations of the net present value of the new projects were made with a nominal discount rate of 12.5%. Since such a discount rate is functionally equivalent to a WACC rate, as applied in the present context, assuming the cost of debt and leverage ratio of EGSA did not depart at that time significantly from the levels considered here (i.e. an after-tax cost of debt of 5.91% and a 71.24% debt/equity ratio), the implicit equity cost considered by EGSA's directors was 17.2%, i.e. almost 3 full points above the 14.45% used by Rurelec and significantly above the Tribunal's 15.83% as well.

566. Even making allowances for some drop in the risk-free rate from September 2008 to May 2010 and for Mr Abdala's argument, in response to the Tribunal's questions, that a willing buyer would naturally espouse relatively optimistic views about the future of EGSA—for otherwise it would not have bid for the company—it would be quite extraordinary for an outside buyer, not as familiar with a company as its own managers and directors, to consider it less risky than those insiders. As such, 17.2% can reasonably be taken a lower limit for the return on equity required by a willing buyer of EGSA.

567. Secondly, as indicated by the Respondent, Mr Earl himself, acting in September 2005 as CEO of Independent Power South Africa (IPSA), when describing potential electric projects in South Africa to investors in the UK's Alternative Investment Markets, declared that the company expected to select projects with an Internal Rate of Return (IRR) of no less than 20%. This was in 2005, not 2010; moreover, the IRR represents the highest discount factor which would make the project not have a negative present value, rather than a normal WACC, and the 20% project IRR was probably aspirational, as befits a pitch to potential investors. Nevertheless, it is a clear indication that the cost of equity of EGSA, as calculated by Rurelec under a standard CAPM methodology, fails to reflect all the risks taken into consideration by real equity investors in emerging economies.

568. Lastly, the Tribunal, as mentioned to the Parties during the hearings, has made an effort to compare the equity costs and WACCs espoused by the parties with the alternative benchmark set out in Article 48 of the 1994 Electricity Act (Law 1604, dated December 21, 1994), still in force at the time of the expropriation, which states that "[t]*he discount rate ('tasa de actualización') to be used when applying this law shall be ten per cent (10%) annually, in real terms. This rate shall only be modified by the Ministry by way of a duly-justified administrative decision. The new discount rate set by the Ministry shall not differ from the prevailing rate by more than two (2) percentage points.*" [Tribunal's translation][613]

569. The Respondent claims that this discount factor applies only to the calculation of capacity payments, based on the notional purchase of new turbines with an expected 20 year-life, far less than EGSA's 28-year total authorization period, in a context very different from the calculation of the EGSA's FMV as of the time of expropriation.

[613] Spanish original: "*La tasa de actualización a utilizar en la aplicación de la presente ley será de diez por ciento (10%) anual, en términos reales. Esta tasa solo podrá ser modificada por el Ministerio, mediante resolución administrativa debidamente fundamentada. La nueva tasa de actualización fijada por el Ministerio no podrá diferir en más de dos (2) puntos porcentuales de la tasa vigente*". Electricity Law, Article 48 (Exhibit **C-5**).

570. It is true that the official discount rate enshrined in the law—increased to 12% in real terms as of 2000[614]—has only ever been used in practice to calculate capacity payments. However, for the sake of this benchmarking exercise, one may assume that it is possible to use this discount factor for other purposes, including the valuation of an expropriated company (a scenario that, for obvious reasons, is unlikely to have been made express in a 1994 Law whose declared purpose was to attract foreign investment in Bolivia's electricity sector).

571. Having accepted the Respondent's view that the standard CAPM fails to reflect all the relevant risks which would have been taken into account by a WB, it is now necessary to discuss the specific risk add-ons advocated by the Respondent, namely, a 1.5 country risk multiplier and a so-called "size premium".

6. The 1.5 country risk multiplier

572. Econ One applies a 1.5 multiplier to Compass Lexecon's sovereign country risk for Bolivia (i.e. 7.02%) and arrives at a premium of 10.526%, which melds Bolivia's sovereign risk with the special volatility of equity markets in emerging economies like Bolivia. This adjustment is based on Professor Damodaran's methodology, and his concept of "country equity risk premium", as described in the following statement: "*The country default spreads that come with country ratings provide an important first step, but still only measure the premium for default risk. Intuitively, we would expect the country equity risk premium to be larger than the country default risk spread. To address the issue of how much higher, we look at the volatility of the equity market in a country relative to the volatility of the bond market used to estimate the spread*."[615]

573. Professor Damodaran has further estimated that, "[i]*n 2008, for instance, there were 28 emerging markets, where both the equity market volatility and the government bond volatility numbers were available. The median ratio, across these markets, of equity market volatility to bond price volatility was approximately 1.50*."[616]

574. Compass Lexecon takes issue with Econ One's multiplier, and argues that, in Professor Damodaran's view, this correction should apply only to short-term valuations, since equity markets may be more volatile than bond markets in the short run, but there is a natural

[614] Claimants' Post-Hearing Brief, ¶154.

[615] A. Damodaran, "Measuring Company Exposure to Country Risk: Theory and Practice", Stern School of Business, September 2003, p. 10 (Exhibit **EO-25**).

[616] A. Damodaran, "Equity Risk Premiums (ERP): Determinants, Estimation and Implications—The 2010 Edition", Stern School of Business, February 2010, pp. 53-54. (Exhibit **EO-29**).

tendency for both volatilities to converge in the long run. Besides, when Damodaran uses the multiplier, he applies it to country sovereign "default spreads", which are based on their credit ratings and in Bolivia amounted to just 5.50%, much lower than the 7.02% rate estimated by Compass Lexecon on the basis of sovereign bond spreads.

575. Econ One retorts that Damodaran has never written that his multiplier applied only to short term valuations. Besides, he has used it himself in the valuation of investments in his native India.[617] Moreover, there is no natural tendency for the volatility of bonds and equities to converge, since, as argued by corporate finance professors Smithers and Wright, bonds are intrinsically less volatile than equities on two counts: "*The first is that the income element is so much more important relative to changes in capital values. The second is that bonds are usually repayable at par, so that investors know in advance how much they will receive when the bond is repaid on maturity.*"[618]

576. The Tribunal has carefully considered Econ One's case for a 1.5 multiplier, and has come to the conclusion that no multiplier should be applied. There are several reasons for this.

577. It is not accurate to describe the multiplier as *the* methodology of Professor Damodaran. It is just the third one—the so-called "Melded Approach"—of a set of three alternative approaches to assess the country-specific risk of equity investments, the two others being the "Country Bond Default Spread"—the one applied by Compass, in which the country's sovereign risk stands on its own, without correction, and it is added to the US equity risk premium—and the "Relative Equity Market Standard Deviations"—which ignores sovereign risks and directly assesses equity risk premiums in emerging economies by correcting the US equity risk premium with an index of relative volatility of equity markets in the corresponding emerging economy and in the US.

578. Contrary to Econ One's assertion, Professor Damodaran is on record as favouring Econ One's multiplier (i.e. the "melded approach", his third and last one) only for short term valuations. For instance, he writes that "[w]*e believe that the larger country risk premiums that emerge from the last approach are the more realistic for the* <u>*immediate future*</u>*, but that country risk premiums will* <u>*decline over time*</u>. […] *One way to adjust country risk premiums over time is to begin with the premium that emerges from the melded approach and to adjust this premium down towards either the country bond default spread or the country premium estimated from equity standard deviations. Another way of presenting this argument is to*

[617] A. Damodaran, "Valuation", undated (Exhibit **EO-71**).

[618] A. Smithers, S. Wright, "Valuing Wall Street: Protecting Wealth in Turbulent Markets", 2000, p. 176 (Exhibit **EO-73**).

note that the differences between standard deviations in equity and bond prices narrow over longer periods and the resulting relative volatility will generally be smaller. Thus the equity risk premium will converge to the country bond default spread as we look at longer term expected returns. As an illustration, the country risk premium for Brazil would be 7.67% for the next year, but decline over time to either 6.01% (country default spread) or 3.60% (relative standard deviation)" (emphasis added).[619]

579. Similarly, on another occasion, he wrote, "*I add this default spread to the historical risk premium for a mature equity market (estimated from US historical data) to estimate the total risk premium. In the short term especially, the equity country risk premium is likely to be greater than the country's default spread*" (emphasis added).[620]

580. Damodaran has indeed applied the multiplier in valuations of equity investments in India, as claimed by Econ One, but these concerned a 5-year investment in Tata Chemicals and a 10-year in Wipro, a period far shorter than EGSA's 28-year planning horizon.

581. The argument of Professors Smithers and Wright regarding the different structure of the return of bonds and equities is also not particularly compelling in the case of EGSA, whose expected cash flows consist purely of yearly income, with no residual value, and thus have a financial structure closer to a high-coupon long term bond than to a short or medium-term equity investment.

582. Finally, there is an even more fundamental reason which, in the Tribunal's mind, justifies the rejection of Econ One's multiplier, but the acceptance, as explained below, of an additional illiquidity risk premium—or better yet, additional overall risk premium, as explained below—related (though not identical) to Econ One's "size premium". Professor Damodaran's multiplier attempts to capture the volatility of short-term equity investments in companies whose shares are publicly traded in stock exchanges, which are subject to the short-term vagaries and volatility of organized financial markets. But such volatility should not penalize, as such, the value of non-listed companies like EGSA, whose value should be assessed using the "fundamental approach" typical of long-term investors. Similarly, as a non-listed company, EGSA's discount factor should not reflect any other quirk or anomaly typical of stock markets, even if it should nevertheless include a different add-on which

[619] A. Damodaran, "Measuring Company Exposure to Country Risk: Theory and Practice", Stern School of Business, September 2003, pp. 11-12 (Exhibit **EO-25**).

[620] A. Damodaran, "Country Risk Premium Spreadsheet Calculations", January 2010, p.1 (Exhibit **C-308**).

reflects one of the fundamental disadvantages of any private, non-traded stock: its intrinsic illiquidity.

583. The Tribunal's conclusion is that it will not add a specific multiplier. However, when looking at the issue of "size premium" below, the Tribunal will take into account some of the underlying factors argued by the Parties in relation to the multiplier.

7. Size Premium

584. One of the major divergences between the experts relates to the application of a size premium to the valuation. It is in fact an ideological and philosophical issue, as the experts are in total diametrical opposition to one another: Econ One applies a 6.28% size premium which is adamantly rejected by Compass Lexecon. A substantial part of the hearings dealt with this issue.

585. Econ One argues[621] that, as explained in the financial literature and shown by historic stock market records, the returns of small companies are statistically higher than the market average, since they are perceived by markets as riskier and must thus offer higher yields.[622] The standard CAPM and Compass' methodology fail to include this "size premium".

586. Actual premiums paid depend on company size. Ibbotson/Morningstar has calculated their value in "*Markets Results for Stocks, Bonds, Bills and Inflation*" by classifying similar companies in ten groups by capitalization. Using EGSA's equity value as a proxy for its market capitalization, EGSA would belong in the tenth smallest decile ("*10-Smallest*"), whose historical size premium is, according to Ibbotson/Morningstar, 6.28%.[623]

587. Compass Lexecon starts its Rebuttal Report by tracing the size premium to illiquidity issues, as indicated by Professor Damodaran:[624] "*practitioners attribute all or a significant portion of the small stock premium reported by Ibbotson Associates to illiquidity and add it on as an illiquidity premium.*"

---

[621] Econ One Report, ¶¶75-76.

[622] MORNINGSTAR, "Markets Results for Stocks, Bonds, Bills and Inflation 1926-2009 - Ibboston SBBI 2010 Valuation Yearbook" (Exhibit **EO-13**); Flores' Cross-Examination, Transcript (English) Day 5, 8 April 2013, 1289:11-1289:12.

[623] MORNINGSTAR, "Markets Results for Stocks, Bonds, Bills and Inflation 1926-2009-Ibboston SBBI 2010 Valuation Yearbook", pp. 44-46, 86, Table 7-2 (Exhibit **EO-13**).

[624] Compass Lexecon Rebuttal Report, ¶¶60-67; Abdala's Cross-Examination, Transcript (English), Day 5, 8 April 2013, 1051:9-1051:16, quoting Professor Damodaran.

588. After that initial statement, Compass Lexecon rejects the application of a size premium to EGSA's discount rate on several grounds. First, it argues that whilst some authors support the use of size premium (as Fama and French did in 1992), others reject its inclusion, with some claiming that it existed in the distant past, but almost disappeared since the 1980s. Most recently, Fama and French's 2012 empirical study of 23 countries in North America, Europe, Japan, and the Asia Pacific indicates that the size premium effect is non-existent. Secondly, some authors claim that the "size premium" can largely be attributed to the so-called "January effect", i.e. the specific effect on relatively illiquid stocks of the practice of many US investors, either for tax or window-dressing purposes, of selling some shares in December and buying them back in January.

589. Compass Lexecon attaches importance to a paper by Tarbell,[625] which provides a list of company characteristics that cause higher returns for investors in small companies. The main factors included (i) difficulty in raising financing, (ii) high sensitivity to business risks, (iii) lack of dividend history, (iv) lack of externally generated information (i.e. investment banks reports), and (v) lack of management expertise. Compass Lexecon asserts that none of the previous items apply to EGSA,[626] and disagrees that it is a small company. Compass Lexecon also draws attention to the fact that, in South America, with its highly regulated and low volatility energy markets, it is "not customary" to apply the size premium. Therefore, Compass Lexecon considers that no grounds exist to apply the size premium, as the CAPM approach will capture EGSA's default risk.[627]

590. In its Second Report,[628] Econ One emphasizes its arguments and insists that the size premium is clearly justified. At the hearings, Mr Flores stated that, if the markets were fully efficient, no reason would exist for the size premium.[629]

---

[625] J. Tarbell, "The Small Company Risk Premium: Does it Really Exist?" American Society of Appraisers, 18th Annual Advanced Business Valuation Conference, New Orleans, Louisiana, 1999 (Exhibit **C-247**). This piece was actually dated 1999 and not 2012, as referred to in the Compass Lexecon Rebuttal Report, ¶63. Dr Abdala noted this mistake during the hearings and corrected it (See Abdala's Cross-Examination, Transcript (English), Day 5, 8 April 2013, 1130).

[626] Also, in accordance with Mr Abdala, even if any of those items existed, the size premium would not be used automatically, as its potential application would become a matter of judgment (see Abdala's Cross-Examination, Transcript (English), Day 5, 8 April 2013, 1132). Mr Abdala noted that in more than 150 valuations he had only used size premium in one or two cases in which very severe illiquidity situations were present (see Abdala's Cross-Examination, Transcript (English), Day 5, 8 April 2013, 1130:6-1130-12).

[627] See, for instance, Abdala's Cross-Examination, Transcript (English), Day 5, 8 April 2013, 1122:15-1122:23; 1123:1-1123:5.

[628] Econ One Second Report, ¶¶126-135.

[629] Flores' Cross-Examination, Transcript (English) Day 5, 8 April 2013, 1229:25-1230:5.

591. Rurelec, after all the information provided by the experts and in cross examination, states that "*many leading scholars take the view that smaller companies do not on average attract a higher return, and that therefore all risks relevant to a willing buyer and seller are already incorporated in the CAPM derived discount rate and cash flows.*"[630] Rurelec relies on Fama and French,[631] stating that the Ibbotson/Morningstar report "*undermines the applicability of the size premium in the present case*" and criticizing the fact that the Respondent "*applied a massive 6.28% premium solely on the basis of Guaracachi's book value*".[632]

592. For Rurelec, "*small company risks fall into two basic categories: risks relating to hidden defects and risks relating to a volatility of revenues. Neither was relevant to Guaracachi*"[633] and in any event, Rurelec considers that Mr Flores admitted in cross examination that the size premium should be 4.91% instead of 6.28%.[634]

593. This is not the end of the matter for the Respondent, as it states that even Mr Abdala admitted in cross examination that the size premium could be justified in certain circumstances.[635] However, the main argument offered by the Respondent seems to be that, even if one were to accept that a size premium should only be applied if the conditions cited by Tarbell and adopted by Compass Lexecon are met (or, more precisely, if at least one of them is met), the fact is that EGSA falls within some of the situations listed.[636]

594. The Tribunal has carefully considered Econ One's and Compass Lexecon's arguments for and against a "size premium"—which, as already indicated, Econ One argues should be 6.28%—and has come to the conclusion that there are compelling reasons to add an additional risk premium of 4.5% to EGSA's required cost of equity, which, while similar in its effects to Econ One's "size premium", might be more appropriately called an "illiquidity

---

[630] Claimants' Post-Hearing Brief, ¶137.

[631] The Respondent notes that Fama and French's position was taken two years after the relevant date for valuation (see Respondent's Post-Hearing Brief, ¶140; and Flores' Cross-Examination, Transcript (English), Day 5, 8 April 2013, 1239-1242). Professor Damodaran stated in April 2011 that he refuses to use the "Fama-French model or added a small premium cap to a CAPM model in intrinsic valuation" (A. Damodaran, "Alternatives to the CAPM: Part 2: Proxy Models", 20 April 2011, p.3 (Exhibit **C-370**)), but Dr Flores disagrees with Professor Damodaran's approach (Flores' Cross-Examination, Transcript (English) Day 5, 8 April 2013, 1243:12-1243:13; 1253:11-1253:15). See also Flores' Cross-Examination, Transcript (English) Day 5, 8 April 2013, 1292-1293.

[632] Claimants' Post-Hearing Brief, ¶¶138-139.

[633] Claimants' Post-Hearing Brief, ¶141.

[634] Claimants' Post-Hearing Brief, ¶145; Flores' Cross-Examination, Transcript (English) Day 5, 8 April 2013, 1243:8-1248:6. However, when redirected, Dr Flores brought new arguments related to the need to sacrifice the "granulate" effect to statistic strength (Flores' Cross-Examination, Transcript (English) Day 5, 8 April 2013, 1291-1292).

[635] Abdala's Cross-Examination, Transcript (English), Day 5, 8 April 2013, 1132:4-1132:16..

[636] Dr Abdala holds a totally opposite view with the Respondent as to the point that, if a single item is applicable, the size premium would be justified (Abdala's Cross-Examination, Transcript (English), Day 5, 8 April 2013, 1131-1132).

premium", or better yet an "additional risk premium", as it also encompasses some aspects that the Tribunal considers relevant among those discussed by the Parties when addressing the multiplier issue.

595. The reasons underpinning the Tribunal's decision are as follows. To start, the Tribunal is not persuaded that a "size premium", as understood by the Respondent, should apply to EGSA. First, while there seems to be some statistical evidence that such "size premium" can be derived from the analysis of the historical series of long-term returns in the US stock markets, there is controversy as to (i) whether the premium has disappeared in recent decades and (ii) whether it applies to non-US stock markets. These considerations are especially relevant for EGSA, since the notional willing buyer would be expected to take a forward-looking approach in which past historical series are only relevant as a proxy for expected future trends, and may not necessarily be a US-based firm (let us recall that IEL and Rurelec were UK-based investors which bought EGSA from US-based GPU-First Energy).

596. Secondly, even if the premium were clearly detectable in the historical returns of small listed companies and likely to remain relevant for investors in May 2010, its underlying cause might be relevant and have an impact on EGSA's valuation. For instance, were it true that the "size premium" is mostly the result of a "January effect" related to a seasonal, tax-related or window-dressing pattern in the sale and subsequent purchase of shares of US-listed companies, then it could hardly be considered applicable to an unlisted company like EGSA. The same would apply were the "size premium" to be the indirect result of a "survivorship bias" whereby the recorded historical returns of small companies is inflated due to the failure to include the dismal returns of once-listed firms which, faced with a crisis, choose to de-list—a situation which befalls small firms far more often than big firms.

597. Thirdly, it is also questionable whether the size of a company should be measured in absolute terms from a worldwide perspective—comparing Bolivian EGSA to US companies as suggested by Econ One—or relative to the economy in which the company operates—as suggested by Rurelec. Indeed, if, as Econ One suggests, the "size premium" reflects the special risks borne by small companies, a case could be made in favour of a relative, country-related definition of size, since a locally-big, even if internationally-small, company catering exclusively to its domestic market might not face particular risks, and might even enjoy potential "market power" of concern to domestic regulatory authorities.

598. Yet, having rejected the direct application to EGSA of the concept of "size premium" as defined by the Respondent, the Tribunal has duly noted Rurelec's quote of Professor Damodaran that "*practitioners attribute all or a significant portion of the small stock premium reported by Ibbotson Associates to illiquidity and add it on as an illiquidity premium*", which it finds compelling. Indeed, if one delves deeper into the source of that quote, one finds the following statements by Professor Damodaran:

> "*If illiquidity is a risk associated with an investment, it seems logical that we should be using higher discount rates for cash flows on an illiquid investment than for cash flows on a liquid investment. The question then becomes one of measuring illiquidity and translating that measure into a discount rate effect.* […] *In conventional asset pricing models, the required rate of return for an asset is a function of its exposure to market risk. Thus, in the CAPM, the cost of equity is a function of the beta of an asset* […] *There is little in these models that allows for illiquidity. Consequently, the required rate of return will be the same for liquid and illiquid assets with similar market risk exposure. In recent years, there have been attempts to expand these models to allow for illiquidity risk in one of two ways* […]"[637]

599. Later in the paper, Professor *Damodaran* argues further as follows:

> "*In practice*[, t]*o adjust the discount rate used in discounted cash flow valuation for illiquidity, you have to add an illiquidity premium to the discount rate and derive a lower value for the same set of expected cash flows. The asset pricing models that attempt to incorporate illiquidity risk are not specific about how we should go about estimating the additional premium (other than saying that it should be larger for investments which are illiquid when the market is illiquid). There are two practical solutions to the estimation problem:* [The first one is to a]*dd a constant illiquidity premium to the discount rate for all illiquid assets to reflect the higher returns earned historically by less liquid (but still traded) investments, relative to the rest of the market. This is akin to another very common adjustment made to discount rates in practice, which is the small stock premium. The costs of equity for smaller companies are often augmented by 3-3.5% reflecting the excess returns earned by smaller cap companies over very long periods. The same historical data that we rely on for the small stock premium can provide us with an estimate of an 'illiquidity premium'.*

[637] A. Damodaran, "Comatose Markets: What If Liquidity Is Not The Norm?", Stern School of Business, December 2010, pp. 53-54 (Exhibit **C-268**).

- *Practitioners attribute all or a significant portion of the small stock premium reported by Ibbotson Associates to illiquidity and add it on as an illiquidity premium.*

- *An alternative estimate of the premium emerges from studies that look at venture capital returns over long period. Using data from 1984-2004, Venture Economics, estimated that the returns to venture capital investors have been about 4% higher than the returns on traded stocks. We could attribute this difference to illiquidity and add it on as the 'illiquidity premium' for all private companies*."[638]

600. The Tribunal has quoted Damodaran at length because, having been submitted and relied upon by Rurelec, the Tribunal finds this source extremely persuasive. The shares of non-listed companies, like EGSA, should be considered illiquid. Hence, while they are not subject to the vagaries and volatility of stock markets, they should attract a significant illiquidity premium, which in the case of EGSA the Tribunal has decided to estimate at 4.5%, a little higher than the highest illiquidity premiums mentioned by Professor Damodaran.

601. While cognisant of Rurelec's arguments that EGSA was not a "greenfield project", but a well-established mature company producing a steady supply of profits, the Tribunal has decided to opt for a higher illiquidity premium, bearing in mind the other separate concept of "illiquidity" discussed previously in this Award: EGSA's tight cash flow position.

602. It is true that EGSA's "liquidity problem", i.e. its lack of cash, was considered by the Tribunal as a temporary problem and is totally unrelated to the concept of "illiquidity" of non-listed shares discussed in Professor Damodaran's paper. But, as indicated by the Tribunal, it might arguably have had some influence on the risk perception of EGSA's notional willing buyer. And, rather than allowing for a separate risk factor to account for EGSA's liquidity problems, the Tribunal has decided to ratchet up the level of the general "illiquidity premium", and set it at 4.5%.

8. Conclusion on discount factor

603. In keeping with the Tribunal's previous conclusions that EGSA's cost of equity as of May 2010 could reasonably be estimated at 20.33%, with the Tribunal's finding that EGSA's optimal debt-equity ratio could be approximated by its actual 0.7124 ratio—which translates

[638] A. Damodaran, "Comatose Markets: What If Liquidity Is Not The Norm?", Stern School of Business, December 2010, pp. 55-56 (Exhibit **C-268**).

arithmetically into a debt/capital and an equity/capital ratio of 41.60% and 58.40%, respectively—and with the Parties' common acceptance of a 5.91% after-tax cost of debt, the Tribunal's resulting WACC works out to 14.33%, which shall be the factor used by the Tribunal to discount EGSA's expected free flow of funds.

K. EGSA'S FMV

604. If we now apply a 14.33% discount rate to EGSA's expected free flow of funds (as described in Annex A), the overall firm value of EGSA in May 2010 turns out to be USD 150.55 million. Finally, if we subtract from such firm value EGSA's USD 92.7 million in financial debt and bear in mind that Rurelec indirectly held 50.00125% of EGSA's capital, the actual compensation of Rurelec at that date should be USD 28.93 million.

L. INTEREST RATE

605. Article 5 (1) of the UK-Bolivia BIT provides that compensation "*shall include interest at a normal commercial or legal rate, whichever is applicable in the territory of the expropriating Contracting Party, until the date of payment*".

606. Rurelec argues that the expropriation was a wrongful act and, consequently, interest "*is a component of, and should give effect to, the principle of full reparation. Thus, the requirement of full reparation must inform all aspects of an interest award, including the appropriate rate of interest, and whether interest should be simple or compound*".[639]

607. In more practical terms, Rurelec considers EGSA's WACC (i.e. 10.63%)[640] "*as the appropriate rate to compensate for the lost opportunity to re-invest the funds of which they have been deprived as a consequence of the breaches of the Treaties, that is, the deprivation of the opportunity cost of capital. Otherwise stated, the cash flows that Guaracachi lost as a result of the treaty breaches would have been subject to the risk of its business activities, because those cash flows could have been used in those activities. Using an interest rate equivalent to the WACC thus ensures that full reparation is made by Bolivia. To apply a risk-free rate of interest would be to assume that* [Rurelec] *would have invested their resources in*

[639] Statement of Claim, ¶238.

[640] Compass Lexecon Report, ¶98.

risk-free instruments, such as US Government bonds. This does not reflect commercial reality"[641].

608. Rurelec further argues that its proposal is consistent with *Vivendi v. Argentina*—where the tribunal based its pre-award interest on the claimant's cost of capital—and *Alpha Projektholding v. Ukraine*—where the tribunal calculated pre-award interest on the basis of the "*risk-free rate plus the market risk premium*" for a total interest rate of 9.11%, on the basis that "*this rate better reflects the opportunity cost associated with Claimant's losses, adjusted for the risks of investing in Ukraine*".[642]

609. The Respondent rejects Rurelec's WACC argument for two main reasons. First, it is at odds with the applicable BIT since it envisages that interest accrue at a "commercial or legal rate" and the WACC is neither. Secondly, using EGSA's WACC is wrong from a conceptual point of view, since it factors in business risks associated with EGSA from which Rurelec was relieved through the expropriation. Using WACC would therefore overcompensate Rurelec for risks which they have no longer borne since May 2010.

610. In the Respondent's view, were the Tribunal to condemn Bolivia to pay compensation, an appropriate interest rate would be the USD LIBOR 1-year rate, which stood on average at around 0.9% between May 2010 and October 2012, plus a reasonable commercial spread which Econ One estimates at 2%.[643]

611. Concerning whether interest should be simple or compound, Rurelec requests compound interest, "*in line with the jurisprudence constante to this effect in international investment law*"[644]. The Respondent adamantly rejects compound interest on two grounds. First, the Respondent argues that, as stated by the tribunal in *CME v. Czech Republic B.V.*[645], it has seldom been used in international investment arbitration until recently. Secondly, it is not allowed under Bolivian law.[646]

612. In order to determine the interest rate, the Tribunal must decide three separate issues. First, the Tribunal must decide whether, as argued by Rurelec, the Tribunal can depart from the criteria established under Article 5 of the UK-Bolivia BIT and apply the principle of "full

[641] Statement of Claim, ¶240.

[642] Statement of Claim,. ¶¶241-242.

[643] Econ One Report, ¶136

[644] Claimants' Post-Hearing Brief, ¶¶176-177.

[645] Statement of Defence, ¶¶288-289.

[646] Respondent Post-Hearing Brief, ¶¶168-169.

reparation", inasmuch as the BIT's criteria apply only to lawful expropriations and not wrongful ones, as argued by Rurelec. Secondly, the Tribunal must determine what interest rate should be applied in the circumstances of this case. Lastly, the Tribunal must decide whether interest should accrue at a simple or compound rate.

613. On the first question, the Tribunal has concluded that it should continue to apply the terms of Article 5 of the UK-Bolivia BIT. The BIT makes no distinction between the compensation to be provided in respect of an unlawful expropriation as opposed to a lawful one, and the Tribunal does not find any reason to believe that the illegality of the expropriation renders what the BIT deems to be "just and effective compensation" suddenly inadequate.

614. The illegality of the expropriation could, according to the authorities cited by Rurelec, justify shifting the effective date of valuation back to a date later than the actual date of the expropriation as a means to restore the Parties to the positions they would have held but for the unlawful expropriation. However, Rurelec has opted not to argue for the application of this principle in this case, presumably because its application would actually work to Rurelec's disadvantage. Yet, at the same time Rurelec asks the Tribunal to use EGSA's WACC as at May 2010 as the applicable interest rate to compensate it as if it had remained invested in Bolivia throughout the pre-award period. Rurelec cannot shield itself from any negative changes to the fundamentals that make up the WACC during the post-May 2010 period and simultaneously introduce the May 2010 WACC through the backdoor as the most appropriate interest rate.

615. The Tribunal must therefore reject the application of EGSA's May 2010 WACC as the applicable interest rate, both because it does not constitute "*a normal commercial or legal rate*", as well as for the precisely the reasons set forth by Econ One's Dr Flores: the WACC includes an *ex ante* allowance for forward-looking business risks which should not be applied *ex post*, since Rurelec has not faced them since May 2010. The Tribunal instead decides to apply the annual interest rate reported on the website of the Central Bank of Bolivia for USD commercial loans in May 2010, i.e. 5.633331% which it regards as constituting a reasonable normal commercial rate.

616. As for the question of simple versus compound interest, the Tribunal considers that this issue does not fall within the ambit of the UK-Bolivia BIT's reference to the rate "*applicable in the territory of the expropriating Contracting Party*". Moreover, the Tribunal doubts that any prohibition of compound interest that may exist under Bolivian law is applicable to commercial loans, as opposed to consumer loans, and questions whether Bolivia should be

allowed to avail itself of potential limits imposed by the BIT on compensation that it has failed to provide "without delay" or at all. The Tribunal therefore decides to use compound interest in accordance with normal commercial practice.

617. As a result, the Tribunal decides that the 5.633331% annual interest rate reported by the Central Bank of Bolivia at May 1, 2010 shall be applied, on a compound basis, from that date until the date of full payment of the compensation as determined in this Award.[647]

[647] Available at: <www.bcb.gob.bo> and in the document called "MONEDA Y MERCADO 2010" (available at <http://www.bcb.gob.bo/?q=PUBLICACIONES%20OPERACIONES%20DE%20MERCADO%20ABIERTO>). At that website, one can see that the "TASAS DE INTERES ACTIVAS ANUALES" in foreign currenccy as at May 2010 were, for commercial bank loans: nominal (5,474092%) and effective (5,633331%).

CHAPTER XI – COSTS

618. Each side has claimed its costs from the other side in accordance with the UNCITRAL Rules. Article 42(1) of the UNCITRAL Rules provides that "[t]*he costs of the arbitration shall in principle be borne by the unsuccessful party or parties. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.*"

619. Costs are therefore to be awarded to the successful party and against the unsuccessful party, unless the circumstances of the case justify a different approach. In this case, however, there is no clearly successful party. The Tribunal has upheld its jurisdiction in respect of Rurelec and found the Respondent liable to pay compensation. Yet, in reaching that result, the Tribunal has upheld two of the Respondent's jurisdictional objections. One of these objections, regarding the Respondent's right to deny the benefits of the US-Bolivia BIT, resulted in a total lack of jurisdiction over the claims of one of the two Claimants, GAI. Moreover, the Respondent has also been largely successful on quantum, reducing the compensation ultimately awarded to less than a quarter of the original claim. From a technical point of view, GAI has thus been wholly unsuccessful in these proceedings and Rurelec only partially successful. Therefore, inasmuch as it may be said that Rurelec has been forced to undertake these proceedings to obtain the "just and effective compensation" that Bolivia wrongfully denied it, it can equally be said that Bolivia has been forced to defend itself on the "New Claims" and certain elements of quantum which were ultimately unfounded.

620. The Tribunal does not consider that there any further circumstances of the case that weigh heavily in favour of one side or the other on costs. In particular, the Tribunal considers that the Parties and their counsel have been exemplary in their conduct in what has naturally been a hard-fought battle between them to defend their respective rights. As such, given the mixed success on both sides, the Tribunal has decided that each side should bear their own legal and other costs incurred in connection with the arbitration and the Parties should divide the Tribunal's, PCA's, and appointing authority's fees and expenses equally.

621. Over the course of the proceedings, the Parties deposited with the PCA a total of EUR 100,000 (EUR 50,000 by each side) and USD 950,000 (USD 450,000 by each side) to cover the costs of the arbitration. The arbitrators' fees and expenses were USD 153,437.50 in fees and USD 1,766.38 in expenses for Dr Conthe, USD 202,000.00 in fees and USD 14,346.67 in expenses for Dr Vinuesa, and USD 296,250.00 in fees and USD 3,475.50 in expenses for

Dr Júdice. The PCA's fees for registry services in this arbitration total USD 91,777.47. Other tribunal costs, including court reporting, interpretation, hearing and meeting facilities, travel, teleconferencing, bank charges, tribunal witness expenses, and all other expenses related to the proceedings total 259,409.19.

622. This leaves an unexpended balance of USD 53,732.29 on deposit. Seeing as the Parties deposited equal amounts and it has been decided that the Parties shall divide the fees and expenses of the Tirbunal, PCA and appointing authority equally, the unexpended balance of the deposit shall be reimbursed in equal shares (USD 26,866,14 to each side).

CHAPTER XII – AWARD

For these reasons, the Tribunal decides:

(a) that the Tribunal has jurisdiction over the claims submitted jointly by both Claimants under two different BITs in one arbitration proceeding;

(b) that the Tribunal lacks jurisdiction over the claims made under the US-Bolivia BIT due to the Respondent's exercise of the denial of benefits clause, and therefore dismisses in its entirety the claims of GAI;

(c) that the Tribunal has jurisdiction over the claims made under the UK-Bolivia BIT in respect of the indirect investments of Rurelec;

(d) that the Tribunal lacks jurisdiction over the "New Claims" of Rurelec due to the failure to properly notify the Respondent under the UK-Bolivia BIT;

(e) that, in light of the above decisions, the Tribunal need not decide the remainder of the Respondent's jurisdictional objections;

(f) that the Respondent has expropriated Rurelec's investment without providing just and effective compensation, and has therefore breached the Article 5 of the UK-Bolivia BIT;

(g) that the Respondent shall pay to Rurelec compensation in the sum of USD 28,927,582 increased by annually compounded interest at the rate of 5.633331% on that amount since May 1, 2010, and until the date of payment in full of the sums ordered to be paid in this Award;

(h) that the Parties shall bear their own legal and other costs incurred in connection with this arbitration;

(i) that GAI/Rurelec shall pay 50% and Bolivia the other 50% of the Tribunal's and PCA's fees and expenses; and

(j) all further and other relief requested by the Parties is dismissed.

Done this 31st day of January 2014, in English and Spanish, both versions equally authentic.
Place of Arbitration: The Hague, the Netherlands

Mr Manuel Conthe
(Subject to dissenting opinion)

Dr Raúl Vinuesa

Dr José Miguel Júdice
Presiding Arbitrator

DISSENTING OPINION OF CO-ARBITRATOR MANUEL CONTHE

1. I respectfully disagree with my colleagues on three questions which I consider to be related: Bolivia's alleged compliance with *due process*, the Tribunal's finding of a lack of jurisdiction of over the spot price and capacity payment claims, and the equal division of costs.

2. In my opinion:

   (i) Bolivia's expropriation failed to comply with the requirements of *due process*.

   (ii) The Tribunal should have dismissed the spot price and capacity payment claims on the merits, not for lack of jurisdiction, but limiting itself to explain why they did not violate the Treaty.

   (iii) The Tribunal should have ordered Bolivia to pay costs, at least partially.

Bolivia failed to comply with the requirements of due process.

3. In my view, the expropriation of EGSA by Bolivia constituted a "seizure" because, besides not paying compensation, the process Bolivia followed to determine the market value of EGSA did not respect the requirements of "*due process*" set forth in Article 5 of the UK-Bolivia BIT. It is true that the Spanish version of the Treaty translates "*due process*" as "*por procedimientos jurídicos*", an unfortunate expression, as it lacks the long history, jurisprudence, and legal background of the English term "due process" and is rather obscure. But, in keeping with the principles of the Vienna Convention, such obscure Spanish term should be understood as "*due process*", a term frequently translated into Spanish as "proceso debido".

4. As it is evident that a "*due process*" requirement must establish some minimum standard if it is to merit the title of "*due*"—amongst other reasons, because this is required by the principle of "*most favoured nation*" treatment enshrined in Article 3 of the Treaty—the question arises: what are the minimum requirements that the expropriation procedure should have complied with?

5. In my view, an expropriation—as an administrative act infringing upon the rights of an individual—must meet, from a legal point of view, three minimum procedural requirements:

(i) It must be reasoned—i.e. accompanied by a justification of its key features (in this case, a report or analysis that justified the zero value attributed to EGSA).

(ii) Both the act and its reasons must be formally communicated to the individual.

(iii) The legal procedure in question should allow the individual, after being notified of such reasons, to be heard before the State adopts its final decision (i.e. sets the final fair value).

6. Bolivia appeared to *intend* to fulfil the first requirement because ENDE retained the PROFIN consulting firm to prepare a valuation report. However, it promptly thereafter disregarded these minimum requirements of "*due process*":

(i) As noted in the "basis and limitations" section of the PROFIN report, the consulting firm conceived of the report as a secret "strategic document" for the Bolivian Government's use in its negotiations with GAI, from which it can be surmised that PROFIN did not act with full impartiality.

(ii) That report was never communicated to Rurelec, who became aware of it only when it was submitted by Bolivia in this arbitration as exhibit R-154.

(iii) Bolivia never gave Rurelec the opportunity to make submissions in response to that valuation.

7. In sum, a secret strategic report cannot legally constitute the required justification for an administrative act which infringes upon rights.

8. Bolivia thus breached its Treaty with the United Kingdom, not only because it underestimated the value of EGSA, but also because it failed to comply with the minimum requirements of due process under Article 5 when establishing that zero valuation.

The Tribunal should have upheld its jurisdiction over the "New Claims"

9. The breach of due process by Bolivia in the expropriation strengthens the Claimants' argument that the Tribunal had jurisdiction over what Bolivia has called the "New Claims" despite the stipulation in Article 8 of the Treaty of a 6-month waiting period following written notice "of the claim."

10. The Claimants refer to several awards (in particular, *Lauder*, *Abaclat*, *SGS v. Pakistan*, *Biwater Gauff v. Tanzania*, etc.) characterizing such waiting periods as purely procedural,

rather than jurisdictional, in nature. Those arguments become stronger still, in my opinion, when a tribunal must determine whether it has jurisdiction to rule on certain claims ancillary to a main claim relating to a seizure.

11. If Bolivia did not respect the most basic requirements of due process when expropriating EGSA, how could it be entitled to require the Claimants to separately notify claims concerning spot prices and capacity payments and wait six months, even though such claims, if accepted by the Tribunal, would have increased the value of EGSA and, consequently, the amount of compensation due? In my view, given that Bolivia failed to abide by minimum standards of due process in the nationalization of EGSA, it is unreasonable to interpret Article 8 of the Treaty so as to require separate notification by the expropriated individuals of these claims, which were ancillary to the main claim.

12. By the same token, a person who is expelled from a foreign country by a public authority who, without undertaking any administrative procedure, *de facto* takes his or her home without paying compensation, should be entitled to claim not only its value when it was taken, but also the loss of value suffered when, shortly beforehand, the same authorities—in that person's eyes, unfairly—reduced the area of the garden or the property's building rights.

13. I nevertheless share the rest of the Tribunal's view on substance that the 2007 and 2008 decisions did not violate the Treaty, since they were not discriminatory or arbitrary and, hence, should have been dismissed by the Tribunal on the merits. I find it, however, somewhat paradoxical that the Tribunal, after rejecting its jurisdiction on the "new claims", included in its award a long, unrefined *obiter dicta* on States' unrestrained right to introduce regulatory changes, provided they do not jeopardize the financial viability of the affected firms.

The Tribunal should have ordered Bolivia to pay costs, at least partially

14. Bolivia's breach of due process should have also led the Tribunal order <u>costs</u> against Bolivia, at least partially.

15. Indeed, Bolivia's failure to comply with due process forced the Claimants to commence this arbitration and has produced costs that will reduce their effective compensation. It is true that, like so many other aggrieved claimants, Rurelec "inflated" its claims and the Tribunal has rejected a substantial part of them. However, it is particularly appropriate to point out, in a case concerning a power sector applying the principle of "marginal cost", that the

Claimants' dismissed claims produced only a small "marginal cost" for these proceedings: the Tribunal's and Parties' costs were largely fixed and would not have been much lower had Rurelec claimed exactly the amount of compensation that the Tribunal has awarded. Thus, the Claimants' exaggeration of their claims has not imposed a significant "marginal cost" upon Bolivia, while Bolivia—by forcing Rurelec to initiate proceedings in order to assert its rights—has imposed a high "marginal cost" on the latter that the Tribunal should have ordered Bolivia to cover, at least in part.

16. This conclusion would have also been consistent with a basic economic principle in the design and application of mandatory rules, including those embodied in international treaties: it should not prove more advantageous to breach a rule than to comply with it. Therefore, given an expropriation that has been shown to be unlawful by the full Tribunal on the basis of the failure to pay compensation, and by me on the additional basis of a breach of "due process", the Tribunal should have ordered costs against Bolivia, at least partially.

17. Finally, concerning CAPEX, I regret that the Tribunal, just relying on its own hunches, took at face value statements by a party's witness, Mr. Paz, which Bolivia's own expert, unable to verify them, did not deem appropriate to include in his own valuation model.

18. Even if I was unable to persuade my colleagues on the points mentioned in this opinion, I am glad that, thanks to our chairman, we were able to discuss them in a non-confrontational manner.