

**ARBITRATION UNDER THE RULES OF ARBITRATION OF THE
UNITED NATIONS COMMISSION ON INTERNATIONAL
TRADE LAW**

GUARACACHI AMERICA, INC.

&

RURELEC PLC

Claimants

v.

PLURINATIONAL STATE OF BOLIVIA

Respondent

CLAIMANTS' COUNTER-MEMORIAL ON JURISDICTION

26 OCTOBER 2012



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I. INTRODUCTION

1. Guaracachi America, Inc. (*Guaracachi America* or *GAI*) and Rurelec PLC (*Rurelec*, and together with GAI, the *Claimants*) file this response (the *Counter-Memorial*) to the Plurinational State of Bolivia's (*Bolivia* or the *Respondent*) jurisdictional objections of 17 September 2012 (the *Objections*) pursuant to Procedural Order No. 6 as amended by Procedural Order No. 8. Capitalized terms not defined herein shall have the meaning given to them in the Claimants' 1 March 2012 Statement of Claim.
2. Bolivia has repeatedly demonstrated its disdain for these proceedings. This has manifested itself in different forms: failing to appoint counsel until the eve of its deadline for the Statement of Defense, delaying payment of the Tribunal's fees, and repeatedly ignoring the basic deadlines that it agreed to at the beginning of the case. Bolivia's strategy appears designed to prevent the efficient and prompt resolution of this dispute, whose objective is simply the receipt by Claimants of compensation for the openly admitted expropriation of their investment in Bolivia's leading private power generation company, Empresa Eléctrica Guaracachi S.A. (*Guaracachi*).
3. Bolivia's Objections and its attendant request for bifurcation are simply another tactic devised to delay this proceeding. Bifurcation would serve no other end. Equally, both Parties have now pleaded their case on both jurisdiction and the merits. Claimants' substantive claims and Bolivia's Objections can efficiently be heard together at the hearing scheduled for April 2013. Moreover, the Objections raised by Bolivia require a full understanding of the underlying evidence when it adjudicates Bolivia's Objections, which would only be possible following an evidential hearing on the merits. The Parties are entitled to a fair hearing and the efficient disposal of their dispute by this Tribunal. Conserving a unified proceeding would accomplish both of those objectives.

4. This Counter-Memorial is divided into nine further sections and is accompanied by 21 factual exhibits, 43 legal authorities and the second witness statement of Carlos Pedro Marcelo Blanco Quintanilla. The sections are organized, for ease of reference, as a mirror image of Bolivia's Objections. In brief, the Claimants' responses to those sections are organized as follows:

§ **Section II** demonstrates the Claimants' entitlement to bring their claims jointly against Bolivia in this arbitration.

§ **Section III** describes how Rurelec made its investment in Guaracachi in 2006 and how its investment is protected by the UK Treaty.

§ **Section IV** argues that Bolivia cannot invoke the US Treaty's denial of benefits clause to frustrate GAI's arbitration claim, as this clause only applies prospectively, and, in any event, GAI has substantial business activities in the United States.

§ **Section V** rejects Bolivia's argument that the purported amicable settlement provisions in the Treaties bar the Claimants from bringing claims with respect to Bolivia's measures in relation to spot prices, capacity payments and the Worthington engines.

§ **Section VI** demonstrates that the Claimants' claims relating to spot prices, capacity prices and the Worthington engines are properly regarded as Treaty claims.

§ **Section VII** argues that GAI's effective means claim is not barred by the US Treaty's "fork in the road" provision.

§ **Section VIII** establishes that the Claimants' claims regarding spot prices and the Worthington engines is ripe for decision.

§ **Section IX** once again argues that bifurcation should not be granted in this case, and **Section X** is the Claimants' request for relief.

II. THE CLAIMANTS ARE ENTITLED TO FILE THIS ARBITRATION JOINTLY

5. Bolivia's first jurisdictional objection is that, although it has clearly given its consent to investor-State arbitration in the UK and US Treaties, it has not consented to the "accumulation" or "consolidation" of claims under both treaties.¹ Bolivia's objection is baseless.
6. *First*, no issue of "consolidation" arises in this case. Consolidation is "a procedural device combining two or more proceedings into one proceeding"² with the result that the consolidated tribunal takes over the proceedings and the other tribunals cease to function.³ Express consent is required to consolidate proceedings.⁴ This is the purpose of NAFTA Article 1126 which Bolivia cites in its brief.⁵ It does not apply in cases where different investors bring claims jointly in one proceeding, as in the present case.⁶ Similarly, the two cases cited by Bolivia in its Objections, *Pan American* and *CME*, are not applicable as they relate to the consolidation of separate arbitral proceedings into a single arbitration.
- (a) In *Pan American*, the first set of claimants, two U.S. entities, filed a request for arbitration together under the United States–Argentina bilateral investment treaty

¹ Objections, ¶ 16.

² *Canfor Corporation v. United States of America; Terminal Forest Products Ltd. v. United States of America* (UNCITRAL), Order of the Consolidation Tribunal, 7 September 2005, **Exhibit CL-115**, ¶ 77.

³ *See, e.g., Canfor Corporation v. United States of America; Terminal Forest Products Ltd. v. United States of America* (UNCITRAL), Order of the Consolidation Tribunal, 7 September 2005, **Exhibit CL-115**, ¶¶ 100, 156.

⁴ C.H. Schreuer, *The ICSID Convention: A Commentary* (Cambridge UP, 2d Ed 2009), **Exhibit RL-30**, p. 386.

⁵ Objections, ¶ 21 and footnote 7; *See Canfor Corporation v. United States of America; Terminal Forest Products Ltd. v. United States of America* (UNCITRAL), Order of the Consolidation Tribunal, 7 September 2005, **Exhibit CL-115**, ¶ 61; *Corn Products International, Inc. v. United Mexican States/Archer Daniels Midland Company and Tate & Lyle Ingredients America, Inc. v. United Mexican States* (ICSID Case Nos. ARB(AF)/04/1 and ARB(AF)/04/5), Order of the Consolidation Tribunal, 20 May 2005, **Exhibit CL-113**, ¶ 5.

⁶ *See infra* ¶ 7-9.

(*BIT*) which was registered by ICSID on 6 June 2003.⁷ The second set of claimants, one entity based in the U.S. and three based in Argentina filed a separate request for arbitration against Argentina under the United States–Argentina BIT, which was registered by ICSID on 27 February 2004.⁸ Subsequently, the second set of claimants sought to consolidate the two ICSID arbitration proceedings and sought (and ultimately obtained) Argentina’s consent to consolidate. It was only because the claimants had chosen to file two separate requests for arbitration at different times that they were compelled to seek the respondent State’s consent in order to consolidate the two resulting arbitral proceedings. This case is simply not relevant here as the Claimants have initiated a single arbitral proceeding (as the *Pan American* claimants could have done in order to avoid consolidation, as discussed further below).

- (b) Similarly, in *CME*, the claimants (at their election) brought two separate arbitrations, one under the Czech–United States BIT (*Ronald S. Lauder v. Czech Republic*) and one under the Czech–Netherlands BIT (*CME v. Czech Republic*) relating to the same investment. The *Lauder* case was filed on 19 August 1999.⁹ The *CME* case was filed on 22 February 2000. Again, it was the claimants’ decision to proceed separately. Following that choice, as in *Pan American*, but unlike the case here, two separately-constituted tribunals would then need to be consolidated. The results are well-known. The Czech Republic took the position that separate claimants could not file an arbitration regarding the same investment, and that to do so was an abuse of process (a position eventually

⁷ *Pan American Energy and others v. Argentine Republic* (ICSID Case Nos. ARB/03/13 and ARB/04/8), Decision on Preliminary Objections, 27 July 2006, **Exhibit RL-32**, ¶¶ 1–2. There does not appear to have been an objection by Argentina for these two U.S. entities to proceed together, in accordance with standard arbitral practice.

⁸ *Pan American Energy and others v. Argentine Republic* (ICSID Case Nos. ARB/03/13 and ARB/04/8), Decision on Preliminary Objections, 27 July 2006, **Exhibit RL-32**, ¶ 3.

⁹ *Ronald S. Lauder v. Czech Republic* (UNCITRAL), Final Award, 3 September 2001, **Exhibit CL-23**, ¶ 10.

rejected by both tribunals).¹⁰ The claimants offered to consolidate,¹¹ but the Czech Republic refused.¹² On 3 September 2001, the *Lauder* tribunal dismissed all claims for damages.¹³ Ten days later, on 13 September 2001, the *CME* tribunal found that the *same* investment had been expropriated.¹⁴ The *CME* tribunal eventually awarded the claimant nearly US\$ 270 million in compensation.¹⁵

7. *Second*, Bolivia’s argument that the Tribunal lacks jurisdiction because it has not expressly consented to the “accumulation” of claims brought by different claimants under different treaties in a single proceeding, is not supported by any authority. This is because there is none. No claimant has ever been dismissed from an investment arbitration simply because it filed its claims jointly with another claimant.
8. On the contrary, it is common for multiple parties in investor-State arbitration to file their arbitrations jointly, even where there are separate legal instruments involved. For example, in *Foresti*, seven Italian nationals filed a joint request for arbitration against South Africa under the Italy–South Africa BIT with a company constituted in Luxembourg under the Belgo-Luxembourg Economic Union–South Africa BIT.¹⁶ Likewise, in *OKO Pankki OYJ*, three claimants jointly filed a request for arbitration: two of these claimed under the Finland–Estonia BIT while

¹⁰ *Ronald S. Lauder v. Czech Republic* (UNCITRAL), Final Award, 3 September 2001, **Exhibit CL-23**, ¶¶ 176-180; *CME Czech Republic B.V. v. Czech Republic* (UNCITRAL), Partial Award, 13 September 2001, **Exhibit CL-74**, ¶ 412.

¹¹ *CME Czech Republic B.V. v. Czech Republic* (UNCITRAL), Partial Award, 13 September 2001, **Exhibit CL-74**, ¶ 412.

¹² *CME Czech Republic B.V. v. Czech Republic* (UNCITRAL), Partial Award, 13 September 2001, **Exhibit CL-74**, ¶ 412.

¹³ *Ronald S. Lauder v. Czech Republic* (UNCITRAL), Final Award, 3 September 2001, **Exhibit CL-23**, p. 74.

¹⁴ *CME Czech Republic B.V. v. Czech Republic* (UNCITRAL), Partial Award, 13 September 2001, **Exhibit CL-74**, ¶ 624.

¹⁵ *CME Czech Republic B.V. v. Czech Republic* (UNCITRAL), Final Award, 14 March 2003, **Exhibit CL-27**, p. 161.

¹⁶ *Piero Foresti, Laura de Carli & Others v. Republic of South Africa* (ICSID Case No. ARB(AF)/07/1), Award, 4 August 2010, **Exhibit CL-134**, ¶ 1.

the third claimant claimed under the Germany–Estonia BIT.¹⁷ To take yet another example, in the *Itera* arbitration, two claimants filed a request for arbitration jointly under the Georgia–Netherlands and Georgia–United States BITs.¹⁸ In *Suez et al. v. Argentina*, a single arbitration was commenced by two claimants under the France–Argentina BIT, and one claimant under the Spain–Argentina BIT.¹⁹ There is no evidence in any of these cases that respondent States viewed the practice as inappropriate, inconsistent with their respective BITs, or the applicable arbitration rules.

9. Where dispute resolution provisions in different instruments are compatible, as in the present case, investors may (and commonly do) initiate arbitration proceedings jointly under different instruments. For instance, investment treaty tribunals have heard claims brought by multiple claimants relying on multiple, compatible consents in a single arbitration, such as consents found in a treaty and foreign investment law,²⁰ or a treaty and a contract.²¹
10. In the present case, the dispute resolution provisions in the UK Treaty and the US Treaty are compatible and do not preclude the Claimants from initiating arbitration proceedings jointly to have their dispute relating to the same investment resolved together, contrary to Bolivia’s assertions. The only alleged

¹⁷ *OKO Pankki OYJ, VTB Bank (Deutschland) AG and Sampo Bank Plc v. Republic of Estonia* (ICSID Case No. ARB.04/6), Award, 19 November 2007, **Exhibit CL-120**, ¶¶ 1, 4, 6.

¹⁸ *Itera International Energy LLC and Itera Group NV v. Georgia* (ICSID Case No. ARB/08/7), Decision on Admissibility of Ancillary Claims, 4 December 2009, **Exhibit CL-128**, ¶ 25.

¹⁹ *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, **Exhibit CL-117**, ¶ 2.

²⁰ *Pac Rim Cayman LLC v. Republic of El Salvador* (ICSID Case No. ARB/09/12), Decision on the Respondent’s Preliminary Objections under CAFTA Articles 10.20.4 and 10.20.5, 2 August 2010, **Exhibit CL-133**, ¶ 253. See also *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, **Exhibit CL-52**, ¶ 12 (basing claim on bilateral investment treaty and foreign investment law).

²¹ *Duke Energy Electroquil Partners & Electroquil S.A. v. Ecuador* (ICSID Case No. ARB/04/19), Award, 18 August 2008, **Exhibit CL-53**, IV.2. *Perenco Ecuador Ltd. v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)* (ICSID Case No. ARB/08/6), Decision on Jurisdiction, 30 June 2011, **Exhibit CL-137**, ¶ 2.

incompatibility raised by Bolivia is that the UK Treaty provides that “[d]isputes between [an investor and a host State] concerning an obligation of the latter under this Agreement [... may] be submitted to international arbitration if either party to the dispute so wishes”,²² whereas the US Treaty provides that “the national or company concerned may submit the dispute for settlement by binding arbitration.”²³ In other words, disputes relating to the host State’s treaty breaches may be submitted to arbitration only by an investor under the US Treaty, whereas that dispute could be submitted by either the investor or the host State under the UK Treaty.²⁴ In the present case, the Claimants have properly submitted a dispute under the dispute settlement provisions of each of the Treaties. There is no incompatibility here.

11. It is both fair and efficient for this Tribunal to resolve the Claimants’ dispute in a single proceeding. To force the Claimants to proceed separately would involve a duplication of efforts and cost, and would risk inconsistent outcomes (as in the *CME* and *Lauder* cases). Indeed, Bolivia has not identified any substantive

²² UK Treaty, **Exhibit C-1**, Article 8(1).

²³ US Treaty, **Exhibit C-17**, Article IX.3.(a).

²⁴ Bolivia’s argument that the UK Treaty permits counterclaims (Objections, ¶ 29) is incorrect. Article 8(1) provides that “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 ... be submitted to international arbitration if either party to the dispute so wishes.” In other words, if the host State were to submit a dispute to arbitration under the UK Treaty, that dispute would have to relate to an obligation of the host State under the UK Treaty. This clearly precludes “counterclaims”. See *Spyridon Roussalis v. Romania* (ICSID Case No. ARB/06/1) Award, 7 December 2011, **Exhibit CL-139**, ¶ 869. In *Roussalis*, the majority of the tribunal found that “the references made in the text of Article 9(1) of the BIT to ‘disputes ... concerning an obligation of the latter’ undoubtedly limit[ed] jurisdiction to claims brought by investors about obligations of the host State. Accordingly, the BIT does not provide for counterclaims to be introduced by the host state in relation to obligations of the investor. The meaning of the ‘dispute’ is the issue of compliance by the State with the BIT.” The UK Treaty contains the same language as *Roussalis* although, unlike *Roussalis*, the UK Treaty permits either party to refer a dispute to arbitration. Given the UK Treaty’s language about a “dispute”, presumably, the only claim that Bolivia could raise is a question about its obligations under the Treaty in relation to an investor and not a claim against an investor directly; see also C. Schreuer, *The ICSID Convention: A Commentary* (2ed 2009), **Exhibit CL-123**, p. 750 (“In the majority of cases in which counterclaims were presented, they related to the main substance of the case and were not of an incidental nature. They alleged faulty performance or some other wrongdoing on the part of the claimant. These allegations, although couched in the form of counterclaims, were usually of a defensive nature and were intended to fend off the primary claim. They were disallowed by the tribunals [...].”).

distinction between the two treaties' dispute resolution mechanisms that would prejudice it in having these claims heard jointly.

12. The Tribunal has jurisdiction to resolve the parties' dispute under the Treaties, as well as under the 2010 UNCITRAL Rules,²⁵ which gives the Tribunal the widest discretion to conduct the arbitration in a manner that it considers appropriate.²⁶ Indeed, the Tribunal has a duty to conduct the proceedings such as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute.²⁷
13. For these reasons, the Claimants should be allowed to proceed jointly and this objection should be rejected.

III. RURELEC HAS A PROTECTED INVESTMENT UNDER THE UK TREATY

14. Bolivia's second jurisdictional objection is that the Tribunal does not have jurisdiction *rationae personae* over Rurelec. Bolivia argues that: (a) Rurelec has not provided evidence of its indirect ownership of Guaracachi (referred to by Respondent as "EGSA"); (b) even if Rurelec had provided evidence of its investment, indirect ownership interests are not protected by the UK Treaty; and, (c) Rurelec failed to make an "investment of capital" in Bolivian territory and therefore it is not protected.²⁸ None of these positions has any merit.

²⁵ Procedural Order No. 1, Section 5.1.

²⁶ See UNCITRAL Rule 17(1) and Procedural Order No. 1, Section 5.3. Indeed, if the Tribunal finds that it has jurisdiction separately under each Treaty, whether the Claimants can proceed jointly is, at most, a question of arbitral procedure to be decided by the Tribunal in accordance with the discretion granted to it by the Parties under the UNCITRAL Rules and Procedural Order No 1. See *Abaclat and others v. Argentine Republic* (ICSID Case No. ARB/07/5) Decision on Jurisdiction and Admissibility, 4 August 2011, **Exhibit CL-138**, ¶¶ 492, 521.

²⁷ UNCITRAL Rules 17(1).

²⁸ Objections, Section III.

A. RURELEC ACQUIRED ITS MAJORITY STAKE IN GUARACACHI IN 2006

15. In its Statement of Claim, Rurelec explained that it acquired its majority stake in Guaracachi in 2006.²⁹ Bolivia now argues that the documents Rurelec has tendered show that Rurelec acquired its stake in Guaracachi only in June 2009, and that therefore, Rurelec was not the majority shareholder of Guaracachi when some of the major investments in new power generation capacity in Bolivia were made in 2006 and 2008, and Rurelec cannot claim to have sponsored these investments.³⁰
16. Bolivia knows well that this objection is frivolous.
17. *First*, Bolivia fails to mention that it made a direct request to the Claimants for production of specific documents on this issue on 7 September 2012.³¹ Rurelec complied voluntarily with this request on 12 September 2012, providing further documentary evidence of its 2006 investment, including a copy of the 12 December 2005 Share Purchase Agreement establishing the acquisition of Bolivia Integrated Energy Ltd (which holds 100% of GAI's shares) by Birdsong Overseas Limited (a wholly-owned subsidiary of Rurelec) for US\$35 million.³² The

²⁹ Statement of Claim, ¶ 70.

³⁰ Objections, ¶ 49.

³¹ Specifically, Respondent requested: (1) documents related to Birdsong Overseas Ltd., including the share register identifying shareholders since incorporation and the company statutes; (2) documents related to Bolivia Integrated Energy Limited, including the share register identifying shareholders since incorporation and the company statutes; (3) documents related to Guaracachi America Inc., including the share register identifying shareholders since incorporation and the company statutes; and (4) other documents including a copy of the acquisition contract plus annexes mentioned in ¶ 67 of the Statement of Claim, which reads: "In December 2005, Rurelec contracted to acquire Guaracachi America for US\$41.2 million through its wholly-owned subsidiary Birdsong Overseas Limited. The transaction closed on 6 January 2006". Claimants note that ¶ 67 of the Statement of Claim should be corrected. The Share Purchase Agreement through which Rurelec's wholly-owned subsidiary Birdsong Overseas Limited acquired Guaracachi America Inc. stipulated a purchase price of US\$35 million, not US\$41.2 million. *See* Share Purchase Agreement relating to the Purchase of Bolivia Integrated Energy Ltd, 12 December 2005, **Exhibit R-61**.

³² Share Purchase Agreement relating to the Purchase of Bolivia Integrated Energy Ltd., 12 December 2005, **Exhibit R-61**. Bolivia did not submit a copy of this document with its Objections of 17 September 2012, notwithstanding that it had been disclosed by the Claimants in response to its 12 September 2012 document request. Bolivia did, however, submit a copy of this document with its Statement of Defense of 15 October 2012.

transaction closed on 6 January 2006 as is established by the Share Transfer executed on 5 January 2005 in consideration for the payment of US\$35 million.³³ Announcements were made to the London Stock Exchange and the general public in this regard in December 2005 and January 2006.³⁴ Rurelec's investment in Guaracachi was therefore clearly made in 2006 and not in 2009.³⁵

18. *Second*, documents already on the record demonstrate Rurelec's investment in Guaracachi since 2006. Guaracachi's annual reports have detailed Rurelec's ownership of shares every year since the investment was made.³⁶ Peter Earl, the CEO of Rurelec, became President of Guaracachi's Board of Directors in 2006 and is listed as such for the issuance of Guaracachi's bonds.³⁷ Rurelec press releases have touted each investment in power generation capacity made in the

³³ Share Transfer executed between Birdsong Overseas Limited and Southern Integrated Energy Limited, 5 January 2006, **Exhibit C-214**. *See also* Earl WS, ¶ 36.

³⁴ *See* Announcement of Rurelec PLC regarding the acquisition of Bolivia Integrated Energy Limited, 13 December 2005, **Exhibit C-213**; Press Release of Rurelec PLC of 5 January 2006, **Exhibit C-215**.

³⁵ The only document cited in support of Bolivia's allegation that Rurelec acquired its interest in Guaracachi (through Bolivia Integrated Energy Ltd) in 2009 is the Bolivia Integrated Energy Ltd. share certificate submitted as **Exhibit C-35** (Objections, ¶ 47). The 2009 date that appears on this certificate is due merely to corporate record keeping in the British Virgin Islands (BVI). Birdsong Overseas Limited and Bolivia Integrated Energy Ltd. are managed by local agents. As Bolivia Integrated Energy Ltd.'s share register shows, the shares of Bolivia Integrated Energy Ltd. were held by a number of nominee companies in trust for its beneficial owners (See Share Register of Bolivia Integrated Energy Limited, 10 September 2012, **Exhibit C-225**. This document was also provided to counsel for Bolivia in response to its September 2012 document request.) From 2002 through 2007, the local agent was a company known as Obelisk, which was subsequently replaced by Beresford as trustee. When the administration of Bolivia Integrated Energy and Birdsong Overseas Limited was transferred to Nerine Trust Company Limited (*Nerine*) in October 2008, the shares were transferred to Nerine's nominee company Tanelorn Investments Limited which continued to hold the shares as the bare trustee for Birdsong Overseas Limited until June 2009, when the shares were transferred directly to Birdsong Overseas Limited. These mundane corporate changes do not alter the fact that since the initial acquisition was completed in 2006, the ultimate beneficial owner of Bolivia Integrated Energy Ltd. has been Birdsong Overseas Limited, a wholly owned subsidiary of Rurelec. See Letter from Nerine Trust Company, 26 October 2012, **Exhibit C-226**.

³⁶ *See* 2007 Annual Report of Empresa Eléctrica Guaracachi S.A., **Exhibit C-126**, p. 13; 2008 Annual Report of Empresa Eléctrica Guaracachi S.A., **Exhibit C-32**, p. 16; 2009 Annual Report of Empresa Eléctrica Guaracachi S.A., **Exhibit C-36**, p. 18.

³⁷ *See, e.g.*, Minutes of the Meeting of the Board of Directors of Empresa Eléctrica Guaracachi S.A., 23 November 2006, **Exhibit C-123**; Prospectus for the First Issuance of Guaracachi Bonds, 27 December 2007, **Exhibit C-143**.

country since 2006.³⁸ All of this would be inexplicable if Rurelec had not owned a stake in Guaracachi at the relevant time.

19. *Third*, Bolivia cannot argue that it was not aware of Rurelec’s investment prior to 2009. As set out in the witness statement of Peter Earl,³⁹ in March 2007, a formal inauguration ceremony was held following the successful commissioning of the Guaracachi’s GCH-11 unit (which added 71 MW of capacity in Santa Cruz at a cost of US\$21 million). This ceremony, photographed below, was attended by Bolivia’s Vice Minister of Energy, Rurelec’s CEO, Peter Earl, and the British Ambassador to Bolivia, Nigel Baker. A photograph of the ribbon-cutting ceremony appears below. Bolivia, therefore, certainly had knowledge of both Rurelec’s investment in Guaracachi, and its UK nationality, prior to 2009.



B. INDIRECT INVESTMENTS ARE PROTECTED UNDER THE UK TREATY

20. Bolivia next contends that, since the UK Treaty does not specifically refer to indirect ownership interests as protected “investments”, the holder of such assets

³⁸ See, e.g., Rurelec Press Release, “New Generation Capacity Commissioned in Bolivia,” 6 March 2007, **Exhibit C-132**; Rurelec Press Release, “Guaracachi Preliminary Results,” 26 March 2007, **Exhibit C-135**.

³⁹ Earl WS, ¶ 44.

is not entitled to the Treaty's protection.⁴⁰ Bolivia argues that silence of the treaty text as to indirect investment, particularly in light of the express mention in other Bolivian treaties, proves that the UK Treaty was not intended to cover indirect investments.⁴¹

21. The UK Treaty incorporates an expansive definition of the term "investment." It occurs in Article 1(a), which states:

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 concession 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 [...].⁴²

22. The UK Treaty means what it says. The Treaty expressly covers "every kind of asset." "[A]ny . . . form of participation in a company" is expressly protected. And the list of protected investment types is expressly non-exhaustive. Indirect shareholdings are an asset, and they are certainly a form of participation in a
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⁴⁰ Objections, ¶ 74.

⁴¹ Objections, ¶¶ 79–81. Bolivia also makes a rather unclear subsidiary argument that since the UK Treaty does not make express reference to entities incorporated in Bolivia or in third countries and directly or indirectly controlled by UK entities, this is further evidence that the UK Treaty does not extend its protections to indirect investments. Objections, ¶¶ 65, 78.

⁴² UK Treaty, **Exhibit C-1**, Article 1(a) (emphasis added).

company. Indirect shareholdings therefore fall within the definition of “investment” under the UK Treaty.

23. This conclusion is consistent with extensive arbitral practice. In *Siemens A.G. v Argentine Republic*, Argentina argued that Siemens’s indirect shareholding in an Argentine company did not qualify as an investment under the Argentina–Germany BIT as it did not expressly provide that “indirect” investments qualified for protection.⁴³ The tribunal found the indirect shareholding of the claimant to be protected by the treaty, reasoning that:

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.⁴⁴

24. The tribunal in *Kardassopoulos v. Georgia* adopted an analogous position.⁴⁵ There, the claimant, a Greek national with an indirect shareholding in a Georgian-incorporated joint venture company claimed under the Energy Charter Treaty and the Greece–Georgia BIT. Article 1(6) of the Energy Charter Treaty referred to indirect ownership specifically, while the Greece–Georgia BIT referred to “every kind of asset” as well as “shares in and stock and debentures of a company and any other form of participation in a company,” but made no mention of indirect investments.⁴⁶ This difference had no effect on the tribunal’s conclusion that “the indirect ownership of shares by Claimant constitutes an ‘investment’ under the BIT and the ECT.”⁴⁷

⁴³ *Siemens A.G. v. Argentine Republic* (ICSID Case No. ARB/02/8), Decision on Jurisdiction, 3 August 2004, **CL-109**, ¶¶ 23–25, 123.

⁴⁴ *Ibid.*, ¶ 137 (emphasis added).

⁴⁵ *Ioannis Kardassopoulos v. Georgia* (ICSID Case No. ARB/05/18), Decision on Jurisdiction, 6 July 2007, **Exhibit CL-119**, ¶¶ 123–24.

⁴⁶ *Ibid.*, ¶¶ 121–22.

⁴⁷ *Ibid.*, ¶ 124.

25. Faced with a similar objection from Venezuela as the one made by Bolivia in this case, the tribunal in *Mobil v Venezuela* arrived at the same conclusion as the tribunals mentioned above:

The Tribunal notes that there is no explicit reference to direct or indirect investments in the BIT. The definition of investment given in Article 1 is very broad. It includes ‘every kind of assets’ and enumerates specific categories of investments as examples. One of those categories consists of ‘shares, bonds or other kinds of interests in companies and joint ventures’. The plain meaning of this provision is that shares or other kind of interests held by Dutch shareholders in a company or in a joint venture having made investment on Venezuelan territory are protected under Article 1. The BIT does not require that there be no interposed companies between the ultimate owner of the company or of the joint venture and the investment. Therefore, a literal reading of the BIT does not support the allegation that the definition of investment excludes indirect investments. Investments as defined in Article 1 could be direct or indirect as recognized in similar cases by ICSID Tribunals.⁴⁸

26. Likewise, in *Tza Yap Shum v Peru*, the tribunal held that an indirect investment in Peru by a Chinese national made through an intermediary company located in the Virgin Islands could be considered an investment, even though the treaty in question did not refer expressly to “indirect” investments.⁴⁹ The tribunal held that it would be improper to interpret the term “investment”, broadly defined in the treaty as including “every kind of asset”, as excluding indirect investments:

The Tribunal does not encounter indications in the [treaty] that lead it in principle to exclude indirect investments of Chinese nationals in Peruvian territory from the scope of application of the Treaty. ... The Tribunal’s analysis is not altered by the presence of other

⁴⁸ *Mobil Corporation, Venezuela Holdings, B.V. and others v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/27), Decision on Jurisdiction, 10 June 2010, Arbitrators Guillaume, Kauffmann-Kohler and El-Kosheri, **Exhibit CL-131**, ¶ 165 (footnote omitted). It should be noted that under the Venezuela-Netherlands bilateral investment treaty, a national under the treaty can be controlled directly or indirectly by natural or legal persons of a Contracting Party.

⁴⁹ *Sr. Tza Yap Shum v. República del Perú* (ICSID Case No. ARB/07/6), Decision on Jurisdiction and Competence, 19 June 2009, Arbitrators Fernandez Armesto, Otero and Kessler, **Exhibit CL-124**, ¶¶ 89, 92.

investment treaties entered into by the parties to the [treaty] with third countries in which apparently, and contrary to the [treaty], do expressly protect indirect investments. The Tribunal does not see in them reasons determinative of the issue under consideration.⁵⁰

27. In the face of this consistent arbitral case law, Bolivia relies almost exclusively on the *Aguas del Tunari v Bolivia* decision. This reliance is misplaced. In *Aguas del Tunari*, the claimant was Bolivian and brought claims against its own state under the Netherlands–Bolivia bilateral investment treaty.⁵¹ The central issue at stake was whether Dutch companies sufficiently “controlled” the Bolivian claimant for such that the claimant could be considered a Dutch national in accordance with the specific definition of “investor” in the applicable treaty.⁵² The *Aguas del Tunari* tribunal did not consider whether “investments” include indirect shareholdings.
28. Bolivia also argues that the word “of” in the expression “investments of nationals or companies of each Contracting Party,” which appears in the UK Treaty, suggests that investments must be held directly by such nationals and companies to be protected.⁵³ This very argument was unequivocally rejected by the *Cemex* tribunal:

[W]hen 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

⁵⁰ *Ibid*, ¶¶ 106, 109. English translation. The original Spanish reads: “el Tribunal no encuentra indicaciones en el [tratado] que lo lleven por principio a excluir del ámbito de aplicación del Tratado las inversiones indirectas de nacionales chinos en territorio Peruano...El análisis del Tribunal no se ve alterado por las advertencias sobre otros tratados de inversiones suscritos por las partes al APPRI con terceros países en los que aparentemente y a diferencia del APPRI sí protegerían de forma expresa las inversiones indirectas. El Tribunal no advierte en ellos razones determinantes sobre el tema en consideración.”

⁵¹ *Aguas del Tunari, S.A. v. Bolivia* (ICSID Case No. ARB/02/3), Decision on Respondent’s Objections to Jurisdiction, 21 October 2005, **Exhibit RL-28**, ¶¶ 1, 3.

⁵² *Ibid*, p 46 *et seq.*

⁵³ Objections ¶¶ 66-68.

itself be situated in that territory. It does not imply that those investments must be “directly” made in such territory.⁵⁴

29. Finally, Bolivia argues that the presence of third-party companies as intermediaries in the corporate ownership chain supports its contention that Rurelec has no standing as an investor under the UK Treaty.⁵⁵ Again, Bolivia does not rely on the UK Treaty’s text to make this argument, which contains a broad definition of investment, nor does it offer any authority to support its position. Case law and commentary contradict Bolivia’s position. As one of the world’s leading commentators on investment arbitration, Professor Schreuer, has stated:

[I]ndirect shareholding by way of an intermediary company does not deprive the beneficial owner of its right to pursue claims for damages to the company by the host State. In this context it matters little whether the intermediate owner of the affected company’s shares is incorporated in the claimant’s home state, the host State or in a third state.⁵⁶

30. Or as the *Inmaris v Ukraine* tribunal mentioned:

BITs that do not otherwise restrict the structure of investors’ investments are regularly read to encompass investments in the host state that are owned by investors of the home state through one or more levels of subsidiaries, including subsidiaries incorporated in third countries (even when the BITs are silent on the issue).⁵⁷

31. For the reasons presented above, the Tribunal should reject Bolivia’s objection to jurisdiction based on the indirect nature of Rurelec’s investment.

⁵⁴ *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, **Exhibit CL-136**, ¶ 157 (holding that the claimants’ indirect shareholding in a Venezuelan company qualified as an ‘investment’ under the relevant treaty even though the definition of ‘investment’ in the treaty did not expressly mention ‘indirect’ investments).

⁵⁵ Objections, ¶¶ 82–84.

⁵⁶ C.H. Schreuer, “Shareholder Protection in International Investment Law,” *Transnational Dispute Management*, Volume 2, Issue 3, 8 May 2005, **Exhibit CL-112**, p. 15.

⁵⁷ *Inmaris Perestroika Sailing Maritime Services GMBH and others v. Ukraine* (ICSID Case No. ARB/08/8), Decision on Jurisdiction, 8 March 2010, (Arbitrators Alexandrov, Cremades, Rubins) **Exhibit CL-130**, footnote 109.

C. RURELEC HAD AN “INVESTMENT” WITHIN THE DEFINITION OF THE UK TREATY

32. Bolivia argues that under the UK Treaty an “investment” only exists if Claimant Rurelec has made a contribution of capital in the territory of Bolivia.⁵⁸ It further asserts that Rurelec has made no such contribution and therefore Rurelec does not have a protected investment. Bolivia is incorrect both factually and legally.
33. Rurelec has made significant investments in Bolivia. Rurelec paid a purchase price of US\$35 million, plus related acquisition costs, to acquire Guaracachi in 2006.⁵⁹ Since 2006, Rurelec initiated, approved and helped secure funding for the addition of 185 MW of high-efficiency capacity in Bolivia, investing approximately US\$110 million through Guaracachi.⁶⁰ Specifically, thanks to Rurelec’s expertise and know how, between 2006 and the date of the nationalization, Guaracachi was able to bring new sustainable technology into Bolivia, adding new generation capacity through the addition of: (a) seven low-emission Jenbacher gas engines, adding 13 MW of new capacity at a cost of over US\$6 million; (b) a GE 6FA gas turbine, known as the Guaracachi GCH-11 unit, which added 71 MW of new capacity in Santa Cruz at a cost of US\$21 million; (c) an US\$83 million investment in an 82 MW combined cycle gas turbine project in Santa Cruz, which was “state of the art technology”⁶¹, the first of its kind in Bolivia, which qualified under the United Nations Clean Development Mechanism Project.⁶² Moreover, with Rurelec’s support, Guaracachi developed rural electrification projects bringing electricity to the underserved population of Bolivia, entering into a “solidarity pact” with the Government as well as agreeing to finance a subsidy to low-income residential consumers (known as the “dignity

⁵⁸ Objections, Section 3.3.1.

⁵⁹ Share Purchase Agreement relating to the Purchase of Bolivia Integrated Energy Ltd., 12 December 2005, **Exhibit R-61**.

⁶⁰ Statement of Claim, ¶¶ 70-79.

⁶¹ Earl WS, ¶ 47.

⁶² Statement of Claim, ¶¶ 70, 76-79. Earl WS, ¶¶ 46-48; Lanza WS, ¶¶ 32-38.

- tariff”).⁶³ Rurelec also facilitated the transfer of technology and know-how to Bolivia as a result of the training of Guaracachi’s Bolivian management.⁶⁴
34. These investments were funded through the reinvestment of Guaracachi’s returns, deferred dividends, commercial loans, bond programs and an innovative carbon credits scheme at the instance of Rurelec.⁶⁵
35. Bolivia reaped the benefits of these investments. Demand for electricity grew significantly between 2006 and 2009 (peak demand grew by 15%). Without Guaracachi’s investments in new capacity, Bolivia would have faced important electricity shortages.⁶⁶ Moreover, thanks to Guaracachi’s rural electrification initiatives, the percentage of Bolivians living without electricity dropped significantly.⁶⁷
36. Rurelec, through its investment in Guaracachi, has therefore made significant contributions to the electricity sector in Bolivia. Contrary to Bolivia’s assertions, Rurelec’s investment falls squarely within the definition of the UK Treaty.
37. Bolivia’s interpretation of the term “investment” in the UK Treaty is incorrect as a matter of law. Bolivia bases its interpretation on the Spanish version of the UK Treaty, which states in Article 1(a): “el concepto ‘inversiones’ significa toda clase de bienes capaces de producir rentas y en particular, aunque no exclusivamente, comprende [...]”.⁶⁸ Bolivia then invokes the definition of “returns” in the Spanish version of the UK Treaty in Article 1(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,

⁶³ Statement of Claim, ¶¶83-84, 87, Aliaga WS, ¶¶27-28.

⁶⁴ Statement of Claim, ¶ 85.

⁶⁵ First Blanco WS, ¶¶ 26-34.

⁶⁶ Earl WS, ¶ 48.

⁶⁷ Statement of Claim, ¶¶ 83-84; Aliaga WS, ¶¶25-29.

⁶⁸ UK Treaty, **Exhibit C-1**, Article 1(a).

dividendos, cánones y honorarios.”⁶⁹ Bolivia contends on this basis that every time the word “investment” appears in the UK Treaty, it includes the definition of “returns” which in turn refers to an “investment of capital”. As the term “investment of capital” is not defined in the UK Treaty, Bolivia makes reference to an “objective notion of investment”⁷⁰ which it alleges requires a “‘contribution’ or ‘input’ of capital”.⁷¹ The conclusion of Bolivia’s contrived syllogism is that the term “investment” in the UK Treaty requires a direct contribution of capital in the territory of Bolivia.⁷²

38. Bolivia’s interpretation is without foundation.
39. *First*, narrowing the broad meaning of “investment” in the UK Treaty – which is defined as “every kind of asset capable of producing returns” followed by a non-exhaustive list of illustrative examples – such that the term is limited to direct contributions of capital, and doing so circularly via the definition of the term “returns”, is an exercise in interpretative gymnastics that distorts the plain meaning of the text of the UK Treaty and deprives that text of *effet utile*.
40. The implausibility of Bolivia’s interpretation is further demonstrated by the fact that Bolivia cannot support it under the English version of the UK Treaty. While the English and Spanish definitions of “investment” are materially identical, there is a discrepancy in the text of the definition of the term “returns”. The English definition refers to “amounts yielded by an investment and in particular, though not exclusively, includes profit, interest, capital gains, dividends, royalties and fees.”⁷³ The term “investment of capital” (which appears in the Spanish version) does not appear in the English version of the definition of “returns”. The English version simply refers to the term “investment”, which is defined in the UK Treaty.

⁶⁹ *Ibid*, Article 1(b) (emphasis added).

⁷⁰ Objections, ¶¶89-93.

⁷¹ Objections, ¶¶93.

⁷² Objections, ¶¶ 85-91.

⁷³ UK Treaty, **Exhibit C-1**, Article 1(b) (emphasis added).

This makes sense. If an “investment” is defined as “every kind asset capable of producing returns”, it is logical for those “returns” to be defined as the “amounts yielded by [that] investment”, and not some narrower and specific kind of investment. Put simply, if the drafters of the UK Treaty intended for “investment” to mean “investment of capital”, they would have used the term “investment of capital” at the outset, rather than bury that essential term in the definition of “returns”.

41. The Spanish and English versions of the UK Treaty are equally authoritative.⁷⁴ The Vienna Convention on the Law of Treaties provides that “when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.”⁷⁵ For the reasons set out above, comparison of the two texts confirms that the drafters did not intend to limit protected investments to those involving some particular form of capital contribution. Therefore, there is no difference in meaning between the two versions. However, to the extent there is a semantic divergence, given that both versions of the UK Treaty establish a broad definition and a non-exhaustive list of investment types, the prevailing meaning must be that which does not restrict the types of investments or returns that are protected. This interpretation accords with the object and purpose of the UK Treaty⁷⁶ to “create favourable conditions for greater investment [...]”⁷⁷
42. *Second*, the case law that Bolivia relies on to support its alleged “objective definition” of the term investment is inapposite. There are several reasons for this.

⁷⁴ UK Treaty, **Exhibit C-1**, p. 12 (“Done in duplicate at La Paz this twenty fourth day of May 1988 in the English and Spanish languages, both texts being equally authoritative.”).

⁷⁵ Vienna Convention on the Law of Treaties, **Exhibit CL-5**, Article 33(4).

⁷⁶ *Ibid*, Article 31.

⁷⁷ UK Treaty, **Exhibit C-1**, Preamble.

- (a) The majority of arbitral decisions that Bolivia cites in support of a restrictive extra-textual definition of investment are inapplicable here because they were analyzing whether or not the investment satisfied Article 25 of the ICSID Convention, which is inapplicable in this case. In the decisions cited by Bolivia, the tribunals were determining the definition of “investment” not for purposes of consent under an investment treaty, but for purposes of jurisdiction within the ICSID system,⁷⁸ which imposes an additional and wholly separate jurisdictional test. The tribunal in *White Industries* explained clearly that ICSID’s “investment” definition (known as the “Salini” test) is inapplicable outside the context of the ICSID Convention:

[The *Salini*] test was developed in order to determine whether an ‘investment’ had been made for the purposes of the ICSID Convention. The cases cited by India in support of these requirements were also ICSID decisions.

The present case, however, is not subject to the ICSID Convention. Consequently, the so-called *Salini Test* [...] [is] simply not applicable here. Moreover, it is widely accepted that the ‘double-check’ (namely, of proving that there is an ‘investment’ for the purposes of the relevant BIT *and* that there is an ‘investment’ in accordance with the ICSID Convention), imposes a higher standard

⁷⁸ See, e.g., *Saba Fakes v. Republic of Turkey* (ICSID Case No. ARB/07/20), Award, 14 July 2010, **Exhibit RL-53**, ¶ 110 (“the present Tribunal considers that the criteria of (i) a contribution, (ii) a certain duration, and (iii) an element of risk, are both necessary and sufficient to define an investment within the framework of the ICSID Convention”) (Emphasis added); *GEA Group Aktiengesellschaft v. Ukraine* (ICSID Case No. ARB/08/16), Award, 31 March 2011, **Exhibit RL-55**, ¶ 139 (“In a number of well-known cases, tribunals have articulated objective criteria for the definition of the term ‘investment’ that are said to flow from the ICSID Convention [...]”) (Emphasis added); *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Morocco* (ICSID Case No. ARB/00/4), Decision on Jurisdiction, 31 July 2001 **Exhibit RL-58**, ¶ 52 (describing “the notion of investment within the meaning of Article 25 of the Convention”); *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, **Exhibit CL-92**, ¶ 91 (“The ICSID Convention contains no definition of the term ‘investment’. The Tribunal concurs with ICSID precedents [...]”) (emphasis added); *Phoenix Action, Ltd. v. Czech Republic* (ICSID Case No. ARB/06/5), Award, 15 April 2009, **Exhibit RL-38**, ¶ 114 (“To summarize all the requirements for an investment to benefit from the international protection of ICSID [...]”) (emphasis added).

than simply resolving whether there is an ‘investment’ for the purposes of a particular BIT.⁷⁹

- (b) The only two UNCITRAL cases that Bolivia cites, the *Romak* and *Alps Finance* cases,⁸⁰ represent a minority view and are premised upon facts that are not present here. In both cases, the alleged investment was a sales contract. In *Romak*, the alleged investment was based on a one-off transaction for the sale of wheat.⁸¹ In *Alps Finance*, it was an assignment of receivables.⁸² The *Romak* tribunal found that applying the term “investment” to a sales contract would lead to an absurd result. That is why the tribunal resorted to supplementary means of interpretation for the term “investment.”⁸³ The facts of this case could not be more different. A long term investment in a power generation company is plainly an investment and does not require recourse to supplementary means of interpretation.
- (c) In any event, even if this case law was to be applied here (which is not justified), it does not support Bolivia’s argument. *Romak*, upon which Bolivia relies heavily, does not stand for the proposition that “investment” requires a “capital contribution in the territory of the host State”. Rather the *Romak* tribunal defined “investment” as entailing three criteria: “a contribution that extends over a certain period of time and that involves some risk.”⁸⁴ The *Romak* tribunal defined “contribution” in “broad terms” as “[a]ny dedication of resources that has economic value, whether in the form of financial obligations, services, technology, patents, or technical assistance. [...] In other words, a ‘contribution’

⁷⁹ *White Industries Australia Limited v. Republic of India* (UNCITRAL), Final Award, 30 November 2011, **Exhibit CL-73**, ¶¶ 7.4.8–7.4.9.

⁸⁰ *See, e.g.*, Objections, ¶¶ 91–92 and footnote 56.

⁸¹ *Romak S.A.(Switzerland) v. Republic of Uzbekistan* (UNCITRAL), Award, 26 November 2009, **Exhibit RL-54**, ¶ 242.

⁸² *Alps Finance and Trade AG v. Slovak Republic* (UNCITRAL), Award, 5 March 2011, **Exhibit RL-56**, ¶ 23.

⁸³ *Romak S.A. (Switzerland) v. Republic of Uzbekistan* (UNCITRAL), Award, 26 November 2009, **Exhibit RL-54**, ¶¶ 183–86.

⁸⁴ *Ibid.*, ¶ 207 (emphasis in original).

can be made in cash, kind or labor.”⁸⁵ Not a contribution of “capital” as Bolivia argues. Furthermore, the *Romak* tribunal did not interpret the terms “in the territory” of the host State as requiring, as Bolivia argues, that the contribution take place within the borders of that State. In fact, at paragraph 109 of its brief, Bolivia quotes selectively from the paragraph in the *Romak* decision (¶ 237) on this point, conveniently excising the portion of the tribunal’s decision that expressly rejects its argument. The full text of that paragraph reads:

Although the BIT contains numerous references to the “territory” of the Contracting States, the Arbitral Tribunal notes that Article 1(2) of the BIT, which defines the term “investments,” does not. The Arbitral Tribunal can identify no treaty provision requiring that the investor’s contribution physically take place within the boundaries of the host State to trigger substantive protection. Uzbekistan relies particularly on the Preamble of the BIT, which refers to the intention of the Contracting Parties “to create and maintain favourable conditions for investments by investors of one Contracting Party in the territory of the other Contracting Party”. However, the Preamble does not impose any independent requirement for purposes of establishing the existence of an “investment.” The Tribunal considers that, unless contracting States have made “territoriality” an express pre-requisite for treaty coverage (which is not the case in the BIT), references to “territory” normally refer to the benefit that the host State expects to derive from the investment. As already stated, in construing the term “investment” the Arbitral Tribunal has taken the Preamble of the BIT into consideration and concluded that, pursuant to the BIT, an “investment” requires a contribution that

⁸⁵ *Ibid.*, ¶ 214. The concept of a “contribution” to the host State’s economy has been broadly defined by other investment treaty tribunals. For instance, in *Société Générale v. the Dominican Republic* (LCIA Case No. UN 7927), Award on Preliminary Objections to Jurisdiction, 19 September 2008, **Exhibit CL-122**, ¶ 35, the tribunal held that an indirect shareholding in a local electricity company acquired for the nominal sum of US\$2 was held to be a qualifying investment under the France–Dominican Republic BIT. The tribunal rejected the respondent’s argument that the claimant had not made a contribution in the Dominican Republic:

“The issue of the specific contribution made to the local economy by a transaction of this kind might not be as easy to identify as if a factory was built, but this of course does not disqualify financial investments from protection under the Treaty. The Claimant has convincingly identified as part of such contribution the continuing supply of electricity, the improvement of distribution and the contribution to employment within the country. Moreover, the Claimant has also expressed its intention to undertake the capitalization of [the investment] if the obligations relating to the investment are met.”

extends over a certain period of time and entails some risk. It is in light of these three elements (contribution, duration and risk) that the BIT's reference to "territory" – which involves a benefit to the host State – has been analyzed.⁸⁶

- (d) Therefore, even if one were to apply the objective criteria identified by the *Romak* tribunal, i.e. a contribution made for a certain duration and involving some risk, Rurelec's investment would easily satisfy this criteria. Rurelec has made substantial contributions, as described above. Rurelec paid a purchase price of US\$35 million, plus related acquisition costs, to acquire a majority stake in Guaracachi in 2006.⁸⁷ This fact alone would satisfy the "contribution" criterion. Since 2006, Rurelec initiated, approved and helped secure funding for the addition of 185 MW of high-efficiency capacity in Bolivia, investing approximately US\$110 million through Guaracachi.⁸⁸ Rurelec put its expertise and know how at the service of Guaracachi and facilitated the transfer of technology to Bolivia. Bolivia reaped the benefits of these contributions. Rurelec's investment in Guaracachi extended over a certain period of time, namely from 2006 until the Government nationalized the investment in 2010, and Rurelec's investment clearly involved risk (e.g. evolution of costs, risk of demand, risk of revenues depending upon competitiveness within wholesale electricity market). Even if the criteria developed in the ICSID context were to apply (which they do not), Rurelec's investment amply satisfied all the relevant criteria.
43. Bolivia goes to great lengths in its Objections to argue that Rurelec made no contribution in Bolivia because the investments made to significantly increase Guaracachi's power generation capacity were not funded through equity, but through debt and Guaracachi's own funds, as well as the deferral of the payment

⁸⁶ *Romak S.A. (Switzerland) v. Republic of Uzbekistan* (UNCITRAL), Award, 26 November 2009, **Exhibit RL-54**, ¶ 237 (emphasis added).

⁸⁷ Share Purchase Agreement relating to the Purchase of Bolivia Integrated Energy Ltd, 12 December 2005, **Exhibit R-61**. Share Transfer executed between Birdsong Overseas Limited and Southern Integrated Energy Limited, 5 January 2006, **Exhibit C-214**.

⁸⁸ Statement of Claim, ¶¶ 70-79.

of shareholder dividends.⁸⁹ (Based on its treaty interpretation requiring a direct capital investment, Bolivia discounts any contribution other than an equity injection.) Moreover, through its witness, Ms Bejarano Hurtado, the internal auditor of Guaracachi since 2004, Bolivia argues that Rurelec “decapitalized” the company and saddled it with unhealthy levels of debt in order to make investments in new power generation capacity, and that it imprudently stripped Guaracachi of its profits in order to distribute them as dividends. As Marcelo Blanco explains in his second witness statement, this description “conflicts with reality.”⁹⁰ He explains:

Guaracachi made a profit each year between 2006 and 2010 while making significant investments (more than any other capitalized company) in new, high-efficiency and environmentally sustainable power generation capacity, which, in addition to equity, it financed through loans with highly competitive interest rates, bond issuances that received an A+ rating from Fitch and AA2 rating from Pacific Credit Ratings, and the deferral of dividends to its shareholders. It is noteworthy that Ms Bejarano’s alleged concerns were never voiced during her tenure as Internal Auditor prior to nationalization.⁹¹

44. *Third*, Bolivia’s argument that investments must consist of a capital contribution by the investor in the territory of Bolivia is essentially repetitive of its previous argument that only *direct* investments qualify under the UK Treaty. Based on its flawed interpretation of the term “investments”, Bolivia argues that “Rurelec must demonstrate [...] in accordance with Article I(1) of the [UK] Treaty, that its shareholding in [Guaracachi] results from a contribution of cash or other

⁸⁹ Objections, ¶¶ 3.3.2

⁹⁰ Second Blanco WS, dated 26 October 2012, ¶ 6.

⁹¹ *Ibid*, ¶ 21. English translation. The original Spanish reads: “Guaracachi obtuvo ganancias año a año entre 2006 y 2010 y al mismo tiempo realizó inversiones significativas (más que cualquier otra empresa capitalizada) en nueva capacidad de generación de energía sustentable desde el punto de vista ambiental y de alta eficiencia, que además de capital, fue también financiada por medio de préstamos con tasas de interés altamente competitivas, emisiones de bonos calificados A+ y AA2 por Fitch y Pacific Credit Rating respectivamente y por el diferimiento de dividendos a sus accionistas. He de mencionar que las preocupaciones de la Sra. Bejarano jamás fueron expresadas durante su ejercicio como Auditor Interno antes de la nacionalización.”

economic values in the territory of Bolivia.”⁹² Bolivia relies heavily on the expression “in the territory of Bolivia” to argue that the investment must be direct.⁹³ Bolivia’s argument must be rejected. As demonstrated above, investment treaty tribunals have held that “references to ‘territory’ normally refer to the benefit that the host State expects to derive from the investment,”⁹⁴ not to the place where the contribution must take place. Moreover, as demonstrated in the previous section, the UK Treaty does not exclude indirect investments.

45. *Fourth*, Bolivia’s argument, if accepted, would essentially deprive of treaty protection an investor that acquires an investment from the original investor. Here, Guaracachi’s shares were acquired through a bidding process against a capitalization requirement. According to Bolivia, any investor that subsequently acquires that participation will be deprived of protection because the investor did not make a direct capital contribution, but rather paid out the original investor. Yet in both cases the investor is exposing its capital to Bolivian risk. Case law is replete with examples of foreign investors protected notwithstanding that they acquired their participation after the initial offering by the State. For example, in *Fedax v Venezuela*, Venezuela challenged whether promissory notes that were obtained by one company and then endorsed to the claimant could be considered an investment, as it was not a direct foreign investment.⁹⁵ The Tribunal stated that “although the identity of the investor will change with every endorsement, the investment will remain constant, while the issuer will enjoy a continuous credit benefit until the time the notes become due.”⁹⁶ In this case, Bolivia has enjoyed a continuous investment in its electricity sector and although the investor has

⁹² Objections, ¶ 97. English translation. The original Spanish reads: “Rurelec debe demostrar también, de conformidad con el artículo I(1) de dicho Tratado, que su participación en esta empresa resulta de un aporte en dinero u otros valores económicos en el territorio de Bolivia.”

⁹³ Objections, ¶¶97, 100-110.

⁹⁴ *Romak S.A. (Switzerland) v. Republic of Uzbekistan* (UNCITRAL), Award, 26 November 2009, **Exhibit RL-54**, ¶ 237.

⁹⁵ *Fedax N.V. v. Republic of Venezuela* (ICSID Case No. ARB/96/3), Decision of the Tribunal on Objections to Jurisdiction, 11 July 1997, **Exhibit CL-101**, ¶¶ 13, 19.

⁹⁶ *Ibid*, ¶ 40.

changed, that investment has remained constant. It therefore is entitled to protection by the UK Treaty.

46. Finally, Bolivia denies that Rurelec’s indirect 99.998% shareholding in its Bolivian subsidiary, Energais, and the Worthington engines that it seized from Energais and has refused either to return or to pay for, do not constitute an investment under the UK Treaty.⁹⁷ This argument must be rejected. Rurelec’s indirect shareholding interests are protected under the UK Treaty,⁹⁸ as established in Section III(B) above. In accordance with Article 5(2) of the UK Treaty, measures taken by the Bolivian state in respect of a Bolivian subsidiary of a UK investor such as the expropriation of its assets require just and effective compensation. Moreover, the Worthington engines constitute movable property under Article 1(a)(i) of the UK Treaty, and Rurelec’s indirect interest in such movable property is thereby protected.
47. Thus, for the reasons stated above, Bolivia’s second objection and its subparts must be rejected in their totality.

IV. BOLIVIA CANNOT DENY GAI THE BENEFITS OF THE US TREATY

48. In its Objections, Bolivia has for the first time purported to deny the benefits of the US Treaty to GAI.⁹⁹ For the reasons set out below, this can have no effect on these proceedings.
49. The “denial of benefits” provision of the US Treaty is set out within 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

⁹⁷ Objections, ¶ 127.

⁹⁸ Statement of Claim, ¶ 132.

⁹⁹ Objections, Section 4.

company has no substantial business activities in the territory of the Party under whose laws it is constituted or organized.¹⁰⁰

50. As explained below, the denial of benefits provision in the US Treaty cannot be invoked retroactively as Bolivia attempts to do in this case. However, even if Bolivia could deny benefits retroactively, Bolivia has not discharged its burden to show that the conditions for this affirmative defense have been met. Further, even if (for argument's sake), we assume that it could have retroactive effect, Bolivia cannot fulfill the conditions to invoke the denial of benefits clause in this case as GAI has substantial business activities in the United States.¹⁰¹

A. BOLIVIA IS NOT ENTITLED TO DENY THE BENEFITS OF THE US TREATY AFTER THE INITIATION OF GAI'S ARBITRATION

51. The first time that Bolivia affirmatively invoked Article XII of the US Treaty was in its Objections.¹⁰² Its denial cannot apply retroactively in this case.

52. The purpose of a denial of benefits provisions is to give a State the opportunity to counteract nationality planning,¹⁰³ by alerting certain foreign entities *in advance* that they do not have the protections of the relevant treaty. Such a policy is fair and reasonable, as it both permits a State to deny benefits to certain entities if it so chooses, but also protects the legitimate expectations of investors that make investments prior to the right being exercised under the applicable treaty.

¹⁰⁰ US Treaty, **Exhibit C-17**, Article XII.

¹⁰¹ *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, **Exhibit CL-140** ¶ 4.60 ("The Tribunal approaches this issue as to denial of benefits on the basis that it is primarily for the Respondent to establish, both as to law and fact, its positive assertion that the Respondent has effectively denied all relevant benefits under CAFTA to the Claimant pursuant to CAFTA Article 10.12.2 and that conversely, it is not primarily for the Claimant here to establish the opposite as a negative."); *Ulysseas, Inc. v. Republic of Ecuador* (UNCITRAL), Interim Award, 28 September 2010, **Exhibit CL-135** ¶ 166; *Generation Ukraine, Inc v. Ukraine* (ICSID Case No. ARB/00/9), Award, 16 September 2003, **Exhibit RL-24**, ¶ 15.7. See also *Limited Liability Company Amt v. Ukraine* (SCC Arbitration Case No. 080/2005), Final Award, 26 March 2008, **Exhibit RL-34**, ¶¶ 63–65.

¹⁰² Objections, Sections 4.1, 4.2.

¹⁰³ Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law*, (Oxford UP 2008), **Exhibit CL-121**, p. 55.

Allowing a State party to choose at its sole discretion to deny benefits of a treaty at the moment a dispute arises in respect of an investment already made runs contrary to the principle of *pacta sunt servanda* in international law as well as the object and purpose of investment treaties, which is to stimulate investment on the basis of rationality and predictability.

53. Indeed, the language of Article XII is conditional for precisely this purpose. Under the US Treaty, the Parties “reserve[] the right to deny” the benefits of the Treaty, but the Treaty does not require that they do so. The drafters of the US Treaty could have made such a denial mandatory if they so chose,¹⁰⁴ but they did not. This lack of mandatory language has been considered by the *Plama* and *Yukos* tribunals in the Energy Charter Treaty context to be evidence that a denial of benefits can only be applied prospectively.¹⁰⁵
54. It would also be contrary to the US Treaty’s object and purpose, which is to “stimulate the flow of private capital” and to create “a stable framework for investment” (*inter alia*),¹⁰⁶ to apply the denial of benefits clause retroactively in this case. The tribunal in *Plama v Bulgaria* relied significantly on the object and purpose of the Energy Charter Treaty to hold that that instrument’s denial of benefits clause only applied prospectively. The *Plama* tribunal stated that:

[a] putative investor [...] requires reasonable notice before making any investment in the host state whether or not that host state has exercised its right under Article 17(1) ECT. At that stage, the putative investor can so plan its business affairs to come within or

¹⁰⁴ See, e.g., ASEAN Framework Agreement on Services of December 1995, Article VI, cited in *Plama Consortium Limited v. Bulgaria* (ICSID Case No. ARB/03/24), Decision on Jurisdiction, 8 February 2005, **Exhibit CL-110**, ¶ 156.

¹⁰⁵ *Plama Consortium Limited v. Republic of Bulgaria* (ICSID Case No. ARB/03/24), Decision on Jurisdiction, 8 February 2005, **Exhibit CL-110**, ¶ 156; *Hulley Enterprises Limited (Cyprus) v. Russian Federation* (PCA Case No. AA 226), Interim Award on Jurisdiction and Admissibility, 30 November 2009, **Exhibit CL-125**, ¶ 455; *Veteran Petroleum Limited (Cyprus) v. Russian Federation* (PCA Case No. AA 228), 30 November 2009, Interim Award on Jurisdiction and Admissibility, **Exhibit CL-126**, ¶ 512; *Yukos Universal Limited (Isle of Man) v. Russian Federation* (PCA Case No. AA 227), 30 November 2009, Interim Award on Jurisdiction and Admissibility, **Exhibit CL-127**, ¶ 456.

¹⁰⁶ US Treaty, **Exhibit C-17**, Preamble

without the criteria there specified, as it chooses. It can also plan not to make any investment at all or to make it elsewhere. After an investment is made in the host state, the “hostage-factor” is introduced; the covered investor’s choices are accordingly more limited; and the investor is correspondingly more vulnerable to the host state’s exercise of its right under Article 17(1) ECT. At this time, therefore, the covered investor needs at least the same protection as it enjoyed as a putative investor able to plan its investment.¹⁰⁷

When Bulgaria argued that the Treaty text itself constituted sufficient notice, the tribunal rejected the argument stating that such an interpretation “would deprive the [i]nvestor of any certainty as to its rights and the host country’s obligations when it makes its investment [...]”¹⁰⁸

55. The *Yukos* tribunal concurred with the *Plama* tribunal, stating that the “[r]etrospective application of a denial of rights would be inconsistent with [the Energy Charter Treaty’s purpose of] promotion and protection and constitute a treatment at odds with those terms.”¹⁰⁹
56. Moreover, a retroactive denial of benefits would be fundamentally unfair and contrary to the principle of good faith in this case.
 - (a) Bolivia required the establishment of GAI: As described in the Statement of Claim, Energy Initiatives, a US company and subsidiary of US investor, GPU Power Inc. (*GPU*), successfully bid for a stake in (then state-owned) Guaracachi during Bolivia’s “capitalization process” in 1995.¹¹⁰ The Bidding Rules prepared by *Bolivia* for the capitalization process provided that the shares in Guaracachi were to be acquired by a corporation whose purpose was to subscribe the shares in

¹⁰⁷ *Plama Consortium Limited v. Bulgaria* (ICSID Case No. ARB/03/24), Decision on Jurisdiction, 8 February 2005, **Exhibit CL-110**, ¶ 161.

¹⁰⁸ *Ibid.*

¹⁰⁹ *Yukos Universal Limited (Isle of Man) v. Russian Federation* (PCA Case No. AA 227), 30 November 2009, Interim Award on Jurisdiction and Admissibility, **Exhibit CL-127**, ¶ 458.

¹¹⁰ Statement of Claim, ¶ 52-58.

- the tendered company (Guaracachi).¹¹¹ GPU, through its subsidiary Energy Initiatives, therefore established a subsidiary, GAI (a US company), for the purpose of subscribing 50% of Guaracachi's shares.¹¹² Accordingly, GAI was created and it subscribed 50% of the shares in Guaracachi for a cash injection of US\$ 47.131 million.¹¹³
- (b) Bolivia required GAI to invest in Guaracachi and was aware of its investment since day one: GAI signed the Capitalization Contract together with the Minister of Capitalization representing the Bolivian State which obliged it to make investments in Guaracachi.¹¹⁴ In May 2001, GAI corresponded with the Minister of Foreign Commerce and Investment, as well as the Superintendent of Electricity, with respect to its compliance with its obligations under the Capitalization Contract.¹¹⁵ As a consequence of fulfilling its investment obligations, GAI took majority control of Guaracachi.¹¹⁶
- (c) Bolivia issued a nationalization decree specifically naming GAI and expropriating its shares in Guaracachi.¹¹⁷ Having expropriated Guaracachi, Bolivia refused to pay any compensation whatsoever to GAI.¹¹⁸

¹¹¹ See Statement of Claim, ¶ 57. See also Guaracachi. Bidding Rules, **Exhibit C-7**, Articles 1, 2 and 8.3 and the Capitalization Contract, 28 July 1995, **Exhibit C-14**, Articles 3 (definition of “sociedad suscriptora”) and 5.1.

¹¹² Certificate of Incorporation of Guaracachi America Inc, 13 July 1995, **Exhibit C-11**; Share Register of Guaracachi America Inc, 11 December 2003, **Exhibit C-27**. See Statement of Claim, ¶ 57.

¹¹³ Certificate of Incorporation of Guaracachi America Inc, 13 July 1995, **Exhibit C-11**; Receipt evidencing Guaracachi America Inc's subscription to 50% of the shares in Empresa Eléctrica Guaracachi SAM for US\$47.131 million, 28 July 1995, **Exhibit C-12**; Letter from Central Bank of Bolivia to the Minister of Capitalization, 28 July 1995, confirming receipt of US\$47.131 million, **Exhibit C-13**.

¹¹⁴ Capitalization Contract, 28 July 1995, **Exhibit C-14**, Article 2 (definition of ‘parties’) and signature block on pp. 17-18.

¹¹⁵ Letter from Guaracachi America Inc to Ministry of Foreign Commerce and Investment, 14 May 2001, **Exhibit C-210** and Letter from Guaracachi America Inc to Superintendent of Electricity, 14 May 2001, **Exhibit C-211**.

¹¹⁶ Statement of Claim, ¶ 65.

¹¹⁷ Nationalization Decree, **Exhibit C-37**.

- (d) Now that GAI has initiated arbitration proceedings against Bolivia under the US Treaty to recover compensation for its expropriated assets, Bolivia purports to deny GAI the benefits of the US Treaty, notwithstanding that GAI was at all times a US company that was an essential and *required* part of the investment in Guaracachi and was at all times known to Bolivia.
57. As a result, it would be fundamentally at odds with the principles of stability, certainty and good faith for Bolivia now to deny benefits retroactively to a US company that has been an investor in Guaracachi since the capitalization, in accordance with Bolivia’s requirements and with Bolivia’s full knowledge of GAI’s existence. Indeed, if Bolivia were to apply the US Treaty’s denial of benefits provision retroactively, Bolivia would be able to receive all of the benefits of GAI’s continued investment that the US Treaty fostered, without incurring any of the obligations that the Treaty imposes.
58. The purpose of an investment treaty is to mitigate a foreign investment’s vulnerability to hostile measures taken by a host State after an investor makes its investment. Allowing Bolivia to deny a remedy after an investment has been made and hostile measures taken would introduce a “hostage factor”¹¹⁹ to investment treaties that would be contrary to their object and purpose. The Tribunal should find, therefore, that the denial of benefits clause in the US Treaty applies prospectively in this case.

¹¹⁸ Statement of Claim, ¶ 105-110.

¹¹⁹ *Plama Consortium Limited v. Republic of Bulgaria* (ICSID Case No. ARB/03/24), Decision on Jurisdiction, 8 February 2005, **Exhibit CL-110**, ¶ 161. *See also Pac Rim Cayman LLC v. Republic of El Salvador* (ICISD Case No. ARB/09/12), Decision on the Respondent’s Jurisdictional Objections, 1 June 2012, **Exhibit CL-140**, ¶ 4.83 (although denying benefits, stating “[i]n a different case under different arbitration rules, [the question as to timeliness of the denial] might have caused this Tribunal certain difficulties given the importance of investor-state arbitration generally and, in particular, the potential unfairness of a State deciding, as a judge in its own interest, to thwart such an arbitration after its commencement.” (emphasis added)).

B. GAI IS ENGAGED IN SUBSTANTIAL U.S. BUSINESS ACTIVITIES

59. Even if Bolivia could deny the benefits of the US Treaty retroactively (which it cannot), it could not do so here as it has not established that the conditions for the application of the denial of benefits clause are satisfied, in particular the requirement that GAI have “substantial business activities” in the United States.
60. The term “substantial business activities” is not defined in the US Treaty. In accordance with Article 31(1) of the Vienna Convention on the Law of Treaties, the US Treaty must therefore “be interpreted in good faith in accordance with the ordinary meaning given to the terms of the treaty in their context and in light of its object and purpose.”¹²⁰ As the *Amtó v. Ukraine* tribunal ruled in the context of the Energy Charter Treaty’s denial of benefits provision, the term “substantial” means “‘of substance, and not merely of form’. It does not mean ‘large’, and the materiality not the magnitude of the business activity is the decisive question.”¹²¹ Meanwhile, one of the primary purposes of the US Treaty is to “stimulate the flow of private capital and the economic development of the Parties.”¹²² The proper interpretation of the term “substantial business activities” should accord with the Parties’ desire to stimulate the flow of private capital and promote economic development.
61. The business activities of a “traditional holding company” may, in certain circumstances, be considered substantial.¹²³ As the tribunal stated in *Pac Rim Cayman LLC v. El Salvador*, the reason why a holding company may have substantial business activities is that: “[t]he commercial purpose of a holding company is to own shares in its group of companies, with attendant benefits as to

¹²⁰ Vienna Convention on the Law of Treaties, **Exhibit CL-5**, Article 31(1).

¹²¹ *Limited Liability Company Amtó v. Ukraine* (SCC Case No. 080/2005), Final Award, 26 March 2008, **Exhibit RL-34**, ¶ 69.

¹²² US Treaty, **Exhibit C-17**, Preamble.

¹²³ *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, **Exhibit CL-140**, ¶ 4.72.

control, taxation and risk management for the holding company's group of companies. It will usually have a board of directors, board minutes, a continuous physical presence and a bank account."¹²⁴ Similarly, in *Petrobart Limited v. Kyrgyz Republic*, substantial business activities included enlisting the use of a management company located in the area covered by the treaty at issue, where this management company handled "many of [the claimant's] strategic and administrative matters."¹²⁵

62. GAI in fact engaged in a range of substantial business activities in the United States. GAI maintained offices in the United States,¹²⁶ designated an agent in the State of Delaware,¹²⁷ held annual shareholder meetings in the United States (at its principal office in Akron, Ohio),¹²⁸ held board of directors meetings and prepared minutes,¹²⁹ and elected officers (including nationals of the United States) capable of entering into agreements,¹³⁰ amongst other activities.

V. THE CLAIMANTS HAVE VALIDLY SUBMITTED THE DISPUTE TO ARBITRATION

63. In their Statement of Claim, the Claimants requested relief for two adverse measures that occurred prior to and culminated in the expropriation of their investment. These measures included (a) Bolivia's alteration of spot price regulations which violated the fair and equitable treatment, non-impairment and

¹²⁴ *Ibid.*

¹²⁵ *Petrobart Limited v. Kyrgyz Republic* (SCC Case No. 126/2003), Arbitral Award, 29 March 2005, **Exhibit CL-111**, p. 63. The tribunal made this finding despite the fact that Petrobart Limited was a non-resident company in Gibraltar and thus not subject to local corporate tax so long as it carried out no business operations there. *See* p. 42.

¹²⁶ A registered office in Delaware and principal office in Ohio. GAI Certificate of Incorporation, **Exhibit C-11**; Amended by-laws of Guaracachi America Inc, 7 November 2001, **Exhibit C-212**, Article I.

¹²⁷ Evidence of GAI's Delaware Agent, **Exhibit C-229**.

¹²⁸ *See* GAI Shareholder Meeting Minutes, **Exhibit C-227** and Amended By-laws of Guaracachi America Inc, 7 November 2001, **Exhibit C-212**, Article II.3.

¹²⁹ *See* GAI Board of Directors Meeting Minutes, **Exhibit C-228**.

¹³⁰ *See* GAI Board of Directors Resolutions, **Exhibit C-230**. GAI Board of Directors Meeting Minutes, **Exhibit C-228**.

full protection and security standards of the Treaties; and (b) the failure of Bolivia to provide effective means for enforcing the Claimants' rights with respect to capacity payments pursuant to Article II.4 of the US Treaty, a substantive standard which was incorporated into the UK Treaty through that Treaty's most-favored-nation clause.¹³¹ Additionally, the Claimants also requested relief for the seizure of two Worthington engines owned by Rurelec's subsidiary that occurred during the nationalization process.¹³²

64. Bolivia characterizes these requests for relief as “new claims,”¹³³ despite the fact that they arise out of the same dispute. Bolivia contends that the Tribunal lacks jurisdiction over these claims because the Claimants failed to comply with the amicable settlement provisions in the US and UK Treaties. At the same time, Bolivia derides the claims as “frivolous” and “not even claims under the Treaties or international law,”¹³⁴ confirming that requiring further amicable negotiations would be futile. Yet the Claimants have made good faith attempts to settle the dispute amicably with Bolivia in the past, all of which have failed.¹³⁵
65. Bolivia's objection regarding amicable settlement would, in the words of the *Lauder* tribunal, “amount to an unnecessary, overly formalistic approach which would not serve to protect any legitimate interests of the Parties.”¹³⁶ Nor does Bolivia's objection comport with the text of the Treaties or international arbitral precedent. It is worth recalling the specific Treaty texts regarding amicable settlement. The UK Treaty states:

¹³¹ Statement of Claim, Sections II.E, IV.B, IV.C, V.E.

¹³² Statement of Claim, Sections II.F.3, IV.A, V.D.

¹³³ Objections, ¶ 143. English translation. The Spanish original reads: “Nuevos Reclamos.”

¹³⁴ Objections, ¶ 177. English translation. The Spanish original reads: “frívolos” and “ni siquiera son reclamos bajo los Tratados o el Derecho internacional.”

¹³⁵ Statement of Claim, ¶ 138.

¹³⁶ *Ronald S. Lauder v. Czech Republic* (UNCITRAL), Final Award, 3 September 2001, **Exhibit CL-23**, ¶ 190.

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.¹³⁷

66. The US Treaty provides no requirement of prior notification and reads in pertinent part:

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 [...].¹³⁸

As a consequence, all of the Respondent’s arguments fail immediately in respect of GAI and the US Treaty. The only requirement here is that a dispute has arisen. There is no notification requirement at all – let alone a jurisdictional one. Bolivia cannot write in a requirement where none exists in the Treaty.

67. With regard to the UK Treaty, the arbitration has been properly initiated, as established below.

A. AMICABLE SETTLEMENT PROVISIONS ARE NOT JURISDICTIONAL IN NATURE

68. Bolivia states in paragraph 146 of its Objections that it is not “in dispute that [the notification and amicable settlement period] are mandatory and the violation of the same leads to the lack of jurisdiction of the Arbitral Tribunal.”¹³⁹ This characterization of the Claimants’ position is false. Bolivia relies on the Claimants’ good faith (and failed) attempts to settle the dispute amicably to argue

¹³⁷ UK Treaty, **Exhibit C-1**, Article 8(1).

¹³⁸ US Treaty, **Exhibit C-17**, Article IX.3(a).

¹³⁹ Objections, ¶ 146. English translation. The Spanish original reads: “[t]ampoco está en disputa que esas condiciones son de obligatorio cumplimiento y que su violación conlleva la falta de jurisdicción del Tribunal Arbitral.”

that the Claimants “have admitted the existence, mandatory character and jurisdictional nature of the conditions imposed by the Treaties with respect to the prior notice and negotiations.”¹⁴⁰ Yet the Claimants have made no such admission, simply by attempting to initiate amicable settlement via its letters to Bolivia in accordance with best practices.¹⁴¹ To the contrary, the amicable settlement provisions of investment treaties are procedural rather than jurisdictional in nature, and a claimant’s failure to comply cannot divest an arbitral tribunal of jurisdiction.¹⁴²

69. This has been the view of a number of tribunals. For example, most recently in *Abaclat*, the tribunal stated its view that:

[i]n the view of the Tribunal, the consultation requirement set forth in [the] BIT is not to be considered of a mandatory nature but as the expression of the good will of the Parties to try firstly to settle any dispute in an amicable way.¹⁴³

70. The tribunal in *SGS v. Pakistan* noted likewise that:

¹⁴⁰ Objections, ¶ 156. English translation. The Spanish original reads: “haber admitido la existencia, carácter obligatorio y naturaleza jurisdiccional de las condiciones que imponen los Tratados relativas a la notificación y negociación previas.”

¹⁴¹ See Notice of Dispute from Rurelec to President Evo Morales, 13 May 2010, **Exhibit C-40**; Notice of Dispute from Guaracachi America Inc to President Evo Morales, 13 May 2010, **Exhibit C-39**.

¹⁴² See, e.g., *Abaclat and others v. Argentine Republic* (ICSID Case No. ARB/07/5), Decision on Jurisdiction and Admissibility, 4 August 2011, **Exhibit CL-138**, ¶ 564; *Biwater Gauff (Tanzania) Ltd. v. Tanzania* (ICSID Case No. ARB/05/22), Award, 24 July 2008, **Exhibit CL-51**, ¶ 343; *Bayindir Insaat Turizm Ticaret ve Sanayi A.S v. Islamic Republic of Pakistan* (ICSID Case No. ARB/03/29), Decision on Jurisdiction, 14 November 2005, **Exhibit CL-116**, ¶ 100; *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/01/13), Decision of the Tribunal on Objections to Jurisdiction, 6 August 2003, **Exhibit CL-107**, ¶ 184; *Ronald S. Lauder v. the Czech Republic* (UNCITRAL), Final Award, 3 September 2001, **Exhibit CL-23**, ¶¶ 187 and 190–91; *Link-Trading Joint Stock Company v. Department for Customs Control of Republic of Moldova*, Award on Jurisdiction, 16 February 2001, **Exhibit CL-105**, p. 5–6; *Wena Hotels Limited Arab Republic of Egypt* (ICSID Case No. ARB/98/4) Summary Minutes of the Session of the Tribunal, 25 May 1999, **Exhibit CL-103**, p. 891; *Franz J. Sedelmayer v. the Russian Federation*, Award, 7 July 1998, **Exhibit CL-102**, p. 82; *Ethyl Corporation v. Government of Canada*, Award on Jurisdiction, 24 June 1998, 38 I.L.M. 708, **Exhibit RL-5**, ¶¶ 84–85.

¹⁴³ *Abaclat and others v. Argentine Republic* (ICSID Case No. ARB/07/5), Decision on Jurisdiction and Admissibility, 4 August 2011, **Exhibit CL-138**, ¶ 564

[t]ribunals have generally tended to treat consultation periods as directory and procedural rather than as mandatory and jurisdictional in nature. Compliance with such a requirement is, accordingly, not seen as amounting to a condition precedent for the vesting of jurisdiction.¹⁴⁴

71. The general position was summarized correctly by the tribunal in *Biwater Gauff v Tanzania*:

In the Arbitral Tribunal’s view, however, properly construed, this six-month period is procedural and directory in nature, rather than jurisdictional and mandatory. Its underlying purpose is to facilitate opportunities for amicable settlement. Its purpose is not to impede or obstruct arbitration proceedings, where such settlement is not possible. Non-compliance with the six-month period, therefore, does not preclude the Arbitral Tribunal from proceeding. If it did so the provision would have curious effects including: . . . forcing the claimant to recommence an arbitration started too soon, even if the six-month period has elapsed by the time the Arbitral Tribunal considers the matter.¹⁴⁵

72. This reasoning is especially pertinent in the case here, as Bolivia has made no attempt to settle *any* of its “several” perceived disputes either before or after the filing of the Statement of Claim in March 2012. Indeed, forcing the Claimants to resubmit discrete pieces of its dispute with Bolivia would only serve to increase both parties’ costs. The dilatory nature of Bolivia’s position was recognized in the *Wena Hotels v Egypt* case, where a similar objection had been raised by the respondent on the amicable settlement provisions of the treaty at issue in that arbitration and then subsequently withdrawn. The tribunal stated in *Wena Hotels* that the respondent’s withdrawal was “appropriate[.]” as “even if the procedural

¹⁴⁴ *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/01/13), Decision of the Tribunal on Objections to Jurisdiction, 6 August 2003, **Exhibit CL-107**, ¶ 184

¹⁴⁵ *Biwater Gauff (Tanzania) Ltd. v. Tanzania* (ICSID Case No. ARB/05/22) Award, 24 July 2008, **Exhibit CL-51**, ¶ 343.

objections were granted, they could have been easily rectified and would have had little practical effect other than to delay the proceedings.”¹⁴⁶

B. THE CLAIMANTS HAVE ATTEMPTED TO SETTLE THE DISPUTE AMICABLY

73. Regardless of whether the Tribunal finds that the amicable settlement provision of the UK Treaty is procedural or jurisdictional or accepts Bolivia's arguments with respect to the US Treaty (which it should not), the Claimants have complied with any requirements the Treaties may impose. It is admitted that the dispute regarding the nationalization was notified to Bolivia by the Claimants.¹⁴⁷ Bolivia's objection is that the claims regarding spot prices, capacity payments, and the Worthington engines were not specifically notified and thus the Tribunal is divested from jurisdiction over these specific claims.¹⁴⁸ The Claimants' position is a simple one: 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. After the notification, the Claimants engaged in failed settlement talks with the Government of Bolivia, and requiring the Claimants to engage in further consultations would only prove futile.

1. The Claimants notified Bolivia in May 2010 of the dispute regarding the nationalization and the claims regarding spot prices, capacity payments and the Worthington Engines are related to that dispute

74. In May 2010, the Claimants sent two notices of dispute to the Bolivian Government relating to the nationalization. Claimant Rurelec's letter stated in pertinent part:

¹⁴⁶ *Wena Hotels Limited Arab Republic of Egypt* (ICSID Case No. ARB/98/4) Summary Minutes of the Session of the Tribunal, 25 May 1999, **Exhibit CL-103**, p. 891

¹⁴⁷ Objections, ¶ 162.

¹⁴⁸ Objections, Section 5.2.

- “I am writing to notify you of an investment dispute between Rurelec and the Plurinational State of Bolivia (*Bolivia*) arising out of certain measures taken by Bolivia in breach of the protections provided under 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 signed on 24 May 1988 and entered into force on 16 February 1990 (the *Treaty*).”¹⁴⁹
- “The dispute arises out of the Bolivian Government’s nationalization of Rurelec’s indirect shareholding in Empresa Eléctrica Guaracachi S.A. (*Guaracachi*) by means of Supreme Decree No. 0493 dated 1 May 2010 (the *Decree*).”¹⁵⁰
- “As a result of the Government’s measures, a dispute between Bolivia and Rurelec with respect to Rurelec’s investment in Bolivia has arisen in accordance with Article 8 of the Treaty. In accordance with Article 8 of the Treaty, the dispute may be submitted to international arbitration six months after the written notification of the dispute. Consequently, the dispute is hereby notified to Bolivia thus triggering the six-month negotiation period provided for in Article 8(1) of the Treaty.”¹⁵¹

¹⁴⁹ Notice of Dispute from Rurelec to President Evo Morales, 13 May 2010, **Exhibit C-40**, p. 1. English translation. The Spanish original reads: “le escribo para notificarle con respecto a la controversia que ha surgido entre Rurelec y el Estado Plurinacional de Bolivia (en adelante “Bolivia”) emergente de ciertas medidas tomadas por Bolivia en incumplimiento a la protección provista bajo el Convenio entre el Gobierno del Reino Unido de Gran Bretaña e Irlanda del Norte y el Gobierno de la República de Bolivia sobre el Fomento y la Protección de Inversiones de Capital de fecha 24 de mayo de 1988, que entró en vigor el 16 de febrero 1990 (en adelante el “Tratado”).”

¹⁵⁰ *Ibid.* English translation. The Spanish original reads: “[l]a presente controversia surge de la nacionalización por parte del Gobierno de Bolivia de la participación accionaria indirecta que posee Rurelec en la Empresa Eléctrica Guaracachi S.A. (en adelante “Guaracachi”), mediante el Decreto Supremo 0493 de fecha 1º de mayo de 2010 (en adelante el “Decreto”).” .

¹⁵¹ *Ibid.*, p. 3. English translation. The Spanish original reads: “[c]omo resultado de las medidas implementadas por el Gobierno, ha surgido una controversia entre Bolivia y Rurelec con respecto a las inversiones de esta última en Bolivia, en los términos establecidos en el Artículo VIII del Tratado. De acuerdo con el Artículo VIII del Tratado, la controversia puede ser sometida a arbitraje internacional luego de pasados seis meses de la notificación escrita del reclamo. En consecuencia, por medio de la

- “Nothing in this letter should be considered as a limitation of any kind on issues of fact or law, which Rurelec may invoke before an international arbitral tribunal. Rurelec fully reserves its rights and remedies in respect of this dispute under Bolivian law and international law, including the Treaty.”¹⁵²

75. The notice letter for Claimant GAI is substantially similar.¹⁵³ As can be seen above, Bolivia was appraised that there was (a) a dispute relating to the nationalization of Rurelec’s investment; (b) in breach of the Treaty; (c) that could subject Bolivia to international liability before an international arbitral tribunal. The notice letter then expressly reserves the right to supplement the facts and legal issues upon which Rurelec’s claim is based. Indeed, this reservation of rights was also included in the Claimants’ notice of arbitration.¹⁵⁴ Bolivia’s position would require Claimants to be locked into their initial notice without change or supplement and that cannot be what the Treaties or the arbitral case law require.¹⁵⁵ Indeed, where claims have been found to be related to the same dispute, arbitral tribunals have held that a separate notice and amicable settlement period is *not* required.¹⁵⁶
76. For example, in *CMS v Argentina*, the claimant notified a dispute with Argentina for breach of fair and equitable treatment for the suspension of inflation

presente se notifica la controversia a Bolivia, dando así inicio al período de negociaciones de seis meses previsto en el Artículo 8(1) del Tratado.”

¹⁵² *Ibid*, p. 4. English translation. The Spanish original reads: “nada en la presente carta deberá entenderse como una limitación de ninguna especie en asuntos de hecho o de derecho, que Rurelec podría invocar ante un tribunal arbitral internacional. Rurelec hace plena reserva de sus derechos y recursos con respecto a la mencionada disputa, tanto bajo el derecho boliviano, como bajo el derecho internacional, incluyendo el Tratado.”

¹⁵³ Notice of Dispute from Guaracachi America Inc to President Evo Morales, **Exhibit C-39**.

¹⁵⁴ Notice of Arbitration, 24 November 2010, paragraph 73.

¹⁵⁵ As was acknowledged by the tribunal in *Generation Ukraine, Inc. v Ukraine* (ICSID Case No. ARB/00/9) Award, 16 September 2003, **Exhibit RL 24**, ¶ 14.5.

¹⁵⁶ For example, in the *Swisslion* case, the claimants complained of judgments rendered subsequent to the filing of its request for arbitration that related to its expropriation claim. The tribunal found that claims about these acts did not require a separate request for amicable settlement. *See Swisslion DOO Skopje v. Former Yugoslav Republic of Macedonia* (ICSID Case No. ARB/09/16), Award, 6 July 2012, **Exhibit CL-142**, ¶ 138.

adjustments in relation to tariffs in the electricity sector. However, after the service of the request for arbitration, Argentina passed a radical new law imposing the unilateral change of the currency of the tariffs (from dollars to Argentine pesos) at an artificial exchange rate. This new law transformed the case into a claim for expropriation. Notwithstanding the very different nature of the claims (failure to apply inflation adjustments or unilateral decimation of the tariff structure), the *CMS* tribunal considered that the claims concerned different measures related to the same investment of the same investor (i.e. the same subject matter) and were sufficiently notified despite the fact that they were not mentioned in the original notice or request for arbitration.¹⁵⁷ Therefore, although the legal claims involved were quite different, the *CMS* tribunal found that the initial notice of dispute was sufficient to encompass them.¹⁵⁸ The *CMS* tribunal “concluded that [...] the disputes [were] not separate and independent and relate[d] to the same subject-matter, [and therefore] it [was] immaterial whether the pertinent events occurred before or after the submission of the dispute to arbitration [...]”¹⁵⁹

77. Bolivia can cite only two cases in support of its position, the *Murphy* and *Burlington* cases, which are clearly distinguishable from the facts here. In *Murphy*, the claimant itself had never sent a notice of dispute at all – it invoked a letter sent by a third party.¹⁶⁰ As a result, in that case, the claimant’s conduct had “prevented Ecuador and Murphy itself from even commencing the negotiations required by the BIT.”¹⁶¹ In the present case, the Claimants both filed a notice of dispute (as described above) and engaged in amicable settlement discussions (as

¹⁵⁷ *CMS Gas Transmission Company v. Republic of Argentina* (ICSID Case No. ARB/01/8) Decision of the Tribunal on Objections to Jurisdiction, 17 July 2003, **Exhibit CL-83**, ¶¶ 112–15, 118–19.

¹⁵⁸ *Ibid.*

¹⁵⁹ *Ibid.*, ¶ 125.

¹⁶⁰ *Murphy Exploration and Production Company International v. Republic of Ecuador* (ICSID Case No. ARB/08/4), Award on Jurisdiction, 15 December 2010, **Exhibit RL-60**, ¶¶ 111, 116.

¹⁶¹ *Murphy Exploration and Production Company International v. Republic of Ecuador* (ICSID Case No. ARB/08/4), Award on Jurisdiction, 15 December 2010, **Exhibit RL-60**, ¶ 155.

will be described below) with Bolivia. In *Burlington*, the claimant gave notice of a dispute related to new oil legislation.¹⁶² It then initiated arbitration based in part on the allegation that the State had failed to protect its investment from indigenous protestors five years previously.¹⁶³ It was precisely because these claims were wholly unrelated in fact, law and time that the tribunal found the existing notice inadequate.

78. The Claimants' claims prior to the nationalization and those involving the Worthington engines are related to the nationalization. Indeed, in the case of the Worthington engines Bolivia has (improperly) invoked the measure expressly mentioned in the Notice of Dispute, namely the Nationalization Decree in order to justify the seizure,¹⁶⁴ but now states paradoxically that the dispute is separate from the nationalization that was the subject of the amicable settlement discussions. As for the claims prior to the nationalization, these adverse measures were taken as preliminary steps that ultimately resulted in the nationalization of the Claimants' investment. The Government's manipulation of the regulatory framework for capacity prices in 2007 directly and immediately impacted one of only two major sources of revenue for the Claimants' investment in Guaracachi, decreasing the value of this investment shortly before it was nationalized.¹⁶⁵ The Claimants challenged this measure. The Government's manipulation of the regulatory framework for spot prices in 2008 similarly impacted the Claimants' investment on the eve of nationalization.¹⁶⁶
79. It is common for States to take hostile measures toward an investment prior to a nationalization (in many cases in order to devalue the investment that the State is

¹⁶² *Burlington Resources Inc. v. Republic of Ecuador* (ICSID Case No. ARB/08/5), Decision on Jurisdiction, 2 June 2010, **Exhibit RL-17**, ¶ 280.

¹⁶³ *Burlington Resources Inc. v. Republic of Ecuador* (ICSID Case No. ARB/08/5) Decision on Jurisdiction, 2 June 2010, **Exhibit RL-17**, ¶¶ 314–18.

¹⁶⁴ Statement of Claim, ¶¶ 111–13.

¹⁶⁵ Statement of Claim, ¶¶ 89-91.

¹⁶⁶ Statement of Claim, ¶¶ 95-97.

nationalizing in an effort to minimize compensation), where the relationship between the nationalization and the earlier adverse measures only becomes clear in retrospect. That the Claimants raised these specific issues for the first time during the legal and quantification exercise that the filing of a Statement of Claim entails does not render the dispute separate from the expropriation about which Bolivia was consulted and refused to settle. To divide the Claimants' legal position in the way Bolivia is requesting would change the amicable settlement provision into a heightened pleading requirement, which is not the provision's purpose.

2. The Claimants engaged in amicable settlement discussions with Bolivia that ultimately failed and requiring further discussions would be futile

80. Subsequent to the notification, the Claimants attempted to engage in amicable settlement discussions with Bolivia. Despite the Claimants' efforts to engage in a constructive discussion with Bolivia,¹⁶⁷ to date, Bolivia has made no offer of compensation for the nationalization of Claimants' investments.¹⁶⁸ Between July 2010 and March 2011, only four meetings were convened by the Government with Rurelec and Government representatives, including the Minister of Hydrocarbons and Energy, the Vice Minister of Electricity, the Attorney General, and ENDE's General Manager, amongst others. None of these meetings were fruitful.
- (a) The first of these meetings took place on 5 July 2010, when Jaime Aliaga (former General Manager of Guaracachi), Peter Earl (CEO of Rurelec), Rurelec's Bolivian counsel and a representative from the British Embassy met with the Government in La Paz.¹⁶⁹ Claimants offered to consult on the combined cycle gas

¹⁶⁷ Aliaga WS, Section V. *See*, Summary of the General State Prosecutor on the Negotiation Meeting of 30 March 2011, **Exhibit R-79**; Minutes of a Meeting between Bolivia, Rurelec and Guaracachi America Inc., 5 July 2010, **Exhibit C-187**, Section 4.1, 4.2 and 8.

¹⁶⁸ Aliaga WS, 56.

¹⁶⁹ Aliaga WS, ¶ 54; Earl WS, ¶ 61.

- turbine project and indicated that they would consider re-investing a portion of the compensation received for nationalization in new generation projects provided that a reasonable proposal was made, but no offer of compensation followed.¹⁷⁰
- (b) On 8 November 2010, having received no proposal from the Government within the mandated 120 day period, Jaime Aliaga and Peter Earl met with the Government a second time.¹⁷¹ Rurelec was told that ENDE had contracted with several firms to conduct an economic valuation and legal and technical audits, and had received initial results indicating that Guaracachi America's shareholding had a negative value. No offer of compensation was made at this meeting.
- (c) On 11 March 2011, Mr. Aliaga and Mr. Andrade (the former Business Manager of Guaracachi) met with the Government of Bolivia.¹⁷² The Attorney General informed Claimants that they were working on a proposal but that they faced difficulties in coordinating the efforts of the various authorities that were involved in the process. The Government did not repeat its earlier assertion that Guaracachi America's shareholding in Guaracachi had a negative value, but still no offer of compensation was made.
- (d) On 30 March 2011, Mr. Aliaga and Mr. Andrade met with the Government for a final time.¹⁷³ The Government once again made no proposal of compensation for the expropriation of Guaracachi America's shareholdings.
81. As the *Abaclat* tribunal has recognized “[w]illingness to settle is the *sine qua non* condition for the success of any amicable settlement talk.”¹⁷⁴ It is clear from the

¹⁷⁰ Minutes of a Meeting between Bolivia, Rurelec and Guaracachi America Inc, 5 July 2010, **Exhibit C-187**, Section 4.1; Aliaga WS, ¶ 55.

¹⁷¹ Aliaga WS, ¶ 56; Earl WS, ¶ 61.

¹⁷² Aliaga WS, ¶ 57; Letter from Hugo Montero to Peter Earl, 14 February 2011, **Exhibit C-191**. *See also* Earl WS, ¶ 62; Andrade WS, ¶ 64.

¹⁷³ Aliaga WS, ¶ 58; Andrade WS, ¶ 64.

¹⁷⁴ *Abaclat and Others v. Argentine Republic* (ICSID Case No. ARB/07/5) Decision on Jurisdiction and Admissibility, 4 August 2011, **Exhibit CL-138**, ¶ 564.

account above that Bolivia has failed to engage in discussions with the Claimants, and that to require the Claimants to request further amicable discussions would be futile. Indeed, Bolivia, after months of review, has stated that it believes that the claims relating to spot prices, capacity payments and the Worthington engines are “frivolous” and “not even claims under the Treaties or international law.” Any amicable settlement discussions relating to these issues would therefore come to nothing.

82. In its Objections, Bolivia at paragraph 171 quoted the *Burlington* tribunal at length about the object and purpose of amicable settlement provisions. Bolivia quoted the following passage by *Burlington*:

[B]y imposing upon investors an obligation to voice their disagreement at least six months prior to the submission of an investment dispute to arbitration, the Treaty effectively accords host States the right to be informed about the dispute at least six months before it is submitted to arbitration. The purpose of this right is to grant the host State an *opportunity* to redress the problem before the investor submits the dispute to arbitration. In this case, Claimant has deprived the host State of that opportunity. That suffices to defeat jurisdiction.¹⁷⁵

83. This statement only highlights the inherent contradiction of Bolivia’s position. Bolivia has expropriated Claimants’ entire investment and it has nationalized most of the electricity sector in Bolivia. The only way for Bolivia “to redress the problem[s]” that the Claimants have raised is to pay compensation, which Bolivia has steadfastly refused to do while an arbitration is pending. If the Tribunal declines jurisdiction over the adverse measures that occurred prior to nationalization and those relating to the Worthington engines, the Claimants will be forced to engage in a new negotiation process where Bolivia will not participate because the claims are “frivolous”, which will require Claimants to file a new arbitration, constitute a new tribunal and re-litigate these very same issues.

¹⁷⁵ *Burlington Resources Inc. v. Republic of Ecuador* (ICSID Case No. ARB/08/5) Decision on Jurisdiction, 2 June 2010, **Exhibit RL-17**, ¶ 315.

An amicable settlement provision which is meant to facilitate the resolution of disputes would be used instead as an impediment to that resolution.

84. The Tribunal should therefore reject Bolivia's objection and not require the Claimants to undertake another amicable settlement process that will certainly fail.

VI. THE CLAIMS RELATING TO SPOT PRICES, CAPACITY PRICES AND THE WORTHINGTON ENGINES ARE TREATY CLAIMS

85. Bolivia goes to great lengths to re-characterize the claims relating to spot prices, capacity prices and the Worthington engines as claims under Bolivian law in relation to which the Tribunal has no jurisdiction under the Treaties.¹⁷⁶ Bolivia's arguments must be dismissed.

86. The claims in question are plainly Treaty claims:

- (a) As regards the claims based on the manipulation of spot prices: Bolivia mischaracterizes them. It argues that the Claimants have requested that the Tribunal choose which spot price to apply to power generators in Bolivia, which would require it to act as a regulator.¹⁷⁷ The Claimants make no such claim. Rather, they ask the Tribunal to determine whether the legal and regulatory regime in relation to spot prices was fundamentally altered by Bolivia and frustrated Claimants' legitimate expectations, in breach of the fair and equitable treatment standard;¹⁷⁸ the full protection and security standard;¹⁷⁹ and the

¹⁷⁶ Objections, Section 6. By now categorizing these claims as "regulatory", Bolivia appears to have abandoned the argument asserted in the Request for Bifurcation that they are *contractual* claims. Request for Bifurcation, pp. 3-4. We assume that this is because Bolivia realizes that this argument is without merit. See Claimants' Response to the Request for Bifurcation, ¶¶ 32-33.

¹⁷⁷ Objections, ¶ 194(a)

¹⁷⁸ Article II.3(a) of the US Treaty, **Exhibit C-17**, and Article 2(2) of the UK Treaty, **Exhibit C-1**. Statement of Claim, ¶¶ 172-194. Bolivia did so by altering the fundamental premises of the Claimants' investment, thereby frustrating their legitimate expectations.

¹⁷⁹ Article II.3(a) of the US Treaty, **Exhibit C-17**, and Article 2(2) of the UK Treaty, **Exhibit C-1**; Statement of Claim, ¶¶ 195-205.

obligation not to not impair investments by unreasonable measures.¹⁸⁰ The issue to be determined by the Tribunal under this head of claim is whether the Claimants had legitimate expectations that were frustrated by Bolivia's regulatory changes – a determination made under the Treaties.¹⁸¹ Indeed, the tribunal in the *Total v. Argentina* case, in a substantially identical claim, held that similar changes to the Argentine spot price regime were in breach of the BIT.¹⁸²

- (b) As regards the claims relating to capacity prices: Bolivia fundamentally misunderstands the Claimants' claim when it asserts that the Claimants are asking the Tribunal to determine capacity prices.¹⁸³ The Claimants have asserted that Bolivia's legal and court system have failed to provide effective means to seek redress for their claims with regard to capacity payments, in breach of the US Treaty (Article II.4) and the UK Treaty (by way of the most-favored nation provision in Article 3).¹⁸⁴ The question to be decided is one of international law and not Bolivian regulatory law.
- (c) As regards the claim relating to the Worthington engines: Rurelec asserts that the engines were expropriated by Bolivia, without due process of law or compensation, in breach of the UK Treaty.¹⁸⁵ Bolivia's only response is to argue that the deprivation is not attributable to Bolivia and therefore does not engage its State responsibility.¹⁸⁶ This argument only compounds the international legal nature of the dispute to be resolved by the Tribunal.

¹⁸⁰ Article II.3(b) of the US Treaty, **Exhibit C-17**, and Article 2(2) of the UK Treaty, **Exhibit C-1**; Statement of Claim, ¶¶ 206-209.

¹⁸¹ Statement of Claim, Section IV.B.

¹⁸² Statement of Claim, ¶ 194 (referring to *Total S.A. v. Argentine Republic* (ICSID Case No. ARB/04/1), Decision on Liability, 27 December 2010, **Exhibit CL-69**, ¶¶ 309 (g), 333.

¹⁸³ Objections, ¶ 194(b).

¹⁸⁴ Statement of Claim, ¶¶ 210-220.

¹⁸⁵ Statement of Claim, ¶¶ 111-113; 254-259.

¹⁸⁶ Objections, ¶ 194(c).

87. Second, if the Tribunal concludes that the facts as argued by the Claimants could, *prima facie*, give rise to a breach of the Treaties' provisions, the Tribunal must determine that it has jurisdiction to hear the merits of the claim. This is consistent with the position of Judge Rosalyn Higgins in her separate opinion in the *Oil Platforms* case. She stated there that to determine whether an international tribunal has jurisdiction to hear the merits of a claim is "to accept *pro tem* the facts alleged by [a party] to be true and in that light to interpret [a treaty's provisions] for jurisdictional purposes – that is to say, to see if on the basis of [a party's] claims of fact there could occur a violation of one or more of them."¹⁸⁷ Bolivia's contention that the Tribunal should not, for the purposes of a jurisdictional decision, accept the Claimants' claims as true in order to characterize the claim as one falling under the Treaties, but should rather form its "own classification",¹⁸⁸ is erroneous since it would require the Tribunal to reach a conclusion on the facts before evidence had been properly heard in relation to such facts.
88. Moreover, Bolivia's references to the *Iberdrola* case, and its attempts to match the facts of that case to the present one, are unavailing. In *Iberdrola*, the claimant brought a treaty claim on the basis of the regulator's alleged misapplication of Guatemalan law when calculating the tariffs applicable to its investment. The claimant was essentially asking the tribunal to put itself in the position of a Guatemalan regulator in order to reset electricity tariffs.¹⁸⁹ The Tribunal held that

¹⁸⁷ *Case Concerning Oil Platforms - Islamic Republic of Iran v. United States of America* (International Court of Justice), Separate Opinion of Judge Higgins, 12 December 1996, ICJ Reports 1996 847, **Exhibit CL-100**, ¶ 32.

¹⁸⁸ Objections, Section 6.2.1. English translation. The Spanish original reads: "[e]l Tribunal Arbitral debe realizar su propia calificación de los Nuevos Reclamos."

¹⁸⁹ *Iberdrola Energía, S.A. v. Republic of Guatemala* (ICSID Case No. ARB/09/5), Award, 17 August 2012, **Exhibit RL-22**, ¶ 354: "En efecto, tal como planteó la Demandante su reclamación en este caso, lo que pide del Tribunal—con independencia de la denominación que le dé a sus reclamaciones—es la revisión de las decisiones regulatorias de la CNEE, del MEM y las judiciales de las cortes guatemaltecas, no a la luz del derecho internacional, sino del derecho interno de Guatemala. El Tribunal, según la reclamación planteada por la demandante, tendría que actuar como ente regulador, como entidad administrativa y como corte de instancia, para definir [...] a la luz del derecho guatemalteco, los [reclamos] [...]."

that it would only have jurisdiction over the claim if the claimant could “demonstrate that its allegations, if proven, could constitute a breach of the treaty.”¹⁹⁰ However, the claimant had made no such demonstration, and “only submitted to the Tribunal a dispute of Guatemalan law.”¹⁹¹ The tribunal explained that there was no real debate in the proceedings regarding the violations of the treaty or the conduct of the State alleged to be in breach of the treaty.¹⁹²

89. *Iberdrola* bears no resemblance to the present case. The Claimants do not complain of the way in which the electricity authorities applied or interpreted Bolivian spot price or capacity price regulations, nor do they ask this Tribunal to reset tariffs. Rather they ask the Tribunal to determine whether: (a) the fundamental alteration of the spot price regulations frustrated the Claimants’ legitimate expectations in breach of the Treaties; (b) Bolivia’s failure to provide effective means to seek redress for their claims with regard to capacity payments breached the Treaties; and (c) the seizure without justification or compensation of their Worthington engines constitutes an illegal expropriation under the Treaties. The Claimants do not ask this Tribunal to opine on local Bolivian law but instead to determine whether Bolivia has met its obligations under the Treaties. These claims are properly characterized as treaty claims, and fall within the jurisdiction of the Tribunal.

90. For these reasons, the Tribunal should reject Bolivia’s arguments.

¹⁹⁰ *Iberdrola Energía, S.A. v. Republic of Guatemala* (ICSID Case No. ARB/09/5), Award, 17 August 2012, **Exhibit RL-22**, ¶ 350. English translation. The Spanish original reads: “el Tribunal únicamente tendría jurisdicción si [la Demandante] hubiera demostrado que los hechos que alegó, de ser probados, podrían constituir una violación del Tratado.”

¹⁹¹ *Ibid.*, ¶ 350. English translation. The Spanish original reads: “la Demandante no demostró esa premisa básica y se limitó a someter a la consideración del Tribunal una controversia de derecho nacional guatemalteco.”

¹⁹² *Ibid.*, ¶ 352: “No existió, salvo de manera marginal, debate acerca de las violaciones del Tratado, o del derecho internacional, o de cuáles actuaciones de la República de Guatemala, en ejercicio de poder del Estado, habían violado determinados estándares contenidos en el Tratado.”

VII. GAI HAS NOT CHOSEN TO SUBMIT ITS CLAIMS REGARDING BOLIVIA’S DENIAL OF EFFECTIVE MEANS TO RESOLVE ITS CLAIMS REGARDING CAPACITY PRICING TO THE JURISDICTION OF THE BOLIVIAN COURTS

91. Bolivia argues that GAI has already opted to pursue its claim relating to capacity prices before the Bolivian courts through its subsidiary, and that the “fork in the road” provision of the US Treaty prevents it from now presenting a claim under the US Treaty that Bolivia denied it effective means of asserting claims and enforcing rights with respect to covered investments.¹⁹³ This objection must be denied.

92. The “fork in the road” clause is set out in Article IX of the US Treaty:

1. For purposes of this Treaty, an investment dispute is a dispute between a Party a national or company of the other Party arising out of 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 [international arbitration] [...].¹⁹⁴

93. There is no “fork in the road” clause in the UK Treaty.

¹⁹³ Objections, Section VII. This objection pertains only to the Claimants’ capacity payment claim under the US Treaty. The same claim would therefore survive in any event under the UK Treaty, and other claims would be wholly unaffected.

¹⁹⁴ US Treaty, **Exhibit C-17**, Article IX.

94. The “fork in the road” clause is not triggered in this case. Such clauses apply only when an investment treaty arbitration and a domestic court litigation have: (i) the same parties; (ii) the same subject matter or relief requested; and (iii) the same legal basis for the claim.¹⁹⁵ This is known as the “triple identity” test. This standard is nearly universally recognized.¹⁹⁶ For example, in *Yukos*, the arbitral tribunal found that although suits had been launched before Russian domestic courts and the European Court of Human Rights by individuals and entities related to the claimant, since (i) the claimant in the arbitration was not a party to the domestic proceedings and (ii) the arbitration before the tribunal involved claims under the ECT, “there [was] no question that the various Russian court

¹⁹⁵ See, e.g., *Yukos Universal Limited (Isle of Man) v. Russian Federation* (UNCITRAL, PCA Case No. AA 227), Interim Award on Jurisdiction and Admissibility, 30 November 2009, **Exhibit CL-127**, ¶ 598; *Desert Line Projects LLC v. Republic of Yemen* (ICSID Case No. ARB/05/17), Award, 6 February 2008, **CL-95**, ¶¶ 136–138; *Occidental Exploration and Production Company v. Republic of Ecuador* (LCIA Case No. UN 3467), Final Award, 1 July 2004, **CL-31**, ¶ 52 (applying “triple identity” criteria); *Azurix Corp. v. Argentine Republic* (ICSID Case No. ARB/01/12), Decision on Jurisdiction, 8 December 2003, **CL-84**, ¶¶ 88–90.

¹⁹⁶ See, e.g., *Total S.A. v. Argentine Republic* (ICSID Case No. ARB/04/01), Decision on Liability, 27 December 2010, **Exhibit CL-69**, ¶ 443; *Toto Costruzioni Generali S.p.A. v. Republic of Lebanon* (ICSID Case No. ARB/07/12), Decision on Jurisdiction, 11 September 2009, **Exhibit CL-97**, ¶¶ 211–212; *Chevron Corporation (U.S.A.) and Texaco Petroleum Corporation (U.S.A.) v. Republic of Ecuador [I]* (PCA Case No. AA 277), Interim Award, 1 December 2008, **Exhibit CL-96**, ¶ 207; *Desert Line Projects LLC v. Republic of Yemen* (ICSID Case No. ARB/05/17), Award, 6 February 2008, **Exhibit CL-95**, ¶¶ 135–138; *Pan American Energy LLC and BP Argentina Exploration Company v. Argentine Republic* (ICSID Case No. ARB/03/13), Decision on Preliminary Objections, 27 July 2006, **Exhibit CL-93**, ¶¶ 155–157; *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, **Exhibit CL-92**, ¶ 117; *Sempra Energy International v. Argentine Republic* (ICSID Case No. ARB/02/16), Decision on Objections to Jurisdiction, 11 May 2005, **Exhibit CL-91**, ¶¶ 120–123, 127; *AES Corporation v. Argentine Republic* (ICSID Case No. ARB/02/17), Decision on Jurisdiction, 26 April 2005, **Exhibit CL-90**, ¶¶ 95–97; *Occidental Exploration and Production Company v. Republic of Ecuador* (LCIA Case No. UN3467), Final Award, 1 July 2004, **Exhibit CL-31**, ¶¶ 47–59; *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic* (ICSID Case No. ARB/02/1), Decision of the Arbitral Tribunal on Objections to Jurisdiction, 30 April 2004, **Exhibit CL-86**, ¶¶ 74–76; *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic* (ICSID Case No. ARB/01/3), Decision on Jurisdiction, 14 January 2004, **Exhibit CL-85**, ¶¶ 97–98; *Azurix Corp. v. Argentine Republic* (ICSID Case No. ARB/01/12), Decision on Jurisdiction, 8 December 2003, **Exhibit CL-84**, ¶¶ 89–92; *CMS Gas Transmission Company v. Republic of Argentina* (ICSID Case No. ARB/01/8), Decision of the Tribunal on Objections to Jurisdiction, 17 July 2003, **Exhibit CL-83**, ¶ 80; *Ronald S. Lauder v. Czech Republic* (UNCITRAL), Final Award, 3 September 2001, **Exhibit CL-23**, ¶¶ 159–166; *Eudoro Armando Olguín v. Republic of Paraguay* (ICSID Case No. ARB/98/5), Decision on Jurisdiction, 8 August 2000, **Exhibit CL-104**, ¶ 30.

proceedings and applications to the European Court of Human Rights [...] fail to trigger the ‘fork-in-the-road provision’ of the ECT.”¹⁹⁷

95. In this case, there is no identity of the parties between the local and international proceedings. In each circumstance in the underlying action, it was GAI’s subsidiary, Guaracachi, that challenged Bolivia’s actions related to capacity payments, and Bolivia was not party to these domestic suits. Furthermore, unlike in this arbitration, where GAI claims monetary damages, in the underlying domestic proceedings, Guaracachi sought to reverse administrative rulings, making the requests for relief different.¹⁹⁸ Finally, the cause of action in each case is different. Although Guaracachi relied on Bolivian law, GAI is suing for breach of the effective means provision (Article II.4) of the US Treaty.¹⁹⁹
96. This difference in cause of action is especially important. In order to demonstrate that GAI was denied “effective means of asserting claims and enforcing rights with respect to covered investments” GAI would necessarily need to show how those means proved ineffective. Bolivia would attempt to vitiate the terms of this Treaty provision by stating that if an entity sought legal redress in its courts and then was denied effective means by those very same courts, that a Tribunal would be barred from hearing such a claim by the “fork in the road” clause. Bolivia’s logic would even hold true for a denial of justice claim. Bolivia invokes *effet utile* regarding its “fork in the road objection”,²⁰⁰ but its reading of the “fork in the road clause” would deny Article II.4 of the US Treaty from having any effect whatsoever.

¹⁹⁷ *Yukos Universal Limited (Isle of Man) v. Russian Federation*, (UNCITRAL, PCA Case No. AA 227), Interim Award on Jurisdiction and Admissibility, 30 November 2009, **Exhibit CL-127**, ¶¶ 598, 594.

¹⁹⁸ Statement of Claim, ¶¶ 92-93. *See also* Revocatory Appeal of Resolution SSDE Nos. 18/2007, 021/2007 and 40/2007, and Resolution CNDC No. 209/2007-1, 22 March 2007, **Exhibit C-134**; Hierarchical Appeal of Administrative Resolution 154/2007, 31 May 2007, **Exhibit C-139**; and Appeal by Guaracachi of Resolution SSDE No. 1612, 3 April 2008, **Exhibit C-151**.

¹⁹⁹ Statement of Claim, ¶¶ 210-220.

²⁰⁰ Objections, ¶ 313.

97. In support of its objection, Bolivia relies on *Pantechniki*, one of the only cases in the history of investment treaty arbitration in which claims were barred by operation of a “fork in the road” clause.²⁰¹ The sole arbitrator in *Pantechniki* compared the fundamental bases of the claims at issue in order to determine whether a “fork in the road” clause could be successfully invoked by a respondent State.²⁰² In order to reach his holding, the sole arbitrator held that there was “triple identity” since: (i) the Claimant was the same in the arbitration as in the local court action,²⁰³ (ii) the Claimant was seeking the same relief in the arbitration as it did in the local court action,²⁰⁴ and that (iii) the substantive basis for the claims was contractual.²⁰⁵ Yet, at the same time, the arbitrator preserved for international adjudication the Claimant’s “denial of justice” claim, which had not been advanced in local courts.²⁰⁶ There is no reason why an “effective means” claim should be treated any differently by this Tribunal.
98. For these reasons, the “fork-in-the-road” clause in the US Treaty is not triggered and Bolivia’s objection to GAI’s “effective means” claim should be rejected.

VIII. THE CLAIMS REGARDING SPOT PRICES AND THE WORTHINGTON ENGINES ARE RIPE FOR DECISION

99. According to Bolivia’s seventh objection, the Claimants’ claims regarding spot prices and the Worthington engines are premature and therefore inadmissible. Bolivia essentially contends that treaty claims cannot be advanced until local

²⁰¹ Objections, ¶ 315. Respondent’s reliance on *Chevron* (Objections ¶ 314) is also misplaced, as that tribunal ultimately rejected the respondent’s invocation of the relevant treaty’s “fork in the road” clause. See *Chevron Corporation y Texaco Petroleum Corporation c. República de Ecuador [II]* (Caso CPA No. 2009-23), Tercer Laudo Provisional Sobre Jurisdicción, 27 February 2012, **Exhibit RL-23**, ¶ 4.89.

²⁰² *Pantechniki S.A. Contractors & Engineers (Greece) v. Republic of Albania* (ICSID Case No. ARB/07/21), Award, 30 July 2009, **Exhibit RL-18**, ¶¶ 61, 67.

²⁰³ *Ibid.*, ¶ 21.

²⁰⁴ *Ibid.*, ¶ 67.

²⁰⁵ *Ibid.*

²⁰⁶ *Ibid.*, ¶ 68.

remedies are sought or exhausted.²⁰⁷ It does not cite a provision of either Treaty for this proposition, and the legal authorities to which it refers are inapposite.

100. A plain reading of Article 8 of the UK Treaty and Article IX of the US Treaty demonstrates that they do not require that a dispute regarding either Treaty be brought to domestic or administrative tribunals before proceeding to international arbitration. Indeed, the US Treaty forces a party to choose whether to bring its Treaty claim before an international arbitral tribunal or a domestic court.
101. It is black-letter law that exhaustion of domestic remedies is unnecessary in the investment treaty context, except in relation to denial of justice claims. As the tribunal in *CME* stated, such a requirement would run counter to the object and purpose of investment treaties: “a purpose of an international investment treaty is to grant arbitral recourse outside the host country’s domestic legal system. The clear purpose is to grant independent judicial remedies on the basis of an international, accepted legal standard in order to protect foreign investments.”²⁰⁸ This was reiterated by the tribunal in *Mytilineos*:

The result that BITs granting private investors direct access to international arbitration do not require local remedies to be exhausted is also confirmed by underlying policy reasons. A requirement for the exhaustion of local remedies as a general precondition to mixed investment arbitration would seriously undermine the effectiveness of this form of dispute settlement.²⁰⁹

²⁰⁷ Objections, ¶ 318.

²⁰⁸ *CME Czech Republic BV v. Czech Republic* (UNCITRAL), Partial Award, 13 September 2001, **Exhibit RL-33**, ¶ 417.

²⁰⁹ *Mytilineos Holdings SA v. State Union of Serbia & Montenegro and Republic of Serbia* (UNCITRAL), Partial Award on Jurisdiction, 8 September 2006, **Exhibit CL-94**, ¶ 222. Other arbitral tribunals under various investment instruments are in accord, *see, e.g., EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic* (ICSID Case No. ARB/03/23), Award, 11 June 2012, **Exhibit CL-141**, ¶ 1126; *RosInvestCo UK Ltd. v. Russian Federation* (SCC Case No. V079/2005), Final Award, 12 September 2010, **Exhibit CL-99**, ¶ 597; *Yaung Chi Oo Trading PTE Ltd. v. Government of the Union of Myanmar* (ASEAN I.D. Case No. ARB/01/1), Award, 31 March 2003, **Exhibit CL-82**, ¶ 41.

102. Many of the cases that Bolivia cites in support of its position are inapplicable to this case. For instance, Bolivia quotes extensively from the *Jan de Nul* and *Loewen* tribunals.²¹⁰ Yet, both are denial of justice claims which require the exhaustion of remedies, and therefore do not apply here.²¹¹ Similarly, Bolivia's citation to *Waste Management*²¹² is inapposite because again, that tribunal held that in order for a contractual claim to be admissible as a treaty claim there had to be the destruction of a contractual remedy.²¹³ The reference to *Parkerings* is unavailing for the same reason.²¹⁴ Bolivia also relies on the *Generation Ukraine* decision,²¹⁵ but that case has been described by the annulment committee in *Helnan* as "somewhat outside the *jurisprudence constante* under the ICSID Convention in the review of administrative decision-making for failure to provide fair and equitable treatment."²¹⁶ Therefore, its reasoning should not be followed by this Tribunal.
103. Bolivia's objection under this subheading seeks to introduce elements of *substantive* breaches as *jurisdictional* prerequisites where such requirements do

²¹⁰ Objections, ¶¶ 322–24.

²¹¹ *Jan de Nul NV and Dredging International NV v. Arab Republic of Egypt* (ICSID Case No. ARB/04/13), Award, 6 November 2008, **Exhibit CL-56**, ¶ 255; *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America* (ICSID Case No. ARB(AF)/98/3), Award, 26 June 2003, **Exhibit RL-68**, ¶ 156.

²¹² Objections, footnote 241.

²¹³ *Waste Management, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/00/3), Award, 30 April 2004, **Exhibit RL-99**, ¶ 175.

²¹⁴ Objections, footnote 241. *Parkerings-Compagniet AS v. Republic of Lithuania* (ICSID Case No. ARB/05/8), Award, 11 September 2007, **Exhibit RL-13**, ¶ 316.

²¹⁵ Objections, paragraph 325.

²¹⁶ *Helnan International Hotels A/S v. Arab Republic of Egypt* (ICSID Case No. ARB/05/19), Annulment Proceeding, Decision of the *ad hoc* Committee, 14 June 2010, **Exhibit CL-132**, ¶ 49. For further criticism of the *Generation Ukraine* decision in this regard see *Saipem S.p.A. v. People's Republic of Bangladesh* (ICSID Case No. ARB/05/07), Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007, **Exhibit CL-118**, ¶ 151. The President of the *Generation Ukraine* tribunal has also attempted to distinguish its holding in a later case, see *Joseph Charles Lemire v. Ukraine* (ICSID Case No. ARB/06/18), Decision on Jurisdiction and Liability, 14 January 2010, **Exhibit CL-129**, ¶¶ 274–83; Similarly, the *EnCana* decision Respondent references was subject to a vigorous dissent. See generally, *EnCana Corp. v. Republic of Ecuador* (LCIA Case No. UN 3481), Partial Dissenting Opinion of Horacio A. Grigera Naón, 27 February 2004, **Exhibit CL-108**.

not belong. Its objection on this ground is without support in the Treaties or in arbitral case law and therefore must be dismissed.

IX. THE TRIBUNAL SHOULD NOT BIFURCATE THESE PROCEEDINGS

104. In its Objections, Bolivia renews its request for bifurcation.²¹⁷ Bolivia argues that: “[i]t is simply evident that an efficient and economic administration of justice means that, before proceeding to consider the merits of the dispute, the Arbitral Tribunal examines and rules upon the objections filed by Bolivia.”²¹⁸ Bolivia thus recognizes that efficiency is the primary factor of a tribunal’s decision to bifurcate an arbitral proceeding. This view accords with academic commentary on bifurcation²¹⁹ as well as the second sentence of Article 17(1) of the 2010 UNCITRAL Rules which states: “[t]he arbitral tribunal in exercising its discretion shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties’ dispute.”²²⁰ Yet arbitral efficiency demands that Bolivia’s objections be joined to the merits.
105. In *Glamis Gold*, the tribunal enunciated a tripartite test for determining whether bifurcation should be granted under the *previous* version of the UNCITRAL Rules, which required a presumption in favor of bifurcation (which has since been eliminated).²²¹ The tribunal stated that it may decline to bifurcate proceedings

²¹⁷ Objections, ¶ 334. Bolivia incorporates its previous pleadings of 9 August and 29 August 2012 on the matter into its brief.

²¹⁸ Objections, ¶ 336. English translation. The Spanish original reads: “[e]s simplemente evidente que una eficiente y económica administración de la justicia supone que, antes de pasar a examinar el fondo de la desavenencia, el Tribunal Arbitral examine y resuelva las objeciones presentadas por Bolivia.”

²¹⁹ J.Y. Gotanda, “An Efficient Method for Determining Jurisdiction in International Arbitrations” (2001–2002) *Columbia Journal of Transnational Law* 11, **Exhibit CL-106**.

²²⁰ UNCITRAL Rules, Article 17(1).

²²¹ Claimants’ Response to Bolivia’s Request for Bifurcation, 27 August 2012, ¶ 16. This pleading is incorporated into the Claimants’ Response to Bolivia’s Jurisdictional Objections on the issue of bifurcation.

when doing so is unlikely to bring about increased efficiency in the proceedings. Considerations relevant to this analysis include, *inter alia*, (1) whether the objection is substantial inasmuch as the preliminary consideration of a frivolous objection to jurisdiction is very unlikely to reduce the costs of, or time required for, the proceeding; (2) whether the objection to jurisdiction if granted results in a material reduction of the proceedings at the next phase (in other words, the tribunal should consider whether the costs and time required of a preliminary proceedings, even if the objecting party is successful, will be justified in terms of the reduction in costs at the subsequent phase of proceedings); and (3) whether bifurcation is impractical in that the jurisdictional issue identified is so intertwined with the merits that it is very unlikely that there will be any savings in time or cost.²²²

106. The *Glamis Gold* test militates against bifurcation in this case. *First*, it is important to remember that this arbitration is about the measures prior to and culminating in the illegal expropriation of the Claimants' investment, for which Bolivia has refused to pay *any* compensation. As demonstrated in the sections above, the jurisdictional objections Bolivia raises are factually unfounded and rest on inapplicable, isolated or outdated case law. The objections could only have been constructed in order to create a rationale for bifurcation. The purpose of Bolivia's request for bifurcation, then, is not to resolve this dispute in an orderly fashion, but to delay payment of compensation for the nationalization of Claimants' investment. Indeed, these Objections are merely a piece of what preceded them. Bolivia's conduct in this arbitration has been to obstruct these proceedings as much as it possibly can.²²³ That behavior should not be rewarded and it would be inequitable if one party could unilaterally lengthen these proceedings through its obstreperous conduct.

107. *Second*, there would not be a material reduction of the merits phase of the proceeding if jurisdiction were bifurcated from the merits. The Claimants and

²²² *Glamis Gold Ltd. v. United States of America* (UNCITRAL), Procedural Order No. 2, 31 May 2005, **Exhibit CL-114**, ¶ 12(c).

²²³ *See* Claimants' Response to Bolivia's Request for Bifurcation, 27 August 2012, Section I. This pleading is incorporated into the Claimants' Response to Bolivia's Jurisdictional Objections.

Bolivia have already filed their substantive claims and defenses on the merits. They have further submitted their jurisdictional objections and defenses. Now that the case is fully pleaded, having a *separate* jurisdictional hearing prior to the merits hearing would be a waste of time and cost when all of the issues can be heard together in April 2013. Nor would further cost savings be achieved in the written phase of these proceedings since the bulk of the pleadings have been completed already. Moreover, many of Bolivia's objections would not dispose of this case in its entirety. For example, four of Bolivia's objections would not dispose of the case and two of Bolivia's objections would only dispose of one Claimant and not the other.

108. *Third* and finally, in order properly to decide Bolivia's objections, the Tribunal needs to hear testimony on the merits of the dispute. For example, when the Tribunal is considering whether certain of Claimants' claims are those made under the Treaty or those made under local law, it would serve the Tribunal to understand those claims fully.²²⁴ Or while the Tribunal considers whether Bolivia's invocation of the denial of benefits clause is made in good faith, during a merits hearing, it may seek to have a better understanding of how and why GAI was incorporated and its function in the overall corporate structure.²²⁵ Even if the Tribunal were minded to treat the amicable settlement requirement under the UK Treaty as jurisdictional (which it should not), it would be helpful to have the factual background of the dispute to determine whether all of the treaty claims are related to one another.²²⁶

109. Thus, arbitral efficiency and fairness to the parties would be achieved if all issues were joined into one hearing in April 2013. Therefore, Bolivia's request in this regard should be rejected.

²²⁴ *See supra* Section VI.

²²⁵ *See supra* Section IV.

²²⁶ *See supra* Section V.

X. REQUEST FOR RELIEF

110. On the basis of the foregoing, and reserving its rights to further expand its defenses to Bolivia's Objections, the Claimants respectfully request that the Tribunal:

- (a) DISMISS Bolivia's request for bifurcation;
- (b) ORDER the joinder of Bolivia's Objections to the merits of this arbitration;
- (c) DECLARE that it has jurisdiction to decide this dispute in its entirety;
- (d) AWARD attorneys' fees and costs of this phase of the arbitration to the Claimants, plus interest; and
- (e) AWARD such other relief as the Tribunal considers appropriate.

Respectfully submitted on 26 October 2012



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