

**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' REJOINDER ON JURISDICTION

20 DECEMBER 2012



Freshfields Bruckhaus Deringer

701 Pennsylvania Ave NW
Suite 600
Washington, DC 20004
United States of America

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I. INTRODUCTION

1. Guaracachi America, Inc. (*GAI*) and Rurelec PLC (*Rurelec*, and together with *GAI*, the *Claimants*) file this rejoinder (the *Rejoinder*) to the Plurinational State of Bolivia's (*Bolivia* or the *Respondent*) reply on jurisdiction of 26 November 2012 (the *Reply*), pursuant to Procedural Order No. 6 as amended by Procedural Order No. 10.¹

2. Bolivia has labeled this proceeding as an abuse of process.² It is nothing of the kind. The Claimants seek only the adjudication of their claims under the US and UK Treaties by an impartial arbitral tribunal, as is their right. It is Bolivia that has fought desperately to avoid facing its responsibilities to indemnify the Claimants for an outright direct taking of the largest private power operation in Bolivia without a cent of compensation. It has used various procedural tactics in the jurisdictional exchange to delay the day of reckoning, including:
 - insisting upon separate and duplicative arbitral proceedings for Rurelec and *GAI*, which would do nothing more than delay a decision on the merits and increase the costs for all parties (**Section II**);
 - advancing the spurious allegation that Rurelec did not own an investment in Guaracachi despite plain documentary evidence to the contrary, both in the record and voluntarily disclosed to Bolivia by the Claimants (**Section III**);
 - invoking for the first time a denial-of-benefits clause against *GAI* two years after the institution of this proceeding, despite having required that *GAI* be established to hold Guaracachi's shares (**Section IV**);

¹ Capitalized terms not defined herein shall have the meaning given to them in the Claimants' 1 March 2012 Statement of Claim and 26 October 2012 Counter-Memorial on Jurisdiction.

² Reply, ¶ 3.

- arguing that the Claimants’ claims regarding capacity payments, spot prices and the Worthington engines are unrelated to the nationalization while admitting in Statement of Defense that these measures were taken within the context of a State policy to recover control over the electricity sector that culminated in the nationalization (**Section V**);
 - mischaracterizing Claimants’ fair and equitable treatment claim, “effective means” claim and expropriation claim regarding the Worthington engines as domestic law claims (**Section VI**);
 - attempting to use the “fork in the road” clause of the US Treaty to prevent the Claimants’ from challenging the lack of effective domestic recourse against Bolivia’s unlawful intervention in capacity payments (**Section VII**); and
 - creating an exhaustion of local remedies requirement that does not exist in the Treaties or in arbitral jurisprudence, in direct contradiction to other arguments presented in its Reply (**Section VIII**).³
3. Bolivia’s jurisdictional objections are without legal and factual foundation, and therefore can only be explained as tactical in nature. For the reasons set out below, the Tribunal should affirm its jurisdiction over the entire dispute and assess all of the claims presented on their merits.

II. RURELEC AND GAI MAY BRING THIS ARBITRATION JOINTLY

4. In its Reply, Bolivia contends that it has not consented – whether expressly through the text of the Treaties or tacitly through its conduct in this arbitration – to arbitrate with an investor of the United States jointly with an investor of the United Kingdom in the same proceeding.⁴ Bolivia argues that in the absence of

³ The Claimants do not address Bolivia’s arguments regarding bifurcation as its request been rendered moot by Procedural Order No. 10.

⁴ Reply, ¶ 12.

express consent in the Treaties or tacit consent to having claims under both Treaties raised in a single proceeding, this Tribunal must dismiss *both* Claimants' claims.⁵ Bolivia's arguments are untenable.

5. It is not disputed that Bolivia has consented to arbitrate the claims of each Claimant under each Treaty. Nor is it disputed that the Treaties contain no language that would prevent such claims from being heard together. There is therefore no reason to believe that Bolivia did not contemplate that multiple claims could be heard together in a single arbitration when it signed the Treaties. Indeed, Bolivia has not cited a single treaty provision or authority (whether case law or commentary) in support of its argument that this Tribunal lacks jurisdiction. This is because investment arbitration authority does not support Bolivia's argument.
6. It is uncontroversial that multiple investors can file a single investment arbitration together without explicit authorization under the relevant investment treaty,⁶ even over a State's objection.⁷ No claimant has ever been dismissed from an investment arbitration simply because it filed its claims jointly with another claimant. Moreover, in *Quiborax v. Bolivia*, Bolivia did not object to the presentation of claims by three claimants together,⁸ although the argument it now

⁵ Reply, Sections 2.1 and 2.2, and ¶ 51

⁶ Examples of such cases are too numerous to list. As a selection, *see, e.g., Chevron Corporation and Texaco Petroleum Company v. Republic of Ecuador* (PCA Case No. 34877); *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. Mongolia* (UNCITRAL Arbitration); *Renta 4 S.V.S.A, Ahorro Corporación Emergentes F.I., Ahorro Corporación Eurofondo F.I., Rovime Inversiones SICAV S.A., Quasar de Valores SICAV S.A., Orgor de Valores SICAV S.A., GBI 9000 SICAV S.A. v. Russian Federation* (SCC No. 24/2007); *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosc Kaplún v. Plurinational State of Bolivia* (ICSID Case No. ARB/06/2); *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt* (ICSID Case No. ARB/04/13); *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary* (ICSID Case No. ARB/03/16); *Metalpar S.A. and Buen Aire S.A. v. Argentine Republic* (ICSID Case No. ARB/03/5).

⁷ *See Abaclat and others v. Argentine Republic* (ICSID Case No. ARB/07/5), Decision on Jurisdiction and Admissibility, 4 August 2011, **Exhibit CL-138**, ¶ 490.

⁸ *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosc Kaplún v. Plurinational State of Bolivia* (ICSID Case No. ARB/06/2), Decision on Jurisdiction, 27 September 2012, **Exhibit CL-150**, ¶ 1.

- presents would logically apply even where multiple claimants' rights are based on the same instrument.
7. It is equally undisputed that an investor can pursue a single investment arbitration under two separate legal instruments, such as a treaty and a foreign investment law or a treaty and investment contract, relying on the separate consents contained within those instruments, even where they do not specifically envisage the combined adjudication of claims based upon multiple instruments.⁹
 8. There can be no logical distinction between these circumstances and multiple investors advancing claims in a single arbitration under multiple treaties.¹⁰
 9. Whether the Claimants' claims can be heard together is not a question of jurisdiction, but one of arbitral procedure,¹¹ in respect of which this Tribunal has been granted broad discretion under both the UNCITRAL Rules and Procedural

⁹ See, e.g., *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**; *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**; *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador* (ICSID Case No. ARB/04/19), Award, 18 August 2008, **Exhibit CL-53**; *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**. An investor can bring an arbitration under two different instruments even over a State's objection. See, e.g., *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.

¹⁰ Indeed, it is common for multiple parties in investor-State arbitration to jointly initiate arbitration proceedings under multiple investment treaties. See, e.g., *Piero Foresti, Laura de Carli and others v. Republic of South Africa* (ICSID Case No. ARB(AF)/07/1), Award, 4 August 2010, **Exhibit CL-134**, ¶ 1; *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; *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, 2, 6; *Suez, 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.

¹¹ *Abaclat and others v. Argentine Republic* (ICSID Case No. ARB/07/5), Decision on Jurisdiction and Admissibility, 4 August 2011, **Exhibit CL-138**, ¶¶ 489–92.

- Order No. 1.¹² The gains in efficiency and consistency resulting from a unified proceeding are beyond doubt. For its part, Bolivia has advanced no reason for opposing the adjudication of both Claimants' claims by this Tribunal.
10. In this regard, it is noteworthy that, in its Reply, Bolivia did not pursue two arguments that appeared central to its jurisdictional objection. First, in their Counter-Memorial on Jurisdiction, Claimants demonstrated that the dispute settlement provisions of the Treaties are not incompatible.¹³ Bolivia has not responded to this argument,¹⁴ as there are no material inconsistencies between them.¹⁵ Second, Bolivia has not pursued its contention that the present issue is one of "consolidation." Clearly, it is not.
 11. Moreover, Bolivia has not disputed the obvious fact that it is fair and efficient to resolve both claims in a single proceeding, and has identified no prejudice that it will suffer if these claims are heard as part of a single arbitration. Given that there are no substantive incompatibilities between the Treaties and there are obvious benefits to a unified proceeding, Bolivia's only reason to oppose these proceedings is to delay a final award, which is characteristic of its behavior throughout this arbitration.
 12. The Tribunal has a duty under UNCITRAL Rule 17(1) and Section 5.3 of Procedural Order No. 1¹⁶ to conduct these proceedings in a manner that prevents unnecessary delay and expense, and to provide a fair and efficient process for resolving the parties' dispute. Allowing Claimants to proceed together before the

¹² Section 5.3 of Procedural Order No. 1, states: "For issues not covered by the UNCITRAL Rules, and pursuant to Article 17 of the UNCITRAL Rules, the Tribunal shall have the widest discretion to discharge its duties, provided that the Parties are treated fairly and impartially and that at any stage of the proceedings each Party is given a full opportunity to present its case and deal with the case of its opponent."

¹³ Counter-Memorial, ¶¶ 9-11.

¹⁴ Reply, ¶ 43, in which Bolivia limited itself to referring to its Objections.

¹⁵ Memorial on Jurisdiction, ¶ 29, and Counter-Memorial on Jurisdiction, ¶¶ 9-11.

¹⁶ *Supra*, note 12 above.

Tribunal is fair, efficient (avoiding unnecessary delays and the duplication of costs) and will avoid the possibility of inconsistent outcomes. It is also consonant with State practice and the jurisprudence of arbitral tribunals. For these reasons, Bolivia's objection should be rejected.¹⁷

III. RURELEC'S INDIRECT SHAREHOLDING IN GUARACACHI IS A PROTECTED INVESTMENT UNDER THE UK TREATY

13. Bolivia argues that Rurelec has not proved that it acquired an indirect shareholding in Guaracachi, and that, even if it did, such an indirect shareholding would not qualify as an "investment" under the UK Treaty. Rurelec has established as a matter of fact that it acquired Guaracachi through a wholly-owned subsidiary. Rurelec has also established as a matter of law that indirect shareholdings are protected by the UK Treaty. Bolivia's objections are therefore without factual or legal foundation, as further explained below.

A. THERE IS ABUNDANT EVIDENCE THAT RURELEC OWNED GUARACACHI

14. Bolivia argues in its Reply that there is no evidence in the record to prove that Rurelec acquired an indirect interest in Guaracachi prior to the arbitration.¹⁸ In order to sustain Bolivia's objection, the Tribunal would have to accept that Rurelec misrepresented its ownership interest in Guaracachi in a wide variety of contemporaneous documents created since December 2005. Bolivia has marshaled no evidence in support of this serious allegation, relying instead solely

¹⁷ If the Tribunal were to accept Bolivia's argument (which it should not), the only possible remedy would be to dismiss one (and not both) of the Claimants from these proceedings. This raises the insoluble problem, which Bolivia does not address, as to which of the two Claimants would be compelled to initiate a separate arbitration, and which would remain in the present proceedings.

¹⁸ Reply, ¶ 55. The ownership structure of Guaracachi is shown in ¶ 131 of the Statement of Claim. To recap, Rurelec PLC owns 100% of Birdsong Overseas Limited. Birdsong Overseas Limited owns 100% Bolivia Integrated Energy Limited. Bolivia Integrated Energy Limited owns 100% of GAI. GAI owns 50.001% of Guaracachi.

- on inference and circumstance.¹⁹ As the tribunal stated in *Saba Fakes v. Turkey*, “the burden of proof of any allegations of impropriety is particularly heavy.”²⁰
15. Insinuations of this sort have become *de rigueur* for Bolivia in defending against investor claims. In *Quiborax*, Bolivia asserted that the claimants had not proven an interest in the underlying investment.²¹ The tribunal there held that where a claimant provides “plentiful” evidence in support of its jurisdictional case on ownership, it is for the respondent to overcome such evidence.²² In *Quiborax*, Bolivia’s objection was rejected,²³ as it should be here.
16. There is ample evidence that Rurelec acquired an indirect ownership interest in Guaracachi in January 2006:
- the Share Purchase Agreement of 12 December 2005 reflects that Rurelec’s wholly owned subsidiary, Birdsong Overseas Limited (*Birdsong*), acquired Bolivia Integrated Energy Limited (*BIE*), which in turn held a 50.001% indirect interest in Guaracachi;²⁴
 - the contemporaneous announcement of the acquisition for US\$35 million;²⁵

¹⁹ Reply, ¶¶ 57–72.

²⁰ *Saba Fakes v. Republic of Turkey* (ICSID Case No. ARB/07/20), Award, 14 July 2010 **Exhibit RL-53**, ¶ 131.

²¹ *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosc Kaplún v. Plurinational State of Bolivia* (ICSID Case No. ARB/06/2) Decision on Jurisdiction, 27 September 2012, **Exhibit CL-150**, Section C.1.

²² *Ibid.*, ¶ 192.

²³ *Ibid.*

²⁴ Share Purchase Agreement, 12 December 2005, **Exhibit R-61**. *See also Ibid.*, Clause 3.1. (setting out the US\$ 35 million purchase price).

²⁵ *See* Announcement of Rurelec PLC regarding the acquisition of Bolivia Integrated Energy Limited, 13 December 2005, **Exhibit C-213**. *See also* Rurelec Press Release, “EGM Approval of the Acquisition of a controlling stake in Empresa Eléctrica Guaracachi S.A.”, 5 January 2006, **Exhibit C-215**.

- the share transfer executed on 5 January 2006 as a result of which BIE's shares were transferred to Birdsong in consideration of the sum of US\$35 million;²⁶
- a contemporaneous share certificate shows that Rurelec owned all of the shares in Birdsong at the time of the 2005–2006 acquisition;²⁷
- Birdsong's share register (disclosed to Bolivia in response to its document request) confirms that Rurelec owns all of that company's shares;²⁸
- BIE's share register and an accompanying letter from Rurelec's current corporate administrator demonstrate that BIE's shares were held in trust for Birdsong between 2006 and 2009, and then in Birdsong's name from 2009 onwards;²⁹
- GAI's share register demonstrates that BIE held 100% of GAI's shares at all relevant times;³⁰

²⁶ Share Transfer executed between Birdsong Overseas Limited and Southern Integrated Energy Limited, 5 January 2006, **Exhibit C-214**.

²⁷ Share Certificate Evidencing Rurelec's 100% Stake in Birdsong Overseas Limited, 8 December 2005, **Exhibit C-30**.

²⁸ *See* Share Register of Birdsong Overseas Limited, 10 September 2012, **Exhibit C-236**. Bolivia has argued in its Reply, ¶ 69, that "there is no proof (other than affirmations and press reports from the Claimants) that demonstrates that Birdsong is 100% owned by Rurelec. In fact, Claimants only proved that Birdsong was constituted in 2005 in BVI and that Rurelec possessed 1 share [...] None of the Claimants' documents show how many shares form part of Birdsong's stock, as a result of which it is impossible to determine what percentage of shares is owned by Rurelec". Bolivia, however, omits to mention that, in response to Bolivia's document request of 7 September 2012, the Claimants' counsel disclosed a copy of Birdsong's share register in an email to counsel for Bolivia dated 12 September 2012 and exhibited by Bolivia as **Exhibit R-2**. The share register, **Exhibit C-236**, shows the number of shares issued by Birdsong over the years and shows that Rurelec has at all times owned all of Birdsong's shares. Bolivia's assertion that it was unaware of the capital structure and ownership of Birdsong's shares is therefore disingenuous.

²⁹ *See* Counter-Memorial on Jurisdiction, footnote 35. *See also* Share Register of Bolivia Integrated Energy Limited, 10 September 2012, **Exhibit C-225**, and letter from Nerine Trust Company, 26 October 2012, **Exhibit C-226**.

³⁰ Share Certificate and Share Register evidencing Bolivia Integrated Energy Limited's 100% stake in Guaracachi America, **Exhibit C-27**.

- Rurelec’s 2006 Annual Report and audited financial statements states that Rurelec acquired 100% of BIE, with all but US\$2 million of the US\$35 million purchase price already paid by that time;³¹
 - Rurelec’s 2007 Annual Report confirms that final US\$2 million installment for the Guaracachi acquisition was paid;³² and
 - Guaracachi’s Annual Report of 2006 also confirms that Rurelec held 50.01% of Guaracachi’s shares through BIE and GAI;³³
17. Bolivia has made no specific allegation that any of these documents were inaccurate or fraudulent, which naturally they were not.³⁴

³¹ Rurelec 2006 Annual Report, **Exhibit C-113**, p. 69. Rurelec also lists Guaracachi’s value in its balance sheet as “property, plant and equipment”, 2006 Annual Report of Rurelec PLC, **Exhibit C-113**, p. 59.

³² Rurelec 2007 Annual Report, **Exhibit C-127**, p. 62 (note 23C).

³³ See 2006 Annual Report of Empresa Eléctrica Guaracachi S.A., **Exhibit C-114**, pp. 5, 13. See also 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. 15; 2009 Annual Report of Empresa Eléctrica Guaracachi S.A., **Exhibit C-36**, p. 18.

³⁴ Still more documents demonstrate Guaracachi’s ownership structure. Fitch Ratings, when describing Guaracachi’s profile in its 2007 report on the company, states that 50.001% of its shares “are owned by Guaracachi America Inc, a company that belongs to Bolivia Integrated Energy, a subsidiary of Birdsong Overseas Limited (100% owned by Rurelec, from England).” Fitch Rating for Empresa Eléctrica Guaracachi S.A., December 2007, **Exhibit C-233**. The original Spanish reads: “El 50,001% de las acciones de EGSA son de propiedad de Guaracachi América Inc, empresa perteneciente a Bolivia Integrated Energy Limited, subsidiaria de Birdsong Overseas Limited (100% propiedad de Rurelec de Inglaterra)”. When Rurelec agreed in 2008 to incur obligations in relation to the US\$20 million loan that Guaracachi received from a regional development bank (of which Bolivia is a member), the agreement confirmed that “Rurelec, by the companies Birdsong Overseas [...] and Bolivia Integrated Energy Limited [...] is the controlling shareholder of [Guaracachi America Inc]”, which in turn “is the principal shareholder of [Guaracachi].” Agreement for Accessory Obligations between Corporación Andina de Fomento, Rurelec and Guaracachi America, 8 August 2008, **Exhibit C-234**, Clauses 2.1. 3.5 and 4.1. The original Spanish reads: “Rurelec a través de las sociedades Birdsong Overseas Ltd, una sociedad constituida en las Islas Vírgenes Británicas y Bolivia Integrated Energy Limited, una sociedad constituida en las Islas Vírgenes Británicas es el accionista controlador de [Guaracachi America Inc]” and “[Guaracachi America Inc] es el principal accionista de la Empresa Eléctrica Guaracachi S.A. [...]”. There could have been no reason for Rurelec to misrepresent its ownership, nor for the bank to accept the ownership structure as described if it were otherwise.

Moreover, as indicated at paragraph 19 of Claimants’ Counter-Memorial on Jurisdiction, and contrary to Bolivia’s assertions at paragraph 71 of its Reply, the photograph of the formal

18. In sum, the record shows that Rurelec, through its wholly-owned subsidiary Birdsong, acquired a controlling stake in Guaracachi in 2006, through BIE and GAI, for US\$35 million. Rurelec’s 2006 and 2007 Annual Reports and audited financial statements show that this purchase price was, in fact, paid in full. Subsequent to the acquisition, and until June 2009, the BIE shares were held in bare trust for Birdsong’s benefit by nominee entities as a matter of corporate routine. The documentary evidence reflecting this state of affairs is significant, and there is absolutely no evidence to the contrary. Rurelec has therefore established that it has held an indirect controlling interest in Guaracachi since January 2006, and Bolivia’s objection must be rejected.

B. INDIRECT INVESTMENTS ARE PROTECTED UNDER THE UK TREATY IN ACCORDANCE WITH THE TREATY’S PLAIN MEANING

19. Bolivia maintains in its Reply that the UK Treaty does not protect Rurelec’s indirect shareholding in Guaracachi,³⁵ despite the fact that the UK Treaty expressly covers “*every kind of asset* which is capable of producing returns”³⁶ and references a non-exhaustive list of protected investment types, including shares in a company.³⁷ Bolivia’s argument is unsupported by the text of the UK Treaty and contradicts recent relevant arbitral decisions, as explained below.
20. Bolivia ignores the UK Treaty’s definition of “investment”, which includes “*every kind of asset*” which is capable of producing “returns”.³⁸ An indirect shareholding

inauguration ceremony for Guaracachi’s GCH-11 unit in March 2007, attended by the Vice-Minister of Energy, Rurelec’s CEO and the British Ambassador to Bolivia, also demonstrates that Bolivia was aware of Rurelec’s investment and its UK nationality prior to 2009. Why else would Bolivia invite the British Ambassador, if not in recognition of the nationality of Guaracachi’s majority shareholder. The photograph appearing at paragraph 19 of Claimants’ Counter-Memorial on Jurisdiction is drawn from Rurelec’s website (<http://rurelec.com>).

³⁵ Reply, Section 3.2.

³⁶ UK Treaty, **Exhibit C-1**, Art. 1(a) (emphasis added).

³⁷ UK Treaty, **Exhibit C-1**, Art. 1(a)(ii) (“investment means every kind of asset which is capable of producing returns and in particular, though not exclusively, includes: [...] shares in and stock and debentures of a company and any other form of participation in a company”).

³⁸ *Ibid.*

interest, such as Rurelec’s controlling interest in Guaracachi, is an “asset which is capable of producing returns”. Moreover, Rurelec’s indirect controlling interest in Guaracachi clearly falls within the illustrative category of investments “shares in [...] a company and any other form of participation in a company.” It is undisputable that an indirect equity interest is a “form of participation in a company.”

21. Leaving the text to one side, Bolivia bases its argument upon terms that are *absent* from the UK Treaty.³⁹ Bolivia contends that the absence of the words “directly or indirectly” in the UK Treaty is meaningful and must be interpreted as requiring that investments be “directly” held by the investor to attract protection. But where a definition is broad, as here, the absence of more specific clarifying language cannot narrow its scope. For example, the coverage of a treaty referring to “all persons” would be no narrower than one expressly protecting “all persons, whether adult or minor.” In both instances, adults and minors would fall within the definition, despite the absence of the distinction in one of the treaties. Similarly, since the UK Treaty extends protection to “every kind of asset,” and indirect shareholdings are a kind of asset, it makes no substantive difference that the clarifying words “direct or indirect” are absent.
22. Bolivia’s analysis is based on the premise that investment treaties are only intended to protect direct investments, and that the Contracting Parties to the UK Treaty failed to include a specific reference to “direct or indirect” investments because they deliberately sought to *exclude* coverage of indirect investments.

³⁹ Bolivia’s only argument based on the text of the UK Treaty is a contrived reliance on the word “of”, *Objections*, ¶¶ 67-68. In its Reply, Bolivia reprises its argument that the presence of the word “of” in the phrase “investments of nationals or companies of each Contracting Party,” which appears in the UK Treaty, limits protection to direct investments. Reply, ¶ 81. As explained in the Counter-Memorial on Jurisdiction (¶ 28), Bolivia’s argument was unequivocally rejected in *Cemex v. Venezuela*. See *Cemex Caracas Investments B.V. and Cemex Caracas II Investments B.V. v Bolivarian Republic of Venezuela* (ICSID Case No. ARB/08/15), Decision on Jurisdiction, 30 December 2010, **Exhibit CL-136**, ¶ 157. Bolivia’s only response on *Cemex* is a *non sequitur* about Venezuela’s foreign investment law. Reply, ¶¶ 84-86.

Bolivia provides no support for this theory.⁴⁰ Moreover, it ignores evidence that the Contracting Parties intended to broaden rather than to restrict the scope of protection by defining investment as “every kind of asset” with a non-exhaustive list of protected asset categories.⁴¹

23. In addition, Bolivia’s contention is undermined by the weight of legal authority on the issue. Bolivia cites not a single case in support of its argument.⁴² By contrast, the Claimants have provided a wealth of jurisprudence on this topic, demonstrating that investment treaty tribunals have consistently interpreted provisions similar to the one found in the UK Treaty to cover indirect investments.⁴³ Bolivia summarily discards all of these decisions as inapplicable, on the ground that they did not involve the UK Treaty or other treaties signed by Bolivia.⁴⁴ But the treaty provisions interpreted in these decisions are substantively identical to the UK Treaty. Learned tribunals applied investment treaties that, like the UK Treaty, defined “investment” as comprising “every kind of asset”, followed by a non-exhaustive list of asset categories nearly identical to the one at issue here.⁴⁵ There is no basis to conclude that Bolivia’s investment treaty practice differs materially from that of other countries.⁴⁶

⁴⁰ Bolivia simply asserts that it has always meant to exclude indirect investments when signing treaties without the “direct or indirect” language. See Reply ¶¶ 78–79. It offers no documentation of any kind to support this self-serving position, such as *travaux préparatoires*, parliamentary discussions, or other contemporaneous reflections of intent.

⁴¹ See footnote 37 above, quoting the UK Treaty’s definition of “investment”.

⁴² At ¶ 79 of its Reply, Bolivia claims that its position is confirmed by “jurisprudence”, but refers only to ¶ 72 of its Objections. That passage in turn cites the *Anglo Iranian Oil* decision, which makes no mention of the notion of direct or indirect investments. Rather, *Anglo Iranian Oil* dealt with the scope of a submission to ICJ jurisdiction with respect to facts “relating directly or indirectly to the application of the treaties or conventions accepted by Persia.”

⁴³ Counter-Memorial on Jurisdiction, ¶¶ 23–26.

⁴⁴ Reply, ¶ 75.

⁴⁵ For example, in *National Grid*, the tribunal stated that the claimant’s indirect shareholdings qualified as an “investment” under the United Kingdom–Argentina BIT, a treaty which is similarly worded to the United Kingdom–Bolivia BIT. See *National Grid PLC v. Argentine Republic*, Decision on Jurisdiction, 20 June 2006, **Exhibit CL-146**, ¶ 140 (“There is no doubt that National Grid made an investment in Argentina [...]”). In that case, the claimant, National Grid, owned

24. In case after case, treaty provisions nearly identical to Article I of the UK Treaty were found to protect indirect shareholdings:
- In *Siemens v. Argentina*, the tribunal determined that the Argentina–Germany BIT, which defined “investment” as “every kind of asset” followed by a non-exhaustive list of asset categories, including “shares” and “participations” in companies,⁴⁷ covered indirect shareholdings;⁴⁸
 - In *Mobil Corporation v. Venezuela*, the tribunal held that the Venezuela–Netherlands BIT, which defined “investment” as “every kind of asset” followed by a non-exhaustive list of asset categories of investments including “shares” and “other kinds of interests” in companies,⁴⁹ covered indirect shareholdings;⁵⁰
 - In *Tza Yap Shum v. Peru*, the tribunal held that the China–Peru BIT, which defined “investment” as “every kind of asset” followed by a non-exhaustive list of asset categories including “shares, stock and any other kind of participation in companies”,⁵¹ covered indirect shareholdings,⁵² and

shares in an Argentine consortium named Citelec, which in turn owned shares in an Argentine corporation named Transsener, which held various contracts. *Ibid.*, ¶¶ 37–39.

⁴⁶ *Supra*, note 40, above.

⁴⁷ Agreement between the German Federal Republic and the Republic of Argentina on the Promotion and Protection of Investments, 9 April 1991, **Exhibit C-231**, Article 1(1) The original Spanish reads: “El concepto de ‘inversiones’ designa todo tipo de activo definido de acuerdo con las leyes y reglamentaciones de la Parte Contratante en cuyo territorio la inversión se realizó de conformidad con este Tratado; en particular, pero no exclusivamente, esto incluye: [...] b) las acciones, derechos de participación en sociedades y otros tipos de participaciones en sociedades; [...]”

⁴⁸ *Siemens A.G. v. Argentine Republic* (ICSID Case No. ARB/02/8), Decision on Jurisdiction, 3 August 2004, **CL-109**, ¶ 137.

⁴⁹ *Mobil Corporation, Venezuela Holdings, B.V. and others v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/27), Decision on Jurisdictions, 10 June 2010, **Exhibit CL-131**, ¶ 164.

⁵⁰ *Ibid.*, ¶ 165.

⁵¹ Agreement between the Government of the Republic of Peru and the Government of the People’s Republic of China concerning the Encouragement and Reciprocal Protection of Investments, 9 June 1994, **Exhibit C-232**, Article 1(1).

- In *Kardassopolous v. Georgia*, the tribunal held that the Greece–Georgia BIT, which defined “investment” as “every kind of asset” followed by a non-exhaustive list of asset categories including “shares” and “participations” in companies,⁵³ covered indirect shareholdings.⁵⁴
25. The *Kardassopolous* decision is particularly illuminating in this regard. The claimant initiated arbitration under the Energy Charter Treaty and the Greece–Georgia BIT. The definition of “investment” in the ECT was qualified by the words “directly or indirectly,” while the Greece–Georgia BIT did not contain such language.⁵⁵ This textual difference had no impact on the tribunal’s decision, as it confirmed that the indirect ownership of shares by Claimant constituted an “investment” under *both* the BIT and the ECT.⁵⁶
26. The UK Treaty’s definition of “investment” is expansive, and its plain meaning encompasses Rurelec’s indirect controlling shareholding in Guaracachi. This interpretation of the UK Treaty is in accord with the relevant *jurisprudence constante*. Bolivia’s objection is without merit and should be rejected.
- C. IN NON-ICSID CASES NO ADDITIONAL DEFINITION OF “INVESTMENT” IS PERMISSIBLE**
27. In its Reply, Bolivia, again argues that unless Rurelec has made a “contribution” in Bolivian territory, it can have no protected “investment” for the purposes of the UK Treaty.⁵⁷ Contrary to its initial position, Bolivia no longer contends that this

⁵² *Sr. Tza Yap Shum v. República del Perú* (ICSID Case No. ARB/07/6), Decision on Jurisdiction and Competence, 19 June 2009, **Exhibit CL-124**, ¶ 106.

⁵³ *Ioannis Kardassopoulos v. Georgia* (ICSID Case No. ARB/05/18), Decision on Jurisdiction, 6 July 2007, **Exhibit CL-119**, ¶ 122.

⁵⁴ *Ibid.*, ¶¶ 123–24.

⁵⁵ *Ibid.*, ¶¶ 121–123.

⁵⁶ *Ibid.*, ¶¶ 123–24.

⁵⁷ Reply, Section 3.3.

- requirement is imposed by the text of the UK Treaty.⁵⁸ It now posits a rule created by ICSID arbitral jurisprudence alone.⁵⁹ Bolivia’s objection is untenable: no additional criteria can be added to the Treaty definition of the term “investment.”
28. In ICSID arbitration, claimants must establish subject-matter jurisdiction under *both* the consent instrument (e.g., an investment treaty) and Article 25 of the ICSID Convention. Since the ICSID Convention does not define the term “investment”,⁶⁰ tribunals have developed a flexible definition that is distinct from that contained in most investment treaties. Here, the ICSID Convention is not applicable, and Bolivia may not therefore rely on ICSID Article 25 case law.⁶¹ The Contracting Parties to the UK Treaty expressly defined the term “investment”, and Rurelec’s investment falls squarely within this definition. This is the end of the analysis with respect to subject-matter jurisdiction.⁶²
29. The only two non-ICSID decisions that Bolivia cites, *Romak v. Uzbekistan* and *Alps Finance v. Slovak Republic*, are unhelpful to its position. In both cases, the tribunals looked beyond the treaty definition of “investment” only because the disputed assets were far from the common-sense plain conception of the term. Both cases concerned sales contracts.⁶³ The *Romak* tribunal noted that such a

⁵⁸ In its Objections, ¶¶ 85–90, Bolivia had argued that the Spanish text of the UK Treaty’s definition of “returns” should be interpreted as requiring a contribution of capital in Bolivian territory in order to qualify as a protected investment. The Claimants showed that this argument has no support in the UK Treaty’s text in their Counter-Memorial on Jurisdiction, ¶¶ 37–41. Bolivia appears to have retreated from its initial position in its Reply, ¶¶ 89–90, and Section 3.3.1.

⁵⁹ Reply, Section 3.3.1, and ¶¶ 89–91.

⁶⁰ International Bank for Reconstruction and Development, *Report of the Executive Directors on the Convention of the Settlement of Investment Disputes Between States and Nationals of Other States* (1968), **Exhibit CL-144**, Section V.27.

⁶¹ Reply, ¶¶ 94 and 101. *See also* Counter-Memorial to Jurisdiction, footnote 78.

⁶² *White Industries Australia Limited v. Republic of India* (UNCITRAL), Final Award, 30 November 2011, **Exhibit CL-73**, ¶ 7.4.9, holding was that the so-called “Salini factors” do not apply in an UNCITRAL arbitration. Bolivia seeks to downplay the relevance of *White Industries* because the tribunal provided alternative reasoning for its conclusion. Reply, ¶ 95. That the tribunal provided alternative reasoning for its decision (as tribunals frequently do) does not detract from its primary holding. that the so-called “Salini factors” do not apply outside the ICSID context.

⁶³ Counter-Memorial on Jurisdiction, ¶ 42.

contract would fall within the definition of “investment” in the applicable treaty as a “claim to money.” However, it reasoned that reading “claim to money” literally and in isolation would mean that all contracts of any kind would be protected as investments. The arbitrators considered this to be an absurd result clearly incompatible with the Contracting Parties’ intentions, given that Uzbekistan and Switzerland had signed a separate treaty on trade in goods contemporaneously with the investment treaty in question.⁶⁴ It was on this basis that the *Romak* panel proceeded to assess objectively whether the disputed sales contract was an “investment” within the common sense meaning of the word. Here, there is nothing absurd in a literal reading of the phrase “any [...] form of participation in a company.” There is therefore no basis to depart from the plain words of the UK Treaty.⁶⁵

30. In any event, Rurelec satisfies the additional “contribution” criterion that Bolivia posits (and which is only found in ICSID jurisprudence).⁶⁶ Bolivia appears to accept that if Rurelec paid for its shares in Guaracachi, this would be a sufficient contribution to establish an “investment”.⁶⁷ Indeed, this would accord with the recent decision in *Quiborax* which Bolivia cites with approval.⁶⁸ In that case, the tribunal rejected Bolivia’s argument that the Chilean claimant, which had acquired shares in a Bolivian company that held mining concessions, lacked a

⁶⁴ *Romak S.A. v. Republic of Uzbekistan* (UNCITRAL), Award, 26 November 2009, **Exhibit RL-54**, ¶¶ 182, 184–190.

⁶⁵ Article 32 of the Vienna Convention on the Law of Treaties allows a tribunal to determine the meaning of a treaty provision via supplementary means when its ordinary interpretation would lead “to a result which is [...] unreasonable.” Otherwise, a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in light of their object and purpose. Vienna Convention on the Law of Treaties, **Exhibit CL-5**, Articles 31 and 32.

⁶⁶ Reply, ¶¶ 101–02, 114.

⁶⁷ Reply, ¶ 114 (“Rurelec no ha demostrado haber realizado aporte o contribución alguno con valor económico en el territorio de Bolivia (ya sea como pago por su supuesta adquisición de acciones o, posteriormente, como asistencia técnica a EGSA)”); and ¶¶ 99–100.

⁶⁸ *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosc Kaplún v. Plurinational State of Bolivia* (ICSID Case No. ARB/06/2) Decision on Jurisdiction, 27 September 2012, **Exhibit CL-150**.

qualifying “investment” under the ICSID Convention for want of “a contribution of money or assets in the territory of Bolivia”:

as the Tribunal previously concluded, the evidence shows that Quiborax paid for 51% of the shares of NMM. Regardless of where payment was made, this qualifies as a contribution of money because the object of the payment and raison d'être of the transaction - the mining concessions- were located in Bolivia.⁶⁹

31. Here, Rurelec’s payment of US\$35 million for a controlling stake in Guaracachi constitutes a “contribution” as defined by *Quiborax* tribunal.⁷⁰ On this basis alone, Bolivia’s objection can be dismissed.
32. In addition to the payment for its shares in Guaracachi, Rurelec has made other important “contributions” in Bolivia. For example, it incurred obligations in relation to Guaracachi’s US\$20 million loan from the CAF, a regional development bank. Specifically, it provided a negative pledge in relation to Guaracachi’s shares, which carried a US\$10 million exposure to that debt. As a result, Guaracachi was able to obtain financing from the CAF on very competitive terms (Libor + 3.4% interest rate (3.93% in 2008) over 10 years) which in turn facilitated the funding of the combined cycle gas turbine project.⁷¹ Rurelec also brought expertise and know-how to Guaracachi’s operation and management.⁷² This important contribution has been recognized by independent third parties, such as the credit rating agency, Fitch.⁷³

⁶⁹ *Ibid.*, ¶ 229 (emphasis added).

⁷⁰ *Ibid.*, ¶ 219 (holding that the ICSID Convention’s definition of “investment” included “a contribution of money or assets (that is, a commitment of resources)”).

⁷¹ Contrary to Bolivia’s assertions in its Reply, ¶ 106. Loan Agreement between Corporación Andina de Fomento and Guaracachi, 8 August 2008, **Exhibit C-157**, and Agreement for Accessory Obligations between Corporación Andina de Fomento, Rurelec and Guaracachi America, 8 August 2008, **Exhibit C-234**, Clauses 3.6 and 4.1.

⁷² Contrary to Bolivia’s assertions in its Reply, ¶ 108.

⁷³ See Fitch Rating for Empresa Eléctrica Guaracachi S.A., December 2007, **Exhibit C-233**, p. 1; Fitch Rating for Empresa Eléctrica Guaracachi S.A., December 2008, **Exhibit C-165**, p. 1; Fitch Rating for Empresa Eléctrica Guaracachi S.A., March 2009, **Exhibit C-235**, p. 1.

33. In summary, Rurelec’s indirect controlling shareholding interest in Guaracachi, acquired in 2006 against the payment of US\$35 million, qualifies as a protected “investment” under the UK Treaty. While the Tribunal should not refer to any definition of “investment” beyond the text of the Treaty itself, were it inclined to do so, Rurelec’s investment would satisfy even the definition that Bolivia has advanced.

IV. BOLIVIA IS NOT ENTITLED TO DENY THE BENEFITS OF THE US TREATY TO GUARACACHI

34. In its Reply, Bolivia reiterates its argument that it is entitled retroactively to deny GAI the benefits of the US Treaty pursuant to Article XII, nearly two years after the institution of these proceedings. Bolivia’s objection should be rejected since, as explained below: (a) a denial-of-benefits cannot be invoked retroactively, particularly after the institution of arbitral proceedings; and (b) the pre-conditions for denying benefits under Article XII have not been satisfied.

A. THE INVOCATION OF A DENIAL-OF-BENEFITS CLAUSE MUST PRECEDE THE INSTITUTION OF AN ARBITRAL PROCEEDING

35. In its Objections, Bolivia sought for the first time to deny GAI the benefits of the US Treaty pursuant to Article XII of the US Treaty, purporting to divest this Tribunal of jurisdiction over GAI.⁷⁴ As explained in the Counter-Memorial on Jurisdiction, this denial of benefits can only apply prospectively.⁷⁵ To interpret the denial-of-benefits clause as permitting Bolivia to deny the benefits of the US Treaty retroactively after it had expropriated GAI’s investment without

⁷⁴ Objections, Section 4.

⁷⁵ Counter-Memorial on Jurisdiction, Section IV.A. See *Plama Consortium Limited v. Bulgaria* (ICSID Case No. ARB/03/24), Decision on Jurisdiction, 8 February 2005, **Exhibit CL-110**, ¶ 161; *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**, ¶ 458.

compensation would be contrary to the principle of *pacta sunt servanda*, as well as the object and purpose of the US Treaty to “stimulate the flow of private capital” and to create “a stable framework for investment”.⁷⁶ This interpretation of the US Treaty’s denial-of-benefits clause is in accord with the *Plama v. Bulgaria* and *Yukos v. Russia* decisions which looked to the object and purpose of the Energy Charter Treaty to find that that instrument’s denial-of-benefits clause could only apply prospectively.⁷⁷

36. In its Reply, Bolivia does not deny that the Claimants’ interpretation of the denial-of-benefits clause accords with the object and purpose of the US Treaty. It nonetheless reiterates its assertion that the clause, which is silent on the issue of timing, permits the retroactive denial of treaty benefits.⁷⁸
37. Bolivia argues that “the text of the Treaty does not preclude State parties from denying benefits after the initiation of an arbitral proceeding.”⁷⁹ It then argues that the timing of a denial of benefits under the US Treaty is governed by UNCITRAL Rule 23(2),⁸⁰ which provides: “[a] plea that the arbitral tribunal does not have jurisdiction shall be raised no later than in the statement of defence [...]” But depriving an investor of treaty benefits is not “[a] plea that the arbitral tribunal does not have jurisdiction.” It is an act that forms the basis for such a plea. The UNCITRAL Rules set out the procedural deadline beyond which an *existing*

⁷⁶ US Treaty, **Exhibit C-17**, Preamble; Counter-Memorial on Jurisdiction, Section IV.A. .

⁷⁷ Counter-Memorial on Jurisdiction, ¶¶ 54–55. *See Plama Consortium Limited v. Republic of Bulgaria* (ICSID Case No. ARB/03/24), Decision on Jurisdiction, 8 February 2005, **Exhibit CL-110**, ¶ 161; *Hulley Enterprises Limited (Cyprus) v. Russian Federation* (PCA Case No. AA 226), Interim Award on Jurisdiction and Admissibility, 30 November 2009, **Exhibit CL-125**, ¶ 457; *Veteran Petroleum Limited (Cyprus) v. Russian Federation* (PCA Case No. AA 228), 30 November 2009, Interim Award on Jurisdiction and Admissibility, **Exhibit CL-126**, ¶ 514; *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.

⁷⁸ Reply, Section 4.1

⁷⁹ Reply, ¶ 118. The original Spanish reads: “El texto mismo del Tratado [con los Estados Unidos] no impide a los Estados Partes denegar sus beneficios después de iniciado un procedimiento arbitral.”

⁸⁰ Reply, ¶ 122.

jurisdictional obstacle will be waived. The deadline for creating such an obstacle is a matter of substance, governed by international law.⁸¹

38. It is a “well-established principle that jurisdiction is to be determined in light of the situation as it exists on the date the judicial proceedings are instituted.”⁸² This position was confirmed in *Vivendi II*:

it is an accepted principle of international adjudication that jurisdiction will be determined in the light of the situation as it existed on the date the proceedings were instituted. Events that take place before that date may affect jurisdiction; events that take place after that date do not.⁸³

39. The *Vivendi II* tribunal’s reasoning was premised on the decisions of the International Court of Justice which, the tribunal noted, established a clear rule “that, once established, jurisdiction cannot be defeated. It simply is not affected by subsequent events.”⁸⁴ This principle preserves the availability of an international adjudicative process. As the ICJ stated in the *Nottebohm Case*:

[w]hen an Application is filed at a time when the law in force between the parties entails [...] jurisdiction of the Court [...] the filing of the Application is merely the condition required to enable the [jurisdictional

⁸¹ The authorities that Bolivia cites also conflate the rules governing the deadline for raising objections based on existing jurisdictional obstacles, and the rules governing the deadline for creating such obstacles as a matter of substance. *See, e.g., 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**, ¶¶ 4.85, 4.90.

⁸² *Mytilineos Holdings SA v. State Union of Serbia & Montenegro and Republic of Serbia* (UNCITRAL), Partial Award on Jurisdiction, 8 September 2006, **Exhibit CL-94**, ¶ 159. *See also National Grid PLC v. Argentine Republic* (UNCITRAL), Decision on Jurisdiction, 20 June 2006, **Exhibit CL-146**, ¶¶ 114–122.

⁸³ *Compañía de Aguas Del Aconquija S.A. and Vivendi Universal S.A. v. Argentina* (ICSID Case No. ARB/97/3), Resubmitted Case, Decision on Jurisdiction, 14 November 2005, **Exhibit CL-145**, ¶ 61 (emphasis added)

⁸⁴ *Compañía de Aguas Del Aconquija S.A. and Vivendi Universal S.A. v. Argentina* (ICSID Case No. ARB/97/3), Resubmitted Case, Decision on Jurisdiction, 14 November 2005, **Exhibit CL-145**, ¶ 63 (emphasis added). The tribunal noted that: “The ICJ developed cogent case law to this effect in the *Lockerbie case*. There, in a preliminary objection, Libya relied on the Montreal Convention to establish the Court’s jurisdiction. The United States and the United Kingdom contended that Security Council Resolutions adopted after the initiation of the proceedings deprived the Court of jurisdiction. The Court rejected categorically the arguments of the United States and United Kingdom [...]” *Ibid.*, ¶ 61.

clause] to produce its effects in respect of the claim advanced in the Application. Once this condition has been satisfied, the Court must deal with the claim [...]. An extrinsic fact [...] cannot deprive the Court of the jurisdiction already established.⁸⁵

40. This basic principle is particularly compelling with respect to denial-of-benefits clauses. There are two ways in which denying treaty benefits affect an investor's arbitration claims, neither of which can logically operate retroactively.
- (a) *First*, the State ostensibly deprives the claimant of all substantive protections of the treaty, rendering it impossible to demonstrate that the treaty was breached. All claims would thus be inadmissible. But if the State has not denied benefits at the moment it takes measures allegedly in violation of the treaty, then all protections are at that moment in place, and a breach of the treaty can occur. By later denying the benefits of the treaty, the State cannot undo the legal reality of a treaty breach – it can only prevent its subsequent actions from violating the treaty.
- (b) *Second*, the State ostensibly deprives the claimant of the “benefit” of its consent to arbitration as set forth in the treaty, preventing claims from being adjudicated by an international tribunal. But if the State has not denied benefits at the moment when the claimant initiates arbitration, then the State's consent is still in place, and the offer to arbitrate is accepted by the investor and transformed into an irrevocable agreement. By later denying the benefits of the treaty, the State cannot withdraw consent that has already been accepted – it can only prevent the investor from initiating arbitrations with respect to future disputes.
41. In this case, the disputed events took place no later than May 2010. At that time, Bolivia had not invoked the denial-of-benefits clause. Therefore, the full range of substantive protections of the US Treaty applied to GAI and its investment. To the extent that Bolivia's conduct was contrary to the terms of the US Treaty, GAI immediately acquired a right to compensation. Similarly, GAI initiated arbitration

⁸⁵ *Nottebohm Case* (Liechtenstein v. Guatemala), International Court of Justice, Preliminary Objection, 18 November 1953, **Exhibit CL-143**, p. 123.

in November 2010, two years before Bolivia sought to withdraw its treaty benefits. In doing so, it accepted Bolivia's standing offer to arbitrate. By the time Bolivia purported to deny benefits, GAI had long since availed itself of the "benefit" of the arbitration clause of the US Treaty and arbitration had already been commenced.⁸⁶

42. As explained in Claimants' Counter-Memorial on Jurisdiction, Bolivia was at all times aware of GAI's investment in Bolivia: the company was established, as required by Bolivia under the Bidding Rules,⁸⁷ in order to subscribe the shares in Guaracachi at the time of the capitalization; the company entered into a Capitalization Contract with Bolivia in 1995 in which it undertook to make certain investments; it corresponded with Bolivia in 2001 regarding its compliance with its investment obligations under the Capitalization Contract; Bolivia specifically named GAI in the Nationalization Decree and expropriated its shares; and GAI delivered a notice of dispute under the US Treaty to Bolivia in

⁸⁶ The *Plama* tribunal stated that an argument that a denial-of-benefits clause should apply retrospectively loses force when the assertion is made "from a very late date, *even after the Claimant's Request for Arbitration and the accrual of the Claimant's causes of action* under [the treaty.]" *Plama Consortium Limited v. Republic of Bulgaria* (ICSID Case No. ARB/03/24), Decision on Jurisdiction, 8 February 2005, **Exhibit CL-110**, ¶ 162 (emphasis added).

⁸⁷ Contrary to Bolivia's assertions (Reply, ¶ 133), the Bidding Rules prepared by Bolivia for the capitalization process did require that the shares in Guaracachi be acquired by a corporation whose sole purpose was to subscribe the shares in the tendered company (Guaracachi). The Bidding Rules provided that there would be a "Stock Subscribing Company" ("Sociedad Suscriptora") that would receive the new shares to be issued by Guaracachi (Article 2.2). Article 2.1 provided that bidding company (the "Proponente") had to be a "juridical person constituted exclusively for the purposes of participating in the bid, which could be the Stock Subscribing Company" (The original Spanish reads: "Una persona jurídica constituida exclusivamente a efectos de participar en la presente licitación y que podrá ser la Sociedad Suscriptora"). Article 2.3 of the Bidding Rules further provided that "The Qualified Bidder that is declared the winning bidder must constitute, if necessary, prior to the Closing Date, a Stock Subscribing Company" (In the original Spanish: "El Proponente Calificado que resulte Adjudicatario deberá constituir, en caso necesario, con anterioridad a la Fecha de Cierre, la Sociedad Suscriptora."). Article 8.3 of the Bidding Rules then provides that "In the Closing Deed, the Stock Subscribing Company shall subscribe the Subscription Shares [i.e. the shares in Guaracachi] pursuant to the Contract" (The original Spanish reads: "En el Acto de Cierre, la Sociedad Suscriptora deberá subscribir las Acciones de Suscripción de acuerdo a lo establecido en el Contrato"). In other words, the winning bidder had to create a company whose sole purpose was to subscribe Guaracachi's shares, unless the winning bidder was, itself, constituted as such a company.

May 2010.⁸⁸ Therefore, Bolivia could have denied GAI the benefits of the US Treaty prior to the initiation of these proceedings. Instead, it waited nearly two years after the start of the arbitration before purporting to deny GAI the benefits of the US Treaty. Such an invocation of the clause can have no effect on these proceedings.

B. GAI HAS SUBSTANTIAL BUSINESS ACTIVITIES IN THE UNITED STATES

43. Even in the unlikely event that the Tribunal finds that the US Treaty’s denial of benefits provision may be invoked retroactively after the institution of arbitral proceedings, Bolivia has failed to meet its burden of proving that GAI has no substantial business activities in the United States, which is a requirement to trigger the clause.⁸⁹
44. According to Bolivia, the mere allegation that GAI has no substantial business activities in the United States is sufficient to prove the point.⁹⁰ This is in stark contrast with basic principles of evidence and Article 27(1) of the UNCITRAL Rules: “[e]ach party shall have the burden of proving the facts relied on to support its claim or defence.”⁹¹ As the tribunal stated in *Ulysseas v. Ecuador*: “the burden of proving that the conditions for the exercise of the right to deny the BIT advantages is to be borne by Respondent as the party advancing this specific defence to the Tribunal’s jurisdiction.”⁹² Or, in the words of *Pac Rim Cayman v. El Salvador*:

[t]he 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

⁸⁸ Counter-Memorial on Jurisdiction, ¶ 56.

⁸⁹ Counter-Memorial on Jurisdiction, Section IV.B.

⁹⁰ Reply, ¶ 140.

⁹¹ UNCITRAL Rules, Article 27(1).

⁹² *Ulysseas, Inc. v. Republic of Ecuador* (UNCITRAL), Interim Award, 28 September 2010, **Exhibit CL-135**, ¶ 166.

relevant benefits under [the Treaty] [...] and that, conversely, it is not primarily for the Claimant here to establish the opposite as a negative.⁹³

45. As GAI has shown in its Counter-Memorial on Jurisdiction, the requirement of “substantial business activities” is not particularly onerous.⁹⁴ It is undisputed that GAI has held its interest in Guaracachi from 1995 until the nationalization. The evidence of GAI’s US business activities in the record during the period of that investment⁹⁵ includes evidence that GAI designated an agent in the State of Delaware,⁹⁶ held annual shareholder meetings in the United States,⁹⁷ held board of directors meetings,⁹⁸ elected officers (including nationals of the United States) capable of entering into agreements,⁹⁹ and submitted annual tax returns¹⁰⁰ amongst other activities.
46. GAI thus had “substantial business activities” at the relevant times. Therefore, the conditions for denying GAI the benefits of the US Treaty are not fulfilled. Bolivia’s objection should therefore be rejected.

V. THE CLAIMS REGARDING SPOT AND CAPACITY PRICES AND THE WORTHINGTON ENGINES HAVE BEEN VALIDLY SUBMITTED

47. In its Reply, Bolivia maintains its argument that the Claimants did not comply with the Treaties’ amicable settlement requirements with respect to claims arising out of (i) the alteration of spot price regulations; (ii) the failure to ensure effective

⁹³ *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; *see also* Counter-Memorial on Jurisdiction, footnote 101 and cases cited therein.

⁹⁴ Counter-Memorial on Jurisdiction, ¶¶ 60–61.

⁹⁵ Counter-Memorial on Jurisdiction, ¶ 62.

⁹⁶ Evidence of GAI’s Delaware Agent, **Exhibit C-229**.

⁹⁷ GAI Shareholder Meeting Minutes, **Exhibit C-227** and Amended By-laws of Guaracachi America Inc, 7 November 2001, **Exhibit C-212**, Article II.3.

⁹⁸ *See* GAI Board of Directors Meeting Minutes, **Exhibit C-228**.

⁹⁹ *See* GAI Board of Directors Resolutions, **Exhibit C-230**. GAI Board of Directors Meeting Minutes, **Exhibit C-228**.

¹⁰⁰ *See* Entity Details on Guaracachi America, Inc, Delaware Department of State - Division of Corporations, **Exhibit R-23**.

means of resolving Claimants' capacity payment dispute; and (iii) the seizure of the Worthington Engines.¹⁰¹ Bolivia again argues that the Treaties' amicable settlement provisions establish requirements that are jurisdictional in nature. Bolivia contends that the Claimants should therefore be compelled to engage in separate negotiations in relation to these claims, and to re-submit them in a separate arbitration if those talks do not result in amicable settlement. Bolivia's arguments are flawed, as explained below.

A. THE NOTICE PROVISIONS ARE NOT COMPULSORY IN NATURE

48. Bolivia's argument that amicable settlement provisions set out mandatory requirements that are jurisdictional in nature is not supported by principles of treaty interpretation or investment treaty jurisprudence. The vast majority of investment treaty tribunals that have considered this issue have held that amicable settlement provisions are procedural in nature. Bolivia's response to the weight of arbitral authority cited in the Claimants' Counter-Memorial is to argue that Claimants' cases are "outdated" and that "recent arbitral practice" is "uniform" in condemning these decisions.¹⁰² It again cites the 2010 *Burlington* and *Murphy Exploration* in this regard, the only two cases that have held such provisions to be compulsory.¹⁰³ Bolivia ignores two subsequent decisions that found the opposite: *Alps Finance v. Slovak Republic*, upon which Bolivia heavily relies for other

¹⁰¹ Reply, Section V.

¹⁰² Reply, ¶ 164. The original Spanish reads: "las Demandantes fundan su posición en decisiones arbitrales que se distinguen en los hechos del presente caso y además han sido superadas por una práctica arbitral reciente uniforme e incluso duramente criticadas por conllevar a un resultado manifiestamente absurdo e irrazonable, contrario a la interpretación de buena fe de los tratados." Other than *Murphy* and *Burlington*, Bolivia generally cites dissenting opinions and decisions concerning 18-month domestic litigation prerequisites and their interaction with MFN clauses. These latter decisions are both irrelevant and highly controversial.

¹⁰³ Reply, ¶ 165 (Claimants have already distinguished these cases from the present dispute); Counter-Memorial on Jurisdiction, ¶ 77.

purposes, and *Abaclat v Argentina*.¹⁰⁴ These recent decisions confirm that the overwhelming majority of cases on the issue support the Claimants' position.

49. Most importantly, investment treaty tribunals have commonly held that to require parties to undertake futile settlement discussions prior to arbitration would be unnecessarily rigid, formalistic and to no party's apparent benefit.¹⁰⁵ The *Alps Finance* tribunal quoted with approval Professor Schreuer's view that:

What matters is whether or not there was a promising opportunity for a settlement. There would be little point in declining jurisdiction and sending the parties back to the negotiating table if these negotiations are obviously futile. Negotiations remain possible while the arbitration proceedings are pending. Even if the institution of arbitration was premature, compelling the claimant to start the proceedings anew would be a highly uneconomical solution.¹⁰⁶

50. This position is in accordance with a number of arbitral decisions¹⁰⁷ and with principles of treaty interpretation, as codified in Article 32 of the Vienna

¹⁰⁴ Reply, ¶¶ 166–67, 171 (citing *ICS v. Argentina*) and footnote 160 (citing, among other cases, *Daimler Financial Services v. Argentina*).

¹⁰⁵ See *Ronald S. Lauder v. Czech Republic* (UNCITRAL), Final Award, 3 September 2001, **Exhibit CL-23**, ¶ 190; *Abaclat and others v. Argentine Republic* (ICSID Case No. ARB/07/5), Decision on Jurisdiction and Admissibility, 4 August 2011, **Exhibit CL-138**, ¶ 564; *Alps Finance and Trade AG v. Slovak Republic* (UNCITRAL), Award, 5 March 2011, **Exhibit RL-56**, ¶¶ 200–01 (although the “Claimant did not employ the most perfect forms when it firstly notified the State of the outbreak of the dispute [...]”, “the Tribunal [did] not see these perfectible defects as a deficiency which render[ed] the State’s consent to arbitral jurisdiction ineffective” given that “[t]he relevant case-law endorses a less formalistic view”).

¹⁰⁶ *Alps Finance and Trade AG v. Slovak Republic* (UNCITRAL), Award, 5 March 2011, **Exhibit RL-56**, ¶ 204 (quoting C. Schreuer, *International Investment Law* (1st edn 2008), p. 846).

¹⁰⁷ See, e.g., *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania* (ICSID Case No. ARB/05/22), Award, 24 July 2008, **Exhibit CL-51**, ¶ 343 (“Non-compliance with the six-month period, therefore, does not preclude this 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”); *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 (“[T]here was little indication of any inclination on the part of either party to enter into negotiations or consultations in respect of the unfolding dispute. Finally, it does not appear consistent with the need for orderly and cost-effective procedure to halt this arbitration at this juncture and require the Claimant first to consult with the Respondent before re-submitting the Claimant’s BIT claims to this Tribunal”).

Convention on the Law of Treaties. As Bolivia recognizes,¹⁰⁸ Article 32 allows a tribunal to determine the meaning of a treaty provision via supplementary means when its ordinary interpretation would lead “to a result which is [...] unreasonable.”¹⁰⁹ It would be unreasonable to divest the Tribunal of jurisdiction over three claims due to a purportedly defective notice, especially where they are part of a broader dispute with respect to which negotiations were unsuccessful and Bolivia has indicated no inclination to settle them.

51. Contrary to Bolivia’s contentions, it would be futile to require the Claimants to engage in discussions to settle the claims relating to spot prices, capacity payments and the Worthington engines. As explained in prior submissions, Bolivia has already failed to engage constructively in discussions with respect to compensation for the expropriation of the Claimants’ investment.¹¹⁰ Given its insistence that Guaracachi was worthless when the nationalization took place,¹¹¹ Bolivia’s position is pre-determined with respect to compensation for harm caused to that investment by the other measures. This is confirmed by its submissions to date, in which Bolivia contends that no damage was caused to the Claimants by the three measures in question.¹¹² Moreover, the parties in fact met on 18 June 2012 (after the Memorial was filed, as Bolivia acknowledges),¹¹³ but Bolivia indicated at that meeting that it would not engage in any settlement discussions until the entire arbitral process was suspended. Since a dismissal of

¹⁰⁸ Reply, ¶ 159.

¹⁰⁹ Vienna Convention on the Law of Treaties, **Exhibit CL-5**, Article 32(b).

¹¹⁰ Statement of Claim, ¶¶ 106-110, 167-171.

¹¹¹ EconOne Report, Table 1. Indeed, Bolivia reiterates in its Reply that the negotiations failed because “the fair market value of [Claimants’] nationalized shares is zero [...]” Reply, ¶ 174. The Spanish original reads: “el justo valor de Mercado de las acciones nacionalizadas es nulo”; Statement of Defense, ¶ 136.

¹¹² Statement of Defense, ¶¶ 19-20, 24, 231, 296, 616.

¹¹³ Statement of Defense, footnote 86.

the three claims in question would not result in a suspension of the arbitration, negotiations with respect to these claims would be certain to fail.¹¹⁴

52. The Claimants' efforts to settle their dispute with Bolivia have been extensive and fruitless. It is clear that any further attempts to reach an amicable settlement, particularly with respect to claims that Bolivia has characterized as "frivolous,"¹¹⁵ would be futile.¹¹⁶ In such circumstances, the Treaties require no more. The Tribunal should therefore accept jurisdiction over the claims in question.

B. THE CLAIMANTS' CLAIMS REGARDING SPOT AND CAPACITY PRICES AND THE WORTHINGTON ENGINES RELATE TO THE NATIONALIZATION DISPUTE

53. Even were the Tribunal to conclude that the notice and amicable settlement requirements under the Treaties are mandatory and jurisdictional, the Claimants have complied with these requirements, as explained below.

54. Bolivia does not contest that Bolivia was notified of the dispute with respect to the nationalization of Guaracachi, and that this notification complied with all requirements under the Treaties.¹¹⁷ It is also accepted that the Claimants reserved their rights, in their notices of dispute, to supplement the facts and legal issues upon which the Claimants' claims are based.¹¹⁸ Where additional facts or legal claims are related to the notified dispute, investment tribunals have found that no

¹¹⁴ Bolivia argues in Reply, ¶ 174, that the fact that it has reached settlements with the majority shareholders of the other two nationalized power generators (Corani and Valle Hermoso) shows that settlement discussions would not be futile. This argument cannot be countenanced. Bolivia's conduct in relation to distinct nationalized assets has no bearing on this case. Bolivia has expressly refused to engage in negotiations with the Claimants over the compensation owed for the nationalization of Guaracachi because Bolivia has stated that, it is a worthless asset. Moreover, Bolivia's assertion in its Statement of Defense, ¶ 135, that it reached a settled agreement with the shareholders of Corani and Valle Hermoso in the context of the valuation process set out under the Nationalization Decree is a distortion of the facts. It is public knowledge that Bolivia only settled the Corani dispute after international arbitrations under the UNCITRAL Rules were initiated by the owners of the expropriated shares.

¹¹⁵ Objections, ¶ 177.

¹¹⁶ Counter-Memorial on Jurisdiction, ¶ 83.

¹¹⁷ Counter-Memorial on Jurisdiction, ¶¶ 74–75.

¹¹⁸ Counter-Memorial on Jurisdiction, ¶¶ 74–75.

separate notice is required to raise those related claims in arbitration.¹¹⁹ Bolivia has not taken issue with this approach as a matter of law.¹²⁰ Where the parties diverge is whether the three claims relate to the nationalization dispute as a matter of fact. It is clear that they are related.

55. Based upon Bolivia’s own contentions, that the nationalization and the regulatory measures of which the Claimants complain were part of the same orchestrated political program to increase State control over the domestic electricity market. The nationalization of Guaracachi was simply the culmination of this campaign, and was – according to Bolivia – already contemplated when the spot price and capacity payment measures were implemented.¹²¹
56. The taking of the Worthington engines after nationalization are also clearly related to the nationalization. The engines were seized on 1 May 2010, in the process of carrying out the nationalization. Bolivia justified the taking on the basis of the Nationalization Decree.¹²² Despite both Energais and Rurelec requesting in writing that the Worthington engines be released to their rightful owner since

¹¹⁹ Counter-Memorial on Jurisdiction, ¶¶ 76–77.

¹²⁰ Reply, ¶ 184.

¹²¹ Statement of Defense, ¶ 8(a) (“[...] the [Guaracachi] nationalization on May 1, 2010 [...] had been on the political agenda since 2006, as part of the State’s policy of recovery of control over strategic sectors.” The original Spanish reads: “la nacionalización de EGSA el 1 de mayo de 2010 estaba en la agenda política desde el año 2006 como parte de la política de recuperación por el Estado del control sobre sectores estratégicos.”); ¶ 27 (“it will be demonstrated that the nationalization [...] was a foreseeable measure in the Bolivian political context [...]”). The original Spanish reads: “quedará demostrado que la nacionalización [...] fue una medida previsible en el contexto político boliviano [...]”) ¶ 53 (“The nationalization of the electrical power generating companies, including [Guaracachi] on May 1, 2010 was a measure consistent with the State’s policy of reclaiming the strategic sectors for the company.” The original Spanish reads: “[l]a nacionalización de las empresas generadoras de energía eléctrica, incluida EGSA, el 1 de mayo de 2010, fue una medida coherente con la política de recuperación por el Estado de los sectores estratégicos para el país.”); ¶ 58 (“Following his election [in 2006], the Government of President Morales, in fulfilling his Government Program, took the necessary steps for reclaiming control of the electrical sector.” The original Spanish reads: “[t]ras su elección, el Gobierno del Presidente Morales, en cumplimiento de su Programa de Gobierno, dió los pasos necesarios para recuperar el control del sector eléctrico.”).

¹²² See Letter from Freshfields to Procurador General del Estado, 25 October 2011, **Exhibit C-199**.

August 2010,¹²³ Bolivia has refused to release them. The legal and factual basis for the Worthington claim is therefore closely intertwined with the Claimants' primary complaint with respect to the nationalization.¹²⁴

57. Thus, regardless of the Tribunal's decision on the effect of the notice provisions of the Treaties, the Claimants complied with these requirements. Bolivia's measures regarding spot prices, capacity payments and the Worthington engines are measures that were taken in the context of Bolivia's energy control policy and carried out in the framework of the nationalization. There was therefore no need for a separate notification of these measures.

VI. THE CLAIMS REGARDING SPOT PRICES, CAPACITY PAYMENTS AND THE WORTHINGTON ENGINES ARE TREATY CLAIMS

58. In its Reply, Bolivia repeats the argument that the Claimants' claims relating to spot prices, capacity payments and the Worthington engines are not international treaty claims,¹²⁵ but rather claims under Bolivian law that fall within the exclusive jurisdiction of the Bolivian courts.¹²⁶ Bolivia suggests that this characterization of the claims holds, even accepting the facts alleged by the Claimants as true.¹²⁷
59. Contrary to Bolivia's suggestion, the Claimants do not contend that the mere labeling of claims as international is sufficient to establish the Tribunal's jurisdiction.¹²⁸ The position is rather that if the facts as presented could, *prima facie*, give rise to a breach of the Treaties' provisions, then the resulting claims

¹²³ See Carta de EGSA a Energais, 18 November 2010, **Exhibit R-94**; Correspondence between Energais and Empresa Eléctrica Guaracachi S.A., concerning the return of the Worthington engines owned by Energais, 2010-2011, **Exhibit C-169**; Letter from Freshfields to Procurador General del Estado, 25 October 2011, **Exhibit C-199**; Letter from Freshfields to Procurador General del Estado, 29 November 2011, **Exhibit C-201**.

¹²⁴ See Counter-Memorial on Jurisdiction, ¶ 78.

¹²⁵ Reply, Section VI. See also Objections, Section VI.

¹²⁶ Reply, ¶¶ 202–03.

¹²⁷ Reply, ¶ 199.

¹²⁸ Reply, ¶ 195.

fall within the Tribunal's jurisdiction.¹²⁹ This is the holding of the *Total v. Argentina* decision, which Bolivia cites at length in its Reply¹³⁰:

[I]n order to determine its jurisdiction, the Tribunal must consider whether the dispute, as presented by the Claimant, is *prima facie* within the jurisdiction of an ICSID tribunal established to decide a dispute between a French investor and Argentina under the BIT. [...] The object of the investigation is to ascertain whether the claim, as presented by the Claimant, meets the jurisdictional requirements, as to the factual subject matter at issue, the legal norms referred to as applicable and having been allegedly breached, and the relief sought. [...] The investigation does not prejudice whether the claim is well founded, but aims only to determine whether the Tribunal is competent to pass judgment upon it. [...]

[T]he Tribunal must evaluate whether th[e] facts, if established, [...] could possibly give rise to the Treaty breaches that the Claimant alleges, and which the Tribunal is competent to pass judgment upon. In other words, those facts, if proven to be true, must be "capable" of falling within the provision of the BIT and of having caused or representing treaty breaches as alleged by the Claimant.¹³¹

60. For each of the three claims in question, the Claimants have established a *prima facie* case that Bolivia breached the Treaties.
61. *First*, the Claimants have asked the Tribunal to determine whether Bolivia's alteration of the regulatory regime in relation to spot prices breached the fair and equitable treatment standard, the full protection and security standard, and the obligation not to impair investments by unreasonable measures.¹³² It is uncontested that Bolivia altered the regulatory regime relating to spot prices, and that the Treaties provide the treaty protections in question. The Parties differ primarily as to whether the spot price measure was unfair, arbitrary, unreasonable, or otherwise violated Bolivia's international obligations. Even if the Claimants'

¹²⁹ Counter-Memorial on Jurisdiction, ¶ 87 (citing *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).

¹³⁰ Reply, ¶ 198.

¹³¹ *Total S.A. v. Argentine Republic* (ICSID Case No. ARB/04/1), Decision on Objections to Jurisdiction, 25 August 2006, **RL-127**, ¶¶ 52, 55.

¹³² Counter-Memorial on Jurisdiction, ¶ 86(a); Statement of Claim, ¶¶ 189–209.

legitimate expectations about spot prices were formed by reference to Bolivian law, the claim is not rendered purely domestic in nature.¹³³ Indeed, the frustration of expectations based upon a State’s domestic legal framework has frequently been found to give rise to treaty breaches.¹³⁴ Nor would the calculation of damages arising from the spot price manipulation draw the dispute into the domestic realm, as Bolivia contends.¹³⁵ For all claims, the magnitude of damage is a question of fact, assessed in accordance with international law principles of compensation for breach of international obligations.¹³⁶

62. *Second*, the Claimants have asked the Tribunal to determine whether Bolivia breached the Treaties by failing to provide “effective means” to challenge alteration of the capacity payment system.¹³⁷ It is uncontested that Bolivia altered the capacity payments regime, and that the Treaties require Bolivia to provide “effective means” of asserting claims and enforcing rights in relation to investments. The Parties disagree primarily as to whether a delay of four-and-a-half years in the adjudication of Guaracachi’s claims is consistent with Bolivia’s obligations. Given that the “effective means” clause by definition implicates claims based upon local judicial or administrative remedies, Bolivia’s contention that these circumstances cannot give rise to an international claim are particularly
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¹³³ Reply, ¶ 202(a).

¹³⁴ See, e.g., *Total S.A. v. Argentine Republic* (ICSID Case No. ARB/04/1), Decision on Liability, 27 December 2010, **Exhibit CL-69**, ¶¶ 309(g), 332–33; *National Grid PLC v. Argentine Republic* (UNCITRAL), Award, 3 November 2008, **Exhibit CL-55**, ¶¶ 178-180; *CMS Gas Transmission Co. v. Argentine Republic* (ICSID Case No. ARB/01/8), Award, 12 May 2005, **Exhibit CL-35**, ¶¶ 275-276.

¹³⁵ Reply, ¶ 202(a); Objections, ¶ 194(a).

¹³⁶ In *Total*, the tribunal affirmed jurisdiction over a dispute relating to utility tariffs, rejecting Argentina’s argument that the dispute arose under domestic law and was subject to the exclusive jurisdiction of the domestic courts. *Total S.A. v. Argentine Republic* (ICSID Case No. ARB/04/1), Decision on Objections to Jurisdiction, 25 August 2006, **Exhibit RL-127**, ¶¶ 67, 69 (“the Tribunal cannot accept Argentina’s arguments that the present dispute is not a legal dispute involving the application of the BIT under international law. Nor can the Tribunal accept that it is a contractual dispute involving the renegotiation process”), ¶¶ 67-68 (“For the purpose of ascertaining jurisdiction, the Tribunal considers the above claims to fall within its competence since, *prima facie*, they present conduct by Argentina that may constitute a violation of the BIT obligations and standards of protection to which Total as a French investor is entitled”).

¹³⁷ Counter-Memorial on Jurisdiction, ¶ 86(b); Statement of Claim, ¶¶ 210–20.

- difficult to understand. And, as explained above, the quantification of compensation for harm caused by domestic governmental structures in no way affects the characterization of the claims as based on the Treaties.¹³⁸
63. *Third*, Rurelec asserts that the engines were expropriated by Bolivia, without due process of law or compensation, in breach of the UK Treaty.¹³⁹ Bolivia accepts that Guaracachi sold the Worthington engines to Energais prior to the nationalization, that the engines remained in Guaracachi’s possession post-nationalization, that no compensation has been paid, and that the UK Treaty provides protection in relation to expropriation. The disputed issues here are limited to whether Bolivia illegally expropriated the Worthington engines. Bolivia’s position with respect to attribution does not affect the “international” characterization of the dispute.¹⁴⁰ To the contrary, this argument only confirms the international nature of the dispute.
64. Bolivia thus does not challenge the existence of the facts underpinning the claims relating to spot prices, capacity prices and the Worthington engines.¹⁴¹ Rather, it presents an argument on the merits that Bolivia’s conduct in each instance does

¹³⁸ Reply, ¶ 202(b) (“The true nature of this New Claim is evident, above all, in its quantification, as Bolivia has explained in detail in its Objections.” The original Spanish reads: “[l]a verdadera naturaleza de este Nuevo Reclamo queda patente, sobre todo, en su cuantificación, como Bolivia ha explicado con detalle en sus Objeciones.”); Objections, ¶¶ 275–77.

¹³⁹ Counter-Memorial on Jurisdiction, ¶ 86(c); Statement of Claim, ¶¶ 111–13, 254–59.

¹⁴⁰ Bolivia argues at ¶ 611 of its Statement of Defense that “[n]one of the officials mentioned by Mr. Earl had the capacity to commit the international responsibility of Bolivia.” The original Spanish reads: “Ninguno de los funcionarios mencionados por el Sr. Earl tiene la capacidad de comprometer la responsabilidad internacional de Bolivia.” It makes the same argument at ¶ 202(c) of its Reply: “the Claimants base their claim, solely and exclusively, on alleged verbal declarations of the Manager of ENDE which, even if they were true, could not commit the State under international law.” The original Spanish reads: “las Demandantes basan su reclamo, única y exclusivamente, en supuestas declaraciones orales del Gerente de ENDE que, incluso si fueran ciertas, no podrían comprometer al Estado bajo el derecho internacional.” This is clearly an attribution argument.

¹⁴¹ Reply, ¶ 199 (“Bolivia does not need to supply proof of other facts different from those invoked by the Claimants [...]”). The original Spanish reads: “Bolivia no necesita aportar la prueba de otros hechos distintos a los invocados por las Demandantes [...]”).

not trigger liability under the Treaties, and it masks those arguments as a jurisdictional objection.

65. Finally, Bolivia's attempt to draw support from the *Iberdrola v. Guatemala* case is unavailing. In *Iberdrola*, the claimant complained that the electricity regulator's calculation of the tariffs applicable to its investment in the course of a periodic tariff review had been incorrect and contrary to the claimant's interpretation of the Guatemalan electricity legal framework.¹⁴² This complaint had been submitted to the Guatemalan courts, which concluded that the regulator's interpretation of the legal framework was correct. The claimant then presented the same argument, based on *Guatemalan law*, to the investment treaty tribunal. The *Iberdrola* tribunal denied jurisdiction because:

[T]he claimant [...] is asking the Tribunal [...] to review the regulatory decisions of the [regulator] and the judicial decisions of the Guatemalan courts, not in light of international law, but rather the domestic law of Guatemala. The Tribunal, according to the claim as presented by the claimant, would have to act as a regulator, as an administrative entity or as a court, to decide [...] the claims based on Guatemalan law.¹⁴³

66. This bears no resemblance to the claims in relation to spot prices and capacity payments. The Claimants are not asking the Tribunal to set the prices applicable to their investment. Rather, they claim that the alteration of the spot price and capacity payment regimes violated *specific international obligations* giving rise to a right of compensation under the Treaties. A Bolivian regulator could not rule on the international legitimacy of the relevant regulatory regime and the domestic remedies available to challenge its decisions. The Tribunal is thus not in the position of the arbitrators in *Iberdrola*, who had been asked to step into the shoes of the local regulatory authority.

¹⁴² *Iberdrola Energía, S.A. v. Republic of Guatemala* (ICSID Case No. ARB/09/5), Award, 17 August 2012, **Exhibit RL-22**, ¶ 354.

¹⁴³ Counter-Memorial on Jurisdiction, ¶ 88; *Iberdrola Energía, S.A. v. Republic of Guatemala* (ICSID Case No. ARB/09/5), Award, 17 August 2012, **Exhibit RL-22**, ¶ 354.

67. The Claimants have formulated Treaty claims that are *prima facie* admissible for present purposes. Bolivia’s objections must therefore be denied, and the relevant claims adjudicated on the merits.

VII. ARTICLE IX(2) OF THE US TREATY DOES NOT PREVENT THE TRIBUNAL FROM HEARING GAI’S “EFFECTIVE MEANS” CLAIM

68. In its Reply, Bolivia repeats its assertion that, having submitted a dispute relating to the alteration of the capacity payment regime to the Bolivian courts, the Claimants have taken the “fork in the road” of Article IX of the US Treaty, and are thus precluded from presenting a claim that Bolivia denied them effective means of asserting claims and enforcing rights with respect to their investment in Guaracachi in breach of the US Treaty (Article II.4) and the UK Treaty (by way of the most-favored nation (*MFN*) provision in Article 3).¹⁴⁴ Bolivia’s objection is unfounded.

69. The Claimants have already shown that there is no “fork in the road” clause in the UK Treaty and, therefore, Bolivia’s defense could apply only in relation to GAI’s “effective means” claim.¹⁴⁵ Bolivia now argues that Rurelec cannot import the substantive “effective means” standard through the UK Treaty’s MFN clause without also importing the “fork in the road” clause from the US Treaty.¹⁴⁶ Bolivia makes this argument in a footnote and supports it with no authority.¹⁴⁷ A substantive treaty standard constitutes more favorable treatment accorded to a third-party national to which the claiming party is entitled, independent of the dispute settlement provisions to which the third-party national is subject.¹⁴⁸

¹⁴⁴ Reply, Section VII.

¹⁴⁵ Counter-Memorial on Jurisdiction, ¶¶ 91-98.

¹⁴⁶ Reply, footnote 202.

¹⁴⁷ *Ibid.*

¹⁴⁸ *Siemens AG v. Argentine Republic* (ICSID Case No. ARB/02/8), Decision on Jurisdiction, 3 August 2004, **Exhibit CL-109**, ¶ 120 (“This understanding of the operation of the MFN clause would defeat the intended result of the clause which is to harmonize benefits agreed with a party with those considered more favorable granted to another party. It would oblige the party claiming

70. In any event, the Claimants have established that a “fork in the road” clause will only be triggered if the “triple identity” test is satisfied.¹⁴⁹ Bolivia’s argument to the contrary is without support and contrary to the text of the US Treaty.
71. In accordance with Article IX, in order to be entitled to submit a treaty dispute to arbitration: (a) there must be a dispute between a State party to the US Treaty and an investor of the *other* State party; (b) that dispute must relate to the breach of the US Treaty; and (c) the *same* “investment dispute” must not have been previously submitted to the national courts of the State party or to “previously agreed dispute settlement procedures”.¹⁵⁰ The US Treaty thus expressly incorporates the “triple identity test,” such that an investor will be precluded from submitting a claim to arbitration where a dispute submitted to domestic court litigation involves: (i) the same parties (the State party and the investor of the other State party); (ii) the same subject matter or relief requested; and (iii) the same legal basis (i.e. the treaty).
72. Bolivia nevertheless contends that the Tribunal should consider that there is an “identity of parties” in this case, because the entities involved in both the domestic court litigation and the arbitration – GAI and Guaracachi – are part of the same group of companies.¹⁵¹ This would be inconsistent with the express terms of the Article IX(3) of the US Treaty: “provided that *the national or*

a benefit under a treaty to consider the advantages and disadvantages of that treaty as a whole rather than just the benefits. [...] However, this is not the meaning of an MFN clause. As its own name indicates, it relates only to more favorable treatment”).

¹⁴⁹ Virtually every investment arbitration tribunal that has applied such a clause has required an identity of parties, cause of action and subject matter or relief requested in order to trigger a “fork in the road” provision. In its Counter-Memorial on Jurisdiction, GAI cited no fewer than sixteen cases that applied these criteria. *See* Counter-Memorial on Jurisdiction, footnote 195–96. Bolivia refers to a single case, *Genin v Estonia*, claiming that the case applied a double, and not a triple, identity test. *See* Reply, ¶ 211 and footnote 218. This is incorrect. Although the *Genin* tribunal specifically named only two parts of the “triple identity” test, the tribunal did so only because it was following Estonia’s argument in that regard, which the tribunal ultimately rejected. *Alex Genin, Eastern Credit Limited, INC. and A.S. Baltoil v. Republic of Estonia* (ICSID Case No. ARB/99/2), Award, 25 June 2001, **Exhibit RL-128**, ¶ 332.

¹⁵⁰ US Treaty, **Exhibit C-17**, Article IX(a)–(c).

¹⁵¹ Reply, ¶ 211.

company concerned has not submitted the dispute for resolution [to State courts], [...] *the national or company concerned* may submit the dispute for settlement by binding arbitration.” It is clear from this text that the treaty is referring to only one company.¹⁵² Moreover, GAI did not participate in the Bolivian proceedings.¹⁵³

73. Bolivia also argues that the Tribunal should equate the Bolivian court proceedings and this arbitration as the “same dispute”, because the parties share the “same interests”. This is both irrelevant and incorrect. The interests underlying a dispute do not determine the nature of the dispute. The domestic and international disputes remain wholly distinct. Whereas Guaracachi has asked the Supreme Court to reverse administrative rulings upholding a regulatory change pursuant to Bolivian law, GAI asks this Tribunal to award it compensation for Bolivia’s violation of treaty obligations resulting from the Supreme Court’s inaction. The subject matter, legal basis and relief requested in both proceedings are different.
74. Discarding the identity criterion entirely, Bolivia further contends that the Tribunal should decline jurisdiction because parallel litigation and arbitration claims could lead to the Claimants receiving “double compensation”.¹⁵⁴ This would be impossible. If the Bolivian Supreme Court were to find in Guaracachi’s favor at some point in the future, this would benefit only the now-nationalized Guaracachi, and not the Claimants.
75. Contrary to Bolivia’s rhetoric, application of the traditional “triple identity test” would not transform the fork-in-the-road into a “dead letter”.¹⁵⁵ Under the US

¹⁵² The Respondent has no jurisprudential authority for its “group of companies” theory. Although footnote 218 of Bolivia’s Reply suggests that *Genin* examined the claimants in that arbitration as a “group”, this was merely an argument advanced by Estonia. The tribunal specifically held at ¶ 331 of its decision (**Exhibit RL-128**) that though “the revocation of the Bank’s license *certainly affected the interests of the Claimants [...] this in itself did not make them parties to these proceedings.*” (emphasis added).

¹⁵³ Nor, after the nationalization, does Guaracachi share the same interests as GAI, as the former is now held by the Respondent.

¹⁵⁴ Reply, ¶ 208.

¹⁵⁵ Reply, ¶ 206.

Treaty, an investor can chose to submit its treaty dispute to a domestic court or to an arbitral tribunal. If an investor submits a dispute to a court, that same investor cannot present the same claim to an arbitral tribunal. This is the only purpose the provision was designed to serve.

76. The Tribunal should therefore apply the standard criteria for application of the fork-in-the-road clause. The parties to the local proceedings (Guaracachi and SIRESE) are distinct from the Claimants. The subject matter and relief requested in Bolivia (the reversal of administrative rulings *versus* monetary damages) are different from those in this arbitration. And, the cause of action in each case is different (Bolivian law in the courts, and the Treaties here). Bolivia’s objection should therefore be rejected.¹⁵⁶

VIII. THE CLAIMANTS’ CLAIMS REGARDING SPOT PRICING AND THE WORTHINGTON ENGINES ARE NOT PREMATURE

77. In contradiction with its previous objection that the Claimants are precluded from pursuing treaty claims because they submitted a dispute regarding capacity payments to the Bolivian courts, Bolivia objects to the jurisdiction of this Tribunal to hear the Claimants’ claims regarding spot prices and the Worthington engines because they were *not* previously submitted to the Bolivian courts.
78. In its Objections, Bolivia stated that “[a] claim under a treaty may be considered premature when the investor does not exhaust the available appeals nor even requests that local authorities correct the allegedly wrongful act [...]”¹⁵⁷ On this

¹⁵⁶ Bolivia has relied on two cases to support its criticism of the “triple identity” criteria: *Chevron v. Ecuador* and *Pantechniki v. Albania*. Although the Chevron tribunal questioned the triple identity” test in *dicta*, it ultimately applied that very criteria in declining the respondent’s objection. See *Chevron Corporation and Texaco Petroleum Corporation v. Republic of Ecuador [III]* (PCA Case No 2009-23), Third Provisional Award on Jurisdiction, 27 February 2012, **Exhibit RL-23**, ¶¶ 4.74-4.80. The sole arbitrator in *Pantechniki* also used “triple identity” criteria in his analysis. See *Pantechniki S.A. Contractors & Engineers v. Albania* (ICSID Case No ARB/07/21), Award, 30 July 2009, **Exhibit RL-18**, ¶¶ 61-68.

¹⁵⁷ Objections, ¶ 318. The original Spanish reads: “[u]n reclamo bajo un tratado puede ser considerado prematuro cuando el inversionista no agota los recursos disponibles o ni siquiera solicita a las autoridades locales que corrijan el acto supuestamente ilícito.”

basis, it stated that claims regarding spot pricing and the Worthington engines should be dismissed as premature, purportedly because the Claimants did not invoke or exhaust domestic remedies.¹⁵⁸ In its Counter-Memorial on Jurisdiction, Claimants demonstrated that neither Treaty requires the invocation or exhaustion of local remedies. Indeed, the US Treaty forces a party *to choose* whether to bring its claims before an international arbitral tribunal or a domestic court.¹⁵⁹ Claimants explained that imposing a requirement to resort to local remedies prior to commencing an investment treaty arbitration would run counter to the object and purpose of investment treaties and would be contrary to the vast majority of arbitral jurisprudence on the issue.¹⁶⁰ Bolivia has not responded to these arguments in its Reply.

79. The only point to which Bolivia responds is the debunking of its reliance on *Loewen v. United States*, *Jan de Nul v. Egypt*, and *Generation Ukraine v. Ukraine*.¹⁶¹ Bolivia argues that *Loewen* and *Jan de Nul* support the imposition of a local remedies requirement.¹⁶² Bolivia’s quotations from these decisions in its Reply omit critical passages that demonstrate that this is simply not true.¹⁶³

¹⁵⁸ Objections, ¶ 317.

¹⁵⁹ Counter-Memorial on Jurisdiction, ¶ 100.

¹⁶⁰ Counter-Memorial on Jurisdiction, ¶ 101.

¹⁶¹ Reply, ¶¶ 220–23; Counter-Memorial on Jurisdiction, ¶¶ 102–03.

¹⁶² Reply, ¶¶ 220–21.

¹⁶³ For example, Bolivia fails to quote the entire paragraph from the *Loewen* case in paragraph 221 of its Reply. *Compare* Reply, ¶ 221 quoting *Loewen* as stating that it is necessary to “afford the State the opportunity of redressing through its legal system the inchoate breach of international law” with the full paragraph that states (italic portions omitted from Bolivia’s Reply) “[t]he purpose of the requirement that a decision of a lower court be challenged through the judicial process before the State *is responsible for a breach of international law constituted by judicial decision* is to afford the State the opportunity of redressing through its legal system the inchoate breach of international law occasioned by the lower court decision. The requirement has application to breaches of Articles 1102 and 1110 as well as Article 1105.” *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. The Claimants are not invoking a “breach of international law constituted by judicial decision” and thus should not be held to its substantive requirements.

Moreover, the reference to *Jan de Nul* in that same paragraph fails to include the sentence from the tribunal’s decision that states there was no requirement to engage in mandatory pre-trial procedures before local courts. *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic*

Likewise, Bolivia's analogy to *Generation Ukraine* (a case which the Claimants have shown should not be followed as a matter of legal principle) is inaccurate because the analogy is based on the flawed premise that Bolivia's decisions were either taken by low level officials or not vigorously protested.¹⁶⁴ In relation to the spot pricing claim, the impugned measures were issued by the President of the Bolivia through the issuance of a Supreme Decree.¹⁶⁵ As to the Worthington engines, the measure was, indeed, vigorously protested.¹⁶⁶

80. Bolivia's objection regarding prematurity, and its arguments in its Reply, are completely unfounded. It should be dismissed for the reasons set out in the Claimants' Counter-Memorial on Jurisdiction¹⁶⁷ and above.

IX. BOLIVIA'S REQUEST FOR SECURITY FOR COSTS

81. Bolivia's suggests at paragraph 231 of its Reply that there is a risk that the Claimants may be unable to pay an award of costs, should such an award be rendered against them. This suggestion, based solely on press reports regarding the Claimants' external financing, is absurd, as is Bolivia's request that the Tribunal order the Claimants to provide a bank bond covering the eventual costs of the arbitration.¹⁶⁸
82. Bolivia has failed to support its request with fact or legal authority. None is available. As regards the facts, the Tribunal need only consider the conduct of the parties throughout this arbitration to decide the merits of Bolivia's request. Bolivia repeatedly delayed the payment of the advances on the costs of the

of Egypt (ICSID Case No. ARB/04/13), Decision on Jurisdiction, 16 June 2006, **Exhibit RL-12**, ¶ 121.

¹⁶⁴ Reply, ¶¶ 222–23.

¹⁶⁵ Statement of Claim, ¶ 96; Exhibit C-154.

¹⁶⁶ Statement of Claim, ¶ 255; Statement of Defense, ¶¶ 617-27.

¹⁶⁷ See Counter-Memorial on Jurisdiction, ¶¶ 99–103.

¹⁶⁸ Reply, ¶ 233(2)(b) (“de manera subsidiaria, ordene a las Demandantes otorgar una garantía bancaria que cobra los eventuales costos del arbitraje.”)

arbitration, and it failed on multiple occasions to respect the agreed upon and ordered procedural timetable. The Claimants, by contrast, have made every advance on the Tribunal's fees and expenses and have complied with each of the Tribunal's orders.

83. As regards the law, the granting of security for costs in investment treaty arbitration would be unprecedented.¹⁶⁹ As the *Libananco v. Turkey* tribunal held, "it would only be in the most extreme case – one in which an essential interest of either Party stood in danger of irreparable damage – that the possibility of granting security for costs should be entertained at all."¹⁷⁰ More recently, in *Commerce Group v. El Salvador*, the *ad hoc* committee held that security for costs was not required even where, unlike here, the applicants were facing financial difficulties that had prevented them from making the required advances to ICSID.¹⁷¹
84. Bolivia's request should therefore be denied.

X. REQUEST FOR RELIEF

85. On the basis of the foregoing, and reserving all of their rights, the Claimants respectfully request that the Tribunal:
- (a) DISMISS Bolivia's requests for relief;
 - (b) DECLARE that it has jurisdiction to decide this dispute in its entirety;

¹⁶⁹ See, e.g., *Únete Telecomunicaciones S.A. and Clay Pacific S.R.L. v. Republic of Ecuador* (UNCITRAL), Procedural Order No. 5, 29 September 2010, **Exhibit CL-148**.

¹⁷⁰ *Libananco Holdings Co. Limited v. Republic of Turkey* (ICSID Case No. ARB/06/8), Decision on Preliminary Issues, 23 June 2008, **Exhibit CL-147**, ¶ 57.

¹⁷¹ *Commerce Group Corp. & San Sebastian Gold Mines, Inc. v. Republic of El Salvador* (ICSID Case No. ARB/09/17), Annulment Proceeding, Decision on El Salvador's Application for Security for Costs, 20 September 2012, **Exhibit CL-149**, ¶¶ 48–54.

- (c) AWARD attorneys' fees and costs of this phase of the arbitration to the Claimants, plus interest; and
- (d) AWARD such other relief as the Tribunal considers appropriate.

Respectfully submitted on 20 December 2012



Freshfields Bruckhaus Deringer

Nigel Blackaby
Noah Rubins
Caroline Richard
James Freda

for the Claimants