

CENTRO INTERNACIONAL DE ARREGLO DE
DIFERENCIAS RELATIVAS A
INVERSIONES

CARLOS RÍOS Y
FRANCISCO JAVIER RÍOS
Demandantes

Contra

LA REPÚBLICA DE CHILE
Demandada

(Caso ARB/17/16)

AUDIENCIA SOBRE EL FONDO

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(A la hora 9:02)

INTERROGATORIO CONJUNTO A LOS PERITOS
 JAMES DOW Y RICHARD CALDWELL (Continuación)

PRESIDENTA KAUFMANN-KOHLER: Muy buenos días a todos. Good morning sirs, we are ready to proceed with the cross-examination. Is there a problem? Is everybody ready? Fine.

Good, if there is nothing to be raised before we start, we can go directly to the cross-examination. You have the floor for the questions, please.

SEÑORA GEHRING FLORES: Thank you, Madam President. Good morning, gentlemen. My name is Gaela Gehring Flores and I represent the Republic of Chile. I trust you both are very experienced in these sorts of things. I believe everyone has been instructed that there is interpretation happening and court reporters, and thank you very much to the interpreters and court reporters for putting up with us. We should try not to speak over each other.

My first question I wanted to direct to Mr Caldwell. I believe at appendix A of Brattle's First Report, on page 100, I guess your CV actually starts at page 97. Is that correct?

SEÑOR CALDWELL: It seems that way, yes.

SEÑORA GEHRING FLORES: And how long have you had this particular version of your CV?

SEÑOR CALDWELL: Oh -- I don't know. When was this report written? Is it 2008? It may have been prepared some time before then and slotted in in the preparation of this report.

SEÑORA GEHRING FLORES: And the experience that you list in your CV over the next several pages, is that also published on your professional website?

SEÑOR CALDWELL: Do you know what? I don't know what Brattle does on our website. I haven't checked it recently.

SEÑORA GEHRING FLORES: But at least this CV has been in existence for a few years?

SEÑOR CALDWELL: Yes, I imagine so.

1 SEÑORA GEHRING FLORES: And would you say
2 that your CV is the representation of your
3 professional experience?

4 SEÑOR CALDWELL: It is attempting to give a
5 sense of what I have done. It is not complete
6 or, you know, exhaustive but it is giving a
7 sense.

8 SEÑORA GEHRING FLORES: Does it contain your
9 personal opinions?

10 SEÑOR CALDWELL: Does it contain my personal
11 opinions? I don't really know what you mean by
12 that, but it is just trying to list things.

13 SEÑORA GEHRING FLORES: But it would only
14 contain your professional experience. It
15 wouldn't contain your personal opinions?

16 SEÑOR CALDWELL: I don't know what you mean
17 by personal opinions, so ...

18 SEÑORA GEHRING FLORES: That is okay. Since
19 what year have you been working for Claimants?

20 SEÑOR CALDWELL: Oh, I think -- let me see.
21 This was February 2018, so we began in 2017 to
22 prepare this report.

1 SEÑORA GEHRING FLORES: And you didn't work
2 for Claimants before 2017?

3 SEÑOR CALDWELL: Not that I can recall.

4 SEÑORA GEHRING FLORES: And in working with
5 Claimants you have assisted them in their
6 submissions before this Tribunal in this
7 proceeding, correct?

8 SEÑOR CALDWELL: We prepared these three
9 reports. That is essentially our work here.

10 SEÑORA GEHRING FLORES: Have you assisted
11 them before any other decision makers?

12 SEÑOR CALDWELL: We certainly haven't
13 appeared before any other decision maker.

14 SEÑORA GEHRING FLORES: Have you assisted
15 them in their submissions before any other
16 authorities, whether it is this Tribunal or
17 perhaps courts or administrative agencies?

18 SEÑOR CALDWELL: The answer is, from what
19 I can remember, I don't know whether they have
20 used some of our analyses for other bodies, but
21 this is the sum total of our analysis, if you
22 see what I mean. This is our principal

1 analysis. Whether the companies have used this
2 here and elsewhere, I simply don't recall, or
3 elements of this elsewhere.

4 SEÑORA GEHRING FLORES: You don't recall?
5 Or are you aware if they have used --

6 SEÑOR CALDWELL: I am not aware. I just
7 don't know what they have done with it.

8 SEÑORA GEHRING FLORES: So they have never
9 approached you and asked to use your analysis
10 before Chilean authorities, for instance?

11 SEÑOR CALDWELL: I know in our engagement
12 for this project we were engaged to prepare
13 these reports in the context of this
14 proceeding. I don't think there is a
15 restriction on them to limit it to this
16 proceeding.

17 SEÑORA GEHRING FLORES: Could you please go
18 to page 100 of the first Brattle report? It is
19 part of your CV. There is an entry there at
20 the top of the page. It says "Value of a bus
21 network. Providing expert testimony for
22 investors in a bus transit network in

1 Latin America concerning the financial impact
2 of numerous failures by the transportation
3 authority such as in relation to fare evasion,
4 road improvement and network operation". Do
5 you see that, Mr Caldwell?

6 SEÑOR CALDWELL: I do see that.

7 SEÑORA GEHRING FLORES: Are you describing
8 this case there, Mr Caldwell?

9 SEÑOR CALDWELL: Yes, I think it must be
10 this case. I think this has been inserted in
11 my CV at the same time as the CV has been
12 inserted in the report.

13 SEÑORA GEHRING FLORES: When you say "It has
14 been inserted", by whom was it inserted?

15 SEÑOR CALDWELL: Either by me -- I don't
16 recall doing it, but it is either by me or one
17 of my assistants who helped in the preparation
18 of the report. So I think probably the goal
19 was to update the CV and make sure an updated
20 CV was in the report, and I don't remember, as
21 I say, whether it was me or an assistant.
22 I just don't recall.

1 SEÑORA GEHRING FLORES: Just to clarify,
2 when you were hired by Claimants, was
3 Professor Dow hired with you?

4 SEÑOR CALDWELL: Yes, we were both hired
5 together.

6 SEÑORA GEHRING FLORES: And in your
7 description of this case, I am intrigued by the
8 word "failures."

9 SEÑOR CALDWELL: If you want, that is
10 just --

11 SEÑORA GEHRING FLORES: Who failed? Who
12 failed?

13 SEÑOR CALDWELL: Who failed? Well, it says
14 here "the financial impact of numerous failures
15 by the transportation authority". If you want
16 to put "alleged" failures, or what -- the
17 attempt there is just to say there has been
18 breaches that we have to quantify.

19 SEÑORA GEHRING FLORES: But you didn't put
20 "alleged," did you?

21 SEÑOR CALDWELL: Well, not here obviously.

22 SEÑORA GEHRING FLORES: Obviously?

1 SEÑOR CALDWELL: Because it is not in the
2 paragraph.

3 SEÑORA GEHRING FLORES: This is your
4 professional CV. It does not contain your
5 personal opinions, correct?

6 SEÑOR CALDWELL: Yes.

7 SEÑORA GEHRING FLORES: So it is your
8 professional opinion that the Chilean
9 government has failed in this case?

10 SEÑOR CALDWELL: No. The attempt here is
11 not to indicate a view on liability. That is
12 for the Tribunal to decide. It is an attempt,
13 and maybe an inartful attempt, to simply list
14 something we are doing. We are providing
15 expert testimony in a case where there is a
16 claim that the Chilean government has failed
17 and had financial impact. So that is maybe an
18 inartful way of describing it, but that was the
19 intent.

20 SEÑORA GEHRING FLORES: But this CV has
21 existed for about three years, at least. Is
22 that right?

1 SEÑOR CALDWELL: I think it must have -- as
2 I say, it must have been updated at the same
3 time as the report was prepared, and then
4 slotted in at the back.

5 SEÑORA GEHRING FLORES: I am not
6 sure -- Professor Dow, are you the principal
7 expert?

8 SEÑOR DOW: Yes.

9 SEÑORA GEHRING FLORES: Then I will submit
10 these questions to you both and you can decide
11 who is going to answer.

12 The but-for scenario is the world as it
13 would exist without the alleged breaches,
14 correct?

15 SEÑOR DOW: Correct.

16 SEÑORA GEHRING FLORES: And that is the
17 extent of it, correct? In other words, you
18 just adjust the financial state or the impacts
19 on the entity in question by removing what you
20 consider to be the effects of the alleged
21 violation, is that correct?

22 SEÑOR DOW: Correct. We start from what

1 actually happened and we remove the effects, as
2 we quantify them, of the alleged breaches.

3 SEÑORA GEHRING FLORES: Within that
4 framework you cannot correct anything that is
5 unrelated to the alleged violations, right?

6 SEÑOR DOW: Correct.

7 SEÑORA GEHRING FLORES: And being
8 independent experts, you are not supposed to
9 over-correct, is that is right?

10 SEÑOR DOW: That is right.

11 SEÑORA GEHRING FLORES: To illustrate the
12 point I would just like to give you a
13 hypothetical. An investor owns a widget
14 factory -- I am not sure how "widget"
15 translates into Spanish, but we will try.
16 Before the State measures in dispute occur, the
17 widget factory consistently has a productivity
18 rate of 100 widgets per month. The investor
19 alleges certain measures by the State caused
20 the productivity to fall to 50 widgets per
21 month. In your but-for scenario you would
22 correct for the State's actions by returning

1 the productivity rate to 100 widgets per month,
2 right?

3 SEÑOR DOW: You are saying that the rate was
4 previously 100, it falls to 50 due to the
5 actions of the State, and in the but-for your
6 question is would we return it to 100?

7 SEÑORA GEHRING FLORES: In your analysis,
8 yes.

9 SEÑOR DOW: The answer is yes, except for a
10 small qualification that we would have to start
11 not with the previous year, where it was 100,
12 but with the current year, where it might be
13 different to 100.

14 SEÑORA GEHRING FLORES: With the current
15 year --

16 SEÑOR DOW: Your hypothesis is last year
17 production was 100?

18 SEÑORA GEHRING FLORES: Yes.

19 SEÑOR DOW: This year production is 50?

20 SEÑORA GEHRING FLORES: Yes.

21 SEÑOR DOW: Do we restore it to 100? The
22 answer is there may be other things changing,

1 so we don't necessarily restore it to 100,
2 which relates to the previous year, but we do
3 attempt to restore it to what it would have
4 been this year, which could be different from
5 100 due to various factors such as changes in
6 input prices or something like that.

7 SEÑORA GEHRING FLORES: Would you restore it
8 to -- I guess relatively speaking, would you
9 restore it to a productivity rate that was
10 better than any productivity rate they had ever
11 achieved?

12 SEÑOR DOW: Well, we would have to have a
13 hypothesis about what the productivity would
14 have been in the current year, and we would
15 restore it according to that hypothesis or
16 model. So where would that model come from?
17 We would need to have some advice from somebody
18 who knows more about the widget production
19 business, who would give an expert opinion on
20 what productivity would have been this year but
21 for the measures.

22 SEÑORA GEHRING FLORES: But what the

1 productivity would have been in the current
2 year but for the disputed measures would have
3 to be based on some sort of objective evidence,
4 correct?

5 SEÑOR DOW: Correct.

6 SEÑORA GEHRING FLORES: And do you normally
7 do your own independent analysis of what that
8 current year productivity should be?

9 SEÑOR DOW: The only case I have done which
10 was about widgets and was similar -- it really
11 was about widgets actually -- and was similar
12 to your hypothesis, we used management
13 documents which contain their expectations
14 about what productivity would have been.

15 SEÑORA GEHRING FLORES: But as a general
16 matter, when you are correcting for the State's
17 actions, your end goal is not to create a
18 better world than what existed before the
19 State's actions, correct?

20 SEÑOR DOW: Correct.

21 SEÑORA GEHRING FLORES: Before the State
22 actions, correct?

1 SEÑOR DOW: Well, it is not so much a matter
2 of comparing with what happened last year,
3 because things might have changed since last
4 year. Prices might have changed, other things
5 might have changed. So it is about restoring,
6 in your example, this year's output to what it
7 would have been but-for the measures, which
8 could be higher or lower than what it was last
9 year.

10 SEÑORA GEHRING FLORES: But you are not
11 creating a better world than what would have
12 existed but-for the measures?

13 SEÑOR DOW: No, we are trying to create an
14 accurate representation of the world that would
15 have existed but for the measures.

16 SEÑORA GEHRING FLORES: To say it another
17 way, unless our hypothetical started or assumed
18 utopia, the but-for world is not a perfect
19 world, correct?

20 SEÑOR DOW: I'm not sure. I think you are
21 asking me is the but-for world a perfect world.
22 The answer is no, not a perfect world.

1 SEÑORA GEHRING FLORES: So let's move to
2 your but-for world.

3 ICR and ICF discounts. These are discounts
4 from the bus operator's monthly payment
5 associated with a bus operator's regularity and
6 frequency, is that correct?

7 SEÑOR DOW: Correct.

8 SEÑORA GEHRING FLORES: Do you agree that in
9 the actual scenario, Alsacia and Express's ICR
10 and ICF discounts averaged 4 per cent
11 from May 2012 to May 2017?

12 SEÑOR DOW: I don't recall the exact number
13 but in our presentation yesterday we gave the
14 number, which was, I think, roughly in that
15 area.

16 SEÑORA GEHRING FLORES: Could we go to
17 Brattle's First Report, table 7, which is below
18 paragraph 179, please? Does this refresh your
19 recollection?

20 SEÑOR DOW: So you are saying -- could you
21 remind me of your question?

22 SEÑORA GEHRING FLORES: In the actual

1 scenario were Alsacia and Express' ICR and ICF
2 discounts averaging at 4 per cent from 2012 to
3 2017?

4 SEÑOR DOW: I don't see an average of
5 4 per cent here, but maybe I am missing
6 something.

7 SEÑOR CALDWELL: If I [can] answer this. .
8 I think I can see in row 6 there is a figure of
9 2.5 for the period 2012 to 2017, and then in
10 row 7 there is a further figure of 1.5. If you
11 add those two together I think you get the
12 4 per cent that you are talking about. That is
13 what you are referring to?

14 SEÑORA GEHRING FLORES: Yes, I am. Thank
15 you.

16 Now, in Alsacia and Express's own 2012
17 forecast to their bond holders, the companies
18 themselves assumed that 5 per cent of Express's
19 revenues would go to ICR and ICF discounts. Do
20 you recall that? Well, actually let me make
21 sure you recall. I believe you attached as
22 BG-147 to your reports the 2012 forecasts. Do

1 you recall what I am talking about,
2 the May 2012 base model case?

3 SEÑOR CALDWELL: Yes.

4 SEÑORA GEHRING FLORES: And in the companies
5 forecast, and assumed that Express -- and this
6 particular table is only for Express -- would
7 have a 5 per cent ICR and ICF discount with
8 respect to its revenues going forward?

9 SEÑOR DOW: I can see that there, yes. 2
10 plus 3, 5.

11 SEÑORA GEHRING FLORES: Thank you. But in
12 your but-for scenario you assume that Alsacia
13 and Express have -- both have zero per cent ICR
14 and ICF discounts, is that right?

15 SEÑOR DOW: Correct. As I showed in my
16 presentation yesterday. I had a slide on the
17 discounts and in that slide I showed that we
18 had a legal instruction based on input from the
19 transport experts to assume no discounts on
20 those two items.

21 SEÑORA GEHRING FLORES: Was it a legal
22 instruction or was it an instruction from the

1 transport experts? I am confused.

2 SEÑOR DOW: I believe that the transport
3 experts gave opinions about the -- there is a
4 non-linear relationship between the performance
5 on the indicators and the discounts, and
6 I believe that the transport experts, BRT and
7 Transconsult gave an opinion on the indicator
8 performance and, based on that, we had a legal
9 instruction to assume zero discounts. And in
10 that slide I also showed a sensitivity to
11 having some discounts.

12 SEÑORA GEHRING FLORES: If you could speak a
13 little bit closer to the microphone, Professor
14 Dow, please.

15 So you think that the legal instruction
16 relates to analysis by or an opinion by BRT?
17 Is that right?

18 SEÑOR CALDWELL: Well, I mean, from our
19 perspective it is a legal instruction. You can
20 see that explained in paragraph 195 of our
21 First Report. We are not transportation
22 experts, so can't tell the Tribunal what the

1 ICF and ICR would have been but-for.

2 I will reflect, I think, what Professor Dow
3 is reflecting is our understanding of where the
4 legal instruction comes from, but functionally
5 for us what matters is we received a legal
6 instruction to assume zero ICF and ICR.

7 SEÑORA GEHRING FLORES: Could I turn you to
8 slide 9 of the second presentation that you
9 gave yesterday? I believe that is your
10 response to the Versant reports. It is going
11 to come up on your screen. Can you see that on
12 your screen?

13 SEÑOR CALDWELL: Yes.

14 SEÑORA GEHRING FLORES: So here we have a
15 relatively busy graph. It says "Source, BRT --

16 PRESIDENTA KAUFMANN-KOHLER: Can I for the
17 transcript say this was the first presentation,
18 right?

19 SEÑORA GEHRING FLORES: I believe this
20 is -- sorry.

21 PRESIDENTA KAUFMANN-KOHLER: It is the one
22 entitled "Analysis of operating and financial

1 performance."

2 SEÑORA GEHRING FLORES: Right. Yes. That
3 is correct. So it must have been the first
4 presentation, slide 9, and it is a slide that
5 has a title "Demand fall compounded by ..."
6 and it has this graph on the side and it says
7 "Source, BRT/Transconsult" with nothing else.
8 Can you tell me where this comes from?

9 SEÑOR CALDWELL: I think this one actually
10 comes from the opening, the Claimants' opening,
11 and we understand it is the latest data for
12 this year on the ICR.

13 SEÑORA GEHRING FLORES: Right. It goes out
14 to March 2019, doesn't it?

15 SEÑOR CALDWELL: I can hardly see that, but
16 I think that is right.

17 SEÑORA GEHRING FLORES: If we can go to
18 slide 122 of Claimants' opening -- I guess,
19 just while we are doing that, just to clarify,
20 you didn't prepare this?

21 SEÑOR CALDWELL: We didn't prepare that
22 slide. We were just noting what has happened

1 more recently.

2 SEÑOR DOW: We didn't prepare the graphic.

3 SEÑOR CALDWELL: We prepared the slide; we
4 didn't prepare the graphic.

5 SEÑORA GEHRING FLORES: Do you know who did
6 prepare that graphic?

7 SEÑOR CALDWELL: Individually, no. We
8 picked it up from the Claimants' opening,
9 I understand. Yes, I don't know individually
10 who prepared it.

11 SEÑORA GEHRING FLORES: So now I have opened
12 slide 122 from Claimants' opening, which
13 contains a variety of things on one slide. On
14 the bottom right it contains this graphic,
15 which has quite a different cite for this
16 graph. You can see it states indicadores de
17 operación, Q1.1, reportes de velocidades de
18 Express del 1 al 13 de marzo de 2019, C-733 a
19 C-749, correo electrónico enviado por el DTPM a
20 Express de Santiago. It's a very long cite
21 and at the end it says C-750.

22 That cite is different from the cite on your

1 slide, isn't it?

2 SEÑOR CALDWELL: I think that is probably
3 the correct cite, so you should update the
4 source on our slide.

5 SEÑORA GEHRING FLORES: And the graph
6 contains information that goes out
7 to March 2019, meaning last month, right?

8 SEÑOR CALDWELL: Yes, I see that.

9 SEÑORA GEHRING FLORES: We are in
10 April 2019. Do you know how information
11 from March could be included in this graph?

12 SEÑOR CALDWELL: I don't understand. We are
13 in April, so ...

14 SEÑORA GEHRING FLORES: Do you know if this
15 graph contains information that is in the file
16 in this case?

17 SEÑOR CALDWELL: I understood that
18 new -- the lawyers can correct me if I am
19 wrong, but our understanding was that this new
20 data was -- there was either an attempt or it
21 has been submitted to the file, and therefore
22 it appeared in the opening, and we picked it up

1 in slide 9 of our presentation, so ...

2 SEÑORA GEHRING FLORES: But you haven't
3 looked at this underlying data?

4 SEÑOR CALDWELL: We have not independently
5 checked all the underlying data, no.

6 SEÑORA GEHRING FLORES: Okay. Kelby, could
7 you go to the table that is above that? There
8 is a table above that graph that doesn't really
9 have a source on its own. It doesn't really
10 explain much. It seems to be giving ICF, ICR
11 and ICT percentages for years, and the months
12 are on the side. Enero, febrero,
13 marzo -- January, February, March. Is it your
14 understanding that from March 2019 this graph
15 is representing the whole month of March?

16 SEÑOR CALDWELL: I think it is part-month.

17 SEÑORA GEHRING FLORES: But you think? You
18 don't know.

19 SEÑOR CALDWELL: Well, if you look at the
20 double star on March in the table, I think it
21 is the first half of March, if I recall
22 correctly.

1 SEÑORA GEHRING FLORES: Is there anything on
2 this table that says what the double star
3 means?

4 SEÑOR CALDWELL: Obviously, on the bit I can
5 see on the screen right now I don't see where
6 the double star refers to, but ...

7 SEÑORA GEHRING FLORES: I can tell you that
8 there are no double stars. There are no other
9 double stars on this slide. But I guess the
10 point of the matter, Mr Caldwell, is you
11 haven't seen the data that underlie any of
12 this, correct?

13 SEÑOR CALDWELL: No, we have not -- as
14 I said before, we did not independently check
15 all the numbers in the chart there.

16 SEÑORA GEHRING FLORES: And I believe
17 Mr Caldwell mentioned that when you are making
18 assumptions in your but-for model, in order to
19 make sure that your but-for world is not
20 turning into some sort of Utopian world, you
21 might look at management expectations for what
22 the but-for world should be, is that correct?

1 SEÑOR CALDWELL: That might be something you
2 look at.

3 SEÑORA GEHRING FLORES: That is what
4 Professor Caldwell, sorry, Dow said, correct?

5 SEÑOR CALDWELL: I'd be pleased to be called
6 a professor but it depends what information you
7 have to hand. In this case is relevant thing
8 is the input from the transportation experts,
9 who have studied the issues and derived their
10 expert opinion on issues like fare evasion, bus
11 fleet and so on.

12 SEÑOR DOW: If I can clarify, what I said
13 was I had worked on a widget case where for
14 various reasons we had looked at management
15 expectations, but I stress that the but-for
16 world we looked at here was built on actuals
17 reversing the measures. It wasn't the same as
18 the expectations.

19 SEÑORA GEHRING FLORES: But data you haven't
20 looked at, right? You are building a but-for
21 world based on data that you haven't looked at?

22 SEÑOR DOW: Well, our but-for world is based

1 on taking what actually happened and then
2 having a model of how the operating data would
3 have looked but-for the measures, plugging that
4 into the formulas in the contract and seeing
5 what financial results come from that.

6 SEÑORA GEHRING FLORES: But you are making a
7 certain assumption, and the assumption here
8 again is zero.

9 SEÑOR DOW: Correct.

10 SEÑORA GEHRING FLORES: Zero per cent ICR
11 and ICF discounts, right?

12 SEÑOR DOW: Correct, and we gave a
13 sensitivity analysis on that slide yesterday
14 showing different numbers.

15 SEÑORA GEHRING FLORES: Sensitivity analysis
16 or not, did you ever see any data that showed
17 that Alsacia and Express ever reached
18 zero per cent for the history of this
19 concession, old or new? Is that even possible?
20 Did you check that?

21 SEÑOR CALDWELL: We did check it. They
22 never reached zero. They always had some

1 discounts. We understand the claim is in
 2 relation to -- there is a claim being put
 3 forward by the Claimants in relation to those
 4 discounts and how they have been affected by
 5 the breaches in this case. We are not
 6 transportation experts and cannot tell you what
 7 the ICF or ICR would have been, so we have had
 8 to rely on input, ultimately from Claimants'
 9 counsel through the transportation experts.

10 SEÑORA GEHRING FLORES: But you would not
 11 for instance as an independent expert have gone
 12 to Claimants' counsel or perhaps BRT and said
 13 "Hey, these 2012 forecasts from Alsacia and
 14 Express forecast 5 per cent for Express into
 15 time"? Management does not expect to ever
 16 receive zero. You wouldn't have gone back to
 17 them and said this might not be realistic? You
 18 don't do that?

19 SEÑOR CALDWELL: Let me see if I understand
 20 your question. Last part first and then we
 21 will go forward. Do we ever go back and say
 22 what is reasonable or not? Well, of course we

1 do. In this case, as I said before, we cannot
 2 judge the ICF and ICR and what it would have
 3 been but-for. We are not transportation
 4 experts. Yes, I can see the graphs
 5 historically, but can I tell you what it would
 6 have been, should have been? No. I am not a
 7 bus expert. We need the input from others to
 8 be able to do that.

9 SEÑORA GEHRING FLORES: Given historical ICR
 10 and ICF discounts, and given management's 2012
 11 forecasts, if you had not received the legal
 12 instruction, would you have ever assumed zero?

13 SEÑOR CALDWELL: So in the absence of a
 14 legal instruction?

15 SEÑORA GEHRING FLORES: Yes.

16 SEÑOR CALDWELL: Would we have to develop
 17 our own independent view?

18 SEÑORA GEHRING FLORES: Yes.

19 SEÑOR CALDWELL: I'm not sure how we would
 20 go about that, to be honest.

21 SEÑORA GEHRING FLORES: How about with
 22 historical data and how about with the

1 forecasts?

2 SEÑOR CALDWELL: If you are telling me we
 3 are in a world now where other people have not
 4 studied the issue, and then we have to come in
 5 and do something, I just don't know what we
 6 would do. Obviously, we would refer to the
 7 expectations and the history. That would be
 8 essentially all we would have to go on.

9 COÁRBITRO GARIBALDI: May I ask a question
 10 here? I am going to forget about asking this
 11 question later, and I think it is important for
 12 my understanding.

13 Here we are talking about some projections
 14 made by management in 2012. I take it that is
 15 before the new contracts came into effect.

16 SEÑOR CALDWELL: Do you want me to answer
 17 that first part first?

18 COÁRBITRO GARIBALDI: Yes.

19 SEÑOR CALDWELL: Yes. So if you remember
 20 what happened here, we have the bond offering;
 21 there is a base case model developed for the
 22 bond offering. It is part of the bond

1 indenture. That is done in 2011. Then there
 2 are negotiations about the new contract in late
 3 2011. At that point in time there is a
 4 fairness opinion obtained and an update to the
 5 base cases is performed, and I think that is
 6 what we are talking about, that update to the
 7 base case.

8 COÁRBITRO GARIBALDI: In other words, this
 9 document reflects the expectations of
 10 management in 2012 before the new contracts
 11 came into effect and before anything that the
 12 government may have done or failed to do under
 13 the contracts. Do they reflect the expected
 14 size of the fleet at that time? At the
 15 expected programme, operations programme.

16 SEÑOR CALDWELL: So you are not asking what
 17 they expect -- they expect a whole series of
 18 things about the business. One of those is
 19 more buses than they really had, or more buses
 20 than they ended up with, if you see --

21 COÁRBITRO GARIBALDI: Alright. That is very
 22 important.

1 Then my question is -- and with this
2 I finish -- to what extent do the expectations
3 of management in 2012 relate to a but-for
4 world? Because these are expectations of the
5 real world. But-for world is different.

6 SEÑOR CALDWELL: Yes.

7 COÁRBITRO GARIBALDI: So can you elaborate
8 on that? Because I think there may be a
9 confusion here.

10 SEÑOR CALDWELL: Okay. So one perspective
11 you could take with this case, for example, is
12 to say that we should restore their
13 expectations. That would involve taking
14 the May 2012 expectations and saying that is
15 what should have happened. That is not the
16 approach we have adopted in this case. What we
17 have adopted in our First Report we talk about
18 an ex post methodology, so we are going to look
19 back, with hindsight we can see what really
20 happened to the business in each year under the
21 new Concession Contracts, but what we are going
22 to do is start from the actuals and then build

1 back up to the but-for. So rather than taking
2 the expectation and then just looking forward
3 and restoring the expectation, we start with
4 the actual scenario and then say, how would,
5 given all that happened, given all the things
6 that were going on in the business, and given
7 the analysis of the transportation experts, for
8 example, how would demand have been different
9 if fare evasion had been at a different level,
10 for example, and starting from the actual and
11 then going back up.

12 COÁRBITRO GARIBALDI: Thank you

13 SEÑORA GEHRING FLORES: Let's take that
14 assertion. I believe you were saying that in
15 2012, in their forecasts, management was
16 expecting to receive more fleet, is that
17 correct? In 2012?

18 SEÑOR CALDWELL: If you look at the graph,
19 there is a graph in the Versant report actually
20 which shows it. I don't remember the figure --

21 SEÑORA GEHRING FLORES: No matter. If that
22 is true, that they thought they were going to

1 receive more fleet, they were projecting that
2 they would still receive discounts, correct?

3 SEÑOR CALDWELL: Yes. There is discounts in
4 the management projections, yes.

5 SEÑORA GEHRING FLORES: So even under the
6 assumption that in 2012 they were expecting to
7 receive more buses, which I am not sure of but
8 even if that were the assumption, they were
9 expecting with more buses, then, to have
10 discounts averaging 5 per cent -- at least for
11 Express on this table, correct?

12 SEÑOR CALDWELL: Yes.

13 SEÑOR DOW: Correct. We showed a slide
14 yesterday where we had a graph of expected
15 outcomes over time of comparing the but-for
16 world with the expectations, and you can see on
17 that graph that the but-for world is better
18 than the expectations initially, which is the
19 point you are making, and then the lines cross,
20 and later on the but-for world is worse than
21 the expectations. So they don't match, because
22 we are taking a different approach and we are

1 not just taking the expectations.

2 SEÑORA GEHRING FLORES: Are you aware that
3 the first time Alsacia and Express asked for
4 buses was in 2014?

5 SEÑOR CALDWELL: That issue has been in
6 debate, and we understand there is a legal and
7 factual debate on that.

8 SEÑORA GEHRING FLORES: But the first time
9 they actually asked for buses was 2014?

10 SEÑOR CALDWELL: Yes -- well, let me
11 rephrase. I understand that is when there is a
12 first official request, so the answer is yes,
13 we understand that. The relevance of that for
14 the claim of insufficient bus
15 fleet -- I understand there is a debate between
16 the parties about that.

17 SEÑORA GEHRING FLORES: Have you seen any
18 information of any bus operator ever reaching a
19 zero per cent ICR or ICF rates of discounts?

20 SEÑOR CALDWELL: I think the answer is we
21 are not bus experts so I don't typically look
22 at the discounts for lots of bus operators

1 around the world.

2 SEÑORA GEHRING FLORES: So you don't ever
3 question the information that counsel gives
4 you, then?

5 SEÑOR CALDWELL: No, no. I said we do, but
6 on this issue, this is not an issue -- on what
7 the level of the discount is. It is not an
8 issue we are able to opine on.

9 SEÑORA GEHRING FLORES: Given your level of
10 knowledge of this case, do you think it is
11 remotely possible that any bus operator has
12 ever had an ICR or ICF discount of
13 zero per cent?

14 SEÑOR CALDWELL: Your question is so broad.
15 Any operator ever? I mean --

16 SEÑORA GEHRING FLORES: It is pretty
17 specific. It is ICR and ICF. Does anybody
18 ever get zero per cent?

19 PRESIDENTA KAUFMANN-KOHLER: It seems to me
20 a difficult question for someone who is not an
21 expert in the field, no? I'm not sure it is
22 very helpful to us what these experts think

1 about this issue.

2 SEÑORA GEHRING FLORES: I will move on.

3 I guess the bigger point is what ICR and ICF
4 discounts mean to your damages model. A
5 zero per cent ICR and ICF discount assumption
6 actually corresponds to quite a significant
7 percentage of your damages number, isn't that
8 right?

9 SEÑOR CALDWELL: You have to say relative to
10 what? Zero relative to some other number you
11 have in your mind. It is implicit in your
12 question.

13 SEÑORA GEHRING FLORES: You are claiming a
14 damages amount of over \$300 million, isn't that
15 correct?

16 SEÑOR CALDWELL: Correct.

17 SEÑORA GEHRING FLORES: Whether it is 320 or
18 339 or 335, I'm not sure, but it is over
19 \$300 million.

20 SEÑOR DOW: Correct.

21 SEÑORA GEHRING FLORES: Do the ICR and ICF
22 discounts, the assumption that they are

1 zero per cent, does that contribute
2 significantly to the bottom line of your
3 damages number?

4 SEÑOR DOW: Correct. I believe we gave a
5 sensitivity analysis in the presentation
6 yesterday.

7 SEÑORA GEHRING FLORES: Is it about maybe
8 95 million?

9 SEÑOR DOW: I don't think that sensitivity
10 analysis showed 95 million.

11 SEÑOR CALDWELL: Just to be clear, I think
12 what you have in your mind is, if the ICF and
13 ICR discounts remain at the level they were in
14 reality, what is the difference between zero
15 and what they are in reality? Is that the
16 premise to your question?

17 SEÑORA GEHRING FLORES: Or zero -- yes.
18 Zero and the actual. What they were, or zero
19 and some other assumption. The fact that
20 you put -- excuse me.

21 ICR and ICF discounts are one of the variety
22 of damages heads that you put into your model,

1 and one of the, I think, seven major factors in
2 your damages model, correct?

3 SEÑOR DOW: Correct.

4 SEÑOR CALDWELL: It is an important factor,
5 yes.

6 SEÑORA GEHRING FLORES: So when you are
7 looking at those different factors, ICR and ICF
8 represent a large portion of your final damages
9 number, correct?

10 SEÑOR CALDWELL: Yes, if you mean that the
11 but-for world should simply assume that there
12 were no impact of the breaches on the ICF and
13 ICR. So I think the premise of your question
14 is imagine a but-for scenario where everything
15 else gets changed but we just leave the actual
16 ICF and ICR as they are, or as they were in
17 reality.

18 SEÑORA GEHRING FLORES: No. Actually, I am
19 asking if, say, this Tribunal were to decide
20 only ICR and ICF, they were only to agree with
21 you with respect to ICF and ICF.

22 SEÑOR DOW: But not anything else?

1 SEÑOR CALDWELL: That is a very
2 different thing --

3 SEÑORA GEHRING FLORES: We will get to that
4 later, but let's go with yours. They agree
5 with everything, all of your damages heads, but
6 not ICR and ICF -- would that represent maybe
7 around 95 million? 100 million?

8 SEÑOR CALDWELL: I don't remember the figure
9 but --

10 SEÑOR DOW: We showed yesterday a standalone
11 impacts table in our presentation, and in that
12 table we showed what would happen if the
13 Tribunal agreed with everything in our but-for
14 model but took out one category of breaches,
15 and so -- I don't know if we listed ICR/ICF as
16 a specific category, but certainly the impact
17 that you can see in that table, some of them
18 relate to closely related matters --

19 PRESIDENTA KAUFMANN-KOHLER: Can we go to
20 table? It would be more helpful to us. If
21 I am not mistaken, it is second presentation,
22 table 14.

1 SEÑOR DOW: So table 14 of the second
2 presentation we gave yesterday shows the
3 standalone effects on damages reduction, and
4 you can see in that table bus fleet, speeds and
5 infrastructure combined are 162 million, speeds
6 and infrastructure alone are 82 million. When
7 I presented that yesterday I pointed out that
8 the 162 million there is a very significant
9 component of damages, and that 82 and that 162
10 relate to the points you are raising about the
11 discounts. They are part of what is in there.

12 SEÑORA GEHRING FLORES: And I think you
13 spoke about this yesterday, there is kind of a
14 lot going on there, there is ICR, ICF, ICT, bus
15 fleet. Do you know whether ICR and ICF alone
16 represent a pretty significant part of your
17 damages number?

18 SEÑOR DOW: Well, if you reduced damages by
19 restoring ICF and ICR to the actual levels,
20 I agree with the proposition you are making
21 that this would have a large effect on damages.
22 However, it would also be possible for the

1 Tribunal to make an intermediate or different
2 assumption about what the appropriate level of
3 indicators would have been in the but-for
4 world.

5 SEÑORA GEHRING FLORES: But the
6 zero per cent ICR and ICF assumption, that has
7 a significant impact on your damages number, is
8 that right? Is that fair to say?

9 PRESIDENTA KAUFMANN-KOHLER: Do I understand
10 it correctly that this was in the 82.5 million
11 of speeds and infrastructure?

12 SEÑOR DOW: It could also be impacted by bus
13 fleet, because if you had a better bus fleet
14 you might perform better on the indicators, so
15 we have a separate part of the model that deals
16 with bus fleet.

17 PRESIDENTA KAUFMANN-KOHLER: But you have
18 twice speeds and infrastructure, so
19 I understand that your third one includes the
20 second one.

21 SEÑOR CALDWELL: Includes the second one.
22 That is just the way the interactions work from

1 the transportation experts.

2 PRESIDENTA KAUFMANN-KOHLER: So it could be
3 either in the second or the third one?

4 SEÑOR CALDWELL: Yes.

5 COÁRBITRO GARIBALDI: Let me ask a question.
6 The problem I am have in understanding all of
7 this is -- one of the many problems! -- is
8 these indices of performance are a reflection
9 of something else. That something else may be
10 lower speeds, it could be insufficient fleet,
11 it could be mismanagement, it could be a number
12 of factors. If you take them away, as the
13 suggestion is made, so, in other words, if you
14 go to the actual figure, you are assuming that
15 there are no but-for effects of the alleged
16 violations, but I find it hard to understand
17 how you can assume that away.

18 We can disagree with this zero effect
19 assumption but, at the same time, going to the
20 actual seems to me conceptually inconsistent
21 with the idea of a but-for world, because these
22 are consequences of something that is happening

1 in the actual world that is supposedly not
2 happening in the but-for world, unless the
3 whole thing is mismanagement?

4 SEÑOR DOW: Maybe it would help to refer to
5 slide 22 in that presentation. That is where
6 we discuss the indicators, and that is where we
7 mention this zero discounts for the ICR and the
8 ICF.

9 We do do a sensitivity analysis at the
10 bottom of the slide, and we show the results of
11 a sensitivity analysis on these discounts,
12 where instead of assuming no discounts, we
13 modelled what the discounts might have been in
14 a but-for world with a different view of the
15 but-for world, so still not returning it to the
16 actual, as you were discussing, and show that
17 those alternative assumptions on ICR and ICF
18 lower damages by 13.9 for the ICF and 5.4 for
19 the ICR. But those are still sensitivity
20 analyses where we are relying on BRT and
21 Transconsult for the ICF.

22 PRESIDENTA KAUFMANN-KOHLER: We apologise

1 for the interruption.

2 SEÑORA GEHRING FLORES: I am a little
3 confused. Is this a legal instruction or are
4 you saying you have done your own analysis on
5 this?

6 SEÑOR CALDWELL: Which one?

7 SEÑORA GEHRING FLORES: ICR and ICF. You
8 assume it is zero all the time?

9 SEÑOR DOW: And we stated that was a legal
10 instruction.

11 SEÑOR CALDWELL: The zero is a legal
12 instruction.

13 SEÑOR DOW: The sensitivity analysis at the
14 bottom of that slide is not a legal
15 instruction.

16 SEÑOR CALDWELL: Just to be clear, if there
17 are two questions there in one, one is what is
18 the basis for the zero -- that is clearly a
19 legal instruction. What is the basis for the
20 sensitivities? Well, the assumption there is
21 on the ICF, we have input from BRT and
22 Transconsult, who estimated, attempted to

1 estimate a but-for ICF indicator, and then on
2 ICR the assumption was that Alsacia and Express
3 would look like Metropolitana, so it would be
4 better than they really were, and they would
5 look like one of the other major operators.

6 SEÑORA GEHRING FLORES: So am I to
7 understand a sensitivity study is you kind of
8 questioning the legal instruction?

9 SEÑOR CALDWELL: No. We understand that the
10 legal instruction is obviously contested by the
11 parties, and we are trying to, in some ways,
12 come up with an intermediate scenario that has
13 been discussed. We are trying to see what it
14 means.

15 SEÑORA GEHRING FLORES: Is this sensitivity
16 study in either of your reports?

17 SEÑOR DOW: Yes. We give the reference
18 there.

19 SEÑORA GEHRING FLORES: Actually, if someone
20 could give them copies of their reports --

21 SEÑOR CALDWELL: We have them.

22 SEÑORA GEHRING FLORES: I just want to make

1 sure you have them there.

2 I wanted to move on to your ICT assumption.
3 Now, your assumption with respect to ICT, is
4 that a legal instruction?

5 SEÑOR CALDWELL: That comes from
6 BRT/Transconsult.

7 SEÑORA GEHRING FLORES: As did ICR and ICF?
8 Correct?

9 SEÑOR CALDWELL: No. The ICR and ICF, the
10 zero is a legal instruction.

11 SEÑORA GEHRING FLORES: Okay.

12 SEÑOR CALDWELL: ICT, BRT/Transconsult were
13 able to simulate that and so we adopt their
14 indication to us of what it would be.

15 SEÑORA GEHRING FLORES: So BRT/Transconsult
16 was able to simulate a one hundred percent ICT?

17 SEÑOR CALDWELL: We don't have a one hundred
18 percent ICT.

19 SEÑORA GEHRING FLORES: What is it?

20 SEÑOR CALDWELL: It is close. I think the
21 average figure is 99.7, and, as I say, that is
22 based on their detailed simulations.

1 SEÑOR DOW: That is also slide 22 of the
2 presentation yesterday.

3 SEÑORA GEHRING FLORES: I think perhaps you
4 are grouping Alsacia and Express there. You
5 assume one hundred percent ICT for Express,
6 don't you, all the time?

7 SEÑOR CALDWELL: I would have to look at the
8 spreadsheet. I am happy to accept that, but
9 I would have to look back at the spreadsheet.

10 SEÑORA GEHRING FLORES: I guess you would
11 have to look at the spreadsheet. I will try to
12 get someone to find that for you, but I would
13 represent that you have one hundred percent for
14 Express all the time, and maybe for Alsacia
15 something pretty close to one hundred percent.

16 SEÑOR DOW: Well, it is 99.7 anyway on this
17 slide, so it is close enough.

18 SEÑORA GEHRING FLORES: When you combine
19 Alsacia and Express. Right.

20 Do you know what the Alsacia and
21 Express -- what was projected in the May 2012
22 forecasts to the bond holders for ICT? You can

1 find this in your work papers, the DOW/Caldwell
2 work papers tables FB-20, ICT.

3 SEÑOR CALDWELL: You can see it on slide 9
4 of the first presentation.

5 SEÑORA GEHRING FLORES: What was the
6 forecast?

7 SEÑOR CALDWELL: Yes. So you see it is this
8 slide (indicating), slide No 9 of the first
9 presentation.

10 SEÑORA GEHRING FLORES: That is with the
11 graph that has March 2019 data on it?

12 SEÑOR CALDWELL: That is the ICR graph, but
13 the previous bullet indicates what they got or
14 what they achieved was 93 to 95, and what their
15 expectation was was broadly 98 to 99.

16 SEÑORA GEHRING FLORES: So they had never
17 expected to reach one hundred percent, is that
18 correct?

19 SEÑOR CALDWELL: Not in the May 2012 base
20 case model, no.

21 SEÑORA GEHRING FLORES: And historically
22 they have never reached one hundred percent

1 ICT, is that correct?

2 SEÑOR CALDWELL: I am not sure I can say
3 that for the original contract period, but
4 certainly under the new contracts they never
5 reached 100.

6 SEÑORA GEHRING FLORES: Did you not look at
7 data from the old contract?

8 SEÑOR CALDWELL: We will have seen it.
9 I just don't recall off the top of my head now
10 what it was.

11 SEÑORA GEHRING FLORES: Given what you know
12 about the case, do you think they ever reached
13 one hundred percent or 99.7?

14 SEÑOR CALDWELL: As I said, I just don't
15 recall right now. I don't know.

16 SEÑORA GEHRING FLORES: Do you know if any
17 concessionaire has any reached one hundred
18 percent ICT?

19 SEÑOR CALDWELL: Again, I presume you are
20 referring to Transantiago.

21 SEÑORA GEHRING FLORES: Yes.

22 SEÑOR CALDWELL: And any concessionaire ever

1 from 2005 onwards?

2 SEÑORA GEHRING FLORES: Yes.

3 SEÑOR CALDWELL: No, I don't know.

4 SEÑORA GEHRING FLORES: Do you know if any
5 concessionaire in the new concession has ever
6 reached one hundred percent ICT for every month
7 over an entire year, for instance?

8 SEÑOR CALDWELL: I don't know. I don't
9 know.

10 SEÑOR DOW: We would not assert that they
11 have, anyway.

12 SEÑORA GEHRING FLORES: But you think it is
13 reasonable to assume that Alsacia and Express,
14 in your but-for model, have reached one hundred
15 percent ICT? That is a reasonable assumption?

16 SEÑOR CALDWELL: This again comes from the
17 transportation experts. We are not qualified
18 to opine on that. We need to take the input,
19 they have done the analysis and work, and we
20 adopt it.

21 SEÑORA GEHRING FLORES: And you never test
22 the reasonability of the inputs you get from

1 other experts?

2 SEÑOR CALDWELL: Of course we test
3 reasonability, but they are the experts on
4 transportation issues. It is not for us to
5 appear and second guess them. There is a whole
6 debate between transportation experts that has
7 been before the Tribunal.

8 SEÑORA GEHRING FLORES: Sure. But you are
9 independent damages experts, correct? You
10 don't actually work as advocates for the
11 Claimants, right?

12 SEÑOR CALDWELL: No.

13 SEÑORA GEHRING FLORES: Could I see WS-16?
14 This was an annex to the Willumsen and Silva
15 report. This was the ICT of all
16 concessionaires between 2012 and 2018. Do you
17 see one hundred percent ICT anywhere in there?

18 SEÑOR CALDWELL: They all begin with zero
19 point, so there is no one point.

20 SEÑORA GEHRING FLORES: Given that you could
21 express these numbers as percentages -- let's
22 assume that -- 96 per cent, 96 per cent,

1 99 per cent, 97 per cent, right?

2 SEÑOR CALDWELL: Yes -- no, that is exactly
3 what I was trying to refer to. There is no 1
4 at the beginning, so there is no one hundred
5 percent.

6 SEÑORA GEHRING FLORES: Exactly, and you
7 didn't look at information like this to test
8 the reasonability of the assumption that BRT
9 was giving you?

10 SEÑOR CALDWELL: As I said before, there is
11 this debate between the transportation experts
12 occurring in this case, but we are not
13 qualified to judge that. We are not
14 transportation experts, so we use the input
15 available to us.

16 SEÑORA GEHRING FLORES: You are not
17 transportation experts, but you are definitely
18 numbers experts, right?

19 SEÑOR CALDWELL: Yes, I can tell that none
20 of those numbers are 100.

21 SEÑORA GEHRING FLORES: Assuming one hundred
22 percent ICT in your damages model, that also

1 represents a significant portion of your total
2 damages number, is that right?

3 SEÑOR CALDWELL: It is 99.7, but --

4 SEÑORA GEHRING FLORES: Okay, 99.7.

5 SEÑOR CALDWELL: On average.

6 SEÑORA GEHRING FLORES: How much of your
7 total damages do you think that number
8 represents?

9 SEÑOR CALDWELL: So again you are asking us,
10 if we replaced the but-for ICT with the actual
11 ICT what impact it would make. That is a
12 calculation we can straightforwardly do.

13 I don't recall the number off the top of my
14 head. It will be part of the underlying
15 assumptions on -- which slide was it?

16 SEÑORA GEHRING FLORES: Are you telling me
17 you are not exactly sure how much your ICT
18 assumption feeds into your damages number at
19 the end?

20 SEÑOR CALDWELL: Off the top of my head

21 I don't know the precise dollars --

22 SEÑOR DOW: Because if you say how much does

1 it contribute, you are asking us to change a
2 parameter in the model to a different number,
3 and the answer depends on what that different
4 number is.

5 SEÑORA GEHRING FLORES: Actually, what I am
6 getting at is a little bit different. You make
7 assumptions with respect to ICF/ICR. That is
8 on a legal instruction. You make assumptions
9 with respect to ICT based on what appears to be
10 unchecked inputs from BRT/Transconsult.

11 SEÑOR CALDWELL: They reflect
12 BRT/Transconsult's opinion.

13 SEÑORA GEHRING FLORES: Right, that you
14 apparently did not check.

15 SEÑOR CALDWELL: I don't know what you mean
16 by check. We are not transportation experts,
17 so ...

18 SEÑORA GEHRING FLORES: Okay. But these
19 inputs that you are assuming, these assumptions
20 that you are assuming, based on either legal
21 instructions or inputs from other experts,
22 represent a significant portion of your total

1 damages amount. Is that correct? For
2 instance, ICT might go into the tens of
3 millions of dollars.

4 SEÑOR CALDWELL: ICT is an important
5 parameter, like there are many other important
6 parameters.

7 SEÑOR DOW: If I could draw the Tribunal's
8 attention to our Second Report -- not
9 necessarily to open it now but I just point out
10 that in our Second Report, starting at
11 paragraph 335, we have a section on damages
12 sensitivities, and that is where we explore the
13 questions you are addressing here, and we talk
14 about isolating the effects of individual
15 breaches, and there is a section on ICF and ICR
16 discounts where we explore the sensitivity of
17 replacing those parameters by other values for
18 discounts, and that is summarised on page 22 of
19 the presentation we gave yesterday. That was
20 the slide we were looking at earlier, but we
21 don't have, I am afraid, a section on
22 sensitivity to the ICT discounts, although that

1 would also be an analysis that we could perform
2 quite easily if the Tribunal wishes.

3 SEÑORA GEHRING FLORES: I think my question
4 is a little bit more general than that.
5 ICF/ICR contribute significantly to your total
6 damages number. Yes or no?

7 SEÑOR CALDWELL: They are important
8 parameters, yes.

9 SEÑORA GEHRING FLORES: ICT also contributes
10 significantly to --

11 SEÑOR CALDWELL: It is a contributor, yes.

12 SEÑORA GEHRING FLORES: We can give Versant
13 the opportunity to opine on how much these
14 factors might contribute to your final damages
15 number, if you are not particularly familiar
16 with what that number might be.

17 SEÑOR DOW: To give you an equally general
18 answer, if we restore the discounts from the
19 assumptions in our model to what they actually
20 were, then it will have a very large impact on
21 damages.

22 If we restore the discounts or change the

1 discounts to a lower level than our but-for
2 model, but a moderately lower level, shall we
3 say, obviously people can have their own
4 opinions on what is appropriate, but that
5 analysis is given in that section of our Second
6 Report, and the bottom line of the
7 sensitivities we did on the two discounts that
8 were being discussed here, namely the ICF and
9 the ICR discounts, that is given on table 15 of
10 our Second Report at paragraph 348, and that
11 shows sensitivities which are in the region of
12 8.6, 18.8, or \$27.4 million. So yes, they are
13 significant, and that sensitivity is shown
14 there.

15 SEÑORA GEHRING FLORES: Let's move on to
16 evasion, your assumptions with respect to
17 evasion. I wanted to talk about your
18 assumptions with respect to how the timing and
19 rate of improvements of fare evasion work.
20 According to your but-for damages model,
21 evasion rates in Alsacia and Express's bus
22 routes would have been reduced from the

1 April 2012 evasion rate of 23.9 per cent down
2 to 7.7 per cent in May of 2012, I guess -- on
3 the first day of the concession. So on
4 April 30, 2012, the evasion rate was in the
5 actual world 23.9 per cent. On May 1, 2012
6 your model assumes that evasion goes all the
7 way down to 7.7 per cent. This can be found in
8 tab B-14, table F, Dow/Caldwell work papers,
9 column G, rows 39 and... 51 for Alsacia and
10 rows 71 and 83 for Express.

11 That would be this rather large thing! In
12 your binder it is folded up. If you want to
13 look at it, its right there.

14 SEÑOR DOW: Say the tab again?

15 SEÑORA GEHRING FLORES: It is that folded
16 piece of paper there. If you go a little bit
17 down the page, you can see Alsacia is at the
18 top, Express is in the middle, we have in
19 I believe it is row 39, column G, evasion rate
20 23.9. Do you see that?

21 SEÑOR CALDWELL: Yes.

22 SEÑORA GEHRING FLORES: And then down

1 further for Express at row 70, column G, you
2 have 23.9.

3 SEÑOR DOW: Correct.

4 SEÑORA GEHRING FLORES: So that was the
5 evasion rate in your model at April 30, 2012,
6 let's say. Then when the concession started,
7 which up at the top at column G you can see
8 initial date, May 1, 2012, end date -- this is
9 just the first column -- 15 May 2012. If you
10 go down to row 51, 7.7. Do you see that?

11 SEÑOR CALDWELL: Yes, we do.

12 SEÑOR DOW: Yes.

13 SEÑORA GEHRING FLORES: So that is the
14 evasion rate you assume for Alsacia. Express
15 is the same at the bottom of the column at 7.7.
16 Is that correct?

17 SEÑOR CALDWELL: Yes. You see the build-up
18 there, what the spreadsheet is doing, it is
19 doing that movement from the actual to the
20 but-for that we were talking about earlier.
21 Row 39 is the actual for Alsacia, and then it
22 builds up through the assumptions given by the

1 transportation experts to derive the new demand
2 and the demand in the but-for, row 48, and then
3 what that means for the fare evasion rate in
4 row 51. So it is just implementing the opinion
5 of BRT/Transconsult.

6 SEÑORA GEHRING FLORES: Right, and I think
7 perhaps the opinion of BRT/Transconsult might
8 be expressed in row -- it is the 58.4 per cent
9 that is in rows 42, column G.

10 SEÑOR CALDWELL: Yes, the who turns to pay,
11 who continues to evade and so on.

12 SEÑORA GEHRING FLORES: I think that stands
13 for evaders who turn into paying customers, is
14 that right?

15 SEÑOR CALDWELL: Yes.

16 SEÑORA GEHRING FLORES: So that comes from
17 BRT, that assumption, and they believe that
18 58.4 per cent of evasion will be reduced.

19 SEÑOR DOW: 58.4 per cent of evaders become
20 fare paying passengers.

21 SEÑORA GEHRING FLORES: But the driving
22 force in this calculation is -- you are using

1 58.4 per cent to reduce evasion, right?

2 SEÑOR CALDWELL: Yes. The 58.4 per cent of
3 the people who previously evaded, who really
4 evaded in the actual scenario, would turn to
5 become paying passengers in the but-for
6 scenario.

7 SEÑOR DOW: And 31 per cent would carry on
8 evading, and 10 per cent would just not take
9 the bus any more.

10 SEÑORA GEHRING FLORES: Do you know where
11 BRT got this 58.4 per cent figure?

12 SEÑOR CALDWELL: I stand to be corrected.
13 I think it is from survey work carried out by
14 Alto Evasión, but I stand to be corrected on
15 that. We obtained it from BRT. Now I am
16 spec -- speculating is the wrong word, but I am
17 now trying to recall where they obtained it
18 from.

19 SEÑORA GEHRING FLORES: Did you look at the
20 data -- did you see any of the sources that
21 they cited? You just took the 58.4?

22 SEÑOR CALDWELL: As I said, they developed

1 that opinion, and this is again another issue
2 where it is a transport expert issue, and we
3 then attempt to implement.

4 SEÑORA GEHRING FLORES: And I believe in
5 their First Report BRT/Transconsult doesn't
6 provide any indication of the staging, meaning
7 how long would this 58.4 per cent reduction
8 take? Would you be able to achieve a
9 58.4 per cent reduction in evasion in a day?
10 In a month? In the first month? In the sixth
11 month? They don't give any indication,
12 I assume, right?

13 SEÑOR CALDWELL: Sorry, what is the
14 question? Is that a statement or is it a
15 question for us?

16 SEÑORA GEHRING FLORES: The 58.4 percentage
17 figure that you got from BRT/Transconsult, was
18 there any indication of how to apply it?

19 SEÑOR DOW: Your question was in their
20 First Report was that an important
21 qualification?

22 SEÑORA GEHRING FLORES: Yes. Did they?

1 SEÑOR CALDWELL: They had developed a demand
2 scenario attached to their First Report, and
3 these numbers were an attempt to reproduce that
4 demand scenario that they developed. So then
5 the answer is implicitly yes.

6 SEÑORA GEHRING FLORES: So you assume that
7 all 58.4 per cent of evasion reduction will
8 happen in one day?

9 SEÑOR CALDWELL: No, I wouldn't put it like
10 that, but the demand scenario that
11 BRT/Transconsult developed was that at the
12 beginning of the contract period, in the
13 but-for scenario, there should have been that
14 reduction in fare evasion. Whether that is
15 from one day to the next, from April 30
16 to May 1, is a different question.

17 SEÑORA GEHRING FLORES: But you reduce
18 evasion, do you not, by 58.4 per cent starting
19 on -- in your column G, evasion goes all the
20 way down to 7.7 per cent, correct?

21 SEÑOR CALDWELL: Yes.

22 SEÑOR DOW: And, again -- I mean, relying on

1 BRT that there would be a very quick
2 improvement, but again we do a sensitivity,
3 which was discussed yesterday on slide 16, and
4 is to be found in our Second Report at table
5 14, preceding paragraph 3.4.1, where we look at
6 the sensitivity to a delay in improvement by
7 three months or six months, and show that this
8 impact, the impact on damages, would range from
9 10 to 26 million USD. But fundamentally,
10 absolutely, we rely on the transport experts.

11 SEÑORA GEHRING FLORES: Just flipping
12 through this table F, if you look at the bottom
13 line numbers for the resulting or the reduced
14 fare evasion, you have 7.7, 7.7, 7.5, then we
15 go down to 6.5, we go down -- on the second
16 page, you know, evasion is going down to 6.2.
17 On the third page evasion goes all the way down
18 to 4.5.

19 SEÑOR CALDWELL: It also goes up to 9.3.

20 SEÑORA GEHRING FLORES: I am glad you
21 mentioned the 9, because BRT/Transconsult
22 actually state in their reports that it would

1 be reasonable to expect that evasion rates
2 would drop to 9 per cent. Are you aware of
3 that?

4 SEÑOR CALDWELL: Yes.

5 SEÑOR GARCÍA REPRESA: I would have to
6 object when there are misrepresentations about
7 what the experts have said. It is in the
8 transcript. We can read what Dr Hook said. He
9 did not say that.

10 SEÑORA GEHRING FLORES: I am not exactly
11 sure what --

12 SEÑOR GARCÍA REPRESA: And these gentlemen
13 have it in their PowerPoint anyway, so we can
14 all look at it.

15 SEÑORA GEHRING FLORES: Let's go to it. The
16 second BRT/Transconsult report at
17 paragraph 155. Are you aware that
18 BRT/Transconsult in their Second Report state
19 that it would be reasonable to expect that
20 evasion rates would drop to 9 per cent?

21 SEÑOR CALDWELL: I think it is 9 in general.
22 If you follow these many sheets all the way to

1 the end, you will see it varies over time.
2 Sometimes it is lower than 9, sometimes it is
3 higher than 9. I mean, in some months -- there
4 is a 12 per cent, there is a ten per cent --
5 SEÑORA GEHRING FLORES: What months are
6 those in?

7 SEÑOR CALDWELL: I am just flicking through,
8 doing it impressionistically. So if you trace
9 your eye along row 50 or 51 for Alsacia, and
10 then you flick through the sheets, you see
11 there is a development over time. It is lower
12 at some points. It then reaches 11 per cent in
13 October 2014. Then it continues at
14 11 per cent. It reaches 12 per cent in 2015.
15 It continues at ten per cent for 2016, the
16 first half of 2016. Towards the end of 2016 it
17 is 13, 14 then in 2017, and then back down to
18 ten towards the end of 2017, and so on. All
19 I am doing is flicking through the pages.

20 SEÑORA GEHRING FLORES: Understood.

21 If you go through the Express progression,
22 however, the numbers get quite a bit lower, do

1 they not? And, like I said, all the way down
2 to 4.5 per cent. Correct?

3 SEÑOR CALDWELL: Let's see. So -- yes,
4 I see the 4.5 in 2013, and then it starts to
5 come up again. Yes.

6 SEÑORA GEHRING FLORES: As a general matter,
7 in your impressionistic view, do you think that
8 the evasion rate that you assume for Express
9 and Alsacia is below 9 per cent?

10 SEÑOR CALDWELL: If you are asking me what
11 the final average is, it is not computed here.
12 Again, that is a straightforward number for us
13 to compute, but ...

14 SEÑORA GEHRING FLORES: Okay. We can
15 certainly point the Tribunal to that later.
16 Does it seem reasonable to you to have a model
17 that assumed some percentages of evasion that
18 are lower than your own transport expert?

19 SEÑOR GARCÍA REPRESA: Again, objection.
20 You are misrepresenting what the transport
21 expert said.

22 SEÑORA GEHRING FLORES: They just saw it on

1 the page, Mr Garcia Represa. At paragraph 155
2 of their Second Report. Do you believe it is
3 reasonable to assume evasion rates that are
4 below that which the transport
5 expert represented.

6 SEÑOR GARCÍA REPRESA: Again, objection.
7 This is not what the transport expert said.
8 You should read the full report. You have the
9 transport expert here. They made a
10 presentation. It is in the transcript of this
11 hearing from the transport expert --

12 SEÑORA GEHRING FLORES: Their language is on
13 the screen.

14 SEÑOR GARCÍA REPRESA: You have one isolated
15 paragraph. We are not going to go back and
16 forth I suspect. But there is an objection.
17 Dr Hook was here and testified to this. He did
18 not say it is up to 9 per cent drop. He gave
19 the range, and I will stop there. I am not
20 testifying here.

21 PRESIDENTA KAUFMANN-KOHLER: Well, can you
22 tell us the range? We can check it of course

1 but it would be easier to have it.

2 SEÑOR GARCÍA REPRESA: I will go back to the
3 transcript. I think he said between 7 and
4 10 per cent depending on the times, and that it
5 evolved. I believe this is in this gentleman's
6 presentation ... Yes. If you go to slide 19
7 of the financial damages presentation, you will
8 see there the reference to what
9 BRT/Transconsult have said in terms of evasion
10 rates.

11 SEÑORA GEHRING FLORES: We have numbers in
12 your table, is it correct, that are even less
13 than 7, correct?

14 SEÑOR CALDWELL: Just to be clear, these
15 numbers are actually embedded in -- our demand
16 numbers match the demand numbers that come
17 directly from BRT/Transconsult, so what our
18 table is doing is simply replicating their
19 analysis.

20 SEÑOR DOW: Which the transport expert has
21 characterised more generally, as you have
22 indicated.

1 SEÑORA GEHRING FLORES: And I believe in
2 your work papers, just to remind people, the
3 reduction factor that is involved here is a
4 reduction of 58.4 per cent, correct?

5 SEÑOR CALDWELL: 58.4 per cent of evaders
6 become fare paying.

7 SEÑORA GEHRING FLORES: Right. And you had
8 mentioned the Alto Evasión study. This is
9 according to Versant report annex VP-62, at
10 page 3. This is Alsacia and Express's own
11 consultants on fare evasion reduction in Chile.
12 They projected a 5 per cent reduction over two
13 years in fare evasion. Have you seen this?

14 SEÑOR CALDWELL: Can you show us the top of
15 the document?

16 PRESIDENTA KAUFMANN-KOHLER: Have you seen
17 this, have you studied this?

18 SEÑOR CALDWELL: We have reviewed it at some
19 point.

20 PRESIDENTA KAUFMANN-KOHLER: Because before
21 you said that you had relied on BRT that
22 probably had taken this from Alto Evasión, and

1 so I did not understand you to have taken your
2 figures from Alto Evasión.

3 SEÑOR CALDWELL: No. We have taken our
4 figures from BRT/Transconsult. I was referring
5 earlier to where I understood they
6 obtained their figures.

7 PRESIDENTA KAUFMANN-KOHLER: Yes. That is
8 what I understood, yes.

9 SEÑORA GEHRING FLORES: Not to confuse the
10 percentage of evaders who come into, turn into
11 paying customers, sorry about that. So you are
12 familiar with this document? You have seen
13 this document before?

14 SEÑOR CALDWELL: We have seen this in the
15 context of the case, yes.

16 SEÑORA GEHRING FLORES: And, sorry,
17 Professor Dow and Mr Caldwell, do you speak
18 Spanish?

19 SEÑOR DOW: No.

20 SEÑORA GEHRING FLORES: So how did you
21 understand the documents in this case?

22 SEÑOR DOW: Google Translate, and we have

1 three Spanish speakers on our team.

2 SEÑORA GEHRING FLORES: So the paragraph
3 I am referring to -- and I just want to ask if
4 you have seen it before, if you know what it
5 says. Otherwise I can read it in Spanish and
6 you can listen to the interpretation on your
7 headphones: "El resultado de la segunda
8 medición de DICTUC registró una disminución en
9 la evasión de un 0,4 por ciento. Si bien el
10 resultado se encuentra dentro de los márgenes
11 proyectados para lograr una disminución de 5
12 puntos en dos años. Los resultados de la
13 tercera medición serán entregados a contar del
14 9 de diciembre."

15 Have you seen this document before showing
16 Alsacia and Express's own consultants on fare
17 evasion in Chile had projected a 5 per cent
18 reduction in fare evasion over two years?

19 SEÑOR CALDWELL: What is the date of this
20 document? Can I ask that?

21 SEÑORA GEHRING FLORES: 2013.

22 SEÑOR CALDWELL: So is the answer had we seen

1 this, yes, we have seen this document. The
2 date of the document is --

3 SEÑOR CALDWELL: Which month in 2013? It is
4 late 2013?

5 SEÑORA GEHRING FLORES: August 2013.

6 SEÑOR CALDWELL: So that is already --

7 SEÑOR GARCÍA REPRESA: No, I think it is
8 November 2013.

9 SEÑORA GEHRING FLORES: Sorry. November.

10 SEÑOR CALDWELL: So it is a late 2013
11 document already in the context of the measures
12 being claimed in this case.

13 SEÑORA GEHRING FLORES: Did you
14 consult -- maybe you have already answered
15 this. You didn't consult any other independent
16 bases to come to a conclusion as to whether or
17 not BRT's 58.4 per cent reduction of evaders
18 was a reasonable assumption, is that correct?

19 SEÑOR CALDWELL: As I said, they are the
20 transportation experts. We understand there is
21 a disagreement between the parties about that
22 but we cannot judge that debate.

1 SEÑORA GEHRING FLORES: And evasion, from
2 what I understand from your presentation
3 yesterday, evasion is the most significant part
4 of your damages case?

5 SEÑOR DOW: Correct.

6 SEÑORA GEHRING FLORES: I wanted to ask you
7 a bit about the time bar. In your
8 reports -- I believe now in your presentation
9 you are saying you are under a legal
10 instruction to not apply a time bar, is that
11 correct?

12 SEÑOR DOW: Correct.

13 SEÑORA GEHRING FLORES: But in table 4
14 excuse me -starting at paragraph 86 of your
15 Second Report, you are responding to Versant's
16 application of the time bar.

17 SEÑOR DOW: Yes.

18 SEÑORA GEHRING FLORES: And at paragraph 86
19 you state that you could not comment on the
20 legal merits of the instructions given to
21 Versant related to the time bar, but you then
22 observe that a damages time bar, should one

1 exist, would interact with the assumed timing
2 of cash distributions to Claimants in the
3 but-for scenario, correct?

4 SEÑOR DOW: Correct.

5 SEÑORA GEHRING FLORES: And then below
6 paragraph 89 in your Second Report you include
7 a table 4 entitled "Impact of February time
8 bar," is that correct?

9 SEÑOR DOW: Yes.

10 SEÑORA GEHRING FLORES: In paragraph 89 of
11 your Second Report you represent that table 4
12 illustrates the differential impact of the time
13 bar on damages of the Claimants considering
14 three different cash distribution methods,
15 right?

16 SEÑOR DOW: Correct. Assuming that the time
17 bar applies to any cashflows from the operating
18 companies to the Claimants.

19 SEÑORA GEHRING FLORES: And you are
20 assuming -- let's look at that table actually.
21 In your accelerated debt repayment scenario you
22 say that there would be a zero impact of a time

1 bar.

2 SEÑOR DOW: Correct. Because in the
3 accelerated debt repayment scenario there would
4 be no cashflows from the operating companies to
5 the Claimants before the date of the time bar.
6 So what we have done in this paragraph and this
7 table is to explore what would happen if the
8 time bar doesn't apply to actions relating to
9 the way the companies operate but the time bar
10 applies to payment of dividends. So we have
11 said suppose that any dividends that would have
12 been paid to Claimants before the hypothesised
13 date of the time bar, imagine those are not
14 claimable, but dividends and other value that
15 would have been obtained by the Claimants after
16 the time bar date, those are admitted. So we
17 have just subtracted off all payments to the
18 Claimants before the cut-off date. And that
19 depends on the scenario we are using, because
20 if we assume that the company had a policy of
21 paying out a lot of dividends, but then you
22 eliminated those dividends because of a time

1 bar cut-off date, that would reduce damages
2 quite a bit, which is the first column of that
3 table, but if you assume that the company had a
4 policy of paying down debt quickly and not
5 paying out value to shareholders, then the time
6 bar would not have an impact on that. But that
7 is, to be clear, an assumption about the way
8 the time bar operates, which is not the same as
9 Versant's assumption. Versant's assumption on
10 the time bar -- well, I will let them speak for
11 themselves because they haven't presented yet,
12 but, to summarise in one sentence, it is that
13 Chile would not have taken action to restore
14 the but-for world until after the time bar
15 date.

16 SEÑORA GEHRING FLORES: I am a little
17 confused about the zero impact and the
18 accelerated debt repayment scenario. Are you
19 saying that the cashflows that would have been
20 coming into Alsacia and Express would have
21 gone into some bank account until February 2014, and
22 in February 2014 Claimants get it?

1 SEÑOR DOW: They would have gone to repay
2 the debt. So in the accelerated debt repayment
3 scenario, which is the model Versant prefers,
4 all cash collected by the company goes to repay
5 the debt, and then any money that would be left
6 over after the debt is repaid then goes to the
7 Claimants.

8 SEÑORA GEHRING FLORES: But there would be
9 no impact of applying the time bar, then?

10 SEÑOR DOW: Because in this paragraph we are
11 applying an interpretation of the time bar
12 which says no cashflows from the company as
13 dividends to the Claimants before February '14.
14 So we are assuming that the company would not
15 be paying dividends anyway before 2014, because
16 it is paying down the debt, and therefore if
17 you said the time bar prevents any prior
18 distributions from being counted in the
19 exercise, that would not have any bite because
20 there would have been no dividends anyway.

21 The accelerated debt repayment scenario is a
22 somewhat extreme scenario. It is one that we

1 put forward in our First Report, and Versant
 2 prefers that scenario, as I am sure they will
 3 tell you later on, so we don't consider that to
 4 be a realistic scenario. We consider it to be
 5 more realistic that the company would have paid
 6 debt as scheduled and then paid out extra cash
 7 as dividends, so we prefer the dividend
 8 scenario, which is the first column in that
 9 table, and the time bar then has a significant
 10 impact of \$167 million, because it would be
 11 preventing those dividends from being taken
 12 into account for damages.

13 SEÑORA GEHRING FLORES: So according to you,
 14 even if the time bar were to apply, Claimants
 15 would still be much better off due to
 16 improvements in equity value when Alsacia and
 17 Express use the additional cashflows to pay off
 18 the loan? Is that right? Is that your
 19 position?

20 SEÑOR CALDWELL: I think, just to clarify,
 21 the question is what does the time bar apply
 22 to. Does it apply to dividends, i.e. cashflows

1 from the companies to the Claimants, or does it
 2 apply to the companies themselves, so that
 3 their operations would not have been affected
 4 in any way until the time bar; there would be
 5 no but-for scenario effectively until the time
 6 bar date. So that is the legal question that I
 7 think would need to be addressed. So first of
 8 all, does a time bar exist, and then, to the
 9 extent one exists, what does it apply to?

10 Now, the table here at table 4 is, in the
 11 event that a time bar exist, it applies to
 12 dividends, the cashflows coming from the
 13 companies to the shareholders, and then
 14 obviously the way in which you model those
 15 cashflows, the timing you attribute to those
 16 cashflows, differs with the dividend scenarios
 17 and therefore the effect of the time bar
 18 changes.

19 The alternative assumption is what Versant
 20 say, that there should be no but-for scenario
 21 at all in relation to the companies prior to
 22 the time bar date. So there is no incremental

1 cash flow at the company level prior to
 2 their February 2014 date. And so the impact
 3 depends on those two different constructions.

4 SEÑORA GEHRING FLORES: So if this Tribunal
 5 were to determine that it cannot consider any
 6 incremental cashflows that Alsacia and Express
 7 would have received in a but-for scenario
 8 before the date of the time bar, before
 9 26 February 2014, would you agree that the
 10 effect of the time bar on the final damages
 11 number would be different than what you have
 12 stated in table 4?

13 SEÑOR DOW: Correct, although
 14 probably -- no, I don't want to speculate but
 15 it would be large. You can see that, even
 16 under our other interpretation of the time bar,
 17 with the dividend scenario the time bar would
 18 have a big impact. But in the debt covenant
 19 scenario, which is an intermediate scenario,
 20 the time bar would have a ten million dollar
 21 impact. That is the middle column of table 4.

22 SEÑORA GEHRING FLORES: Thank you.

1 SEÑOR DOW: But, just to be clear, in table
 2 4 we are not talking about a time bar on
 3 cashflows to the companies; we are talking
 4 about a time bar on cashflows out of the
 5 companies to the shareholders.

6 SEÑORA GEHRING FLORES: Thanks. You are
 7 familiar, are you not, with the economic
 8 equilibrium mechanism provided in clause 5.5 of
 9 the new Concession Contract?

10 SEÑOR DOW: Correct.

11 SEÑORA GEHRING FLORES: And I think we have
 12 established that you have Spanish speakers on
 13 your team. I imagine, being in this case, you
 14 are quite familiar in particular with this
 15 clause of the contract. Am I right?

16 SEÑOR DOW: We are familiar with it.

17 SEÑORA GEHRING FLORES: Let's talk about how
 18 the PPT is adjusted in accordance with that
 19 economic equilibrium mechanism. In your
 20 reports I believe you refer to this as the PPT
 21 review at paragraph 165 of your First Report.

22 In your First Report you provide an

1 illustration of how the PPT review works.
 2 Let's take a look at that figure. It is
 3 Brattle First Report, figure 11 which appears
 4 on page 62 of your First Report, it's below
 5 paragraph 167. According to your illustration,
 6 the vertical axis is PPT and the horizontal
 7 axis represents IPK. Is that right?

8 SEÑOR DOW: Yes.

9 SEÑORA GEHRING FLORES: Now, in this
 10 graph -- so the horizontal axis is IPK but you
 11 use the term "Paying demand." That line
 12 represents IPK, right? Because IPK is slightly
 13 different than paying demand.

14 SEÑOR CALDWELL: Yes.

15 SEÑORA GEHRING FLORES: And those are the
 16 terms that the contract uses, right? So if
 17 I understand this figure correctly, you are
 18 showing how, according to the PPT review, the
 19 inversely proportionate relationship between
 20 IPK and PPT works. So, essentially, when IPK
 21 goes down, PPT goes up, in this graph.
 22 Correct?

1 SEÑOR DOW: Yes.

2 SEÑORA GEHRING FLORES: Would you agree that
 3 the mechanism also works the other way?

4 SEÑOR DOW: Correct.

5 SEÑORA GEHRING FLORES: As a general matter.
 6 So when IPK goes up, PPT goes down. Is that
 7 right?

8 SEÑOR DOW: Yes.

9 SEÑORA GEHRING FLORES: Let's go to 5.5.2.1
 10 of the contract. This is R-1b, this is the
 11 Alsacia contract, página 44 de 201.

12 It is the paragraph that starts "Del mismo
 13 modo" So it is further down, and I don't
 14 know -- you might already be very familiar with
 15 this clause, but I can read it into the record.
 16 "Del mismo modo la revisión por la causal
 17 descrita en el punto 5.5.2.1 anterior, en caso
 18 de verificarse un aumento del IPK que no se
 19 explique solamente por una reducción de los
 20 kilómetros comerciales, no dará lugar a la
 21 aplicación de un ajuste a la baja del PPT por
 22 aumento de la razón IPK si se verifica que en

1 el período de revisión se ha producido una
 2 reducción de la evasión que explique al alza
 3 del IPK, siempre que dicha reducción a juicio
 4 del Ministerio pueda atribuirse razonablemente
 5 a la gestión del concesionario."

6 Did I read that correctly? Is that what you
 7 understand the clause to say?

8 SEÑOR DOW: Yes.

9 SEÑORA GEHRING FLORES: And then if I could
 10 go to BRT/Transconsult's First Report, page 49,
 11 BRT/Transconsult also explains this clause.
 12 They say: "Esta cláusula ofrecía un incentivo
 13 financiero significativo para reducir la
 14 evasión del pago de tarifas, ya que permitía a
 15 las empresas mantener su PPT actual durante el
 16 período de revisión. Incluso, si el IPK
 17 aumentaba como resultado de más validaciones,
 18 siempre que ese aumento en el IPK fuera
 19 razonablemente atribuible a las acciones de
 20 las empresas para reducir la evasión del pago
 21 de tarifas. Esto, entonces, significaría más
 22 validaciones en el mismo PPT en lugar de

1 disminuirlo para alcanzar el equilibrio debido
 2 a un mayor número de validaciones."

3 Were you familiar with BRT's description of
 4 5.5.2.1?

5 SEÑOR DOW: Yes.

6 SEÑORA GEHRING FLORES: So we can agree that
 7 if you have an increase in IPK, unless the
 8 concessionaire can prove that the IPK increase
 9 is due to efforts to fight evasion, the PPT
 10 will be decreased inversely proportional to the
 11 increase in IPK. Is that right?

12 SEÑOR DOW: That is what it says there.

13 SEÑORA GEHRING FLORES: But do you agree
 14 that is what the contract provides?

15 SEÑOR DOW: I understand there is a dispute
 16 about the interpretation of this clause, and
 17 from what I understand, the question is what
 18 would happen if demand was going to fall
 19 anyway -- and it did fall -- but the
 20 concessionaire takes action to reduce fare
 21 evasion and then demand doesn't fall by so
 22 much, and therefore there is an increase of

1 demand as a result of more validations
2 resulting from the concessionaire's actions.
3 However, overall demand fell anyway for other
4 reasons.

5 So my understanding is there is a debate
6 about what should happen in that case, and, to
7 be clear, our report assumes that the PPT would
8 credit for the own actions of the
9 concessionaire in that case, just as it would
10 credit for the own actions of the
11 concessionaire when there is an overall
12 increase. So our assumption, and it is built
13 into our model, is that it works both when
14 demand was going to increase anyway, and when
15 demand fell by so much as to more than offset
16 the actions of the concessionaire.

17 SEÑORA GEHRING FLORES: You say it is your
18 understanding that there is a debate.

19 SEÑOR DOW: Correct.

20 SEÑORA GEHRING FLORES: Is it your
21 understanding that the contract is in debate?

22 SEÑOR DOW: I am not a legal expert, so

1 I have no view on that.

2 SEÑORA GEHRING FLORES: But you said you are
3 familiar with the contract, right?

4 SEÑOR DOW: I can read that.

5 SEÑORA GEHRING FLORES: Is this idea that
6 you just discussed in the contract?

7 SEÑOR DOW: I don't know how to interpret
8 the contract because I am not a lawyer, but
9 I have received views from the legal team, and
10 I believe that debate has been aired in these
11 proceedings, that the interpretation we use is
12 an appropriate interpretation of the contract.
13 But I don't -- obviously, neither Mr Caldwell
14 nor I have any competence to pronounce on how
15 the contract should be interpreted.

16 As an economist, I would say, given that
17 this clause in the contract was designed to
18 preserve incentives, it would be arbitrary to
19 truncate this mechanism in case overall demand
20 fell, so economically it makes sense to assume
21 what we have assumed.

22 SEÑORA GEHRING FLORES: I saw that in your

1 presentation, that it "makes sense." Were you
2 ever pointed anywhere in the contract where it
3 is actually stated?

4 SEÑOR DOW: No.

5 SEÑORA GEHRING FLORES: And you say you are
6 not a lawyer and you are not going to interpret
7 the contract, but beginning at paragraph 163 of
8 your First Report, we start talking about the
9 contract and the PPT review
10 mechanism -- I think that is paragraphs 163
11 through 170, and then the concept is picked up
12 later, at paragraph 184, and at paragraph 185
13 you state "At each biennial review the new
14 Concession Contracts specify that the
15 adjustment mechanism should ignore the
16 reduction in fare evasion and the corresponding
17 increase in paying demand due to the operating
18 companies' own efforts. In other words, any
19 demand improvement generated by the operating
20 companies' own fare evasion efforts should not
21 trigger a downward adjustment in the PPT in
22 subsequent biennial reviews."

1 And you have a footnote there and I believe
2 you are citing to exhibits to your report,
3 exhibit BG-23 and BG-22, and I believe you are
4 citing to clause 5.5.2 of the contract. Is
5 that right?

6 SEÑOR DOW: Correct.

7 SEÑORA GEHRING FLORES: So you are kind of
8 going through this description of PPT review,
9 and it kind of seems to me like you are
10 interpreting the contract, are you not?

11 SEÑOR DOW: That is not what we intended,
12 and it is not really how I read this report,
13 but I appreciate the point you are making.

14 SEÑORA GEHRING FLORES: Would you say that
15 these paragraphs here and what you do with the
16 PPT review mechanism, was that a legal
17 instruction?

18 SEÑOR DOW: We had a legal instruction
19 regarding this point which, to be perfectly
20 honest, as economists, we never thought it
21 could be interpreted any other way than we did
22 interpret it, but we had a legal instruction,

1 and it was recently, that there was an issue
2 here, so we carried on with our assumption
3 based on that legal instruction.

4 SEÑORA GEHRING FLORES: But you carried on
5 with this assumption knowing that what you are
6 doing with this particular PPT adjustment, this
7 credits, credits for fare evasion efforts, does
8 not exist in the contract. Is that right?

9 SEÑOR DOW: We had a legal instruction and
10 we followed it.

11 SEÑORA GEHRING FLORES: Did you see it
12 anywhere in the contract?

13 SEÑOR DOW: When we look at the contract, as
14 economists, it would never occur to us that
15 this incentive mechanism would be truncated or
16 invalidated in situations where overall demand
17 nevertheless falls. It was pointed out to us,
18 I believe quite recently, that that was in fact
19 the interpretation Chile was suggesting, but,
20 to be perfectly honest, it didn't occur to me,
21 as an economist, to think of that.

22 SEÑORA GEHRING FLORES: But it occurred to

1 you to cite to the contract when you were doing
2 this?

3 SEÑOR DOW: Yes.

4 SEÑORA GEHRING FLORES: And when you were
5 doing this you said you read the contracts?

6 SEÑOR DOW: Yes.

7 SEÑORA GEHRING FLORES: To come up with the
8 formula or the calculations that you are doing?

9 SEÑOR DOW: Yes.

10 SEÑORA GEHRING FLORES: I must say that we
11 have had a bit of a difficult time figuring out
12 exactly what you were doing with respect to
13 fare evasion credits, because it is not in the
14 contract, so we have spent quite a bit of time
15 pondering over this and trying to figure out
16 what was done --

17 SEÑOR GARCÍA REPRESA: I have to object to
18 pleading during these questions. What you just
19 made was a pleading, not a question to an
20 expert.

21 SEÑORA GEHRING FLORES: I can retract
22 that --

1 SEÑOR DOW: Can I just comment on
2 paragraph 186? We do make clear, I think,
3 that, as we put it, demand would have fallen
4 even further in the absence of the efforts of
5 the operating contracts, so we are talking
6 about a situation where demand has fallen
7 anyway, but would have fallen even further in
8 the absence of efforts.

9 SEÑORA GEHRING FLORES: Is that anywhere in
10 the contract?

11 SEÑOR DOW: I think I have answered that
12 question.

13 SEÑORA GEHRING FLORES: Actually I want you
14 to answer that question.

15 SEÑOR GARCÍA REPRESA: Objection.

16 PRESIDENTA KAUFMANN-KOHLER: When I read
17 this sentence that demand would have fallen
18 even further in the absence of the efforts of
19 the operating company, that is just a statement
20 of facts, or does this imply --

21 SEÑOR DOW: What it says here is figure 15
22 illustrates our implementation of the contract

1 provision. Suppose demand fell to the red
2 dotted line indicating observed IPK. The
3 observed IPK inherently reflects the operating
4 company's own efforts and includes extra demand
5 generated through these efforts. Demand would
6 have fallen even further in the absence of the
7 efforts. So we are talking about a situation
8 where demand has fallen but because the
9 companies made efforts, it didn't fall as much
10 as it would have.

11 PRESIDENTA KAUFMANN-KOHLER: I understand
12 that, and that is not a legal issue. That is
13 just a statement of the facts.

14 SEÑOR DOW: I see.

15 PRESIDENTA KAUFMANN-KOHLER: Then there is
16 an impact on the PPT, but that is a different
17 question.

18 SEÑOR CALDWELL: Yes. This is just a
19 statement of how you understand what has
20 happened in reality.

21 PRESIDENTA KAUFMANN-KOHLER: The factual
22 situation. Yes.

1 Ms Gehring Flores, are you going to a
2 different topic? Because we have been now
3 going for two hours, it would be a good time
4 for a break.

5 SEÑORA GEHRING FLORES: I think I just want
6 to finish up this line really quickly.
7 I think --

8 PRESIDENTA KAUFMANN-KOHLER: That is fine.

9 SEÑORA GEHRING FLORES: I am going to go to
10 the white board, however. It might be a
11 somewhat awkward situation since the white
12 board is behind you.

13 (Counsel drew on the white board)

14 Just to illustrate what is going on with the
15 efforts or the credit for evasion
16 efforts -- I am not exactly sure what you want
17 to call it -- mechanism that you develop in
18 your report, I just wanted to show what is
19 going on, and you can tell me if I am doing it
20 right.

21 So let's say the vertical axis is PPT, the
22 horizontal axis is IPK, and, just so this can

1 be a little bit more precise, I am not
2 representing that this is at all scientifically
3 accurate but I just put little ticks on the
4 graph, and I am going to use very simple
5 numbers (because of course an attorney who does
6 damages doesn't know numbers). So let's say
7 you have IPK in one year, let's call it IPK 0,
8 and let's say it has a value of 4. And let's
9 also say that in that year you have PPT 0, and
10 PPT 0 has a value of 3. So to graph that
11 I have this handy dandy little thing -- okay.

12 So there is a reference IPK. So let's say
13 the next year IPK goes down. So we have IPK 1.
14 Under the contract, if IPK goes down, PPT is
15 supposed to go up -- right -- inversely
16 proportionally, and the idea -- and let me just
17 put this down. So IPK 0 times PPT 0, 4 times 3
18 is 12. Would you agree with me there?

19 SEÑOR DOW: Yes.

20 PRESIDENTA KAUFMANN-KOHLER: I am just
21 asking myself how this will look on the
22 transcript. What you probably need to do is a

1 picture, and then we name it Respondent hearing
2 exhibit, or something like this. I don't know
3 how it will evolve and whether there will be
4 answers of the experts that you will put into
5 your chart. If that is the case, then you need
6 to make a first picture with what you are
7 representing to them as questions, and then we
8 put in their answers -- we do another picture
9 with their answers. Otherwise this will get
10 lost.

11 SEÑORA GEHRING FLORES: If at any time you
12 think I should take a picture, just let me
13 know.

14 So in this scenario, if IPK goes down, PPT
15 should go up. Am I correct? If you are going
16 to maintain the economic equilibrium -- and
17 this kind of comes from your examples, I think
18 figure 11 --

19 PRESIDENTA KAUFMANN-KOHLER: I think they
20 have already said yes to this question.

21 SEÑOR GARCÍA REPRESA: If I may, I will
22 object, because we are getting into legal

1 terminology, so I see we are not just going
2 about the IPK but about whether IPK means
3 economic equilibrium, and we may have an issue
4 there.

5 PRESIDENTA KAUFMANN-KOHLER: Yes. Maybe,
6 can we avoid going into the economic
7 equilibrium and just speak about the evolution
8 of IPK and PPT?

9 SEÑORA GEHRING FLORES: In the PPT review
10 mechanism, this area -- once you adjust -- as a
11 general matter; I am not talking about fare
12 evasion efforts yet. As a general matter, when
13 IPK goes down, PPT goes up, and in that way you
14 maintain -- in other words, this box should
15 equal the next box. This is what you are
16 representing in your figure 11 in your First
17 Report.

18 SEÑOR DOW: Yes.

19 SEÑORA GEHRING FLORES: I don't have to use
20 the word economic equilibrium --

21 PRESIDENTA KAUFMANN-KOHLER: No, you don't.

22 SEÑORA GEHRING FLORES: So, IPK 1 goes down.

1 PPT 1 should be at 4, correct?

2 SEÑOR DOW: Correct.

3 SEÑORA GEHRING FLORES: So that they are
4 both the same size.

5 This is where it gets a little interesting
6 to me and to our team. In your figure 15 in
7 your First Report, and in the paragraphs above,
8 you explain an "IPK no efforts", and this
9 I think is what you were just referring to,
10 meaning, I think the idea is, if the bus
11 operator weren't making any efforts to combat
12 evasion, then IPK would go even lower.

13 SEÑOR DOW: Correct.

14 SEÑORA GEHRING FLORES: We will call this
15 IPK NE -- "no efforts." Is that okay?

16 So I guess, presumably, potentially, if we
17 were maintaining some sort of equality in the
18 rectangles, there would be a PPT no efforts,
19 and then we get another rectangle that goes
20 like that. So I just put IPK, IPK 0, PPT 0 is
21 12, IPK 1 times PPT 1 is 12, IPK no efforts
22 times -- then, we will see about that. [See

1 RAA-1]

2 So all of these rectangles would be, or are
3 the same value?

4 SEÑOR DOW: Correct.

5 SEÑORA GEHRING FLORES: So IPK no efforts
6 times PPT no efforts would equal 12. But from
7 what I gather you are saying -- and I think
8 this is in your figure 15 but it is not quite
9 stated -- is that, because you think it would
10 make sense for the concessionaire to get
11 something extra if they have made efforts to
12 combat fare evasion even though IPK is going
13 down, you think that the calculation that
14 should be made is this (red dots and hatched
15 red box drawn).

16 SEÑOR DOW: Correct.

17 SEÑORA GEHRING FLORES: So you are actually
18 applying this kind of hypothetical PPT, the PPT
19 no efforts, to IPK 1. Is that correct?

20 SEÑOR CALDWELL: Can I go to the board?

21 PRESIDENTA KAUFMANN-KOHLER: Maybe we take
22 another picture now.

1 (Picture 2 taken) [See RAA-2]

2 SEÑOR CALDWELL: So the question -- we are
3 doing a damages analysis so we have to compare
4 a but-for and actual scenario. Just to be
5 clear, first of all, what happens in the actual
6 scenario is IPK goes down to IPK 1. So the
7 actual scenario will reflect the red outcome.
8 That is what really happened in Chile. That is
9 what we are modelling in the actual scenario.

10 Then the next question you need to answer
11 for damages is, we have a but-for scenario
12 where IPK would be very different. Fare
13 evasion rates would be lower. It is going to
14 be somewhere up here. But then the question
15 is, if there is a 50 or 50 per cent own efforts
16 credit, then credit with relation to what? How
17 much did the concessionaire's efforts affect
18 the level of the IPK? And therefore how that
19 50 per cent calculation relates to.

20 So what reference point -- the but-for is up
21 here. The question is what is the reference
22 point to compute the own efforts credit in the

1 but-for scenario. The reference point is
2 actually down here, because that is what IPK
3 would have been had the concessionaire not done
4 anything at all, and so that is the point of
5 the IPK no efforts. It is not that this
6 outcome ever happens; the question is how do
7 you measure the 50 per cent credit that you
8 give to the concessionaire for their own
9 effort. It is not the difference between
10 the -- it is simply the difference between the
11 actual red IPK and where the but-for is,
12 because the red IPK already embeds some of the
13 effects of the company's own efforts; it is the
14 difference between the blue outcome, which
15 would have occurred absent any effort at all by
16 the company, and given all the other things
17 that are going on, and the but-for. You then
18 have to split the difference between blue and
19 but-for to get you to the 50 per cent credit
20 that the company should get.

21 PRESIDENTA KAUFMANN-KOHLER: And the
22 but-for -- because before you said "here" and

1 "here" will not show on the transcript -- is
2 around, we would say 6? Is that where you
3 placed it?

4 SEÑOR CALDWELL: I am not saying in terms of
5 real numbers that is where it is. I am just
6 saying imagine it was up here, that is the
7 but-for. Now the question is where do we
8 measure the own efforts credit with respect to.
9 It is actually the difference between -- I
10 don't know how to draw it, but I will draw it
11 (red arrows). That is the scope of improvement
12 because of efforts both by the companies and
13 the State in combating fare evasion, so if we
14 are giving an own-efforts credit, it has to
15 relate to 50 per cent of that difference as
16 opposed to 50 per cent of that difference, and
17 by that difference I mean the red line here to
18 6, which would reflect -- the red line would
19 already embed some of the effort that the
20 companies have done. (Picture 3 taken) [CAA-1]

21 SEÑORA GEHRING FLORES: You speak of this
22 50 per cent credit as if it is in the

1 contract --

2 PRESIDENTA KAUFMANN-KOHLER: Excuse me,
3 before we go on, when we mark these hearing
4 exhibits, the last one is Mr Caldwell's
5 annotation on the chart.

6 SEÑORA GEHRING FLORES: Is this 50 per cent
7 credit --

8 PRESIDENTA KAUFMANN-KOHLER: I am a little
9 concerned. This is lasting much longer than
10 what I thought, and now it is two hours 15.
11 For the court reporters it is very long. So
12 I don't know -- either it is very short or we
13 take the break.

14 SEÑORA GEHRING FLORES: I think we should
15 take a break. That is fine.

16 PRESIDENTA KAUFMANN-KOHLER: So nobody
17 touches the board during the break, please, and
18 the experts don't speak other than to each
19 other during the break as well.

20 (Short break from 11.18 am to 11.31 am)

21 PRESIDENTA KAUFMANN-KOHLER: So, we are
22 ready to continue, Ms Gehring Flores?

1 SEÑORA GEHRING FLORES: Thank you,
2 Madam President.

3 I am just going to erase what Mr Caldwell
4 did for us, and I would ask Kelby to go to
5 figure 15 in Brattle's First Report, and for
6 everyone's benefit I am going to put "own
7 efforts evasion credit." [See RAA-3]

8 Now, in figure 15 of your First Report that
9 scenario is when the IPK is going down,
10 correct?

11 SEÑOR CALDWELL: Figure 15 is -- yes.
12 Saying IPK 0 to a lower IPK.

13 SEÑORA GEHRING FLORES: So in your but-for
14 scenario and in this "own efforts for evasion
15 credit," you assume that the concessionaires
16 can get credit for their efforts to combat
17 evasion even when the IPK goes down?

18 SEÑOR CALDWELL: Remember, there is a
19 dispute here. In reality they didn't get any
20 credit in the resetting of the PPT. We are
21 saying in the but-for scenario they should get
22 some credit for their own efforts in that

1 scenario, their contribution to the reduction
2 in the fare evasion.

3 SEÑORA GEHRING FLORES: In your but-for
4 scenario?

5 SEÑOR CALDWELL: Yes.

6 SEÑORA GEHRING FLORES: In your but-for
7 scenario the IPK -- and in figure 15 your IPK
8 is going down, and you are telling us or
9 describing to us this extra credit that you
10 believe concessionaires should get for their
11 own evasion efforts when IPK goes down. Is
12 that correct?

13 SEÑOR CALDWELL: Figure 15 is just to
14 illustrate what has really happened. You have
15 essentially tried to replicate figure 15 here.
16 IPK 0 decreases to IPK 1. That is what you
17 really observe, was IPK 1. But there is a
18 separate -- the companies did something, so the
19 IPK would have fallen even further to IPK NE
20 without the companies' efforts. That is simply
21 the framework here. That is the beginning
22 point for the analysis.

1 SEÑORA GEHRING FLORES: And this last
2 equation I just put at the bottom, IPK 1 times
3 PPT no efforts equals 18, and that would
4 express this credit, this bonus that the
5 concessionaires would get.

6 SEÑOR CALDWELL: That would have been the
7 outcome had Chile provided the own efforts
8 credit in the real world.

9 SEÑOR DOW: Had they provided one hundred
10 percent credit. Just to clarify, on slide 19
11 of our presentation yesterday where we
12 discussed this, we point out that we are
13 instructed to assume only half of this
14 compensation mechanism that is currently under
15 discussion. Only 50 per cent credit for own
16 efforts.

17 SEÑORA GEHRING FLORES: But none of this is
18 in the contract, right? None of this is in the
19 contract?

20 SEÑOR GARCÍA REPRESA: Objection. Asked and
21 answered. I think it is the third time you
22 have asked the same question.

1 SEÑORA GEHRING FLORES: We have been going
2 through a lot of things, Mr Garcia Represa, and
3 they have been talking about but-for and actual
4 and if Chile had in the actual scenario done
5 this. Does the contract --

6 SEÑOR GARCÍA REPRESA: No, in the but-for.

7 SEÑORA GEHRING FLORES: He just said if
8 Chile had done this in the actual scenario.

9 SEÑOR GARCÍA REPRESA: The "if" is a
10 conditional, so it must be the but-for.

11 SEÑORA GEHRING FLORES: Which they did not
12 because it is not in the contract, correct?

13 PRESIDENTA KAUFMANN-KOHLER: But that is not
14 really a question to financial experts. They
15 confirm that they have done this.

16 SEÑORA GEHRING FLORES: On the basis of?

17 PRESIDENTA KAUFMANN-KOHLER: Then that is a
18 different question. On which basis did you
19 give the credit?

20 SEÑOR DOW: On our slide 19 yesterday we
21 said we were instructed to assume 50 per cent
22 own efforts credit in line with BRT and

1 Transconsult.

2 PRESIDENTA KAUFMANN-KOHLER: So the answer
3 is on the basis of instructions from counsel.

4 SEÑORA GEHRING FLORES: On the basis of
5 instruction of counsel or BRT Transconsult?

6 PRESIDENTA KAUFMANN-KOHLER: Well, I assume
7 BRT does not give instructions to other
8 experts.

9 SEÑOR CALDWELL: I think the logic here is
10 it is an instruction from counsel; it is how
11 you interpret the contract. Counsel's
12 instruction is informed by BRT/Transconsult's
13 view about what is required to fight fare
14 evasion.

15 PRESIDENTA KAUFMANN-KOHLER: Fine.

16 SEÑORA GEHRING FLORES: So in accordance
17 with the contract, I think we have established
18 if IPK goes down, PPT goes up, these boxes
19 should be the same, so if IPK were to go down,
20 PPT would go up. Essentially the
21 concessionaires would be receiving the same
22 sort of revenue to maintain that equality,

1 correct?

2 But you are saying that if IPK goes down, in
3 this hypothetical world, if IPK goes
4 down -- I guess maybe my question is where do
5 you get this number? How do you establish
6 this? Where does IPK no efforts come from in
7 this 50/50 split? What is being split 50/50?
8 Is the bonus being split 50/50? Is the IPK no
9 efforts being split 50/50? How did you come up
10 with this? Because this seems pretty
11 sophisticated. We don't know where you came up
12 with it. Where does it come from?

13 PRESIDENTA KAUFMANN-KOHLER: Can you pick a
14 different color?

15 SEÑORA GEHRING FLORES: And I think I need
16 another picture before this.

17 (Picture 5 taken) [See RAA-4]

18 SEÑOR CALDWELL: Ok, so let's do this in
19 steps. First steps, the first thing is what
20 happened actually, so we are talking about the
21 actual scenario. IPK goes from IPK 0 to 1.
22 This one, the red one, that is the actual

1 outcome, what was really done in Chile given
2 the profile of demand.

3 SEÑORA GEHRING FLORES: You are saying that
4 this bonus actually happened?

5 SEÑOR CALDWELL: No. I am just trying to
6 indicate on the red. I am pointing to the red
7 outcome here. I don't know if the notation is
8 clear. So that is what really happened.

9 Our next question is what happened in the
10 but-for world, so if we had seen BRT's view,
11 IPK, let's just for argument's sake say there,
12 and that is the but-for IPK at 6, so it is
13 higher than what was really observed, IPK 1,
14 and it is also higher in our example than IPK
15 0.

16 So how should the PPT revision work now in
17 the but-for world scenario given we are at IPK
18 6? So with no change at all, no credit at all,
19 what would happen is you would go ...

20 (Mr Caldwell drew in green on the
21 chart) -- that would preserve the 12, the same
22 as before; it would claw back all the benefit.

1 PRESIDENTA KAUFMANN-KOHLER: You should say,
2 because otherwise on the transcript it will not
3 be understandable, that PPT would be at 2.

4 SEÑOR CALDWELL: PPT would be at 2 in this
5 example. So the 12 would remain exactly the
6 same as the 12 here, under the yellow line, and
7 the 12 under the red line too.

8 But okay, there is an own efforts credit
9 under the contract that we have been
10 discussing. The legal interpretation that we
11 have been provided is that that should be
12 there, and we have the instruction to say that
13 50 per cent of the credit should go to the
14 companies.

15 So how do you work out the credit, is the
16 next question. What we do is we say the red
17 line IPK, IPK 1 observed, is affected already
18 by the companies' own efforts, so therefore you
19 cannot just simply compare the red line with
20 the but-for IPK, which reflects both the
21 companies and the State, and say okay, the
22 difference between those two I am just going to

1 carve up 50/50 between the parties.

2 What you first have to do is say I am going
3 to imagine the hypothetical outcome which
4 completely removes all of the efforts from
5 everybody, that is what it would have been had
6 nobody done anything, neither the company nor
7 the State, that is the blue line, and then from
8 there we get to the but-for. So that is the
9 improvement related to everyone's
10 efforts -- I am going to call it, that is the
11 "improvement from companies, C, plus State
12 efforts." (In green)

13 What we come back and do is say, given that
14 is the whole improvement due to everyone's
15 efforts, 50 per cent of that is to go to the
16 companies, so therefore we are going to
17 recompute the IPK or the PPT based on
18 50 per cent here, we are going to recompute the
19 IPK on 4, in other words, or recompute the PPT
20 based on an IPK of 4, given this construction,
21 working through from the actual outcome to the
22 new efforts at all by anybody, and then to the

1 efforts by everyone in the but-for.

2 So that is the logic of the calculation.

3 PRESIDENTA KAUFMANN-KOHLER: Thank you.
4 Let's take another picture of the chart now.
5 (Picture 6 taken) [See CAA-2]

6 SEÑOR CALDWELL: Sorry, one final comment.
7 What that obviously means is that you calculate
8 the new PPT at 3 -- it would ultimately be 3
9 given the assumption of the 4 IPK, given the
10 own efforts credit -- but then that PPT of 3
11 will apply to the but-for IPK, and that is the
12 entire purpose of the own efforts credit.

13 SEÑORA GEHRING FLORES: Thank you. Do you
14 ever use the but-for IPK in your table or
15 figure 15 in your report?

16 SEÑOR CALDWELL: No. That doesn't explain
17 the full -- that is introducing the concept of
18 where the IPK would have gone had no one done
19 anything. It doesn't fully follow through all
20 the diagrams we have just drawn, if that is
21 your question.

22 SEÑOR DOW: We explain figure 15 in

1 paragraph 186 as an illustration, and then in
2 188 we say we go halfway towards that. We
3 implement it at 50 per cent.

4 SEÑORA GEHRING FLORES: And the only way to
5 maybe try to reverse engineer what you actually
6 did in your model would be to go into your
7 model and look at all the numbers you are
8 using. That is the only way we could find out
9 what this might be, for instance? What this
10 hypothetical "IPK no efforts" is? Is that
11 right?

12 SEÑOR CALDWELL: Sorry, what is the
13 question?

14 SEÑORA GEHRING FLORES: You can strike that.
15 The end result -- we are getting back to the
16 end result -- is that instead of, as the
17 contract provides, when IPK goes down, PPT goes
18 up, and things would remain the same, you know,
19 12, 12, 12, your point is that you argue that
20 should be this extra bonus - this extra credit.
21 Would you be surprised that this is worth
22 \$115 million of your bottom line damages

1 number? [See RAA-5]

2 SEÑOR CALDWELL: Again, it depends what you
3 are talking about. If you are comparing a
4 scenario where there is an own efforts credit
5 versus one where there isn't one at all, then
6 I don't recall the number but the own efforts
7 credit is valuable. Again, that is something
8 that is easily computable; I just don't
9 remember the number off the top of my head.

10 SEÑOR DOW: For context, the overall damages
11 from fare evasion considers a standalone amount
12 to 218.7, as we showed in our presentation
13 yesterday. Slide 14.

14 SEÑORA GEHRING FLORES: So maybe it is even
15 upwards of 200, but ...

16 SEÑOR DOW: We are giving 50 per cent in
17 credit. So ... I am trying to help you by
18 suggesting your number is roughly half of that.

19 SEÑORA GEHRING FLORES: But in any event,
20 this concept that you argue should be a part of
21 the contract, that you argue is fair, the own
22 efforts for evasion credit, is a significant

1 part of your damages case. Am I right?

2 SEÑOR DOW: It is significant, but if the
3 Tribunal wants us to explore sensitivities with
4 respect to that, we can do that, but I don't
5 want to endorse a number on the hoof without
6 having done that calculation.

7 (Counsel returned to her seat)

8 SEÑORA GEHRING FLORES: So from what
9 I understand from your testimony now, and
10 perhaps a little bit from your reports, that at
11 least part of this was a legal instruction, and
12 that is the 50/50 split?

13 SEÑOR DOW: Correct.

14 SEÑORA GEHRING FLORES: But just generating
15 this credit, all of the formulas that went
16 behind this, all of the ideas that went behind
17 this, this No Efforts IPK for instance, that
18 was your idea? You came up with it on your
19 own?

20 SEÑOR DOW: I don't understand the question.
21 The idea of giving credit for own efforts is in
22 the contract, and was actually implemented at

1 one hundred percent for Redbus and STP --

2 SEÑORA GEHRING FLORES: When their IPK did
3 what?

4 SEÑOR DOW: When it went up, so the
5 mechanism, if you like, of making an adjustment
6 to the PPT to reflect own efforts is not our
7 invention; it is something that was done and
8 that we have simply implemented, but the
9 assumption that we would implement half of the
10 credit for own efforts was a legal instruction.

11 SEÑORA GEHRING FLORES: Where in the
12 contract does it say you get any sort of credit
13 when IPK goes down?

14 SEÑOR GARCÍA REPRESA: Objection, asked and
15 answered.

16 PRESIDENTA KAUFMANN-KOHLER: Yes, I think
17 the question has been asked.
18 Ms Gehring Flores, I think I should draw your
19 attention to the fact that you have 40 minutes
20 left in total. I am not saying we will cut you
21 off strictly after the 40 minutes, but I note
22 that there is still Versant coming who will

1 need a time for their presentation. This is of
2 course without the closing arguments and the
3 question time.

4 But just so that you know how much is left
5 for this examination.

6 SEÑORA GEHRING FLORES: Point taken. I have
7 very little left.

8 PRESIDENTA KAUFMANN-KOHLER: Good. That is
9 fine.

10 SEÑORA GEHRING FLORES: You have spoken
11 about your model. I think we are all in
12 agreement that if, for some reason, the
13 Tribunal were not to choose the various
14 permutations and combinations that you put in
15 your reports with respect to the various heads
16 of damages, I think you have about seven, is
17 that right?

18 SEÑOR DOW: We had a number of them, yes.

19 SEÑORA GEHRING FLORES: There are about 7
20 and some of them have sub-headings. If the
21 Tribunal weren't to agree to your particular
22 combination, then your damages model, your

1 reports, do not provide them with a guide on
2 what to do. They would not be able to do that
3 on their own, right?

4 SEÑOR DOW: We have shown the standalone
5 effects in the sensitivity I showed yesterday,
6 so we have provided some sensitivities, but,
7 you know, there are many, many different
8 combinations of the different claims. If you
9 have seven items on a list, then there are two
10 to the power of seven, which is 64 times two,
11 which is 128 different permutations, so we have
12 not done all those, but I think there are some
13 relatively easy switches in our model that we
14 could turn on and off, and Versant can do the
15 same, and no doubt agree with us on the effect
16 of those.

17 SEÑORA GEHRING FLORES: But you are not
18 suggesting that the Tribunal would be able to
19 do that on its own, right?

20 SEÑOR DOW: No, but I would be happy, we
21 would be happy to assist the Tribunal in those
22 matters, if requested.

1 SEÑORA GEHRING FLORES: Particularly to the
2 extent, like you have already identified, to
3 the extent that there is overlap in these
4 categories. Some categories have
5 sub-categories. Evasion includes not only
6 evasion rate but this own-efforts evasion
7 credit, correct? So it would be difficult to
8 pull that apart, am I right?

9 SEÑOR DOW: Well, the model is too difficult
10 for -- I think, with due respect to the
11 Tribunal -- probably too difficult for them to
12 go into it and tweak it the way they would
13 like, but if they are so able, then that is
14 fine, of course, but we would be happy to help
15 them, if requested.

16 SEÑORA GEHRING FLORES: The other question
17 I have for you, I know in your scenarios for
18 damages you were assuming that the Tribunal
19 would determine that they would agree with all
20 of the heads of damages, except one. For
21 instance, they would agree with buses and
22 vandalism and evasion and all the different

1 heads of damages. We can go to -- let's see,
2 it is the second Brattle report, table 13, top
3 of the page 109, above paragraph 339.

4 SEÑOR DOW: Yes. Individual impact of
5 specific breaches. So this is -- that table is
6 having all of the breaches except, turning off
7 one at a time.

8 SEÑORA GEHRING FLORES: Right, and my
9 question is this. If the Tribunal were to
10 decide that only one --

11 SEÑOR DOW: Yes.

12 SEÑORA GEHRING FLORES: If they were to
13 decide that Chile's breach only involved one,
14 and none of the others, for instance, let's say
15 the Tribunal were to decide that the breach was
16 based on vandalism but none of the other
17 factors, the damages that Claimants would get
18 would be zero, correct?

19 SEÑOR DOW: Well, I haven't done the
20 calculation but I am sure that is right. If
21 I refer you to the diagram we showed yesterday
22 on slide 4 of our second presentation, that

1 probably helps, because what that amounts to
 2 doing is choosing a number more in line with
 3 Versant, whereby one says that the actions of
 4 Chile have reduced value to the company;
 5 however, it would have gone into financial
 6 distress anyway, because reversing that action
 7 would not take it above the amount of debt.

8 SEÑORA GEHRING FLORES: How about if the
 9 Tribunal decided that the only one that they
 10 agreed with, the only one of these factors,
 11 was, let's say, bus fleet and speeds and
 12 infrastructure. Just that one. Damages would
 13 be zero there as well, correct?

14 SEÑOR DOW: I can't say that, because that
 15 is quite a big one, so I would have to do the
 16 calculation, but perhaps you have done the
 17 calculation. I don't know.

18 SEÑORA GEHRING FLORES: I am sure Versant
 19 will give their opinion on that. Would you be
 20 surprised if they agreed to fare evasion, let's
 21 say the own efforts for fare evasion credit, if
 22 the Tribunal only agreed with that one point,

1 then damages would be zero.

2 SEÑOR DOW: I think I would be surprised
 3 because that is quite a small point. If the
 4 fare evasion remained high at, you know, the
 5 very high levels, but that credit was
 6 given -- I don't know, I haven't done the
 7 calculation but I would not be surprised, if
 8 you asked me to answer the question, but
 9 I would have to do the calculation.

10 SEÑORA GEHRING FLORES: You wouldn't be
 11 surprised if damages were zero?

12 SEÑOR DOW: We can see from table 4, and
 13 I tried to emphasise this yesterday, because
 14 the company is under water compared to its
 15 level of debt, the actual value in the company
 16 is much less than its level of debt, and
 17 therefore, indeed, it is one of the features of
 18 this case that small changes to what actually
 19 happened result in zero damages, although they
 20 would benefit the debt holders but the debt
 21 holders are not Claimants in this arbitration.

22 SEÑORA GEHRING FLORES: Thank you very much,

1 Professor Dow and Mr Caldwell.

2 PRESIDENTA KAUFMANN-KOHLER: Any questions
 3 in re-direct?

4 Re-examination by the Claimants
 5 by Mr Garcia Represa

6 SEÑOR GARCÍA REPRESA: Yes, Madam President.
 7 If I may, gentlemen, I have a few questions for
 8 you that actually involve maybe explaining a
 9 bit more some of the concepts we have been
 10 discussing, and maybe we can start from the
 11 back so that we have it all fresh in our mind.
 12 I would like you, if you want to, you can use
 13 the diagram below, and actually I think it
 14 would be interesting, at least for me, if you
 15 could draw in there back the own credits
 16 effort, and so that it is clear to you, I would
 17 like you to explain what is your economic view
 18 of how that credit operates on the graph and
 19 why it should operate that way, and if you
 20 could also represent in a different colour what
 21 is Chile's view and why, in your economic
 22 opinion, it destroys the incentive to fight

1 against evasion.

2 SEÑORA GEHRING FLORES: Excuse me, I think
 3 there were a few questions in there. Could you
 4 break it up, please?

5 SEÑOR GARCÍA REPRESA: Sure. Could you
 6 please stand and go to the board, please? It
 7 would be great if you could delete everything
 8 that is in red --

9 SEÑORA GEHRING FLORES: Just one second.
 10 I don't know if one final picture was taken.
 11 I am sorry.

12 PRESIDENTA KAUFMANN-KOHLER: I think it was.
 13 You took a picture at the end.

14 SEÑORA GEHRING FLORES: I don't think it has
 15 the number.

16 (Picture 7 taken) [See RAA-5]

17 SEÑOR GARCÍA REPRESA: If you delete what is
 18 in red so we can start afresh. Ok, as I say,
 19 you were asked a number of questions, and
 20 I would like you to, if you could again,
 21 represent the IPK that would result in the
 22 but-for scenario, identify the actual scenario,

1 and then explain what PPT would result from the
2 50/50 credit and why you think that
3 economically that makes sense.

4 SEÑOR CALDWELL: Let's take it in steps.
5 What is the credit doing, fundamentally? Now,
6 we heard it said Chile's view seems to be that
7 the credit is there only to the extent that
8 demand increases. So what does Chile's view
9 mean? It means that suppose the original IPK
10 was red. (Microphone off)

11 SEÑOR GARCÍA REPRESA: Is the microphone on?
12 I'm afraid it might be off.

13 SEÑOR CALDWELL: Is that okay? Ok, do I need
14 to start again?

15 SEÑOR GARCÍA REPRESA: I think you can
16 continue.

17 SEÑOR CALDWELL: So it is what is Chile's
18 view of the own efforts credit. Suppose the
19 original IPK was red, but that, because of own
20 efforts, the IPK actually increases to yellow.
21 Well, then, what you don't want to do is come
22 back at the review and find out that you have

1 got more IPK than you had, that there has been
2 an increase. You need to provide a credit.
3 What do you do? You do not reset the PPT based
4 on the yellow one. What you do is you reset
5 the PPT based on the red. So that would be the
6 own efforts credit (red hatched area) this
7 entire bit, on the way up.

8 SEÑOR GARCÍA REPRESA: And that, to be
9 clear --

10 SEÑOR CALDWELL: If I take off some of
11 these, maybe it is clearer.

12 SEÑOR GARCÍA REPRESA: When you say the IPK
13 goes up, is that because demand is actually
14 going up because evasion is going down and
15 hence more people are actually boarding and
16 paying?

17 SEÑOR CALDWELL: Yes, so let's assume
18 everything else..

19 SEÑOR GARCÍA REPRESA: To be clear, IPK at
20 the bottom, do we agree that is demand?
21 Compared from one year to another.

22 SEÑOR CALDWELL: Yes, IPK is demand. Yes,

1 when you compare one year to another, and we
2 have started with an IPK, we develop the PPT
3 originally based on an IPK -- can I rub out
4 some of this stuff? Just to be... [See CAA-3]

5 SEÑOR DOW: So demand went up. Normally the
6 PPT would go down, but giving -- this is in the
7 scenario when demand goes up -- giving full
8 credit to the operator for that increase in
9 demand means that the PPT doesn't go down; it
10 remains where it was, and that is what happened
11 to Redbus and STP. So that is in the situation
12 where demand goes up, and you give full credit
13 to the operator for that increase in demand.

14 The question then is what if demand goes
15 down and what if the credit is only
16 50 per cent?

17 SEÑOR GARCÍA REPRESA: I was going to ask
18 you about that. Is that why you refer to
19 Redbus and STP at the bottom of slide 19 in the
20 second presentation?

21 SEÑOR DOW: Yes.

22 SEÑOR CALDWELL: And why do you want to do

1 this when demand goes up? Well, because you
2 want to provide the company an incentive to
3 fight fare evasion. If you don't do this, what
4 the company is going to get, it is going to
5 spend money to fight evasion, but if you were
6 to reset based on the new IPK that they have
7 generated by their own efforts, they would lose
8 the value of that.

9 SEÑOR DOW: All the cost of fighting fare
10 evasion would be borne by the company, but if
11 you didn't make this allowance, they would get
12 none of the benefit from it. So the idea is
13 give them the benefit of their efforts in
14 reducing fare evasion.

15 SEÑOR CALDWELL: And then the next thing is
16 what does a 50 per cent credit mean? A
17 50 per cent credit means, rather than go all
18 the way back -- so this has been the outcome.
19 Rather than go all the way back to here, and
20 recalculate the PPT there, we go to halfway in
21 between, and we recalculate the PPT based on
22 that, and it would give a slightly smaller own

1 effort -- it would result in a PPT somewhere
2 between 3 and 4, and then that PPT would apply
3 to the actual outcome, the 4. So that is what
4 happens on the way up.

5 SEÑOR DOW: In a nutshell, what we are
6 saying is that also happens on the way down,
7 but it is more complicated to represent on the
8 diagram on the way down.

9 SEÑOR GARCÍA REPRESA: And Professor,
10 economically, why should it also happen on the
11 way down?

12 SEÑOR DOW: Because when exogenous factors
13 are making demand go up and down, we still want
14 the operator to have the same incentives. From
15 an economic point of view, maybe demand goes
16 down because of some unrelated
17 reason -- everybody is taking the Metro,
18 everybody is driving a car, whatever -- we
19 would still like economically the incentive
20 problem for the operator hasn't changed, which
21 is, if you can put in some work to reduce fare
22 evasion, that would be good for everybody. So

1 that is why that mechanism and those incentives
2 are not affected by whether demand has gone
3 down for exogenous reasons.

4 SEÑOR GARCÍA REPRESA: Can you explain to us
5 what happens in the scenario put forward by
6 Chile where there is zero own efforts credit
7 for the company from an economic and incentive
8 perspective, what happens to the operator who
9 is spending money on evasion, seeing that
10 overall demand is still going down and yet not
11 taking any own efforts credit?

12 SEÑOR DOW: So economically -- you mean in
13 terms of incentives?

14 SEÑOR GARCÍA REPRESA: Yes.

15 SEÑOR DOW: Economically, if I am the
16 operator, I would be spending money to reduce
17 fare evasion but then any benefits from that
18 reduction in fare evasion would just be taken
19 away from me when there is a PPT review, so
20 that would severely reduce my incentives to
21 combat fare evasion. I would get a short term
22 boost until the PPT changed but there would be

1 no real incentive.

2 SEÑOR GARCÍA REPRESA: I think I will move
3 on to another topic, so if you want to go back
4 to your seats, you may.

5 (Mr Caldwell and Mr Dow resumed their seats)

6 You may recall you were taken to an exhibit,
7 BG-147. It was presented to you as being the
8 companies' expectations of discounts, and I was
9 wondering whether you were in the room when
10 Mr MacAllister testified before this Tribunal
11 at this hearing? Were you or were you not?

12 SEÑOR CALDWELL: I was not.

13 SEÑOR DOW: I was not either.

14 SEÑOR GARCÍA REPRESA: So I will read to you
15 an extract from the transcript at pages 612 and
16 613 in Spanish. And I think we have printed
17 copies for the Tribunal, I know you have the
18 transcript but it may be easier for this part

19 So I will begin by reading, and the answer
20 of Mr MacAllister begins on line 13 of
21 page 612. He was asked a question, as you can
22 see above, about the reference in Versant to

1 discounts being expected at 4 per cent, and he
2 responded - I will read line 13- : "Puede que
3 haya algún documento que tenga esta cifra.
4 Básicamente uno de los documentos que había era
5 con los informes o con las expectativas que
6 tenían los bonistas, y en las expectativas con
7 los bonistas siempre en todos los modelos que
8 se les presentó se les presentaba el peor
9 escenario en términos de todas las variables
10 operacionales que íbamos a tener. Y el peor
11 escenario pues en términos de descuentos era el
12 máximo que íbamos a tener, que era el 4 por
13 ciento. Obviamente nuestras expectativas no
14 eran el 4 por ciento de descuento; nuestras
15 expectativas están alrededor del cero por
16 ciento."

17 How does that accord with the indicators
18 that to your knowledge were applied in this
19 case in your model, and, two, were estimated
20 independently by BRT/Transconsult?

21 SEÑOR CALDWELL: So obviously in the
22 principal case we have zero for the ICF and ICR

1 and ICT at 99.7, which was all discussed
2 earlier. I think the one comment here is that
3 it is routine -- we have been focusing on
4 the May 2012 base case model. It is routine
5 for the lenders to be conservative in the way
6 they forecast, because obviously their concern
7 is to get repaid.

8 The equity holders in any given asset may
9 have more optimistic expectations than the bond
10 holders.

11 SEÑOR GARCÍA REPRESA: A lot of questions
12 turned on one hundred percent, one hundred
13 percent, one hundred percent. Are you aware
14 that, for example, for ICF discounts are zero
15 above 95 per cent? Is that something you have
16 considered in your reports?

17 SEÑOR DOW: I mentioned that there was a
18 non-linearity earlier this morning.
19 I mentioned there was a non-linearity whereby
20 the indicators translate into discounts, and
21 that is what I was referring to there, that you
22 don't multiply -- you don't just take the

1 indicator and make it into a discount.

2 SEÑOR GARCÍA REPRESA: So --

3 SEÑOR DOW: So, as you put it, you go above
4 a threshold and then you get no discount.

5 SEÑOR GARCÍA REPRESA: And that threshold is
6 not one hundred percent.

7 SEÑOR DOW: Correct.

8 SEÑOR GARCÍA REPRESA: You were also taken,
9 you may recall, to slide 122 of the Claimants'
10 opening -- I will hand you a paper copy of
11 it -- and you were asked questions about the
12 sources underneath, and I think the submission
13 to you was made that somehow the data is not to
14 be found in those exhibits. So I would like to
15 show you some of the exhibits we have
16 presented, and that are referred to as sources
17 of that graph, and we will get to C-746. Now,
18 as you can see, the series above, the series
19 beginning with C-733, are speed reports
20 dated March 2019. Do you see that?

21 SEÑOR DOW: Yes.

22 SEÑOR GARCÍA REPRESA: And we have a speed

1 report for every day in March up until exhibit
2 C-746, 17 March 2019.

3 SEÑOR DOW: Yes.

4 SEÑOR GARCÍA REPRESA: Is this the date of
5 mid March you were mentioning earlier today
6 when you were responding to what the graph
7 actually represents in terms of ICR?

8 SEÑOR CALDWELL: Yes. Yes, I was referring
9 to mid March. I knew the data was there for
10 the first half of the month.

11 SEÑOR GARCÍA REPRESA: To be clear, on that
12 graph we were looking at on slide 122, is
13 that -- how does that compare, that actual
14 graph, to your but-for?

15 SEÑOR CALDWELL: Sorry, what is the
16 question?

17 SEÑOR GARCÍA REPRESA: The graph is
18 representing actual data until March. What
19 would you do in your but-for if you wanted to
20 represent the but-for in an ICR, what would
21 happen to that graph?

22 SEÑOR DOW: What is our but-for ICR?

1 SEÑOR GARCÍA REPRESA: I think it is
2 conceptually. This is an actual world graph.
3 If you correct for the but-for, can you explain
4 what would happen to that graph?

5 SEÑORA GEHRING FLORES: Just one moment.
6 Have we actually established that the graph has
7 ICR in it as opposed to just speeds? Do these
8 graphs actually speak of ICR or ICT?

9 SEÑOR GARCÍA REPRESA: Yes, it is in the
10 title.

11 SEÑORA GEHRING FLORES: Because speed is not
12 the same as ICR.

13 SEÑOR GARCÍA REPRESA: Well, you could have
14 asked the experts about that --

15 SEÑORA GEHRING FLORES: Well, you presented
16 these documents and you are saying what they
17 say they say.

18 SEÑOR GARCÍA REPRESA: Yes, and they were in
19 the record when you cross-examined the
20 transport experts. So, assuming this graph
21 represents ICR, what would happen to it in the
22 but-for world if you were to correct for the

1 various breaches that impact ICR?

2 SEÑOR DOW: It would be improved relative to
3 what we see there.

4 SEÑOR GARCÍA REPRESA: And do you get to see
5 what the ICR for Express is around March of
6 this year?

7 SEÑOR DOW: ICR, 87.4 per cent? Is that the
8 figure you are referring to?

9 SEÑOR GARCÍA REPRESA: Let's put it on the
10 screen. Yes. That trend line in yellow is
11 Express. Would it continue to go up in the
12 but-for world assuming that the breaches are
13 corrected?

14 SEÑOR DOW: Well, to some extent this
15 improvement reflects a better bus fleet, which
16 is one of the breaches. But if we remove the
17 other breaches, then there would be a further
18 improvement above these numbers.

19 SEÑOR GARCÍA REPRESA: You may recall you
20 were also asked about how other operators, and
21 you were asked questions, is it reasonable to
22 get to one hundred percent, do you know if

1 anyone got to one hundred percent? I would
2 like to show you exhibit R-13. This is of
3 course an exhibit in the record submitted by
4 colleagues. It is the DTPM report of 2017, and
5 I would like you to go to page 64 of the pdf,
6 which has graphic 12, which is the average ICF.
7 To be clear it is ICF, indicador de frecuencia,
8 for business units, and we can see what
9 happened, and as we can see, the scale goes
10 from 80 and all the companies are between 90
11 and 100.

12 SEÑOR DOW: Yes.

13 SEÑOR GARCÍA REPRESA: Do you see MetBus,
14 where it is located, it is unit 5, the colours
15 are not all that clear, but I understand MetBus
16 is close to one hundred percent. Right?

17 SEÑOR DOW: Yes.

18 SEÑOR GARCÍA REPRESA: Is it above
19 99 per cent consistently?

20 SEÑOR DOW: It looks as if it is above 90
21 per cent often, if not most of the time.

22 SEÑOR GARCÍA REPRESA: And you see for some

1 reason DTPM has made a note there for
2 January 2017, and it seems that for some of the
3 Chilean operators, after January 2017 there is
4 an increase in ICF, correct?

5 SEÑOR CALDWELL: The green line for Vulebus
6 and the red line for Redbus and the yellow line
7 for STP diverge from the other ones following
8 that January '17.

9 SEÑOR GARCÍA REPRESA: Are you aware that
10 Quantil has analysed what happened with the
11 change in operating programmes in January 2017?

12 SEÑOR CALDWELL: In general, yes.

13 SEÑOR GARCÍA REPRESA: So the only three
14 operators that do not follow the same trend are
15 Alsacia, Express and SuBus in this graph?

16 SEÑOR CALDWELL: Yes. The two blues and the
17 orange.

18 SEÑOR GARCÍA REPRESA: And again, these are
19 graphs in the actual world. They are not
20 corrected for the but-for, are they?

21 SEÑOR DOW: No.

22 SEÑOR GARCÍA REPRESA: Is it correct, what

1 I said?

2 SEÑOR DOW: What you said is correct. They
3 are not corrected for the but-for.

4 SEÑOR GARCÍA REPRESA: Now, you were also
5 questioned about evasion and how in your model
6 you considered that evasion changed from May
7 2012. If you could please go to your
8 Second Report at paragraph 98. I know you are
9 not transport experts but what is your view, or
10 at least, can you summarise the view you
11 express in your report about how evasion might
12 have been in the but-for at a lower rate than
13 it was in the actual world by May 2012?

14 SEÑOR DOW: Our view is that when
15 Chile -- when the new Concession Contracts
16 started, and they were, among other things,
17 designed to improve the fare evasion climate,
18 our view is that when the new
19 Concession Contracts started, Chile would have
20 put measures in place to make sure they started
21 on a good footing, and therefore it would have
22 taken some preparations before the start date.

1 SEÑOR GARCÍA REPRESA: Thank you. I have no
2 further questions.

3 PRESIDENTA KAUFMANN-KOHLER: Do my
4 colleagues have questions?

5 COÁRBITRO STERN: Your presentation
6 yesterday put great emphasis on the fact that
7 the level of debt was standard and not too
8 high, slide 19 and 20. We don't need to look
9 at them.

10 I have a very simplistic question on that.
11 Is the situation the same for a company
12 starting a business and using a debt for
13 92 per cent and developing its business on the
14 basis of this borrowed money, compared to
15 another company, which also uses a debt for
16 92 per cent, but has already an important
17 former historical debt, meaning that only a
18 small part of the borrowing money will be used
19 for developing the business?

20 Maybe to make it even more specific with
21 figures, I would like to take the figures we
22 found in the Memorial de Contestacion,

1 paragraph 44. These figures are based on PwC
2 reports but here they are just summarised more
3 clearly. "Así, de los USD 464 millones que
4 levantó el bono, USD 148.3 millones fueron
5 usados para pagar la deuda existente de
6 Alsacia, y USD 179.1 millones para pagar la
7 deuda existente de Express. Es decir, un total
8 ... So that is a total in USD of 347.4
9 millones, 77.54 per cent of the net amount, and
10 this was used to pay off debt. Adicionalmente,
11 USD 80 millones fueron utilizados para que los
12 Demandantes se hicieran del control de
13 Express."

14 And then in the same memorial at
15 paragraph 88 there is another information
16 saying that approximately in USD -- de costos
17 asociados con la emisión incluyendo pagos por
18 servicios de asesoramiento legal, financiero,
19 contable, entre otros.

20 If you make the calculation, if you take out
21 all that was used for paying the debt, it gives
22 116.60. Then you take out the 12 million.

1 Then it is 104.60. Then you take out what was
2 paid for USD for the control of Express, and
3 the remaining is 24,000,060, which is the only
4 money that was left, if I understand correctly,
5 to be put in the company.

6 So my question is do you agree with these
7 figures, first, and, again, do you agree -- the
8 question I asked at the beginning -- that the
9 situation is completely different for a company
10 starting with a debt which you find normal and
11 a company having a debt but which is only
12 mostly used to, you know, reimburse a former
13 debt?

14 SEÑOR DOW: Let's start with the general
15 question of is it normal for a company -- well,
16 okay. So I would say what was the debt
17 transaction? The company was replacing a
18 collection of previous loans with a single bond
19 issue, and it was also increasing the amount of
20 money in the debt.

21 COÁRBITRO STERN: Of 24.060 million,
22 finally.

1 SEÑOR DOW: So, first thing, is it common
2 for an established company to tidy up its
3 capital structure by replacing one kind of
4 borrowing by another kind of borrowing, and the
5 answer is yes, that is quite common, and the
6 company here believed it made sense, because
7 then they would have a single category of
8 lenders to deal with, and it would be good
9 value and so on.

10 Second question, or second element of that
11 question, is it normal for an ongoing company
12 to increase its amount of debt? And you
13 pointed out that whereas a start-up company
14 without any borrowing may need to borrow in
15 order to finance its operations, a company that
16 is already operating may not need to borrow to
17 finance its operations but may nevertheless
18 choose to borrow more as part of a financial
19 restructuring.

20 So the answer is that is quite a standard
21 financial transaction. For example, we have
22 something that is absolutely standard and that

1 I would teach in my courses with case studies
 2 and so on, which is called a levered
 3 recapitalisation, so a levered recapitalisation
 4 is when a company looks at its existing
 5 obligations and decides to change to having
 6 more debt than previously. It is a choice
 7 about what makes sense for its capital
 8 structure. That can be done for a number of
 9 reasons, but, in very simple terms, I would
 10 say, tax is one of the reasons because the
 11 corporation tax burden would be reduced by
 12 doing that.

13 So it is quite common for a company to
 14 increase its leverage basically as just part of
 15 its general financial management. A company
 16 that doesn't ever do that normally would
 17 gradually run down its debt and not have any
 18 debt if the business succeeds, and that is
 19 actually quite unusual for large companies.
 20 They do generally like to keep leverage.

21 Now a third element of this transaction is
 22 that some of the money they borrowed was taken

1 out in the form of a loan to Pan American, and
 2 PwC referred to that yesterday. It is also not
 3 uncommon in a leverage recapitalisation for the
 4 owners of the company to increase leverage and
 5 then take a special dividend. Now that is not
 6 what happened here. The money wasn't paid out
 7 as a dividend but there was a loan to Pan
 8 American, which PwC characterised as being a
 9 distribution to shareholders. So paying out a
 10 dividend as a result of -- which is not what
 11 happened here, but that is certainly quite a
 12 normal financial practice.

13 So that is one part of your question in
 14 general terms. The other part is the numbers.

15 COÁRBITRO STERN: I am not sure you really
 16 answered. You told me what is normal practice,
 17 but here we have to look at what happened when
 18 the new contracts entered into force, what was
 19 the situation at that point, and you know your
 20 lecture on normal practice was very interesting
 21 but I don't think it answers really the
 22 question I asked you.

1 SEÑOR DOW: Which was, was it, a ...?

2 COÁRBITRO STERN: Well, the situation at the
 3 time the new contracts were signed. If you
 4 look at the real situation, you had a debt
 5 which finally at the end of the day, or at the
 6 beginning of the day I should say, was just
 7 giving 24.60 million for developing the
 8 business.

9 SEÑOR DOW: I see. But to me that is quite
 10 normal. So a debt issuance doesn't have to be
 11 something that you do in order to buy new
 12 assets. It is quite normal --

13 COÁRBITRO STERN: But then the debt ratio,
 14 equity:debt, is completely bizarre.

15 SEÑOR DOW: Well, the standard practice
 16 would be to look at various indicators of what
 17 is a healthy level of indebtedness, and then
 18 check that you are within appropriate ranges.
 19 So that is why we looked at it in terms of what
 20 percentage leverage they had, but we didn't
 21 look at it in terms of --

22 SEÑOR CALDWELL: Just to come back on that,

1 what's happening here in the transaction, now
 2 remember, the bond transaction is 2011, that is
 3 before the new Concession Contracts are ever
 4 talked about. What that transaction is based
 5 on is lenders know that have to rely on the
 6 companies to generate the cash flow to repay
 7 the debt, so the lenders and the companies do
 8 substantial effort at financial planning at
 9 that point, and they look at the cash flow
 10 generation that they believe the companies
 11 should make over the remaining life of the
 12 original Concession Contracts, and they will
 13 then design the debt in a way that is
 14 satisfactory for the lenders.

15 Now, that is what was done here back in 2011
 16 at the beginning, and the debt gets issued, and
 17 the point we were making yesterday is many
 18 people -- this is not an issue, some weird
 19 little company doing something on the side;
 20 this is a major, half a billion USD issue,
 21 which then gets reviewed by institutional
 22 investors, by the rating agencies, it is fully

1 transparent, the bond information memorandum
2 goes to 500 pages so people could study all the
3 aspects of the transaction, and the lenders and
4 the rating agencies thought that the debt
5 sizing was a reasonable thing. That is what
6 happened at the beginning of 2011.

7 Then the new Concession Contracts come
8 along, and obviously that changes the revenue
9 model for the business, and there is a separate
10 reassessment at that point, with a fairness
11 opinion and the lenders are -- and the fairness
12 opinion indicates that the debt remains
13 manageable given the new Concession Contracts.
14 So that is how the planning works. They look
15 forward from the time of the debt and they see
16 what the company can afford over its remaining
17 life.

18 SEÑOR DOW: But in simple terms, I think we
19 are saying yes, it is quite normal, and high
20 leverage like this is quite standard in project
21 finance. That is very common. It is the
22 normal way to finance a public concession.

1 COÁRBITRO STERN: Do you contest as
2 financial experts the figures I read, which are
3 taken from the PwC report?

4 SEÑOR CALDWELL: We would have to see them
5 written down. You went so fast.

6 SEÑOR DOW: We did do an analysis of what
7 the Claimants put into the company and what
8 they got out, and I know that PwC yesterday
9 showed us 29.5 going in --

10 COÁRBITRO STERN: But that was not the debt.
11 That was the capital.

12 SEÑOR CALDWELL: The debt is discussed
13 I think in our First Report. Section 3C from
14 paragraph 33 then describes what is happening
15 and where the money is, the flows of money in
16 the bond issuance, and essentially the source
17 that will tell you all of that is -- and PwC
18 referred to it as well -- is the bond
19 information memorandum describes what was going
20 to happen with the funds at pages 83 and 84 of
21 the bond information memorandum. It was fully
22 transparent to investors, and we are simply

1 recounting that in this part of our report.

2 COÁRBITRO STERN: Okay.

3 Maybe another short question. If we look at
4 slide 26 of your second presentation, Financial
5 Damages for the Claimants, here you say that it
6 would be worth 51 USD for lost opportunity and
7 I would like to be sure I understood. In this
8 you suppose that in a new tender the company
9 would invest 397 million USD?

10 SEÑOR DOW: 387.

11 COÁRBITRO STERN: Where does that money come
12 from?

13 SEÑOR DOW: That comes from the Binswanger
14 real estate valuation which we use, plus the
15 money they spent on buses of 212, so it was 212
16 plus the Binswanger valuation gives 387. The
17 money they spent on buses was some time ago, so
18 that is not pushed up for inflation. Arguably
19 it could be viewed as conservative, but that is
20 where it came from.

21 SEÑOR CALDWELL: So your question was where
22 does the money come from. So the idea is in

1 the but-for scenario you would have had the new
2 Concession Contracts proceed to the end in
3 2019. The companies in the but-for scenario
4 would have generated substantially more
5 cash flow. Our conclusion is, based on the
6 transportation inputs and so on that the
7 companies could support the existing debt and
8 repay it by the end of the existing
9 Concession Contracts in 2019. Then what
10 happens next, the claim here is that the
11 companies would then be able to compete, obtain
12 a new contract, and obviously, with the new
13 contract, the way this business works, we
14 bought buses under the original contracts, they
15 have operated their entire life, for the new
16 contract period you need to buy more buses, you
17 would finance those again in a standard way,
18 given that you would then have the right to
19 operate them for a ten-year period over -- the
20 existing -- but the point is the existing debts
21 would be dealt with under the original
22 contract, finishing 2019, and then the new

1 contract would be financed in a typical, normal
2 way.

3 COÁRBITRO STERN: Okay. Thank you for your
4 explanations.

5 COÁRBITRO GARIBALDI: I have a couple of
6 questions. I wish we had two days to ask more
7 questions, but we don't, so I have to limit
8 myself.

9 There was a debate with Pricewaterhouse
10 about this issue of whether the revenues went
11 up or down, and it all depends on what you add
12 and what you subtract, and I have some issues
13 about that, but I would like to ask you about
14 one of the components of that debate, which is
15 this adjustment for inflation.

16 Pricewaterhouse takes the view that it is
17 not appropriate to adjust for inflation in
18 comparing revenues from, say, 2012 to 2017, and
19 I take it that you, gentlemen, do think it is
20 appropriate to adjust for inflation.

21 If I am misstating that, please correct me,
22 and please comment on this question of

1 adjustment for inflation.

2 SEÑOR DOW: So, yes, we think it is
3 appropriate. Why do we think it is
4 appropriate? Because we are looking at how
5 revenues have changed over a long period when
6 there has been significant inflation, so when
7 we want to see how revenues have evolved over
8 that period, it would be useful to see whether
9 they have just kept pace with inflation, which
10 would be neutral; beaten inflation, which would
11 be a rise in real terms; or fallen behind in
12 inflation, which would be a fall in real terms.
13 So therefore yes, we do think that the
14 comparison should be on the basis of
15 inflation-adjusted revenues, not to do a
16 sophisticated but-for analysis but just in
17 order to get a sense of whether they have gone
18 up or down.

19 COÁRBITRO GARIBALDI: I understand that.
20 I take it that Pricewaterhouse takes the view
21 that there is already an adjustment for
22 inflation in the revenue figures for each year.

1 How do you deal with that?

2 SEÑOR CALDWELL: No, what I understood them
3 to say was that under the contract there is a
4 MAC index. Part of that is an inflationary
5 adjustment to the PPT and the PK. In other
6 words, the contractual price will update over
7 time based on an index which part of its
8 component is reflecting inflation. That is one
9 issue -- right? That is how you determine the
10 prices under the contract which then determines
11 the revenues. An entirely separate question is
12 just in general terms what has happened to the
13 overall revenue line. Did it in the end, given
14 the indexation under the contract, rise with
15 inflation, beat inflation, or fall behind?

16 I think we are confusing -- the PwC answers
17 seemed to me to confuse the two issues. One
18 thing is what the contract does, and it has an
19 indexation part to it; the second thing is then
20 just taking the outcomes, looking at the
21 revenues as they stood in 2012 and then in
22 2017, and asking yourself the question did they

1 beat or match or fall behind simple inflation?

2 COÁRBITRO GARIBALDI: I have another
3 question, which is more conceptual than
4 anything. It is about the construction of the
5 but-for world, and we have talked about various
6 components, inputs, that go into the
7 construction of the but-for world, we have
8 talked about legal assumptions, we have talked
9 about various elements that -- let me call them
10 matters of detail.

11 I would like to talk more at a conceptual
12 level.

13 Am I right in believing that when you
14 construct a but-for world, you are already
15 building causality or causation into it? So
16 you assume that there is a violation, because
17 you have to assume it.

18 SEÑOR DOW: Correct.

19 COÁRBITRO GARIBALDI: You assume there is a
20 violation, and the question that you have to
21 determine and opine on is whether that
22 violation caused damages. So in using a

1 but-for method and constructing a but-for world
2 and comparing that with the real world, you are
3 building the but-for world on the basis of
4 causation, aren't you?

5 By that I mean that you are assuming that
6 your but-for world is a world that would exist
7 but for the violation. In other words, the
8 violation caused that world, that but-for world
9 not to exist.

10 SEÑOR DOW: Correct.

11 COÁRBITRO GARIBALDI: So it is a kind of
12 inverse causation that is built into the model.
13 Is that right? Or am I wrong?

14 SEÑOR DOW: I am not sure I would call it
15 inverse causation. To me that is causation.
16 If I punch Mr Caldwell on the nose and then his
17 nose bleeds, you might say I have caused his
18 nose to bleed. What you mean is but for my
19 punch, his nose would not be bleeding. So that
20 is my idea of causation.

21 COÁRBITRO GARIBALDI: So my understanding is
22 correct that the but-for world implies

1 causation.

2 Now, my question now is, again conceptually,
3 how do you determine causation for the purpose
4 of building the but-for world?

5 SEÑOR DOW: Can I give you a specific
6 example?

7 COÁRBITRO GARIBALDI: Please.

8 SEÑOR DOW: So we see that actually the
9 buses ran every ten minutes, and then we have
10 an opinion from the transport experts that says
11 but-for the breaches, the buses would have run
12 every five minutes -- I hope this answers your
13 question -- so we build a model that takes all
14 the data we have about the operations and the
15 formula, but we just change the operating
16 inputs to make the buses run more frequently,
17 every 5 minutes.

18 COÁRBITRO GARIBALDI: In this example you
19 gave, the causation is an input that you take
20 from the transport experts.

21 SEÑOR DOW: Correct.

22 COÁRBITRO GARIBALDI: Is there any instance

1 of causation that you determine yourselves as a
2 matter of economic theory, for example? Or as
3 a matter of -- whatever -- common sense.

4 SEÑOR CALDWELL: I would distinguish two
5 parts of causation in this case. There is the
6 one we have just been talking about: but-for,
7 what would be the impact be on the operating
8 business? Then there is a separate question,
9 and there has been much discussion at the
10 opening, for example, about whose fault was it,
11 or why did these companies enter into financial
12 distress? When we talk about causation, for
13 example, in our response to PwC's slides from
14 yesterday, we are saying, given what we are
15 hearing from the transportation experts about
16 the impact of the breaches on the operations of
17 the business, what does that then mean for
18 financial performance and what ultimately led
19 to the bankruptcy of these companies? So that
20 is an element of causation that we are testing,
21 given the inputs about do the buses run, should
22 they have been -- or would they have but-for

1 been five minutes as opposed to the ten that
2 they really made in reality?

3 COÁRBITRO GARIBALDI: I understand perfectly
4 well what you are saying, but what the experts
5 on the other side are offering is an
6 alternative view of causation in a more global
7 way. What you are doing, if I understand
8 correctly, is you are constructing a but-for
9 world which implies causation on the basis
10 of -- let me call it detailed inputs.

11 SEÑOR DOW: Yes.

12 COÁRBITRO GARIBALDI: And this is what the
13 world would have looked like but for these
14 alleged violations. On the other side the
15 experts say well, all of that doesn't matter
16 because in fact the main cause, the primary
17 cause, of this collapse was excessive
18 indebtedness, mismanagement -- whatever.

19 SEÑOR DOW: I would say there are two groups
20 of experts on the other side. I think the
21 Versant team agree with us on methodology and
22 using the but-for approach. They just have

1 different inputs.

2 COÁRBITRO GARIBALDI: I realise that.

3 SEÑOR CALDWELL: But you can't answer the
4 causation question without thinking about the
5 but-for world. You simply can't answer it
6 because you don't know. All PwC can say in the
7 end is what really happened. What really
8 happened was the companies performed poorly.
9 To know why they performed poorly, you have to
10 ask yourself the question what would have
11 happened and what changed their performance to
12 get it to the level it became.

13 There is no way around -- if you are going
14 to start thinking about causation, there is
15 simply no way around thinking about but-for
16 analysis.

17 SEÑOR DOW: That is why we said yesterday
18 that PwC must be using an implicit but-for,
19 because in places they say these companies
20 performed worse than the average of the other
21 operators, so what they mean is, in the but-for
22 world, we should -- they would have performed

1 like the other operators.

2 I am not sure I said that quite right but
3 there is an implicit but-for in their analysis
4 because they are saying something else caused
5 the failure, so they are implicitly saying
6 something caused the failure; they just haven't
7 articulated it as an explicit but-for world,
8 and when they say that it is the costs that
9 caused the failure, they mean that the
10 appropriate but-for world, in their view, is
11 one where management acted differently, costs
12 were much smaller, and then, you know, the
13 companies' outcome was different.

14 So we felt they had a but-for analysis in
15 mind implicitly, but they didn't articulate
16 that but-for scenario, and probably in some
17 places they had one implicit but-for and in
18 other places they had another one. So we
19 prefer to have an explicit analysis.

20 COÁRBITRO GARIBALDI: Thank you very much.

21 PRESIDENTA KAUFMANN-KOHLER: I would like
22 just to get back to some basics to well

1 understand your expert reports.

2 You take an ex post date of valuation. Can
3 you agree on that with Versant? I can ask them
4 that later on.

5 SEÑOR DOW: Yes.

6 PRESIDENTA KAUFMANN-KOHLER: You do this as
7 a result . . . You say this is a legal question
8 and therefore you don't opine on it. However,
9 then you add a number of reasons why this makes
10 particular sense here, is that right?

11 SEÑOR CALDWELL: Yes.

12 PRESIDENTA KAUFMANN-KOHLER: So do you
13 consider this as a matter of economics, like
14 the correct approach here, or not?

15 SEÑOR DOW: Approach here, yes. The correct
16 approach here, yes. The alternative would be
17 to rely much more on expectations, and so we
18 considered -- I personally consider it is more
19 appropriate here.

20 SEÑOR CALDWELL: Yes. I think the
21 reconstruction of the world here is complicated
22 from the transportation experts, so practically

1 ex post is the way to go, in our view.

2 SEÑOR DOW: And when we do ex ante
3 approaches in other cases, that is often
4 because one of the major issues at stake, and
5 one of the main variables in the business, is
6 something like natural resources prices, and
7 then we have data on what they have done, and
8 we have data on expectations, we have a forward
9 curve -- whatever -- so we have a much richer
10 way of modelling from an ex ante point of view,
11 but if we tried to do an ex ante approach here,
12 it would have amounted to taking management
13 expectations, and I think people would have
14 validly said, "If you just took management
15 expectations, how do we know they are the
16 appropriate benchmark?"

17 SEÑOR CALDWELL: One final question, and
18 I think it is right. I am just reminding
19 ourselves of what we said in our First Report,
20 and I think part of the issue in this case is
21 that the impact of various breaches emerges
22 over time, so you only pick that up in the

1 ex post framework.

2 PRESIDENTA KAUFMANN-KOHLER: That is one of
3 the things you said. Absolutely, yes. But
4 I understand the point of the expectations that
5 are not based on other information here than
6 management expectations.

7 And then, if I understand your analysis
8 correctly, you say you have three essential
9 components. I understood the damage elements,
10 I understood it more to before, but you will
11 correct me.

12 You have the dividends, that is essentially
13 a past cash flow analysis up to December 2017,
14 and to that you then add interest. Is that
15 right?

16 SEÑOR DOW: To July 2018.

17 SEÑOR CALDWELL: The First Report
18 was December 2017. We updated that to July.
19 That is the backward-looking part.

20 SEÑOR DOW: And yes, we add interest.

21 PRESIDENTA KAUFMANN-KOHLER: Yes. Then you
22 do a post December 2017 cash flow analysis, and

1 that is to get to the equity value, is that
2 right?

3 SEÑOR DOW: Yes, or the asset value of the
4 company, the remaining value in the company.

5 SEÑOR CALDWELL: But it is an equity value
6 in the company. So it is what remains for the
7 equity holders as of our valuation date under
8 the existing contracts.

9 PRESIDENTA KAUFMANN-KOHLER: Which valuation
10 date we can then update?

11 SEÑOR CALDWELL: Which you then could update
12 with the passage of time, yes.

13 PRESIDENTA KAUFMANN-KOHLER: Absolutely.
14 Then we have an element that is not a DCF
15 calculation but more an asset based calculation
16 for the terminals. Is that right?

17 SEÑOR CALDWELL: That forms part of
18 the -- if you are looking at slide 2, that
19 contributes --

20 PRESIDENTA KAUFMANN-KOHLER: You --

21 SEÑOR CALDWELL: It is included in what is
22 left in the company for the equity holders. So

1 the value remaining in the company is the value
2 of the cashflows for the remaining life of the
3 concession, plus the real estate value.

4 PRESIDENTA KAUFMANN-KOHLER: So it is
5 composed of two elements computed differently.

6 SEÑOR CALDWELL: Yes, it is composed of two
7 bits computed differently.

8 PRESIDENTA KAUFMANN-KOHLER: And then you
9 have the lost opportunity to participate in the
10 tender.

11 SEÑOR DOW: Correct.

12 PRESIDENTA KAUFMANN-KOHLER: And that is a
13 separate future cash flow analysis.

14 SEÑOR DOW: It is a separate calculation.

15 PRESIDENTA KAUFMANN-KOHLER: Also a DCF
16 calculation?

17 SEÑOR DOW: Yes.

18 PRESIDENTA KAUFMANN-KOHLER: Good. I think
19 that is clear.

20 Now, you have given separate figures and
21 sensitivity analysis for -- you have
22 individualised certain impacts, right?

1 SEÑOR DOW: Hmm mm.

2 PRESIDENTA KAUFMANN-KOHLER: We have seen
3 one of your charts a moment ago, and there is
4 one at the end of your Second Report. It is
5 table 23 in paragraph 3.3.8. I think you have
6 reproduced this in your PowerPoint.

7 SEÑOR CALDWELL: Yes, that is correct.

8 PRESIDENTA KAUFMANN-KOHLER: You have been
9 asked questions about this. I would just like
10 to make sure I get it right. If the Tribunal
11 were to find that certain acts were breaches of
12 the standards, but not others, we would have to
13 separate the impacts, right?

14 SEÑOR CALDWELL: Yes.

15 PRESIDENTA KAUFMANN-KOHLER: To extract the
16 impact of the separate breach.

17 SEÑOR DOW: Correct.

18 PRESIDENTA KAUFMANN-KOHLER: And you have
19 here aggregated some of the acts, acts or
20 omissions.

21 SEÑOR DOW: Correct.

22 PRESIDENTA KAUFMANN-KOHLER: Is that right?

1 So now if we were to say that the issue of the
2 lack of increase of the bus fleet is a breach
3 and we need to determine the impact of that, we
4 would not see this on this chart the way it is
5 represented.

6 SEÑOR DOW: Correct.

7 PRESIDENTA KAUFMANN-KOHLER: It would have
8 to be calculated separately using your model.

9 SEÑOR DOW: Yes, it would have to be
10 calculated separately, and you could not just
11 isolate the bus fleet by subtracting those two
12 lines, one of which has the bus fleet and one
13 of which does not.

14 SEÑOR CALDWELL: The other thing, just to be
15 very clear, you cannot simply add up -- so the
16 purpose of this table is just liability, yes or
17 no, on these broad heads of claim. What you
18 can't do is simply add up the impacts going
19 down -- let's say you find no liability on two
20 things but liability on the rest, you can't
21 simply take the impacts on this table and add
22 them up. They interact with each other in the

1 model.

2 SEÑOR DOW: That is common sense, really,
3 because if you wanted to study the impact of
4 fare evasion, the impact of fare evasion would
5 depend on whether the buses are running
6 quickly, and they are new buses and bus lanes
7 are enforced, or whether they are old buses and
8 there is a traffic jam in the bus lane and so
9 on. Fare evasion would have a different impact
10 in those two cases.

11 PRESIDENTA KAUFMANN-KOHLER: Did Versant use
12 your model with different inputs?

13 SEÑOR CALDWELL: They adopt -- in the
14 end -- You can ask them but this is not a case
15 where there is two fundamentally different
16 financial models in play. There is one model
17 that has been used by both people.

18 PRESIDENTA KAUFMANN-KOHLER: By both with
19 different inputs.

20 SEÑOR CALDWELL: With different inputs.

21 SEÑOR DOW: And we can recover their numbers
22 from our model by changing our inputs.

1 PRESIDENTA KAUFMANN-KOHLER: We haven't
2 spoken about interest rates, and you propose 8
3 or you use 8 per cent whereas Versant uses 2.3,
4 or 3.2, if I am not mistaken. You base this,
5 I think, on the forced loan theory -- no, but
6 you use it because it essentially permits to
7 allow for either scenario in terms of the
8 dividend distribution? Is that a good
9 substantiation for this relatively high rate?

10 SEÑOR DOW: Well, it is not a reason outside
11 the model. It is a reason inside the model.

12 PRESIDENTA KAUFMANN-KOHLER: What does that
13 mean?

14 SEÑOR DOW: What we mean, we said yesterday,
15 for example, slide 29, or elsewhere in the
16 reports it is explained and maybe that is where
17 you are looking --

18 PRESIDENTA KAUFMANN-KOHLER: I was looking
19 at your report but I can also look at your
20 slide.

21 SEÑOR DOW: It is the same thing, really.
22 So what it means is we have got different

1 scenarios with different dividend policies in
2 them, and if you used a different interest rate
3 to 8 per cent, which is Alsacia and Express's
4 cost of borrowing, then you would find there
5 would be different damages. If the company had
6 paid out more money early, then that would be
7 brought forward, for example, at a lower
8 interest rate. Then that would result in less
9 favourable damages than if the company had a
10 policy of not paying dividends, then the debt
11 would have been paid off quickly therefore by
12 saving 8 per cent interest, so that is why it
13 makes sense in the model. And I suppose it is
14 also a way of saying that the companies were
15 borrowing at 8 per cent, so that was the
16 opportunity cost to them.

17 PRESIDENTA KAUFMANN-KOHLER: Yes.
18 Absolutely. I understand that. But there is
19 an argument that this is not the right test on
20 the other side.

21 SEÑOR DOW: Yes. There are different views
22 on what is the appropriate interest rate. It

1 is true.

2 SEÑOR CALDWELL: But, notice -- I guess the
3 point we want to make clear here is the
4 interaction between the pre-judgment rate and
5 the dividend policy that you presume. If, like
6 Versant, you presume that the debt should be
7 repaid earlier, then the debate on pre-judgment
8 interest has less of an effect than if you
9 presume the payments, the dividend payments
10 were made back in time. So that is the
11 connection between those two things.

12 PRESIDENTA KAUFMANN-KOHLER: I am not sure
13 I entirely understand your position with
14 respect to the repayments of the bond holders
15 and interaction with the payment of the
16 dividends. It relates in particular to your
17 slide 11 of your second presentation.

18 The first one says that there can be no
19 distribution of dividends because the bond
20 holders must be paid before the shareholders,
21 I mean, said in general terms, and that you do
22 not take into account the solvency and the

1 financial requirements of the bond covenants
2 for payment of the dividends. I can point you
3 to their report if you wish, but I think that
4 is the argument, and I am not sure
5 that -- I understand that after this argument
6 you continue to present this version, but I am
7 not entirely certain I understand what your
8 answer is to this.

9 SEÑOR DOW: So in our First Report we said
10 repay the debt as scheduled, and then every
11 time you have cash left over after repaying the
12 debt, distribute it as a dividend.

13 Versant said oh, but that will violate bond
14 covenants. So in our Second Report we
15 implement the bond covenants, and we say pay
16 the debt as scheduled, and then pay out
17 whatever dividend you can within the bond
18 covenants. So our debt covenant scenario does
19 in fact satisfy backward and forward-looking
20 covenants.

21 I don't think Versant have taken on board
22 that that is what we have done, because they

1 claim in their Second Report that we have only
2 partially modelled the covenants. They claim
3 we have only modelled the backward-looking ones
4 and not the forward-looking solvency covenants,
5 but in fact we have modelled the
6 forward-looking ones also.

7 PRESIDENTA KAUFMANN-KOHLER: So we will have
8 to hear them this afternoon.

9 SEÑOR DOW: So our debt covenant model is
10 fully compliant with the covenants.

11 SEÑOR CALDWELL: The debate on the
12 forward-looking ones is, we had stated in our
13 Second Report that, because they are
14 forward-looking, they involve a degree of
15 subjectivity. You have to develop a forecast,
16 as somebody would have forecasted the cashflows
17 insolvency of the business, at each given point
18 in the past, in the but-for world. We do that
19 in a straightforward way based on the base case
20 model, but that is the subjectivity part.

21 PRESIDENTA KAUFMANN-KOHLER: Yes, I noted
22 the subjectivity. You also say circularity, if

1 I am not wrong, in your report, yes.

2 SEÑOR DOW: Let me explain those.
3 Subjectivity is there in reality in the
4 following sense. If I am a borrower -- and you
5 can read this in the debt covenant -- I have to
6 make a forecast of cashflows, and then I have
7 to give a certificate to the bond holders which
8 says according to my forecast, I am solvent.

9 So there is an element of subjectivity in
10 the sense that somebody has made a forecast,
11 which might be wrong, it might be
12 disputed -- whatever. So we have had to model
13 that on what the forecast would have been, and
14 we have done that by just taking the management
15 expectations model and then we scale it for the
16 outcomes. So when things have out-performed
17 that model, we scale up the forecast, and when
18 things have underperformed we scale it down.
19 So we do a relatively simple adjustment to
20 that.

21 Now the circularity point, it doesn't mean
22 there is any error in logic; it just means in

1 mathematical terms it is a simultaneous
 2 equation or a recursive calculation. Because
 3 the dividend we pay now affects how much money
 4 there is in the future, and therefore
 5 affects -- to check how the solvency condition
 6 is satisfied, but equally the solvency
 7 condition rests on an assumption about the
 8 dividend we pay now, so we have to
 9 simultaneously fix it so those things are
 10 consistent with each other. So that is what we
 11 refer to as circularity. It doesn't mean there
 12 is a flaw in the logic. It is just
 13 mathematically they have to be simultaneously
 14 compatible.

15 PRESIDENTA KAUFMANN-KOHLER: There is a
 16 difference between you and Versant with respect
 17 to the timing of the impacts. In a sense,
 18 Versant has excluded pre-2014 losses. That is
 19 a legal instruction.

20 You have explained this, I think, today as
 21 well, or yesterday.

22 There was this criticism, let's put it that

1 way, that your First Report assumes that
 2 overnight things would have changed, because
 3 actions would have been taken immediately and
 4 have immediate effects. I understand that what
 5 you have done in answer to this is to consider
 6 that actions should have been taken by Chile in
 7 preparation for the new contracts starting
 8 already in 2010. Is that your answer to this
 9 criticism or is there another one that I miss?

10 SEÑOR DOW: That is one answer. It really
 11 depends on what you, the Tribunal, think is the
 12 appropriate benchmark. If you take the view
 13 that Chile should have put in place measures so
 14 that the contracts worked well from the start,
 15 that is what we do as our base case.

16 PRESIDENTA KAUFMANN-KOHLER: That is what
 17 you do?

18 SEÑOR DOW: Yes. We do a sensitivity with
 19 respect to delayed effect of the fare evasion.
 20 So if you take the view that there should have
 21 been a delay, then you would either accept our
 22 sensitivity or perhaps ask us to do further

1 sensitivities.

2 PRESIDENTA KAUFMANN-KOHLER: That is your 3
 3 or 6 months sensitivities.

4 SEÑOR DOW: Correct.

5 PRESIDENTA KAUFMANN-KOHLER: And if we were
 6 to think there is more, we would have to ask
 7 you to run the calculations.

8 SEÑOR DOW: Correct.

9 PRESIDENTA KAUFMANN-KOHLER: About the real
 10 estate, in your presentation yesterday at slide
 11 25 I note that you elaborated on the lease
 12 contract and you said that the lease payments,
 13 actually the level of the lease payment
 14 confirms your valuation by other means,
 15 essentially the Binswanger appraisal.

16 SEÑOR DOW: Correct.

17 PRESIDENTA KAUFMANN-KOHLER: I'm not sure
 18 I understand how the lease payments come into
 19 your overall equation of the valuation of this
 20 asset.

21 In simple terms, if the terminals are sold
 22 tomorrow, then you would cash the value of the

1 terminals as you have established it, but there
 2 would still be lease payments coming in the
 3 future. So how does that work? Have you
 4 simply not taken into account the fact that the
 5 terminals are now leased for a number of years?

6 SEÑOR CALDWELL: Let me see if I understand
 7 the question correctly. You could have either
 8 seen -- so the leases ensure the continued use
 9 of the terminals for the next nine years by
 10 whoever is operating the routes in future, and
 11 the lease is signed between the companies here
 12 and the Ministry.

13 The alternative would have been for the
 14 Ministry to buy the terminals and pay an amount
 15 of money today instead of leasing them and
 16 paying money in instalments over time. So
 17 those are the two scenarios that I think we are
 18 talking about.

19 All we are saying is that when you look at
 20 the series of payments over time and you value
 21 them at a typical rate in terms of present
 22 value, the value of those lease payments today,

1 that resulting present value corresponds to the
2 fair market value of what you would have sold
3 the terminals for. So the two things
4 correspond with each other. Binswanger did
5 their appraisal, determined that the value was
6 170 million capital value, and the series of
7 lease payments that we now see from the
8 terminal, their present value is roughly the
9 same.

10 PRESIDENTA KAUFMANN-KOHLER: So you just
11 used the lease contract and the lease payments
12 as a confirmation of the valuation you have
13 done without taking into account that this
14 asset was leased?

15 SEÑOR DOW: Okay --

16 SEÑOR CALDWELL: It is not like there is
17 double counting of those two values. The lease
18 contract is telling you --

19 SEÑOR DOW: I take your question to be do we
20 need to adjust our valuation now that there is
21 a lease contract -- I am not sure if that was
22 your question.

1 PRESIDENTA KAUFMANN-KOHLER: Yes. Impliedly
2 that was the question, yes.

3 SEÑOR DOW: So the answer is not really,
4 because whether I own the asset, which I could
5 sell tomorrow, or whether I have leased it out
6 and I am going to be getting those lease
7 payments and I won't get the asset back for
8 nine or twelve years and then I could sell it,
9 that should be equivalent value.

10 PRESIDENTA KAUFMANN-KOHLER: It makes no
11 difference if the lease payments --

12 SEÑOR DOW: Are in line with the asset
13 value.

14 PRESIDENTA KAUFMANN-KOHLER: I have no
15 further questions, except I think that you have
16 already mentioned this in your presentation
17 yesterday: you would agree to work together
18 with Versant if the Tribunal were to give you
19 certain assumptions and ask you to work out a
20 damage analysis on the basis of these
21 assumptions.

22 SEÑOR DOW: We would, yes.

1 PRESIDENTA KAUFMANN-KOHLER: Fine. Good.
2 No follow-up questions? Then that completes
3 your examination, gentlemen. Thank you for
4 your assistance.

5 That leads us to the lunch break. Would it
6 be a problem to start again at 2 o'clock and
7 have a shorter lunch? I am just a little
8 concerned about the time.

9 SEÑOR SILVA ROMERO: That is fine with the
10 Claimants.

11 PRESIDENTA KAUFMANN-KOHLER: And is it fine
12 on your side as well?

13 SEÑORA GEHRING FLORES: That is fine,
14 Madam President.

15 PRESIDENTA KAUFMANN-KOHLER: Have a good
16 lunch everyone.

17 (Pausa para el almuerzo.)
18

1 INTERROGATORIO CONJUNTO A LOS PERITOS

2 MATTHEW SHOPP Y KIRAN SEQUEIRA

3 PRESIDENTA KAUFMANN-KOHLER: I see you are
4 ready, gentlemen, and everyone is ready as
5 well. So we can start.

6 For the record, can you please confirm that
7 you are Matthew Shopp?

8 SEÑOR SHOPP: Yes, I am Matthew Shopp.

9 PRESIDENTA KAUFMANN-KOHLER: And you can
10 confirm that you are Kiran Sequeira?

11 SEÑOR SEQUEIRA: I confirm.

12 PRESIDENTA KAUFMANN-KOHLER: Thank you. You
13 have provided us with two reports. The first
14 one is dated 13 June 2018 and the second one
15 28 January 2019. Is that correct?

16 SEÑOR SHOPP: That is correct.

17 PRESIDENTA KAUFMANN-KOHLER: Who of the two
18 of you will take the lead and answer questions,
19 or defer to the other?

20 SEÑOR SHOPP: I think I will be taking the
21 lead today --

22 PRESIDENTA KAUFMANN-KOHLER: You will take

1 this role?

2 SEÑOR SHOPP: Yes.

3 PRESIDENTA KAUFMANN-KOHLER: Good. You are
4 heard as expert witnesses in this arbitration
5 and, as you know, because you have been here,
6 you are asked to confirm that you will make
7 only statements in accordance with your sincere
8 belief. Can you please each of you read the
9 expert declaration?

10 SEÑOR SHOPP: I solemnly declare upon my
11 honour and conscience that my statement will be
12 in accordance with my sincere belief.

13 PRESIDENTA KAUFMANN-KOHLER: Thank you.

14 SEÑOR SEQUEIRA: I solemnly declare upon my
15 honour and conscience that my statement will be
16 in accordance with my sincere belief.

17 PRESIDENTA KAUFMANN-KOHLER: Thank you. We
18 have received the print-out of your
19 presentation. Are there any questions before
20 we go over to the presentation?

21 SEÑORA GEHRING FLORES: Only the
22 preliminaries. Do you confirm these are your

1 reports, do you have any corrections, those
2 types of things?

3 PRESIDENTA KAUFMANN-KOHLER: Why don't you
4 go ahead, then?

5 SEÑORA GEHRING FLORES: Mr Shopp and
6 Mr Sequeira, can you confirm that the two
7 reports that you have before you are the
8 reports that you submitted in this arbitration
9 proceeding?

10 SEÑOR SHOPP: We confirm.

11 SEÑORA GEHRING FLORES: And do you have any
12 corrections to make to either of them?

13 SEÑOR SEQUEIRA: So I do have one correction
14 to make to our First Report, and if we could
15 turn to paragraph 8 of the First Report, the
16 third sentence, where we say "We have no
17 present or prior relationship with either of
18 the parties outside of this proceeding," I must
19 disclose that about 15 years ago I was involved
20 in a commercial matter for actually an economic
21 development agency in the water sector. It
22 lasted for a few weeks, so that would be have

1 been an oversight on my part and I wanted to
2 disclose that right now. That matter is
3 obviously no longer active and I certainly
4 confirm my independence in this matter.

5 SEÑORA GEHRING FLORES: Any further
6 corrections?

7 SEÑOR SHOPP: No.

8 SEÑORA GEHRING FLORES: With that, do you
9 fully ratify the contents of both of your
10 expert reports?

11 SEÑOR SHOPP: We do.

12 SEÑORA GEHRING FLORES: Thank you.

13 PRESIDENTA KAUFMANN-KOHLER: Fine.

14 SEÑOR SEQUEIRA: So we will begin the
15 presentation and we will start on slide 3 of
16 the presentation. As we go through the slide
17 deck we will try to connect elements of what we
18 are discussing here with what you heard from
19 Brattle earlier today, hopefully lend a little
20 more clarity to some of the issues that are
21 relevant to your determination on damages.

22 If we go to slide 4, the table on the left,

1 that is where the experts have ended up on
2 damages, and in that table, if you focus on the
3 actual scenario, which is the second column,
4 you will see that, fifth line from the bottom,
5 the equity value today of the companies is very
6 negative, and that is because there is a
7 significant amount of debt outstanding of over
8 \$440 million today, so therefore the shares,
9 the equity value, is very negative.

10 If we move to the columns to the right, we
11 are in the but-for scenario. When I say
12 but-for scenario, to be clear, it is but-for
13 the alleged bad acts or breaches, and in there,
14 if you see Brattle Group's simulation of the
15 but-for scenario, they model that the company
16 would have performed much better and would have
17 generated significant cashflows that would be
18 used to pay down the debt. As a result there
19 would be dividends to be paid out and so they
20 calculate 97 million of dividends. There is
21 also significant equity value as of July 2018,
22 which you see is 171.7 million towards the

1 bottom of that column, which includes the real
2 estate value, and 51 million as the value of
3 lost opportunity.

4 If we move to the column to the left, that
5 is our simulation of the but-for scenario, and
6 we do model significant additional cashflows
7 that the companies would generate in the
8 but-for scenario, about \$144 million. But that
9 cash is all going towards paying down the debt,
10 and therefore there is no cash flow to
11 distribute to the Claimants. So, as you see,
12 the equity value as of July 2018 is still quite
13 negative because about \$300 million of debt
14 remains unpaid, and therefore we conclude that,
15 even though the companies generate more
16 cashflows, there are no damages suffered by
17 Claimants.

18 If we can move to the next slide, slide 5,
19 what are the reasons for this significant
20 difference in the results of the experts?
21 There are three main areas. The first is the
22 difference in the calculations of the lost

1 cashflows, and there are two main drivers of
2 that. One is the difference in the
3 construction of the but-for scenario, and we
4 will get into this, and the second are the
5 assumptions regarding the operational and
6 financial impact of the measures on the
7 companies.

8 The second and third are the real estate
9 value and the opportunity value and we will
10 tackle each of these in the presentation.
11 I will do issue 1(a) and Mr Shopp will do the
12 remaining issues.

13 If we now move to section 2, slide 7, the
14 damages framework, here we have tried to list
15 out the areas of agreement between the experts,
16 because I think there are quite a few and it is
17 worth going through them. We agree that the
18 standard approach is to compare the but-for and
19 the actual, and the delta gives you damages.
20 We also agree that you need a financial model
21 to quantify and simulate the impact of the
22 measures, which Brattle has done, and I think,

1 hearing Brattle both yesterday and today, we
2 both agree this is a complex model, it is not
3 easy to manipulate and adapt, and, given the
4 various breaches that are alleged, there can be
5 many different outcomes on liability, and we
6 think it could be difficult for the Tribunal.
7 If it comes to a view that is different from
8 what either of the two experts have actually
9 modelled, it could be quite difficult to
10 project it, and we would agree with Brattle
11 that you would need the input of the experts,
12 and we would be more than happy to offer that
13 input as well in the determination of damages.

14 We also agreed that the ex post assessment,
15 which is what Brattle has done, is the correct
16 approach here, because there are many breaches
17 occurring over a wide time frame, over
18 different points in time, and the ex post
19 therefore approach is a better approach to
20 quantify damages.

21 Lastly, and most importantly, we agree that
22 Claimants, as equity holders, only incur losses

1 if there is cash remaining to distribute after
2 all debt obligations have been fulfilled. This
3 is a key issue, in our view, that underpins the
4 assessment of whether the breaches caused the
5 failure of the companies, and, if so, what was
6 the damages resulting from those breaches. So
7 while the experts agree on this issue, we reach
8 very different conclusions when we implement
9 this approach, and we will discuss why in the
10 following slides.

11 The next slide is the areas of disagreement.
12 There are two main areas of disagreement with
13 regard to the but-for scenario. The first is
14 the timing of when the but-for scenario begins
15 to depart or deviate from the actual scenario,
16 and the second is the specific assumptions that
17 are used for the distribution of dividends.

18 I will tackle the first issue, which was the
19 start date for the but-for scenario, slide 9.

20 In the Brattle model, the but-for scenario
21 departs significantly from the actual on the
22 very first day of the revised concessions, and

1 if you look at the table to the right, you will
 2 see, for example, fare evasion goes down from
 3 24 per cent to 7.7 per cent, day 1, so there is
 4 a two-thirds reduction; the ICR and ICF
 5 discounts go from 3 per cent to zero on day 1;
 6 the ICT ratio goes up, the compliance goes up
 7 from 97.5 per cent to one hundred percent on
 8 day 1; the bus fleet is bigger, passenger
 9 demand is higher, and all of these are
 10 occurring on the very first day of the
 11 concession. In our view, this reflects more of
 12 a near perfect or a blue sky view of the
 13 performance of these companies, and we believe
 14 this is commercially unreasonable.

15 In terms of our approach, when we model the
 16 but-for scenario, first off, our but-for
 17 scenario does not depart from the actual
 18 scenario until February 2014, but that is
 19 because of a legal instruction we were given to
 20 exclude events prior to that. That has a
 21 significant impact on damages of about
 22 155 million, and we heard from Brattle earlier

1 today that in a debt repayment scenario, when
 2 cashflows from the company are used to just
 3 repay the debt, there would not be much
 4 difference in damages, and we disagree with
 5 that, because when you are repaying debt what
 6 you are really doing is transferring value from
 7 the debt holders to the equity holders, so
 8 there is a one for one correlation between a
 9 paydown of debt and a benefit to Claimants,
 10 even if this happens before February 2014. So
 11 we disagree and we would say that in all of the
 12 different scenarios, whether it is dividend
 13 repayment, debt covenants or debt repayment,
 14 this time bar has a significant impact on
 15 damages to the tune of about \$155 million.

16 Then we would say that even if the time bar
 17 did not apply, we would say it is unrealistic
 18 to assume such a drastic and immediate change
 19 in the operating conditions and the but-for
 20 scenario, rather than to the actual scenario.
 21 Why do we say that? You can test the statement
 22 by looking at the contemporaneous disclosures

1 that the companies themselves made back in 2012
 2 and 2013.

3 If you are on slide 10, on the left hand
 4 side we have some statements about the outlook
 5 of the company in 2012, and what were the
 6 companies saying about the outlook. You will
 7 see that the companies played an important role
 8 in determining the terms of the revised
 9 concessions, and they thought that these
 10 revised concessions represented a great
 11 opportunity to improve the position of the
 12 company.

13 But what actually happened in these early
 14 years is the companies performed quite poorly,
 15 and so later on the companies provided
 16 explanations of this performance, and if we go
 17 through the reasons for this poor performance,
 18 you will see at the top they say that there was
 19 a reduction in demand because of a reduction in
 20 growth, and because of a growth in the quantity
 21 of cars and automobiles; there was a drop in
 22 fleet availability because of

1 maintenance-related issues; there was a
 2 reduction in passenger demand because of a poor
 3 level of service offered by the companies; and
 4 there was also a shortage of bus drivers. If
 5 you see these reasons, these are either
 6 company-specific or market-specific reasons.
 7 As we see, these are not related to the alleged
 8 breaches.

9 If we move forward to the next slide, this
 10 is what the credit rating agencies opined as
 11 far as the performance of the company, and we
 12 see they largely echo the company's own
 13 reasons. Moody's talks about the increased
 14 maintenance costs coming from the overhaul and
 15 part replacements, Fitch talks about the
 16 synergies expected from the merger not being
 17 realised or taking longer to materialise, there
 18 was a discussion about the increased
 19 competition from the Metro and
 20 automobiles -- again, reasons we see as either
 21 company or market specific.

22 If we go to the next slide, what were the

1 companies not saying, then, about the
 2 performance in 2012 and 2013? They were not
 3 saying the fare evasion rate would drop by two
 4 thirds, that the discounts would go down to
 5 zero, that compliance with the
 6 Operational Plan, the ICT ratio would be one
 7 hundred percent, or they would be needing new
 8 buses, so we conclude on this issue that, even
 9 though the companies themselves did not expect
 10 these changes to happen, and they weren't the
 11 reasons stated for the poor performance of the
 12 companies in 2012 and 2014, the Brattle Group
 13 models these changes in the but-for scenario
 14 starting from the first day of the revised
 15 concession, and we believe this is unreasonable
 16 and significantly inflates damages.

17 Moving to slide 13, this is the issue with
 18 the way in which dividend payments are
 19 modelled, and this was discussed earlier today
 20 with Brattle. In the First Report Brattle
 21 modelled what they call their dividends
 22 approach where dividends were paid whenever

1 cash was available. We raised some concerns
 2 about this in our report, because we said this
 3 may be in violation of the bond covenants, and
 4 so in the Second Report they provided two more
 5 approaches. One is the debt covenants
 6 approach, where dividends are paid in
 7 accordance with the debt covenants -- at least
 8 that is the objective -- and the debt repayment
 9 approach, where dividends are only paid after
 10 the debts are fully repaid.

11 We heard some discussion today where Brattle
 12 suggested they have implemented the debt
 13 covenants portion correctly. We do believe
 14 they have attempted to do this, and we also
 15 agree with them that it is a complex exercise,
 16 but we do not agree they have done this
 17 correctly or properly, particularly because
 18 there is a forward-looking element to these
 19 debt covenants, and you have to project these
 20 at various points looking forward, which
 21 Brattle has not done. They relied entirely on
 22 a static point in time projection from 2012 to

1 do these forward-looking projections, so we
 2 would not accept they have correctly done the
 3 debt covenant scenario.

4 For that reason we think the debt repayment
 5 scenario is really the best approach one should
 6 use here to assess damages.

7 I will say in closing here on this
 8 particular issue that for the affirmative case
 9 of Brattle's assumptions, these different
 10 scenarios do not have much impact on damages,
 11 but if you start changing your operational
 12 assumptions and parameters, these differences
 13 and this these different approaches can become
 14 quite significant and therefore it is an area
 15 of disagreement we still want to highlight.

16 I now turn to Mr Shopp, who will discuss the
 17 specific assumptions of the but-for scenario.

18 SEÑOR SHOPP: Good afternoon. Just jumping
 19 into the specific assumptions in the but-for
 20 scenario, and how our assessment of what the
 21 but-for scenario would look like regarding
 22 these assumptions differs from Brattle groups.

1 Turning to slide 15, what this shows are the
 2 additional cashflows that Brattle Group and we
 3 forecast that Alsacia and Express would earn in
 4 the but-for scenario, so how much cash over and
 5 above what they earned in the actual scenario
 6 will the companies generate, and you can see in
 7 the middle column Brattle Group estimates that
 8 Alsacia and Express over the course of 2012
 9 through 2019 will generate \$491 million of
 10 additional cashflows in the absence of the
 11 breaches. Our column, which you can see on the
 12 far right, we estimate that the companies would
 13 generate 144 million USD in additional
 14 cashflows if we are in the but-for scenario.

15 So two things to note here. You can see we
 16 have zeros in our column for 2012 and 2013.
 17 That reflects the time bar which has been
 18 applied. So in other words, the companies
 19 don't have additional cashflows in 2012 and
 20 2013, because the time bar, we have been
 21 instructed, there is effectively no change
 22 between the but-for and the actual scenario

1 prior to 2014. We are not saying the companies
2 don't earn money in those periods; just that
3 they don't earn any more money in the but-for
4 scenario due to this time bar.

5 Beyond 2014, you will see our numbers in
6 most years, I think in all years, are
7 significantly lower than Brattle Group's again
8 estimate of the incremental additional
9 cashflows that would be earned in the but-for
10 scenario.

11 Turning to the next slide, really there are
12 five reasons why that is the case, five
13 specific assumptions where we differ or our
14 assessment is different from Brattle Group's
15 assessment that leads to this discrepancy
16 between 491 million and 144 million. There are
17 other small differences but these are the main
18 five. They are the fare evasion rate that
19 results in the but-for scenario; how this
20 concept of fare evasion credit is dealt with,
21 which I think some of the discussion earlier
22 today highlighted really involves in large part

1 this IPK and PPT calculation; third are the ICF
2 and ICR discounts; fourth is the ICT ratio; and
3 fifth whether the costs associated with the
4 debt restructuring which did occur in
5 August 2014 would also occur even in the
6 but-for scenario.

7 So, turning the slide, starting with fare
8 evasion, this is, I think we agree, the most
9 significant or at least one of the most
10 significant assumptions in the but-for
11 scenario. What you can see here is the green
12 line at the top demonstrates the actual fare
13 evasion rate. The orange line at the bottom
14 demonstrates the Brattle Group's but-for fare
15 evasion rate they have applied. As you can
16 see, they have an 8 per cent roughly average
17 fare evasion rate over the life of the revised
18 concessions, and that is based on a two-thirds
19 reduction in the evasion rates starting on
20 1 May 2012.

21 Our analysis is different. We assume that
22 there would be a one-third reduction in the

1 evasion rate starting in the third quarter of
2 2014. On the next slide I will discuss both of
3 those aspects.

4 Next slide. The first aspect is what
5 explains our assumption on the timing of the
6 reduction in fare evasion, and this is based in
7 large part on the Willumsen and Silva report,
8 where they observe that fare evasion didn't
9 really increase much until Q3 2014, so this
10 concept that there would be these exceptional
11 efforts on the part of the government to
12 further reduce evasion may not be implemented
13 until a later date.

14 So that explains the timing issue.
15 Obviously there is also the time bar as a
16 separate point but independent from that this
17 explains why we only adjust it later.

18 Then as to the level of fare evasion
19 reduction, again, based in part on the
20 Willumsen and Silva assessment that a best case
21 reduction would be one-third -- I think they
22 mentioned yesterday that it could be over 20

1 years you might get down to a 5 per cent
2 evasion rate.

3 Also, we have looked at the Alsacia and
4 Express fairness opinion, which describes a 2
5 to 4 percentage point reduction in fare
6 evasion. Just to be clear, this was a fairness
7 opinion conducted at the end of 2011/early 2012
8 to explain to bond holders what the impact of
9 these revised concessions would be, and in this
10 fairness opinion they term a 2 to 4 percentage
11 point reduction as "an optimistic scenario".

12 Similarly, Alto Evasión, the consultants
13 hired by Claimants, in reports that were
14 slightly later on in 2013, referred to a
15 5 percentage point reduction over the course of
16 2 years. They also talk about a 10 or
17 20 per cent evasion being the lowest possible,
18 the floor evasion rate for specific individual
19 routes, and obviously not every route would
20 have the lowest possible evasion rate.

21 Finally, we heard discussed earlier this
22 week and were curious about it and looked into

1 it, this R-295 document, this working paper.
 2 We looked at the formula itself and although
 3 I believe 9 per cent was presented as some sort
 4 of expectation, or what was believed would
 5 occur, if you follow the math, 9 per cent is
 6 actually the lowest possible target evasion
 7 rate, the lowest EV obj año_t, that the
 8 concessionaires would ever be held to, so we
 9 provided an example of this at the bottom,
 10 showing that, again, the concessionaires would
 11 never be expected to have an evasion rate less
 12 than 9 per cent, although it certainly could be
 13 higher than 9 per cent, depending on how the
 14 objective had moved over the course of the past
 15 few years and how they had actually performed
 16 with respect to the evasion rate.

17 So turning the slide again to the credit for
 18 fare evasion -- I hope I am not beating a dead
 19 horse here but just to expand on this again,
 20 what do we mean when we say what is credit for
 21 fare evasion? What is this concept? What we
 22 mean is if there is an observed increase in the

1 IPK, which is a measure of demand, not demand
 2 itself, it is a metric that attempts to measure
 3 demand, that is attributable to Alsacia and
 4 Express having successfully reduced fare
 5 evasion, then they receive an economic we call
 6 it a bonus under the contract. This bonus
 7 takes the form of a PPT (per passenger payment)
 8 that stays the same when it otherwise would
 9 have decreased.

10 With respect to this, there are two
 11 differences between the experts. The first is
 12 whether this reduction in fare evasion in the
 13 but-for scenario can reasonably be attributed
 14 to Alsacia and Express. The second is should
 15 this IPK/PPT adjustment involving credit for
 16 fare evasion be calculated in accordance with
 17 the contract or by another method that is not
 18 in the contract. We call this a Brattle Group
 19 error. Having heard their explanation earlier
 20 today, I don't think we appreciated that was a
 21 legal instruction they received to follow their
 22 interpretation of the contract. It is

1 different from how we read the contract,
 2 different, I believe, from what Chile's
 3 position is. So "error" may be too strong here
 4 but we did this presentation last night, so
 5 I do apologise for that.

6 So first with respect to the attribution,
 7 Brattle Group assumes 50 per cent attributable
 8 to the companies, 50 per cent to the
 9 government, and that was based on an
 10 instruction from Claimants' counsel, it seems.
 11 We assumed that the incremental reduction in
 12 fare evasion in the but-for scenario would be
 13 zero per cent attributable to the companies and
 14 one hundred percent to the government, and it
 15 begs the question why do we assume one hundred
 16 percent per cent attribution? That seems a
 17 fairly extreme scenario.

18 But we list the reasons below. Of all the
 19 factors that BRTPlan/Transconsult explains
 20 would result in this incremental reduction in
 21 fare evasion, they all seem to be attributable
 22 to the government. Transit police force and

1 additional inspectors, criminalising fare
 2 evasion and enforcing fines, adding new bip!
 3 recharging points, which I think only the
 4 government could do, adding new zonas pagas,
 5 which of course the concessionaires had the
 6 ability to do themselves but, as we understood
 7 BRTPlan's report, the complaint seems to be the
 8 government hadn't done enough of them.

9 Turning to slide 21, I know we have seen a
 10 lot of boxes today, I won't harp on this, all
 11 this is showing is what we call the IPK and PPT
 12 under the normal operation of the contract.
 13 And just to say upfront, obviously, we do not
 14 intend to make any legal commentary as to what
 15 the contract should mean or should say or what
 16 it is meant to say. This is based on our
 17 understanding just having read the contract and
 18 the relevant clauses, as I think both experts,
 19 I imagine, would have done with respect to
 20 things like the MAC index, the AIPK. It is a
 21 necessary part of our analysis to incorporate
 22 the way the contract functions into our

1 economic model. If it is an area of dispute we
2 don't intend to make any legal arguments here.

3 So having said that, this first slide 21
4 just shows, I think, this concept that if the
5 IPK goes down from one year to the next, there
6 is a corresponding and offsetting increase in
7 the PPT such that the -- we have called it
8 economic balance; here again, we don't mean
9 that in any legal sense but the size of the
10 boxes are the same in both instances.

11 Similarly, when IPK goes up, in other words,
12 there is decreasing or an increase in this
13 demand metric, the PPT would normally go down
14 again such that the size of the box stays the
15 same.

16 Turning to the next slide, which is this
17 concept of how does this concept of credit for
18 fare evasion function under the contract as we
19 read it in clause 5.5.2? What it shows is
20 that, if there is an increase in the IPK, in
21 other words, if there is an increase in this
22 demand measure, that is attributable to the

1 companies' successful efforts in having reduced
2 fare evasion, then the company can benefit
3 through this bonus because the PPT does not
4 decrease in this example from 3 to 2. Again,
5 under the normal operation of the contract, the
6 PPT would go down when the IPK goes up, but
7 because this increase in IPK is due to the
8 companies' successes, the PPT stays the same.
9 This results in a larger box, 6 times 3 equals
10 18, rather than 6 times 2 equals 12.

11 The contract does not, at least from what we
12 read in it, appear to provide for any
13 corresponding, at least exactly corresponding
14 mechanism, if IPK decreases. In that case the
15 normal mechanism applies. There is a decrease
16 in the IPK, the PPT increases, and the size of
17 the box is kept the same.

18 If we turn again to slide 23, that however,
19 what we read in the contract, what we
20 understood the contract to say, is not how
21 Brattle Group implemented this contractual
22 mechanism. What they do, and I think it was

1 again explained today -- I don't know that we
2 need to explain every step, but when there is a
3 decrease in the IPK in the absence of A and E's
4 efforts, we see that, rather than the normal
5 increase in PPT, there is an additional
6 increase in PPT based on this No Efforts IPK
7 decrease that doesn't appear to be in the
8 contract, and, very simply, what is the point
9 of this? By calculating this extra increase
10 Brattle is applying a higher PPT than would be
11 calculated in the contract and that
12 significantly inflates damages.

13 If you turn the slide to slide 24, we
14 calculated this recently. I am sure I would be
15 happy for Brattle Group to do the same, but we
16 calculate that just by simply implementing
17 5.5.2 as it appears to be written in the
18 contract, their damages would decrease by 115
19 million dollars compared to what it is.

20 So, turning quickly -- I am conscious of
21 time -- we have ICF and ICR discounts. I think
22 you heard earlier today, Brattle Group assumes

1 zero discounts. We assume 4 per cent, which is
2 equivalent to the actual scenario. So why no
3 change in the but-for scenario? I think it is
4 a legitimate question but one that has answers.

5 On the one hand, we relied on Willumsen and
6 Silva's analysis that shows that in conditions
7 that approximate the but-for scenario, real
8 world data that shows us something that looks
9 kind of like the but-for scenario when there is
10 higher fleet availability, faster driving
11 speeds, there is not a material change in these
12 discounts. We also looked at the May 2012
13 forecast that shows what you saw earlier today,
14 a 5 per cent ICF and ICR.

15 Turning the slide to 26, there is the ICT
16 ratio in the but-for scenario. At the table on
17 the top on the far right you can see
18 Brattle Group has 100 per cent -- we are
19 rounding here from 99.7 to one hundred in both
20 of these periods. In the actual road it was
21 95. We have done something in between those
22 two. We assume actual scenario through 2014

1 because the companies had not been turned down
2 for any additional fleet request prior to that
3 point, and there was no significant
4 infrastructure scheduled to be completed.

5 After 2014 we largely adopt
6 BRTPlan/Transconsult's assumptions. What we
7 don't adopt is this 5 per cent increase in the
8 ICT ratio that is due to lower vandalism. That
9 is entirely unsupported. Brattle Group claims
10 they got it from BRTPlan/Transconsult. They do
11 not. If you turn to slide 27 you can see that
12 BRTPlan/Transconsult very specifically says we
13 did not attempt to quantify this impact, yet it
14 appears as a 5 per cent very significant
15 adjustment in Brattle Group's ICT metric.

16 So issue No 5, restructuring costs and
17 currency hedges in the but-for scenario. This
18 one is fairly straightforward. The companies
19 did incur these costs because they were in
20 default. If the company would be in default in
21 the but-for scenario, we assume they would
22 likewise have to go through this process.

1 In Brattle Group's assumption there is no
2 default in the but-for scenario, so they
3 exclude these costs. In our but-for scenario
4 the companies do default, they do not have
5 sufficient cash to repay their debts at all
6 times, so we include these restructuring costs.

7 Turning to slide 30, we are now on to real
8 estate assets. In our original reports
9 Brattle Group used the Binswanger appraisals at
10 177 million. We relied on a series of
11 appraisals that implied a \$30-\$40 million
12 value.

13 We, based on new information -- and I am
14 happy to go as slowly as possible here because
15 we are not trying to hide this or obfuscate
16 this -- based on the lease agreements which
17 have been concluded now, we think it is
18 appropriate to update our real estate
19 valuation. The lease terms using the lease
20 rates that are set out in these nine-year
21 leases -- Brattle mentioned the cap rate
22 earlier today -- applying the cap rate that is

1 used by the MTT in making these purchase
2 decisions, we have used that to calculate an
3 implied value of 100 million, and that is our
4 real estate value at this point. This lease
5 had been discussed or considered when we wrote
6 our Second Report, and we didn't know whether
7 it would be finalised or where things would go.
8 The fact that it has been concluded I think
9 means we need to more strongly consider it.

10 We would caution it is probably if anything
11 a maximum value. It is a higher lease rate
12 than other terminals. Using the cap rate as a
13 concept implies it would be leased for
14 perpetuity. We don't know whether that would
15 be the case, and we understand there were some
16 unique considerations in the negotiation which
17 we have not attempted to account for.

18 PRESIDENTA KAUFMANN-KOHLER: I know you are
19 aware that the time has lapsed by now, but of
20 course you can finish your presentation.

21 SEÑOR SHOPP: Sure. So briefly on slide 33,
22 this is the lost opportunity value damages

1 concept. Brattle Group claims 51 million or
2 calculates 51 million. We see a number of
3 conceptual flaws in this approach. These
4 concessions, their terms, their economics, what
5 assets they'll require, I don't believe they
6 have even been set yet, so to try to estimate
7 how much value someone could obtain from them
8 is essentially a guess at this point, so we
9 think this is somewhat speculative. We think
10 it is perhaps not entirely realistic to put a
11 75 per cent probability of success for Alsacia
12 and Express, and certainly we have the question
13 as to how Alsacia and Express would raise the
14 \$400 million required to obtain the assets
15 needed to pursue these new concessions, given
16 our view that they would be in default even in
17 the but-for scenario.

18 On that basis, we conclude damages are zero.
19 However, for the reasons we listed on the
20 right, which I invite you to read about in our
21 report, even if one were to move forward with
22 this type of damages calculation, the correct

1 number in our view would only be closer to
2 8 million than 51 million.

3 Finally, on slide 35, just to wrap things
4 up, our conclusion, as we said, is that
5 Claimants have suffered no damages as a result
6 of the alleged breaches. When a more realistic
7 but-for scenario is applied, as we think we
8 have done, we agree that Alsacia and Express,
9 the companies, could have generated an
10 additional \$144 million in additional
11 cashflows. However, even with that additional
12 \$144 million, the companies could not pay
13 dividends to the shareholders, including
14 Claimants, they could not fully repay their
15 debts when they came due, meaning there is no
16 equity value to Claimants, and we don't think
17 it is reasonable to assume on that basis that
18 they would obtain future concessions.

19 So what is the bottom line? Although there
20 are additional cashflows, they are insufficient
21 to generate any dividends or equity value to
22 Claimants. Thus damages are zero, in our view.

1 I apologise for going over a few minutes.

2 PRESIDENTA KAUFMANN-KOHLER: That is fine.
3 Thank you. Can I give the floor to Claimants
4 for direct examination?

5 SEÑOR GARCÍA REPRESA: Thank you,
6 Madam President.

7 Cross-examination by Claimants
8 by Mr Garcia Represa

9 SEÑOR GARCÍA REPRESA: Good afternoon,
10 gentlemen. I have seen you in the back of the
11 room patiently waiting to express yourselves,
12 so hopefully we will give you that opportunity.
13 My name is José-Manuel Garcia Represa. As you
14 know, I am counsel for the Claimants and I will
15 be asking you a few questions today. You just
16 received a blue binder to which I will be
17 referring you, and I suggest that you may want
18 to keep your presentation at hand, because
19 I think we will be going both through the
20 documents and through your presentation.
21 I think it will be most efficient.

22 SEÑOR SHOPP: Sure.

1 SEÑOR GARCÍA REPRESA: What I suggest is
2 that we begin precisely at slide 10 of your
3 presentation?

4 Now, slide 10 of your presentation, I heard
5 you say that stands for the proposition that
6 what the companies were saying in 2012/2013
7 shows that the issues were not related to the
8 alleged breaches. Is that the point? I wrote
9 it as you were speaking, so there may be
10 something in the transcript that is slightly
11 different but the gist of it to me was that you
12 were trying to tell this Tribunal that if you
13 look at the documents that were issued shortly
14 after the contract, you will see no reference
15 to the companies complaining about the breaches
16 that are part of the case. Is that your
17 testimony?

18 SEÑOR SHOPP: No. I think you have probably
19 mischaracterised that a bit. I think the point
20 of this analysis is in reference to this
21 assumption that there is an immediate drastic
22 improvement and a two-thirds reduction in the

1 fare evasion rate, perfect ICT, perfect
2 ICF/ICR, and so I think to say that it means
3 that there is no discussion at all of any of
4 these issues, I doubt that is true. It is that
5 the level of improvement is entirely
6 contradicted by what the company seems to be
7 saying at the time, which is not that we think
8 tomorrow fare evasion will drop by two-thirds.

9 SEÑOR GARCÍA REPRESA: Ok, ok, I understand.
10 Thank you for your clarification.

11 So, let's now look at one of those documents
12 that you cited precisely in this slide. At the
13 bottom of slide 10 you refer to VP-57, and you
14 will find VP-57 at tab 32, we just have the
15 time to added it at the back of the bundle...

16 SEÑOR SHOPP: All the way at the back...

17 SEÑOR GARCÍA REPRESA: So, congratulations to
18 the team who manage to do that.

19 SEÑOR SHOPP: Yes, we have it.

20 SEÑOR GARCÍA REPRESA: Ok, and I seem to be
21 the only one that... o no, I do have it too.

22 Now, this is a management report and

1 analysis for the fourth quarter of 2012, and,
2 as you can see, it is VP-57. Correct?

3 SEÑOR SHOPP: Yes, that's correct.

4 SEÑOR GARCÍA REPRESA: It is the same
5 document that you referred to on slide 10.
6 And, just so that everyone is clear, this is
7 for the Tribunal's reference at Versant
8 Partners Second Report, page 39, footnote 40,
9 you will see reference to this too.

10 Now, I was particularly...

11 COÁRBITRO GARIBALDI: Do we have it here?

12 SEÑOR GARCÍA REPRESA: It should be at the
13 very end of your bundle, Tab 32, I believe.

14 SEÑOR GARCÍA REPRESA: Now, you see, in your
15 slide 10 and in your reports you do not cite to
16 what I think is very relevant information in
17 this document, so I want to give you an
18 opportunity to address it with the Tribunal.

19 SEÑOR SHOPP: Sure.

20 SEÑOR GARCÍA REPRESA: If you can go to
21 page 2, page 2 begins with section A, the new
22 Concession Contract, and that is the first

1 highlight of the year in this management
2 report, correct? The section is highlighted
3 for the year 2012 and the first highlight is
4 the new Concession Contract.

5 SEÑOR SHOPP: Sub-bullet A. Yes.

6 SEÑOR GARCÍA REPRESA: And you would agree
7 with me 2012 is the very first year in which
8 these contracts came into effect, correct?

9 SEÑOR SHOPP: I believe so, yes.

10 SEÑOR GARCÍA REPRESA: And these contracts
11 for Alsacia was to run about six years and for
12 Express was to run about 6 years and a half.

13 SEÑOR SHOPP: That sounds right.

14 SEÑOR GARCÍA REPRESA: Ok, so in the very
15 first year of operating, if you look to the
16 first paragraph below the title the New
17 Concession Contract, this is what it says.
18 "Starting in May 1st 2012", and apologies for
19 the transcribers, "the Company began operating
20 under the new Concession Contract negotiated
21 and agreed during the last part of 2011. The
22 new contract generated more financial and

1 operational challenges than its predecessors,
2 especially during the first year of operation.
3 The contract introduced a new income structure,
4 which places a higher reliance on the variable
5 income component of the concession revenue, and
6 offering potential significant incremental
7 revenue if the fare evasion efforts are
8 effective."

9 Is this consistent with how economically you
10 think the contract works?

11 SEÑOR SHOPP: Which aspect of it?

12 SEÑOR GARCÍA REPRESA: What I just read?

13 SEÑOR SHOPP: Certainly the new contracts
14 have different economics from the old ones. To
15 the extent that they are challenging, I suppose
16 that reflects the terms of the contract itself.

17 SEÑOR GARCÍA REPRESA: Well, let me ask you
18 again. Do you think the contract places a
19 higher reliance on the variable income
20 component of the concession? Yes or no?

21 SEÑOR SHOPP: Yes.

22 SEÑOR GARCÍA REPRESA: Do you think that it

1 offers a significant incremental revenue if the
2 fare evasion efforts are effective? Yes or no?

3 SEÑOR SHOPP: We discuss that in our slides.
4 Yes.

5 SEÑOR GARCÍA REPRESA: But what you don't
6 discuss in your slides is what comes next.
7 "The Company initially considered a revenue
8 increase of almost 28 per cent coming from fare
9 evasion control, but was able to capture only
10 6 per cent." Do you see that?

11 SEÑOR SHOPP: I do.

12 SEÑOR GARCÍA REPRESA: Do you quote it
13 anywhere in your report or in your
14 presentation?

15 SEÑOR SHOPP: I don't believe we do, no.

16 SEÑOR GARCÍA REPRESA: So in fact, just
17 because of fare evasion control problems, in
18 the very first year of operations, instead of
19 an increase of almost 28 per cent of revenues,
20 the companies captured only 6 per cent,
21 correct?

22 SEÑOR SHOPP: Well, I think the first part of

1 your question is probably a
 2 mischaracterisation. It does discuss two
 3 sentences down, "Even though fare evasion
 4 levels were lowered for both Alsacia and
 5 Express", so I think what is being reflected
 6 here is a capture of 6 per cent revenue
 7 increase due to successful efforts in
 8 combatting fare evasion, initially, that was
 9 not as high as the 28 per cent that perhaps had
 10 been hoped for. But I don't know that I would
 11 categorise it as a problem. I think they are
 12 saying it is not as much of a success as they
 13 had hoped.

14 SEÑOR GARCÍA REPRESA: So is it your
 15 testimony that a company relying... with a fixed
 16 cost base, a company who is relying on a
 17 28 per cent increase in revenues, would have no
 18 problem with just having a 6 per cent increase
 19 in revenues? Is that your testimony?

20 SEÑOR SHOPP: I would hope they weren't
 21 relying on a 28 per cent increase in revenues.
 22 I suppose if you thought you could get

1 28 per cent but only got 6, that is a worse
 2 than expected outcome.

3 SEÑOR GARCÍA REPRESA: And especially for a
 4 company with a very large fixed cost component,
 5 correct?

6 SEÑOR SHOPP: That depends on how high
 7 revenues are compared to costs when you start.

8 SEÑOR GARCÍA REPRESA: Do you know what the
 9 margin is normally in this sort of business,
 10 sir?

11 SEÑOR SHOPP: Which margin?

12 SEÑOR GARCÍA REPRESA: The operating margin.

13 SEÑOR SHOPP: I have seen various figures.

14 SEÑOR GARCÍA REPRESA: About what?
 15 Operating figures that range from what to what?

16 SEÑOR SHOPP: I would have to look at the
 17 various reports. I don't recall from memory.

18 SEÑOR GARCÍA REPRESA: Below 5, above 5?

19 SEÑOR SHOPP: I think that depends to some
 20 extent on how they perform. I honestly can't
 21 recall off the top of my head.

22 SEÑOR GARCÍA REPRESA: Ok, so the text goes

1 on, and I am glad you actually mention it, but
 2 before that did you calculate -- since the
 3 reason you just said you had put the text and
 4 these documents on slide 10 was to show that
 5 the quick, the timing issue of evasion that
 6 this Tribunal will have to address, did you
 7 calculate from this revenue difference what it
 8 would mean in terms of passenger demand, that
 9 is, how many passengers that were expected to
 10 be captured through this 28 per cent increase
 11 in revenues coming from fare evasion control,
 12 which is what it says? Did you calculate how
 13 many passengers that means?

14 SEÑOR SHOPP: We did not specifically.
 15 I would wonder how complicated that would be
 16 given the various mechanisms, but no, we
 17 haven't done it.

18 SEÑOR GARCÍA REPRESA: You also did not
 19 calculate it unspecifically, correct? Yes or
 20 no?

21 SEÑOR SHOPP: We didn't calculate it.

22 SEÑOR GARCÍA REPRESA: Ok, that is the

1 problem when you introduce qualifiers in your
 2 answer. I will get back to those.

3 So you did not calculate the difference that
 4 is shown here, but do you agree that just
 5 coming from fare evasion, the companies
 6 expected a revenue increase of almost
 7 28 per cent in the very first year of this
 8 contract? Yes or no?

9 SEÑOR SHOPP: I think it says considered,
 10 but if you interpret that to mean expected,
 11 sure.

12 SEÑOR GARCÍA REPRESA: Let's put just
 13 considered. Do you think the companies
 14 considered when they were negotiating that in
 15 the first year they would get a 28 per cent
 16 increase in revenues due to fare evasion
 17 control?

18 SEÑOR SHOPP: I don't know if they
 19 considered it when they were negotiating the
 20 contract. It says considered 28 per cent here.

21 SEÑOR GARCÍA REPRESA: Ok, It says
 22 initially, initially considered. And the

1 paragraph starts with May 2012, no?

2 SEÑOR SHOPP: I understood they negotiated
3 before that. I apologise.

4 SEÑOR GARCÍA REPRESA: They did negotiate
5 before that, I agree. It came into force
6 in May 2012. Your "initially" to you doesn't
7 mean anything there?

8 SEÑOR SHOPP: It could mean they considered
9 it would be an initial increase, that is the
10 first time they considered that is what they
11 thought it would be, I don't know.

12 SEÑOR GARCÍA REPRESA: Ok, let's see how the
13 text goes on in relation to fare evasion
14 control. It says, the first sentence after
15 what we just read, "A dedicated fare evasion
16 area was created to manage this income
17 opportunity." So that is what the companies
18 did, correct?

19 SEÑOR SHOPP: That is certainly what it says
20 here.

21 SEÑOR GARCÍA REPRESA: Costing the company
22 4.7 billion Chilean pesos during that year,

1 correct?

2 SEÑOR SHOPP: Again, that is what it says,
3 yes.

4 SEÑOR GARCÍA REPRESA: Then it goes on,
5 "Even though fare evasion levels were lowered
6 for both Alsacia and Express", so it means that
7 the companies' efforts yielded some
8 improvement, correct, in the evasion rate?

9 SEÑOR SHOPP: It says that.

10 SEÑOR GARCÍA REPRESA: It says "the Company
11 believes that its ability to significantly
12 lower current levels of evasion and thus
13 obtaining significant variable revenue
14 increases will be difficult". You are aware,
15 are you not, that in this case it is Claimants'
16 submission that unless the State does its part,
17 reducing fare evasion is not -- to the extent
18 we say it should be done, is not really
19 possible without the State. Are you aware that
20 is our submission?

21 SEÑOR SHOPP: I am broadly aware of that,
22 yes.

1 SEÑOR GARCÍA REPRESA: And you are aware
2 that is actually the basis for the 50/50
3 allocation of the fare evasion credit, are you
4 not?

5 SEÑOR SHOPP: Again, I suppose broadly.
6 I understood that to be an instruction from
7 counsel to Brattle Group but obviously I wasn't
8 privy to all the reasoning behind that.

9 SEÑOR GARCÍA REPRESA: Ok, did you analyse
10 how BRT/Transconsult have actually explained
11 why in their view 50/50 is a fair allocation of
12 the evasion efforts revenues?

13 SEÑOR SHOPP: Yes, what they have done --

14 SEÑOR GARCÍA REPRESA: That is not my
15 question.

16 SEÑOR SHOPP: Yes, I have certainly analysed
17 it. Yes.

18 SEÑOR GARCÍA REPRESA: Yet you don't refer
19 to that in your presentation, correct?

20 SEÑOR SHOPP: We refer to it in our reports,
21 absolutely.

22 SEÑOR GARCÍA REPRESA: But not in your

1 presentation, and we will get to that in a
2 moment. Now, given the difficulties in
3 reducing further the evasion, the document goes
4 on to say, last sentence of the paragraph,
5 "Therefore, the Company, as part of its ongoing
6 discussion with the Ministry is discussing the
7 modification to this aspect of the
8 Concession Contract, in order to diminish the
9 financial burden."

10 So it seems that the companies were reaching
11 out to the authorities already in 2012,
12 correct?

13 SEÑOR SHOPP: Again. That is what is
14 written, yes.

15 SEÑOR GARCÍA REPRESA: And you see where I
16 have a problem is when we go to your slide 12
17 of your presentation. Slide 12 of your
18 presentation at the bottom says, "even though
19 Alsacia and Express did not expect these
20 changes to happen", and we see that you list
21 the first change to be evasion, "and they were
22 not the reasons stated for poor performance in

1 2012" -- so do you want to correct that
2 statement?

3 SEÑOR SHOPP: I don't know that I would
4 correct it. Again, what has been put forward
5 in the but-for scenario is a 68 per cent
6 reduction in evasion rate on day 1, to the
7 extent the companies had discussions with the
8 Ministry regarding some potential re-evaluation
9 of the terms because they got a 6 per cent
10 increase rather than 28. I think the critical
11 issue here is, is this 68 percent immediate
12 reduction in evasion rate a reasonable and
13 realistic assessment starting on the first day
14 of the contract? I... Yes, go ahead.

15 SEÑOR SEQUEIRA: I would also add, to bring
16 to the context, that we are doing an assessment
17 but-for the alleged breaches. This is the
18 but-for scenario. So the question then is: is
19 the failure to achieve the 28 per cent, as you
20 are suggesting, a breach of Chile? That is the
21 other question to be answered. So it is a
22 broader assessment. There is an expectation

1 and there is a breach and they are the two
2 different things.

3 SEÑOR GARCÍA REPRESA: Yes, so let's take
4 this step by step. Slide 12. The title is:
5 "What were Alsacia and Express not saying in
6 2012? No 1, Evasion." And you say at the
7 bottom evasion was not the reason stated for
8 poor performance in 2012. We just saw what
9 they were telling the bond holders. Do you
10 want to correct your statement? Yes or no?

11 SEÑOR SHOPP: I don't believe there is any
12 reference in there to saying "We performed
13 poorly because we thought evasion would
14 decrease by two-thirds on day 1. It hasn't.
15 That explains our results". So in that sense,
16 no.

17 SEÑOR GARCÍA REPRESA: Have you tried to
18 reconcile what the reduction in evasion in 2012
19 would mean in terms of additional revenues? Do
20 you know if that corresponds to the
21 28 per cent? Or you haven't done that
22 calculation?

1 SEÑOR SHOPP: We haven't specifically. . . We
2 have not done it. You are correct.

3 SEÑOR GARCÍA REPRESA: So you don't know if
4 maybe that 28 per cent increase in revenues due
5 to fare evasion actually corresponds to the
6 drop in the evasion rate that we have seen in
7 the but-for scenario? You just don't know,
8 correct?

9 SEÑOR SHOPP: No. We don't know.

10 SEÑOR GARCÍA REPRESA: Now, let's go to slide
11 18. Excuse me I may have it wrong...Yes, slide
12 18, apologies. So slide 18 we see in the blue
13 circle to the left where you deviate with the
14 Brattle Group in relation to fare evasion
15 reduction, and we see that your correction,
16 your but-for for fare evasion begins in the
17 third quarter of 2014, so basically when there
18 were about four years left in the contract for
19 Alsacia. Is that correct?

20 SEÑOR SHOPP: Yes. I think third quarter of
21 2018. So that is about right.

22 SEÑOR GARCÍA REPRESA: Would you agree with

1 me or not, looking at the document we just saw,
2 the management report for 2012, that the
3 companies were already in 2012 saying that the
4 evasion rate was much higher than they
5 expected, and that that was due to the low
6 evasion control efforts by the State?

7 SEÑOR SHOPP: I am not sure that is exactly
8 what that document says.

9 SEÑOR GARCÍA REPRESA: Strike out "by the
10 State". See if that is what is driving your
11 response. Would you agree that already in that
12 document in 2012 the companies were complaining
13 that evasion was higher than they expected, and
14 that that was due to insufficient fare evasion
15 control? Do you agree or not?

16 SEÑOR SHOPP: Well, they hadn't reduced
17 evasion as much as they would like to. In that
18 sense it was higher than they hoped it would be
19 at least.

20 SEÑOR GARCÍA REPRESA: And by "they" do you
21 mean the companies alone, or the companies and
22 the State?

1 SEÑOR SHOPP: This seems to be the companies
2 issuing that document. I don't know what the
3 State's expectations were.

4 SEÑOR GARCÍA REPRESA: But you see, you
5 refer to this document in your presentation,
6 you refer to it in your report, but you never
7 cited to that second page that we looked at,
8 which is the initial discussion of the
9 contracts, so are you now telling me that you
10 actually have really no idea what that document
11 says in relation to the new contracts?

12 SEÑOR SHOPP: No, I don't think I am saying
13 that.

14 SEÑOR GARCÍA REPRESA: Ok, so how did you
15 understand that document when you referred to
16 it? Did you understand that the companies were
17 complaining that there were insufficient
18 evasion control efforts?

19 SEÑOR SHOPP: Let me look --

20 SEÑOR SEQUEIRA: I think they are saying
21 that the expectations didn't bear out. I don't
22 think they are saying, you can point me to the

1 place if I am wrong, that there were
2 insufficient efforts on fare evasion.

3 SEÑOR GARCÍA REPRESA: Sure. We can go back
4 to it.

5 SEÑOR SHOPP: It talks about a modification
6 to this aspect of the contract, it talks about
7 its ability to significantly lower levels will
8 be difficult, it talks about that it had
9 implemented, the companies had implemented a
10 fare evasion control area --

11 SEÑOR GARCÍA REPRESA: Absolutely.

12 SEÑOR SHOPP: I don't know that there is
13 some specific complaint that said "To
14 summarise, the State isn't doing its part,
15 other than this contract itself makes it a
16 challenge for us to generate the revenues we
17 expected when evasion is not going down as much
18 as we hoped."

19 SEÑOR GARCÍA REPRESA: Ok, but in any event
20 your but-for assumes, implicitly assumes, that
21 the State has done everything it had to do up
22 until Q3, 2014? Correct? That is the embedded..

1 that is the implicit but-for there, correct?

2 SEÑOR SHOPP: That in the but-for scenario -
3 I mean... the time bar is a part of that. From
4 that third part. Yes, I guess, based in part
5 on Willumsen and Silva's assessment that the
6 additional efforts -- I wouldn't say wouldn't
7 have made sense but may not have been a
8 sensible approach, because it was the
9 concessionaire's responsibility -- I don't mean
10 the word in any legal sense, but responsibility
11 to reduce fare evasion, that the State stepping
12 in when there was initial success to some
13 extent before evasion had gone up beyond the
14 levels it had been prior to the start of these
15 new contracts, that that sort of marks the
16 point at which the step-in would occur. If
17 that had occurred at an earlier date -- that is
18 not what we have assumed in our analysis. You
19 are correct.

20 SEÑOR GARCÍA REPRESA: Ok, so lets get that
21 straight, lets see If I can get a yes or no,
22 just to confirm what you just said, your

1 but-for assumes therefore that there is no
2 correction in the evasion rate -- you actually
3 take the evasion rate as the actual up until
4 Q3, 2014, correct?

5 SEÑOR SHOPP: That is what we show on this
6 chart, yes.

7 SEÑOR GARCÍA REPRESA: You said that one of
8 the reasons for that was the instruction on
9 time bar. Do you recall that?

10 SEÑOR SHOPP: That is maybe a broader
11 statement as to why nothing in the but-for
12 changes prior to February 2014.

13 SEÑOR GARCÍA REPRESA: And you also refer to
14 Mr Willumsen and Mr Silva's report. Now, are
15 you aware that before 2014 there were only 20
16 police men allowed to issue fines to control
17 about 3.5 million passengers a day in
18 Transantiago? You were not in the room when
19 the former Minister said that?

20 SEÑOR SHOPP: No, I was not.

21 SEÑOR GARCÍA REPRESA: Let's assume -- you
22 are an expert -- Let's assume that 20 police

1 men entitled to issue fines is insufficient to
 2 control fare evasion from May 2012 to Q3, 2014,
 3 and let's assume that the State has to do some
 4 control, and that more controls from the State
 5 means less evasion, which I think is
 6 undisputed, would you agree with me or not that
 7 we should then work through your but-for or
 8 that you would have to include the lower
 9 evasion rate in your but-for from the moment
 10 that this Tribunal will consider evasion
 11 efforts were insufficient?

12 SEÑOR SHOPP: Certainly if the evasion rate
 13 were lowered in the but-for before the date we
 14 lowered it, yes. Your proposition that the
 15 State was obligated to do something that
 16 specifically would have resulted in lower fare
 17 evasion prior to Q3, 2014, that is not
 18 reflected in our but-for scenario. You are
 19 correct about that.

20 SEÑOR GARCÍA REPRESA: Now, let's go back to
 21 your slide 18, and I think we will be
 22 displaying the contract on the screen. You

1 refer at the bottom -- the contract, R-295.
 2 You refer at the bottom to R-295. Do you see
 3 that?

4 SEÑOR SHOPP: Hmm mm.

5 SEÑOR GARCÍA REPRESA: That was never
 6 mentioned in your report, was it?

7 SEÑOR SHOPP: The first time we heard about
 8 this specifically, and specific to the context
 9 of fare evasion, was at this hearing. No, it
 10 was not in our reports. I don't think we had
 11 seen this document prior to that.

12 SEÑOR GARCÍA REPRESA: I would like you to
 13 please explain to me, because you have copied
 14 here only the bottom part of the formula, and
 15 not even the bottom part of the formula, so
 16 I would like you to explain to me the top part
 17 of the formula. Can you tell me? It is shown on
 18 the screen now. I understand you can read
 19 Spanish, sir?

20 SEÑOR SHOPP: That is incorrect.

21 SEÑOR GARCÍA REPRESA: Well, if you can put
 22 your headphones on we will kindly ask the

1 interpreters to translate what I am about to
 2 say now so that you can respond in English.
 3 ¿Está escuchando lo que voy a decir en español?

4 SEÑOR SHOPP: Sorry the volume was turned
 5 down, could you try again?

6 SEÑOR GARCÍA REPRESA: ¿Me escucha si le
 7 hablo así, en español?

8 SEÑOR SHOPP: Yes, yes.

9 SEÑOR GARCÍA REPRESA: La formula que aparece
 10 aquí reflejada en pantalla para evasión y AIPK
 11 de la que usted ha copiado una parte en la
 12 filmina 18 dice lo siguiente, y voy a ir
 13 directamente a la fórmula, lo demás se puede
 14 leer:

15 "Si al momento del cálculo del ajuste del
 16 año se tiene que la evasión del año es superior
 17 a la evasión del año menos 1, el valor del IPK
 18 inf se recalcularía de la siguiente forma". Y
 19 usted puede ver ahí la fórmula.

20 "Del mismo modo, si la evasión del año es
 21 inferior o igual a la evasión objetivo del año
 22 T, el valor del IPK sub se recalcularía de la

1 siguiente forma."

2 Me puede usted decir como ha entendido esa
 3 fórmula y como la ha aplicado para decirle al
 4 Tribunal lo que le ha dicho en la página 18?

5 SEÑOR SHOPP: Sorry, that was very quick on
 6 the translation at the end. It seems to be a
 7 formula setting out how the IPK would be
 8 calculated using this IPK from the previous
 9 year, this alpha factor, and a difference
 10 between the evasion rate in one year versus the
 11 evasion rate in the previous year, so had there
 12 been an increase, I assume, in the evasion rate
 13 it is defined up above, we didn't look at that,
 14 so it sets out how the IPK would be calculated
 15 under these two various scenarios --

16 SEÑOR GARCÍA REPRESA: Let me make it easier
 17 for you sir, if I may. Do you have any idea
 18 whether this formula actually says that the
 19 maximum is going to be nine per cent, or
 20 whether what it is telling you is that you have
 21 an incentive to reach a 9 per cent evasion
 22 rate, and once you go below 9 per cent evasion

1 rate, you will get that incentive as long as
2 you remain below 9 per cent? Do you know
3 whether that is the case in this formula, and
4 we can go to the next page to see that?

5 SEÑOR SHOPP: That was a lot to process. I
6 meant, what we have focused on is that the EV,
7 obj -that I assume is "objetivo", in year t,
8 can only be... cannot be lower than 9 per cent.
9 How that then plays into the IPK formula above,
10 no, we have not analysed that specifically.

11 SEÑOR GARCÍA REPRESA: Ok, because that is
12 precisely the point. What this part of the
13 formula is telling you is what is the
14 objective. The objective is 9 per cent. What
15 it is not telling you...

16 SEÑOR SHOPP: It is the lowest possible
17 objective. The objective certainly can be
18 higher. If you see, it is a maximum formula, so
19 if the objective is higher... if the evasion rate
20 has not been 9 per cent yet, the objective
21 could be 20, it could be 15, it could be 12.
22 It could never be 7.

1 SEÑOR GARCÍA REPRESA: But the real evasion
2 can be lower than 9. That is the point.

3 SEÑOR SHOPP: Of course. You could achieve
4 that --

5 SEÑOR GARCÍA REPRESA: No, no, let me say the
6 point.

7 SEÑOR SHOPP: I apologise.

8 SEÑOR GARCÍA REPRESA: What the "Evasión
9 objetivo" (EV obj) "año_t" formula is telling
10 you is that, that evasion rate will be
11 calculated as the maximum between the evasion
12 rate that you actually achieved in the prior
13 year compared to the objective that had been
14 set for the prior year, or 9 per cent. So what
15 this is telling you is that the objective for
16 the year is going to be the maximum between
17 9 per cent or, if you were above 9 per cent, is
18 going to compare your objective from the prior
19 year to what you actually achieved in the
20 current year. So it is only telling you how
21 are we going to measure "Evasión objetivo" (EV
22 obj) año_t, and if you go up in the formula,

1 what this is telling you is that if your
2 "Evasión objetivo" (EV obj) año_t is
3 greater -- and it is the bottom part -- is
4 greater than what you had expected, so if your
5 objective was 10 and you actually managed to
6 get 9.5, you will get an IPK kick sure, but if
7 you actually go below 9, then we will just take
8 9 and you will still get the IPK kick.
9 Correct?

10 SEÑOR SHOPP: Incorrect, I don't think we
11 have ever tried to say the evasion rate
12 couldn't be below 9. It is that the target,
13 what they are being measured on, that can never
14 be below 9. That is the minimum target, sorry...
15 yeah, the minimum target that could ever be set
16 for the concessionaires as a..., presumably based
17 on some idea of what the realistically
18 achievable minimum rate would be.

19 SEÑOR GARCÍA REPRESA: Now, you also said in
20 your slide 18 that Alto Evasión estimated 10 to
21 20 per cent lowest possible evasion rate for
22 individual routes but you did not say how many

1 routes. I put it to you that if you actually
2 look at the document, it is only 19 routes
3 where actually Alto says that as a hypothesis
4 they were trying to get them down to ten, but
5 not that that was the lowest possible. Do you
6 agree with me or not?

7 SEÑOR SHOPP: I think I would have to look
8 at the document.

9 SEÑOR GARCÍA REPRESA: Ok, Tab 18, please.
10 For the record, VP-63.

11 Are you with me sir?

12 SEÑOR SHOPP: Yeah, I am on the Tab.

13 SEÑOR GARCÍA REPRESA: Ok, this is what you
14 call a document from Alto Evasión, correct?

15 SEÑOR SHOPP: Yes. I apologise if we
16 mislabelled that.

17 SEÑOR GARCÍA REPRESA: Yes, City Planning is
18 not Alto Evasión. Do you know who City
19 Planning is, sir?

20 SEÑOR SHOPP: One of the other consultants
21 they are... I think, but I don't recall from
22 memory.

1 SEÑOR GARCÍA REPRESA: Ok, it is City
 2 Planning, anyway. Now, let's go to slide 10,
 3 page 10, here, because I think that is what you
 4 were referring to, where we will find the
 5 ten per cent, and there I will read it in
 6 Spanish, and, by the way, did you get an
 7 English translation of this document?

8 SEÑOR SHOPP: A member of our team is fluent
 9 in Spanish so we looked at it with him.

10 SEÑOR GARCÍA REPRESA: Ok, I will read it in
 11 Spanish and you will get the interpretation or
 12 maybe I...

13 SEÑORA GEHRING FLORES: Excuse me, just one
 14 moment, I believe on slide 18 this document is
 15 referred to as VP-62, page 3?

16 SEÑOR GARCÍA REPRESA: Excuse me, I have on
 17 the front page VP-63, in tab 18.

18 PRESIDENTA KAUFMANN-KOHLER: Your point is
 19 that on slide 18 it says VP-62, page 3.

20 SEÑORA GEHRING FLORES: On slide 18 it says
 21 18, page 3.

22 SEÑOR GARCÍA REPRESA: Yes, and

1 I understand. Now, there was a list of
 2 documents in your reports, this is mentioned,
 3 and I can give you the reference for the
 4 Tribunal's convenience to the report. This is
 5 part of what is cited in the reports at
 6 paragraphs 139 of your Second Report and
 7 paragraph 140. This is the support you give
 8 for this same proposition, and I think the
 9 documents are similar.

10 SEÑOR SHOPP: Sorry. I think there is a lot
 11 of document discussion going on.

12 SEÑOR GARCÍA REPRESA: No worries. Let's
 13 keep to tab 18. Let's assume that what I
 14 represented was correct and if not I will stand
 15 to be corrected. So tab 18, VP-63, slide 10, I
 16 will read it in Spanish: "Si se acepta como
 17 piso un 10 por ciento de evasión, 11 servicios
 18 tienen la potencialidad de recuperar..."

19 SEÑORA GEHRING FLORES: Excuse me, the
 20 witness does not have their headsets on yet...

21 SEÑOR GARCÍA REPRESA: ¿Me puede escuchar
 22 ahora?

1 SEÑOR SHOPP: Yes.

2 SEÑOR GARCÍA REPRESA: Vuelvo, disculpe,
 3 vuelvo a leerlo.

4 "Si se acepta como piso un 10 por ciento de
 5 evasión, 11 servicios tienen la potencialidad
 6 de recuperar o generar más de 2.000 millones,
 7 entiendo, mensuales por bus o 2 millones." Pero
 8 eso no es lo que -- 2 millones, no es lo que es
 9 importante. Lo de: "Si se acepta como piso un
 10 10 por ciento de evasión", usted no cree --
 11 excuse me, am I correct in understanding that
 12 for you that title reflects that ten per cent
 13 is the lowest possible evasion rate for these
 14 routes? Because that is what you said to this
 15 Tribunal.

16 SEÑOR SHOPP: I think I understood piso to
 17 mean lowest possible... I don't speak Spanish.

18 SEÑOR GARCÍA REPRESA: But you know the "Si
 19 se" is a conditional tense, and what you have
 20 here is a modelling, saying that if we take
 21 ten per cent as the lowest rate at which we get
 22 here the results are; it is not saying this is

1 the lowest possible revision rate, does it?

2 SEÑOR SHOPP: It is the lowest hypothesised
 3 evasion rate in their study. If they take that
 4 as the lowest, the floor evasion rate for the
 5 purpose of this study, here are the extra
 6 revenues. I suppose it is not an absolute
 7 statement that it is; ten per cent is an
 8 example.

9 SEÑOR GARCÍA REPRESA: Ok, it is not the
 10 lowest possible, is it?

11 SEÑOR SHOPP: Well, in this example it is.

12 SEÑOR GARCÍA REPRESA: No, but is not... that
 13 is not what you said. You said... we can go to
 14 the slide, Alto Evasión said 10-20 per cent is
 15 the lowest possible evasion rate for individual
 16 routes. Without qualification. That is what
 17 I am getting at. Do you want to correct what
 18 you say on slide 18?

19 SEÑOR SHOPP: When City Planning apparently
 20 conducted a study to determine the economic
 21 impact of potentially lower evasion rates, they
 22 used a floor of ten per cent evasion rate in

1 their analysis. Perhaps that is more accurate.

2 SEÑOR GARCÍA REPRESA: It was a hypothesis,
3 correct. Do you know why they were running
4 these hypotheses, or do you not know?

5 SEÑOR SHOPP: It seems to be determine the
6 potential revenue capture of lower evasion
7 rates.

8 SEÑOR GARCÍA REPRESA: Do you know, if you
9 look at the bottom, do you know why some of
10 these routes have an asterisk next to them?

11 SEÑOR SHOPP: I lost the slide... we are on
12 slide --

13 SEÑOR GARCÍA REPRESA: Tab 18, slide 10.

14 ...

15 Are you with me? Slide 10, at the bottom...

16 SEÑOR SHOPP: I see the note. I can't
17 translate it in real time.

18 SEÑOR GARCÍA REPRESA: I will do it for you.
19 "Services were identified as critical in 2011
20 analysis".

21 Do you understand, therefore, that what this
22 document is saying is the companies are looking

1 at what are those services that were actually
2 losing the most because of insufficient or
3 because of high evasion? Is that your
4 understanding?

5 SEÑOR SHOPP: I don't... I mean...-- it just
6 says it identified as critical. I don't know
7 any context.

8 SEÑOR GARCÍA REPRESA: Ok, well but you cited
9 to this document in your reports and that is
10 why I have to ask questions about them, but we
11 will move on.

12 We can now move on to slide 20 of your
13 presentation please, we are still in the
14 subject of fare evasion, and now we are moving
15 to the credits. My first question here, you
16 say why do we assume one hundred percent
17 attribution of incremental fare evasion
18 reduction to the government, and you say that
19 because BRT listed a series of measures that
20 only the State could take. You see that?

21 SEÑOR SHOPP: I don't know that I would say
22 that only the State could take these measures.

1 I think in BRT Plan's assessment of what would
2 have been done otherwise, these all would have
3 been taken by the State as incremental steps.
4 I would not put forward that only the State can
5 do all these things. Certainly there are some
6 that only the State can do.

7 SEÑOR GARCÍA REPRESA: So you are no longer
8 saying what you said before, and here we see
9 government for each one of these four items at
10 the end. So you are not saying that the reason
11 you have considered zero credit to the
12 companies for the improvement in fare evasion
13 is because only the government according to BRT
14 was to do things to improve that fare evasion
15 rate?

16 SEÑOR SHOPP: That only the government was
17 to "do" them, not necessarily that only the
18 government "could" do them. So BRT is saying
19 it will be the government who will do these
20 things, not necessarily that the government is
21 the only party who can do these things.

22 SEÑOR GARCÍA REPRESA: ok, In the actual

1 scenario -let's be clear, we are building the
2 but-for from the actual. In the actual
3 scenario the companies made efforts to fight
4 against evasion, did they not?

5 SEÑOR SHOPP: It seems that they did, yes.

6 SEÑOR GARCÍA REPRESA: But in the but-for
7 scenario, your implicit but-for is that the
8 companies would not do anything to fight
9 against evasion and hence 100 per cent of the
10 credit goes to the State. Isn't that what is
11 embedded in your model?

12 SEÑOR SHOPP: Well, I think first you have to
13 accept the proposition that this credit is not
14 binary, and I don't know that that again,
15 non-legal interpretation, this idea that there
16 is some sliding scale of credit doesn't seem to
17 appear anywhere. It is if there is an increase
18 in the IPK, if that happens, the PPT would not
19 be reduced if that reduction in fare evasion is
20 attributable to the companies' successes in
21 reducing fare evasion. So I don't know that
22 there is if X per cent of the effort or if

1 X per cent of the success is attributable to
 2 the companies, then we will do it this way. It
 3 is a binary in the sense that who will receive
 4 attribution of this reduction in fare evasion,
 5 and given the balance of the efforts, it seems,
 6 that are being put forward by BRTPlan, the
 7 government seemed to be the party who it would
 8 be attributable to.

9 SEÑOR GARCÍA REPRESA: Ok, I understand that
 10 you received a legal instruction, and correct
 11 me if that is not the case, you received the
 12 legal instruction to assume that there would be
 13 no credit to the companies in the but-for for
 14 their efforts to fight against evasion, is that
 15 correct?

16 SEÑOR SEQUEIRA: Can you point us to where
 17 we say that? I am sorry. I don't recall that.

18 SEÑOR GARCÍA REPRESA: You don't recall what
 19 legal instructions you got even though you
 20 referred to the credit here during your
 21 presentation? I mean, I just want to know if
 22 that is coming from your reading of the

1 contract or from counsel's reading of the
 2 contract.

3 SEÑOR SHOPP: The formula that sets out how
 4 PPT is calculated by reference to IPK and how
 5 fare evasion can play, it is successfully
 6 reducing fare evasion play into that, that is
 7 based on us looking at the clause of the
 8 contract -- us, broadly our team. I think we
 9 at some point would have discussed that with
 10 the lawyers. They didn't give us a specific
 11 instruction to interpret it one way or the
 12 other.

13 SEÑOR GARCÍA REPRESA: Ok, so if I understand
 14 your point --

15 COÁRBITRO GARIBALDI: May I ask a question?
 16 I am not sure that I understand. So, are you
 17 saying that if a decrease in evasion can be
 18 attributed in a real world sense, 99 per cent
 19 of the efforts of the company and 1 per cent of
 20 the efforts of the government, how can you
 21 calculate that? Because both are contributing.

22 SEÑOR SHOPP: So, again --

1 COÁRBITRO GARIBALDI: It is all or nothing
 2 in your interpretation?

3 SEÑOR SHOPP: In the contract... again, I am
 4 working from memory, and I am not trying to
 5 interpret the contract but, as I recall what it
 6 says, it is to the effect of if there is an
 7 increase in the IPK, again, normally the PPT
 8 would go down. If that increase in IPK can
 9 reasonably, or not even reasonably, can be
 10 attributed or is attributable to the efforts of
 11 the companies in successfully combatting fare
 12 evasion, then the PPT can remain the same. So
 13 it is sort of binary in the sense that it is
 14 either attributed or not. There is nothing, it
 15 seems, that says whatever percentage
 16 attribution there is will adjust the way we
 17 calculate it, based on that. But again, I am...

18 COÁRBITRO GARIBALDI: Ok, let's suppose that
 19 50 per cent of the increase -- the reduction in
 20 the evasion is one hundred percent attributable
 21 to the actions of the government and
 22 50 per cent is one hundred percent attributable

1 to the actions of the company, how do you
 2 analyse that?

3 SEÑOR SHOPP: Well, again, working from
 4 memory, I suspect that there is some mechanism
 5 in the contract that the concessionaire would
 6 petition their case on the PPT and say this
 7 evasion reduction was due to our efforts, we
 8 should not have a PPT reduction. I imagine
 9 there is some process through which that gets
 10 decided, appealed if necessary. It's not... there
 11 isn't in a formulaic or financial sense any
 12 mechanism that allows for anything other than
 13 does the PPT stay the same or does it go down
 14 in correspondence. I am not trying to evade
 15 the answer; that is just what the contract
 16 says.

17 COÁRBITRO GARIBALDI: Thank you.

18 SEÑOR GARCÍA REPRESA: And I think you will
 19 need the headsets again, because if
 20 I understand your point, when overall demand
 21 decreases, what you are saying is there is no
 22 explicit mechanism to recognise that maybe the

1 demand did not fall as much as it would
 2 otherwise have fallen, because there are some
 3 efforts by the companies to fight evasion. Is
 4 that a fair summary of what you are reading?
 5 Yes or no? Is this a fair summary?

6 SEÑOR SHOPP: As it relates to the clause at
 7 hand.

8 SEÑOR GARCÍA REPRESA: Yes or no? Is it a
 9 fair summary of your understanding of what the
 10 issue is before this Tribunal?

11 SEÑOR SHOPP: A fair summary of my
 12 understanding of the specific clause in which
 13 IPK and PPT are set out.

14 SEÑOR GARCÍA REPRESA: Ok, now, were you in
 15 the room when former Minister Gomez Lobo
 16 testified?

17 SEÑOR SHOPP: No, I was not.

18 SEÑOR GARCÍA REPRESA: Ok, so I will now read
 19 that from the transcript at page 920, I will
 20 read it in Spanish, and this is the section
 21 where he was describing what are the mechanisms
 22 in the contract for adjustments. He first

1 referred to the annual mechanism AIPK and then
 2 he said, "Y después", line 90, "Al cabo de dos
 3 años, o sea cada dos años, hay una revisión
 4 programada donde si hubo una baja en la demanda
 5 en parte por la evasión, por ejemplo, y
 6 nosotros consideramos que la empresa sí hizo
 7 esfuerzos en luchar para la evasión, uno le
 8 compensa aumentando el pago por pasajeros
 9 transportados."

10 Did you understand?

11 SEÑOR SHOPP: Yes. We referenced --

12 SEÑOR GARCÍA REPRESA: Wait. Do you agree
 13 that what the Minister just said is directly
 14 opposite to your reading of the contract, yes
 15 or no?

16 SEÑOR SHOPP: No. You should look at slide
 17 21 of our presentation in which the normal
 18 increase in PPT as set out in the formula, a
 19 little green asterisk, see on the left side,
 20 PPT increase green asterisk, the baseline
 21 assumption in the increased PPT in the event of
 22 a decrease in IPK assumes that the companies

1 are not responsible for the decrease in
 2 evasion. So that they have made whatever
 3 efforts are necessary that you can't say it is
 4 your fault, companies, that demand declined.

5 But that is a qualifier again. I am
 6 not trying to...-- other than the economic terms
 7 of the contract, which we need to put into a
 8 formula in Excel, it seems that that is the
 9 basic criteria for that baseline increase in
 10 PPT with a decline in IPK. It is not a bonus;
 11 it is just to get that initial increase in PPT.

12 SEÑOR GARCÍA REPRESA: Ok, I think the issue
 13 is covered. We will move on in the interests
 14 of time to tab 14, please. For the record,
 15 exhibit R-591. This is again in Spanish so you
 16 may want to keep your headphones on. And
 17 I would like you to go to page 7. And the
 18 second bullet down the page is referring to
 19 proceso de revisión del equilibrio económico de
 20 los contratos, and is referring to the year
 21 2014, that is the first revisión programada, is
 22 every two years, contracts 2012, revisión

1 programada 2014. And the third bullet point
 2 reads, I will say it: "De entre los 4
 3 escenarios, el más realista parece ser el de
 4 reducción de evasión y fraude en 50 por ciento
 5 y donde los beneficios se reparten en partes
 6 iguales entre Estado y operadores."

7 And follows the explanation. "Es imposible
 8 reducir completamente la evasión y el fraude.
 9 Además, alcanzar la meta de reducir en 50 por
 10 ciento la evasión y el fraude requeriría de un
 11 esfuerzo conjunto del Estado con los
 12 operadores".

13 Do you agree with this assessment?

14 SEÑOR SHOPP: I agree that is what it says.
 15 I mean, I don't... It may be the case. It
 16 certainly is what it says in this document.

17 SEÑOR GARCÍA REPRESA: Ok, let's move on to
 18 your slide 31, and we are going to talk and
 19 finish our discussion with terminals.

20 In your slide 31 you say, and I quote, "We
 21 apply a 9.7 per cent cap rate based on what the
 22 MTT used to make lease purchase decisions for

1 bus terminals."

2 Now, the terminals that you looked at in
3 your report for this are not the same terminals
4 that are at stake in these -- are not the
5 Alsacia and Express terminals, are they?

6 SEÑOR SHOPP: No. They are other
7 Transantiago terminals, as I understand it. If
8 we look at the document, I can confirm that.

9 SEÑOR GARCÍA REPRESA: Well, I would like to
10 look at the document because you have not
11 submitted any of the contracts for those
12 transactions. Have you seen them?

13 SEÑOR SHOPP: No. I believe what we had was
14 the spreadsheet that showed the MTT's
15 assessment of leases purchased for these
16 various terminals.

17 SEÑOR GARCÍA REPRESA: So what you are
18 referring to is the 9 per cent from a
19 spreadsheet that you got from the MTT.

20 SEÑOR SHOPP: Yes.

21 SEÑOR GARCÍA REPRESA: You did not
22 independently validate that spreadsheet?

1 Correct?

2 SEÑOR SHOPP: We did not see the proposed
3 lease and the proposed sale agreements, no.

4 SEÑOR GARCÍA REPRESA: You did not also see
5 what the properties were, where they were
6 located, what they were used for. You did not
7 conduct an appraisal of those terminals, did
8 you?

9 SEÑOR SHOPP: No, we did not conduct full
10 appraisals for each of those properties.

11 SEÑOR GARCÍA REPRESA: Ok but you are not
12 questioning, and I think this is-- you are not
13 questioning that those are.. that the State
14 generally, when they enter into a contract,
15 enter into an arm's length contract, correct?

16 SEÑOR SHOPP: I have no reason to doubt
17 that.

18 SEÑOR GARCÍA REPRESA: So when you referred
19 in the last bullet point of your slide 18 to
20 some unique considerations in lease
21 negotiation, you are not saying, are you, that
22 the lease contracts that were signed in this

1 case are not arm's length transactions between
2 the State and a private entity, correct?
3 Please respond.

4 SEÑOR SHOPP: Arm's length? They are
5 separate parties, so yes, I understand that it
6 is arm's length.

7 SEÑOR GARCÍA REPRESA: So by unique
8 considerations, you are not saying, are you,
9 that these contracts somehow are not reliable
10 when they value the terminals? Do you?

11 SEÑOR SHOPP: Arm's length isn't the only
12 criteria for establishing a market value.
13 There is also compulsion --

14 SEÑOR GARCÍA REPRESA: Yeah, I don't need a
15 lecture about market value. I am interested in
16 these specific contracts that are...-- let me
17 finish -- that are part of public deeds and
18 between Ministry and a private entity in Chile.
19 You are not questioning, are you, that the rent
20 that we see in those contracts is a market
21 rent, correct? It is market value.

22 SEÑOR SHOPP: It is what was agreed to by

1 two parties. What motivations and incentives
2 those parties had, separate from the core
3 economics of the lease --

4 SEÑOR GARCÍA REPRESA: Why are you
5 suggesting there is anything separate from the
6 core economics of the lease? I don't
7 understand. Please explain.

8 SEÑOR SHOPP: Time pressure would be one.
9 Time Pressure, Wanting to close the deal to
10 ensure continuous operation of these bus
11 routes, with maybe a party who doesn't have the
12 same time pressures, that could introduce a
13 degree of compulsion.

14 SEÑOR GARCÍA REPRESA: I just want to
15 understand, are you saying that those leases
16 are not reflective of market value? That is
17 what I want to understand.

18 SEÑOR SHOPP: No, we have adjusted our
19 conclusion on market value to use the lease
20 rates that are in the contracts.

21 SEÑOR GARCÍA REPRESA: No, no, no, I am
22 referring to the terminals we are discussing

1 here in this case.

2 SEÑOR SHOPP: As am I.

3 SEÑOR GARCÍA REPRESA: You do not question,
4 do you, that the lease agreements between the
5 State and the companies in this case reflect
6 market value? Are you?

7 SEÑOR SHOPP: To some extent, yes, in that
8 there are unique considerations such as time
9 pressure that I think --

10 SEÑOR GARCÍA REPRESA: Well, let's go ahead.
11 Unique considerations. Time pressure. What
12 else? No, no...

13 (Pausa.)

14 SEÑOR GARCÍA REPRESA: We were on your
15 presentation, the slide where you have the
16 9 per cent capitalisation rates, and I have
17 already asked you a few questions but I will
18 ask you another set of questions. You said in
19 your presentation you think you need to correct
20 your evaluation to apply that 9.7 per cent that
21 you were given by the Ministry. You also
22 referred to earlier in your reports to other

1 valuations. Can you remind me, or rather,
2 I put it to you those valuations came down to a
3 value of 40 million, 40. That was your initial
4 opinion.

5 SEÑOR SHOPP: Yes, that was our opinion
6 based on the appraisals we had seen.

7 SEÑOR GARCÍA REPRESA: And now your revised
8 opinion -- and we are of course talking about
9 the same assets -- is that they would be worth
10 99 million? Correct?

11 SEÑOR SHOPP: We rounded to 100 based on the
12 9-year lease agreement that has been signed
13 that, as you say, involves these specific
14 terminals, and as you say... --

15 SEÑOR GARCÍA REPRESA: So that is a
16 difference -- between your first and Second
17 Report is a difference of 150 per cent in the
18 valuation of the terminals. Correct?

19 SEÑOR SHOPP: 100 divided by 40 is 2.5, so
20 yes, 150 per cent increase.

21 SEÑOR GARCÍA REPRESA: No. 250 per cent.

22 SEÑOR SHOPP: No, 150 increase, 250 per cent

1 total, so the increase would be 150.

2 SEÑOR GARCÍA REPRESA: Yes, good. But you
3 are not real estate appraisers, are you?

4 SEÑOR SHOPP: No. Well, we valued real
5 estate assets and we have in other situations.
6 We are not real estate appraisers in any
7 licensed or regulated sense.

8 SEÑOR GARCÍA REPRESA: You know that
9 Colliers is a renowned international real
10 estate appraiser?

11 SEÑOR SEQUEIRA: We are familiar with
12 Colliers, yes.

13 SEÑOR GARCÍA REPRESA: Did you review what
14 Colliers says are the cap rates that apply to
15 Santiago Chile? Do you not?

16 SEÑOR SEQUEIRA: For which sector?

17 SEÑOR GARCÍA REPRESA: Let say logistics. Did
18 you review them?

19 SEÑOR SEQUEIRA: I believe there is an
20 exhibit on the record on that.

21 SEÑOR GARCÍA REPRESA: Yes, and it says that
22 between 7 and 8 per cent, correct?

1 SEÑOR SEQUEIRA: For the logistics sector,
2 yes.

3 SEÑOR GARCÍA REPRESA: Yes, and you do not
4 consider that terminals would be logistics, is
5 that your point?

6 SEÑOR SEQUEIRA: No, but I think we would
7 need to get into the specific breakdown of the
8 logistics sector, it is a pretty broad sector.

9 SEÑOR GARCÍA REPRESA: Ok and you are right,
10 there are four sub items in the logistics
11 sector in Colliers. Now, the slide's point is
12 that they are all between 7 and 8 per cent so
13 regardless of which logistics sector you take,
14 you are still between 7 and 8 per cent,
15 correct?

16 SEÑOR SEQUEIRA: That is correct.

17 SEÑOR GARCÍA REPRESA: But you maintain that
18 it should be 2 points above ten per cent
19 almost? Is that based on the Ministry file?
20 Correct? Yes or no?

21 SEÑOR SHOPP: The 9.7 per cent is based on
22 the Ministry file. The reason we maintain it

1 should be that high is not based on the
 2 Ministry file. It is, as I believe Mr Caldwell
 3 said, you can value these as land and buildings
 4 or you can value this as bus terminals. And If
 5 you are talking about bus terminals, the MTT,
 6 I am trying to quote from memory, but the
 7 alternative is the Ministry can either lease or
 8 buy them, so I think the relevant cap rate we
 9 would be interested in is the cap rate used by
 10 the party that would either lease or buy them,
 11 if we are talking about their use as bus
 12 terminals.

13 SEÑOR GARCÍA REPRESA: Ok, just that I
 14 understand, do you accept that this Ministry
 15 has leased those terminals because they are bus
 16 terminals, or do you think they have leased
 17 them because they want to do something else
 18 with them?

19 SEÑOR SHOPP: I strongly suspect they have
 20 leased them because they are bus terminals.

21 The issue is, if you are talking about
 22 translating a lease to a price, which is what

1 the cap rate does, and you are saying there is
 2 really only one buyer who is going to use these
 3 at this high value for their existing purpose
 4 as terminals, I think the relevant cap rate
 5 would be the one that is used by the single
 6 party who will continue to use these terminals
 7 at their higher value than what they would
 8 exist at as land and buildings.

9 SEÑOR GARCÍA REPRESA: And for these
 10 terminals we agree there is only one seller,
 11 correct?

12 SEÑOR SHOPP: For these specific terminals.
 13 Certainly there are... in some cases there are
 14 alternative sites, but for these specific
 15 terminals that is right.

16 SEÑOR GARCÍA REPRESA: Ok, now, the
 17 qualification is "in some cases". You do
 18 accept that for various of these terminals
 19 there is simply no alternative, do you not?

20 SEÑOR SHOPP: Binswanger reached that
 21 conclusion. That is something that I suspect
 22 changes over time as plots become available.

1 At the point in time they were looked at
 2 I think there were some with viable
 3 alternatives, others that were in some reports
 4 stated not to be the case, in some it was. I
 5 cannot recall.

6 SEÑOR GARCÍA REPRESA: In your opinion are
 7 there alternatives or are there not
 8 alternatives to these bus terminals?

9 SEÑOR SHOPP: The documents we have seen
 10 indicates that certainly for some there are
 11 alternatives. Others I think there may be
 12 conflicting information. There may be one or
 13 two where no alternative has been identified
 14 specifically.

15 SEÑOR GARCÍA REPRESA: Or maybe three where
 16 there is no alternative? Do you agree with
 17 that?

18 SEÑOR SHOPP: I think that is what
 19 Binswanger has. I don't know that all of them
 20 do. Again, I am working from memory. If you
 21 would like to take us to our report, we could
 22 look at that. I am not trying to be

1 argumentative.

2 SEÑOR GARCÍA REPRESA: Sure, let's go to tab
 3 5, and this is the last document I will show
 4 you, Tab 5 in the bundle, its for the record:
 5 VP-66. It is a document that you submitted
 6 of March 2018. Do you agree that this is a
 7 document prepared for the State?

8 SEÑOR SHOPP: If I recall correctly, that is
 9 the case, but I will trust you on that.

10 SEÑOR GARCÍA REPRESA: No, you don't need to
 11 trust me. You just need to read the first
 12 sentence of the document, under introduction.

13 SEÑOR SHOPP: Yes. It looks like they are
 14 working for a Secretary, I assume, of the
 15 State.

16 SEÑOR GARCÍA REPRESA: You presented this
 17 document so I assume you have read it. That is
 18 why I am not asking you every time whether you
 19 know this document because it is one of your
 20 exhibits.

21 SEÑOR SHOPP: I have not memorised it.
 22 Based on the Spanish I would have looked at

1 with members of team, it does seem to indicate
2 that. Yes.

3 SEÑOR GARCÍA REPRESA: Ok, now if you go, to
4 make it simple to page 3, you will see there is
5 a table, and the last row in the table
6 is -- you may get your headset on: "Resumen y
7 conclusiones". And it says the following: "En
8 el caso específico de la licitación de vías
9 2017, teniendo en consideración las cuatro
10 unidades de negocio que actualmente se licitan,
11 quienes cuentan con un total de 22 terminales,
12 se puede señalar que solo en tres de estos no
13 fue posible encontrar su reemplazo
14 correspondiente a las empresas Alsacia y
15 Express."

16 So according to the State or, at least, to
17 this firm that was hired by the State as
18 of March 2018, three terminals from Alsacia and
19 Express did not have any alternative, correct?

20 SEÑOR SHOPP: That is correct. Again, I am
21 trying to recall if this refers to the one
22 specifically that they owned. If it does, then

1 that would be three. If it refers to them
2 broadly, the companies to that terminals that
3 they themselves leased, it does say three of
4 them. I don't recall off the top of my head if
5 those three are on the list. They may be.

6 SEÑOR GARCÍA REPRESA: Ok, now, Well,
7 I submit the document doesn't really specify
8 which three. Maybe the State knows. Now this
9 could very well include Pudahuel. True?

10 SEÑOR SHOPP: That is one of the Alsacia and
11 Express terminals, so in that sense it could,
12 yes.

13 SEÑOR GARCÍA REPRESA: Now, assuming there
14 were no alternatives, you would agree with me,
15 would you not, that cost savings is a proper
16 component of the valuation of terminals. Yes
17 or no?

18 SEÑOR SHOPP: What you will pay will be
19 based on your options. If all your options are
20 higher cost, that will be a factor you would
21 consider. I agree with that.

22 SEÑOR GARCÍA REPRESA: Would you agree with

1 me or would you not that, assuming there are no
2 alternatives to these terminals, the price of
3 the terminals -- the value, not the
4 price -- the value of the terminals should
5 reflect cost savings calculated per Binswanger,
6 ie meant to compute the savings in the
7 operations of dead kilometres by bus operators
8 that have to go to a certain length beyond
9 where the current terminal is located. Do you
10 agree or not?

11 SEÑOR SHOPP: I think that would be a
12 consideration. We talk about this at some
13 length in both of our reports, about how that
14 would be calculated, how that potential cost
15 savings would be separated potentially between
16 buyer and seller. It would be a relevant
17 consideration, yes, I agree with that.

18 SEÑOR SEQUEIRA: Conceptually we agree with
19 that.

20 SEÑOR GARCÍA REPRESA: Ok I have no, no..

21 SEÑORA GEHRING FLORES: Just one question,
22 just being mindful of time and knowing how much

1 time the parties have left, I have on my timer
2 that we have been going on for an hour and 13
3 minutes, so I just, I know that our closing
4 time is separate from the time that we have for
5 cross --

6 PRESIDENTA KAUFMANN-KOHLER: Yes. According
7 to my record last night the Claimants had one
8 hour .16 left, but you should tell us where we
9 stand.

10 SEÑOR GARCÍA REPRESA: I do not have any
11 more questions, if that may facilitate things
12 but of course we would need to have the count.

13 PRESIDENTA KAUFMANN-KOHLER: It facilitates
14 things, yes, absolutely.

15 THE SECRETARY: Yes, I sent the time to the
16 parties during lunch time, and what Claimant
17 has used in its cross has been 56 minutes and
18 40 seconds.

19 PRESIDENTA KAUFMANN-KOHLER: I mean. We are
20 getting to a close, so it is not a question of
21 one minute or two excess time. Everyone should
22 be able to finish asking the questions that

1 need to be asked. You said you have one more?

2 SEÑOR GARCÍA REPRESA: No. I said I had no
3 more, but now I am being tempted! We will not
4 abuse your generosity. Thank you very much.

5 PRESIDENTA KAUFMANN-KOHLER: Let's be
6 serious here. If you think there is an
7 important question that you have not been able
8 to ask, then you should please ask it now.

9 SEÑOR GARCÍA REPRESA: Just one. It is the
10 same issue. In relation to the leases,
11 I assume you have reviewed the lease contracts
12 that were signed between the Ministry and the
13 companies, and I would like you to confirm that
14 the discount that is applied there to the
15 breakout clause, i.e. what the state will have
16 to pay if it gets out of the contract in
17 anticipation of the nine years, that is
18 discounted at a 5 per cent rate. Do you agree?
19 SEÑOR SHOPP: I can't recall. That may be
20 the case. If you have the document I would be
21 happy to look at it. I don't recall what each
22 of the rates are.

1 SEÑOR GARCÍA REPRESA: Let's leave it there.
2 Thank you, gentlemen.

3 PRESIDENTA KAUFMANN-KOHLER: Any
4 questions -- short questions -- in re-direct?

5 SEÑORA GEHRING FLORES: Just a couple.

6 THE SECRETARY: Are we still confidential?

7 SEÑORA GEHRING FLORES: No.

8 Re-examination by Respondent

9 by Ms Gehring Flores

10 SEÑORA GEHRING FLORES: First, did you ever
11 receive a legal instruction regarding the
12 credits for evasion efforts issue?

13 SEÑOR SHOPP: Not that I recall. We can
14 look in our report.

15 SEÑOR SEQUEIRA: We don't recall receiving
16 one.

17 SEÑOR SHOPP: We would have written it if we
18 did receive it.

19 SEÑORA GEHRING FLORES: Second, at some
20 point you were asked about the BRT analysis of
21 evasion and evasion reduction, and I believe,
22 Mr Sequeira, you weren't allowed to finish

1 something you were trying to explain, and
2 counsel told you you would have time with me.

3 SEÑOR SEQUEIRA: Right. If I recall
4 correctly, this was a question of what happened
5 before 2014, and I think counsel took us to
6 some documents talking about expectations of
7 fare evasion and revenue being higher, and
8 I think the point that I was trying to make,
9 and I got it in partly, was it is important to
10 understand what your but-for scenario is here.
11 So there is an expectation, there are
12 negotiations going on, but really the question
13 is the goal of the analysis is what should have
14 been the right fare evasion rate but for the
15 breach of Chile, let's say, between 2012 and
16 2013, and we were trying to explain that we
17 didn't see any specific acts or discussion in
18 those documents that points to inactions or
19 failures on the part of Chile.

20 To the extent that there are any, which
21 there may be, then the next step would be okay,
22 what is the cause of that? What should be,

1 then, the appropriate fare evasion rate
2 assuming that that is a breach? So we were
3 talking about 28 per cent and 6 per cent, and
4 sort of two milestones or book ends here, but
5 I think the relevant question is what were the
6 wrongful acts, how did they affect fare
7 evasion, and if so what is the proper fare
8 evasion rate?

9 SEÑORA GEHRING FLORES: Thank you. No
10 further questions.

11 PRESIDENTA KAUFMANN-KOHLER: Thank you. Do
12 my colleagues have questions for these experts?

13 (Pausa.)

14 PRESIDENTA KAUFMANN-KOHLER: Is this a
15 correct understanding?

16 SEÑOR SHOPP: Yes, that's correct.

17 PRESIDENTA KAUFMANN-KOHLER: You agree on the
18 date of the valuation, you agree on the DCF,
19 you agree on the model -- you have used their
20 model, is that right, inputting different
21 information? Is that correct or not?

22 SEÑOR SHOPP: Broadly correct. We used

1 their model. The model is a combination of
 2 data, input assumptions, and formulas. We used
 3 the same framework. We don't only change the
 4 input assumptions. In some cases the way we do
 5 it requires a change to a formula, for
 6 instance, the IPK, PPT issue, but by and large,
 7 yes, what you are describing is correct. We
 8 used the same fundamental model; as they said,
 9 we could work together on a common framework.

10 PRESIDENTA KAUFMANN-KOHLER: That was my
 11 next question. There would be no issue of
 12 different approaches or the like?

13 SEÑOR SHOPP: No.

14 PRESIDENTA KAUFMANN-KOHLER: And you would
 15 be willing to do this if the Tribunal asks you?

16 SEÑOR SHOPP: Yes, of course.

17 SEÑOR SEQUEIRA: Of course.

18 PRESIDENTA KAUFMANN-KOHLER: Thank you.
 19 Then there was the issue of the repayment of
 20 the bond holders and the covenants, and bond
 21 agreements. You were here when Brattle
 22 answered my questions on this. Do you have a

1 reaction?

2 SEÑOR SHOPP: This was alluded to by
 3 Mr Sequeira. As they explained, there are 3
 4 covenants. One is just have there been
 5 defaults or events of default in the
 6 past -- that is backward looking. 2A, as
 7 I think they called it, is another
 8 backward-looking DSCR, debt service coverage
 9 ratio. Then there are two forward-looking
 10 metrics --

11 PRESIDENTA KAUFMANN-KOHLER: I understand
 12 that is where we have the dispute.

13 SEÑOR SHOPP: I don't think there is a
 14 dispute. When we say Brattle Group has not
 15 implemented we don't mean there has not been an
 16 attempt to implement. Brattle Group has, in a
 17 sense, implemented the forward-looking
 18 covenants that apply. As Mr Sequeira said,
 19 because they are forward-looking, at each
 20 particular dividend date you would want to know
 21 in this but-for scenario what would the equity
 22 holders be submitting at the time to say we

1 would like to be able to pay a dividend, here
 2 is our proof that that wouldn't violate the
 3 covenants, and Brattle Group's approach to that
 4 at each of the various dates from 2012 through
 5 2018 is to say the way the shareholders would
 6 have done that is just take the May 2012 base
 7 case model and just sort of use that each time,
 8 and because, correctly, I think they identify,
 9 it would be very difficult and very complex to
 10 try to actually do a valuation in a but-for
 11 scenario on each of these specific dates just
 12 to determine if you are meeting a debt service
 13 coverage ratio or a debt equity requirement. So
 14 I don't think...

15 PRESIDENTA KAUFMANN-KOHLER: And how did you
 16 do it? Because I understand you are telling us
 17 you have implemented also the forward-looking
 18 part.

19 SEÑOR SHOPP: No. We have said that the
 20 debt covenants approach -- the dividends
 21 approach where you ignore the covenants, we
 22 don't think that is correct. The debt

1 covenants approach in theory would be the
 2 accurate, most accurate, and I think we agreed
 3 with Brattle group, the correct way to do this,
 4 but because there is this issue of not being
 5 able to reliably do the forward-looking piece,
 6 we think just focusing on debt repayment -- it
 7 is to some extent unfortunate I suppose in a
 8 way that we don't have better data to look at
 9 how the covenants would work at each point in
 10 time with these but-for models, but we don't in
 11 this case. So, you know, we think it is an
 12 important issue, we certainly aren't trying to
 13 be critical of Brattle Group, we just don't
 14 agree with their attempt at implementing these
 15 forward-looking covenants.

16 PRESIDENTA KAUFMANN-KOHLER: Because you
 17 think it is difficult and you don't have the
 18 information to do so in your judgment, you are
 19 rather looking for the accelerated repayment
 20 scenario?

21 SEÑOR SHOPP: I think we, both Brattle and
 22 ourselves, agree that it is very difficult.

1 They have gotten around that problem by
 2 using -- again, it is a very complicated
 3 shortcut that involves a lot of work but a
 4 shortcut nevertheless to not actually do these
 5 valuations as they would have been done. We
 6 have said this is really just something that in
 7 practice can't be accomplished, so we defer to
 8 the debt repayment scenario.

9 PRESIDENTA KAUFMANN-KOHLER: Thank you, can
 10 we go to slide 15. That is your forecast of
 11 additional cash flows in the but-for. In 2012
 12 and 2013 you have zero -- these are additional
 13 flows right?; these are not actual flows, if
 14 I can say so?

15 SEÑOR SHOPP: Yes.

16 PRESIDENTA KAUFMANN-KOHLER: And it is zero
 17 because that is your... the way in which you
 18 implement the instruction on time bar?

19 SEÑOR SHOPP: Correct.

20 PRESIDENTA KAUFMANN-KOHLER: Or is the
 21 instruction on time bar to do this, or the
 22 instruction is simply not to take account of

1 what happened before 2014? Is that what it is?
 2 SEÑOR SHOPP: So, we have not, for instance,
 3 calculated the effect before 2014 and then just
 4 zeroed out these columns. These zeros, you
 5 reach zero by saying there is no difference in
 6 the fare evasion rate prior to February 2014.
 7 There is no difference in the bus fleet or the
 8 ICF and ICR indicators, so it is a time bar
 9 that applies to essentially the start of the
 10 but-for scenario with respect to each
 11 individual impact. The effect of that is that
 12 there is no difference between the but-for and
 13 the actual scenario with respect to Alsacia and
 14 Express prior to February 2014.

15 PRESIDENTA KAUFMANN-KOHLER: But if you had
 16 no instruction in respect of the time bar, you
 17 are telling me now that you would have come to
 18 the same result? Or do I misunderstand you?

19 SEÑOR SHOPP: I think you misunderstand.
 20 I think there are certain elements of this
 21 where - you know vandalism for instance; there
 22 is a claim that just the direct cost of

1 vandalism, the replacement parts, to the extent
 2 those were incurred prior to 2014, we
 3 absolutely would account for that. There is
 4 the labour issues and the route expropriation
 5 and these various things.

6 In some variables, for instance, if fleet
 7 would be one where we see there is not a
 8 request for fleet that had been rejected prior
 9 to February 2014, that is what we call a
 10 commercial/expert judgment that happens to be
 11 simultaneous with what this time bar is but is
 12 independent from it, in which case, even if the
 13 time bar did not apply, I think in our but-for
 14 scenario we still wouldn't include a fleet
 15 improvement prior to February 2014.

16 Now, of course, if the Tribunal were to
 17 determine that there were a breach that should
 18 have resulted in a fleet improvement before
 19 that date, again, we would be happy to work
 20 with Brattle Group to account for that.

21 PRESIDENTA KAUFMANN-KOHLER: Fine. Saying
 22 this, you have already touched on my next

1 question, which is the individualisation of the
 2 impacts of the breaches. You could do this, as
 3 I discussed earlier with Brattle?

4 SEÑOR SHOPP: That is right. I think there
 5 would probably need to be some discussion on
 6 exactly how to implement and how it would
 7 interact depending on the specific scenario
 8 identified.

9 PRESIDENTA KAUFMANN-KOHLER: The Tribunal
 10 would have to give you the assumptions with
 11 respect to which act needs to be considered,
 12 certainly, and maybe other elements as well.
 13 I need to think about that.

14 SEÑOR SHOPP: Yes. So for instance,
 15 certainly with respect to whether the act
 16 should be included in this but-for scenario
 17 where we are assuming away the breaches, then
 18 I would think also in many, if not most cases,
 19 some judgment as to what the but-for
 20 scenario would -- what situation with respect
 21 to the individual assumption would have
 22 resulted in the absence of the breaches.

1 PRESIDENTA KAUFMANN-KOHLER: There is
2 probably also a time issue that needs to be
3 specified?

4 SEÑOR SHOPP: That is right, yes.

5 SEÑOR SEQUEIRA: And possibly causation as
6 well. Did those specific breaches cause a
7 certain action to happen or not happen?

8 PRESIDENTA KAUFMANN-KOHLER: Let me see if I
9 have other questions that remain... We have
10 covered all my questions. I have no further
11 questions. No follow-up questions? No? Then
12 that concludes your examination. Thank you
13 very much for your help.

14 This would be a good time for us to take our
15 break. Then we will go over to the closings,
16 and your answers to the Tribunal's questions.
17 You will remember that overall you will have 50
18 minutes each, and then the Tribunal has some
19 procedural steps that we need to discuss.

20 We will not end very early today but we will
21 end today, so that is all I can say for the
22 time being.

1 (Pausa.)

2 PRESIDENTA KAUFMANN-KOHLER: Y propongo que
3 hagamos la pausa ahora. ¿15 minutos estará
4 suficiente? Bien.

5 (Pausa.)

6 ALEGATO DE CLAUSURA DE LAS DEMANDANTES

7 PRESIDENTA KAUFMANN-KOHLER: Bien.

8 ¿Podemos comenzar? Llegamos a los alegatos
9 de cierre. Faltan algunos miembros de su
10 equipo, ¿no?

11 SEÑOR SILVA ROMERO: Ya deben estar por
12 llegar. Como vamos a empezar con las preguntas
13 del Tribunal podemos empezar ya.

14 PRESIDENTA KAUFMANN-KOHLER: Bien.

15 SEÑOR SILVA ROMERO: Con la venia, señora
16 Presidenta.

17 PRESIDENTA KAUFMANN-KOHLER: Sí, por favor.

18 SEÑOR SILVA ROMERO: Señora presidenta,
19 miembros del Tribunal: muy buenas tardes.

20 Vamos a dividir nuestra intervención en dos
21 partes. Primero vamos a abordar de una manera
22 más completa, y esperaría yo, más elegante las

1 preguntas que formuló el Tribunal el primer
2 día. Y en segundo lugar, vamos a hacer algunas
3 observaciones a manera de alegato de clausura
4 en los segundos 30 minutos.

5 En cuanto a las preguntas, lo que ocurrió el
6 lunes fue que se nos formularon ciertas
7 preguntas respecto de los estándares de
8 protección del Tratado aplicable y también una
9 pregunta relativa a una objeción
10 jurisdiccional, la pregunta en derecho chileno.
11 De tal manera que el doctor Bofill y yo vamos a
12 absorber las preguntas pendientes.

13 La primera pregunta tiene que ver con la
14 expropiación indirecta y consiste, decía la
15 Profesora Stern, en si es necesario que el
16 Estado haya actuado como un ente soberano para
17 que haya expropiación indirecta en este caso.
18 Ya di un principio de respuesta a esta pregunta
19 y quiero simplemente hacer cinco observaciones
20 muy rápidas adicionales.

21 La primera es que este argumento ha sido
22 planteado para decir que los reclamos de las

1 demandantes son puramente reclamos
2 contractuales. Hay un punto que, aunque es
3 obvio, es importante subrayar, y es que los
4 demandantes no son partes de los contrato de
5 concesión: son accionistas de las
6 concesionarias. Quería subrayarlo para que no
7 lo olvidemos.

8 Mi segunda observación es regresar sobre
9 algo que mencioné, es decir esta distinción que
10 han hecho algunos Laudos entre la actuación del
11 Estado juri imperii y la actuación del Estado
12 juri gestionis en derecho internacional y citar
13 una decisión que es SGS contra Paraguay, donde
14 se dice algo interesante. Y dice: "Lógicamente,
15 se puede caracterizar como un acto soberano
16 todo acto de un Estado. Incluidos los
17 realizados por un Estado para dejar de cumplir
18 o rescindir contratos de los que sea parte." El
19 punto de esta decisión es que quizás en muchos
20 casos esa distinción no es pertinente.

21 La tercera observación, esta vez yendo al
22 texto de nuestro Tratado, es regresar sobre

1 algo que dijo Chile sobre la base de la
 2 terminología en el Tratado del carácter de la
 3 acción gubernamental, y ustedes pueden ver el
 4 texto relevante en la pantalla. Para nosotros
 5 esta referencia al carácter de la acción
 6 gubernamental no hace referencia a que el
 7 Estado tiene que actuar como soberano para que
 8 haya expropiación indirecta, y ello por cuatro
 9 razones: primero, si los redactores del Tratado
 10 hubieran querido que el Estado como requisito
 11 tenía que actuar como soberano para que hubiera
 12 expropiación indirecta, lo ha podido decir
 13 expresamente de esta manera. Es más, si ustedes
 14 ven el inicio de esta disposición, 3.A, el 3.A.
 15 lo que dice es que el tema de la expropiación
 16 indirecta es un tema fact driven, es decir,
 17 implica una investigación fáctica. Y que el
 18 Estado actúe como soberano no es necesariamente
 19 una investigación fáctica sino jurídica.

20 Segundo punto, pensamos nosotros que la
 21 referencia al término "carácter" se refiere a
 22 la naturaleza de la acción. Por ejemplo, si la

1 acción es arbitraria o no es transparente. Y
 2 esto es coherente con el encabezado del 3.A el
 3 cual establece que los reclamos por
 4 expropiación directa requieren, cito-:
 5 "Requieren de una investigación fáctica caso a
 6 caso."

7 Las otras dos disposiciones del numeral
 8 3.A, se refieren al efecto de la medida en
 9 disputa, es decir su impacto económico y su
 10 grado de interferencia respecto de las
 11 expectativas de la inversión.

12 COÁRBITRO STERN: ¿Puedo preguntar? ¿Hay una
 13 referencia al carácter de la acción
 14 gubernamental? Si no hay una diferencia, ¿a qué
 15 se refiere esta?

16 SEÑOR SILVA ROMERO: A eso voy, Profesora
 17 Stern, y ese es el tercer punto. Y es que el
 18 numeral 3.B, que es el último de la
 19 disposición, confirma la interpretación que
 20 estamos proponiendo: esta disposición establece
 21 que, salvo en circunstancias excepcionales, no
 22 constituyen expropiaciones indirectas los actos

1 regulatorios no discriminatorios de una parte
 2 que son diseñados y aplicados para proteger
 3 objetivos legítimos de bienestar público. Por
 4 lo tanto, las partes contratantes tenían la
 5 intención de que el Tribunal analizara las
 6 características de la acción gubernamental,
 7 precisamente porque en ciertos casos el
 8 carácter de la acción gubernamental impide que
 9 ocurra una expropiación indirecta.

10 COÁRBITRO STERN: El carácter y la
 11 característica no es el mismo.

12 SEÑOR SILVA ROMERO: El carácter, nosotros lo
 13 interpretamos más como la naturaleza.

14 Y el último punto, para terminar de
 15 responder esta pregunta, es que cabe destacar
 16 que los términos carácter de la acción
 17 gubernamental se encuentran únicamente en el
 18 análisis de una expropiación indirecta en el
 19 Tratado. Y lo que nos parece, es que exigir que
 20 una expropiación indirecta sea producto de los
 21 poderes soberanos de un Estado y no la
 22 expropiación directa, parece absurdo dentro del

1 contexto del Tratado.

2 Ahora bien, con esto en mente y paso a mi
 3 cuarta observación, como los demandantes ya
 4 explicaron en sus escritos, para establecer la
 5 existencia de una expropiación indirecta el
 6 inversor debe demostrar la pérdida sustancial
 7 del valor de su inversión y eso decimos
 8 nosotros es lo que ha hecho Brattle.

9 Y llego a la quinta y última observación, y
 10 es que en todo caso, aun si el Tribunal
 11 considerara que la actuación por parte del
 12 Estado como un ente soberano forma parte del
 13 test necesario para establecer la existencia de
 14 una expropiación indirecta, esta audiencia,
 15 decimos nosotros, ha demostrado que las
 16 acciones y las omisiones de Chile que llevaron
 17 a la pérdida de valor de la inversión de los
 18 demandantes, fueron las de un ente soberano.

19 Es decir, Chile ha dejado de actuar, o ha
 20 actuado, en este caso como un ente soberano y
 21 aquí quiero hacer cuatro observaciones a título
 22 de ejemplo.

1 Primer ejemplo: sabemos que de conformidad
 2 con el derecho chileno y en particular la
 3 Constitución, correspondía al Estado velar por
 4 el equilibrio económico de las concesiones, y
 5 especialmente para velar por la continuidad en
 6 la prestación del servicio público del
 7 transporte. Ese principio de continuidad del
 8 servicio público de transporte es un principio
 9 que está en la Constitución del país. Es una
 10 decisión soberana de Chile de incluir ese
 11 principio allí. Y vemos en la pantalla algunos
 12 extractos de la audiencia donde se reconoció lo
 13 anterior, con el ex ministro Gómez-Lobo, con el
 14 señor Pérez Gómez, también con el señor Pérez
 15 Gómez se habló por ejemplo, de cómo el tema del
 16 equilibrio económico se discutió cuando se
 17 celebraron los nuevos contratos de concesión.

18 Segundo ejemplo de cómo Chile ha dejado de
 19 actuar como un Estado soberano aquí tiene que
 20 ver con el tema de la evasión. Y pues no es
 21 ningún misterio en este caso que hay dos leyes
 22 que hemos visto sobre la evasión, la del 2010 y

1 la del 2018. Es decir, solamente un Estado
 2 soberano legisla la ley como explicará el
 3 doctor Bofill en un instante es la
 4 manifestación de esa voluntad soberana de un
 5 Estado. Es más, para controlar la evasión es
 6 necesaria la fuerza pública, los Carabineros.
 7 Solo un Estado soberano puede recurrir a los
 8 Carabineros para que se encarguen del problema
 9 de la evasión. Y vemos en la pantalla algunos
 10 extractos también de esta problemática de la
 11 evasión.

12 Tercer ejemplo: la lucha contra el
 13 vandalismo. Solamente el Estado soberano de
 14 Chile puede luchar contra el vandalismo. ¿Cómo?
 15 A través de la fuerza pública. Y vemos cómo
 16 Chile ha presentado un proyecto de ley, otra
 17 manifestación de la voluntad soberana, para
 18 precisamente luchar contra el vandalismo.
 19 Sabemos que ese proyecto de ley todavía está en
 20 trámite.

21 Y cuarta y última prueba de esta capacidad
 22 de soberano en que ha dejado de actuar Chile

1 tiene que ver con el Plan Maestro. Hablamos
 2 mucho de si era o no un acto administrativo. El
 3 acto administrativo es una expresión también de
 4 la voluntad del Estado como ente de iure
 5 imperii y vimos cómo respecto de ese Plan
 6 Maestro pues no se cumplieron los diferentes
 7 compromisos que estaban en ello.

8 Y con esto le dejo por primera vez la
 9 palabra al doctor Bofill para que complete
 10 nuestra respuesta desde el punto del derecho
 11 chileno.

12 SEÑOR BOFILL: Muchas gracias, doctor Silva
 13 Romero. Señora Presidenta, con su venia.

14 De acuerdo al derecho chileno, el Estado
 15 realizó acciones y omisiones como soberano
 16 respecto al Transantiago en general y a las
 17 compañías en particular. Ello no podía ser de
 18 otra manera, pues según el derecho chileno el
 19 Estado siempre actúa como ente soberano.

20 En primer lugar, y para despejar cualquier
 21 duda, en Chile no existe la distinción entre
 22 actos soberanos y actos del Estado como parte

1 contratante privada. Esa tesis extranjera no es
 2 recogida por el derecho chileno.

3 En segundo lugar, muchos de los actos
 4 ejecutados por el Estado de Chile consistieron
 5 en la dictación de leyes directamente relativas
 6 al Transantiago, algunas de las cuales son el
 7 antecedente inmediato de los nuevos contratos.
 8 En Chile es como se ve en pantalla, las leyes
 9 son actos soberanos ya que según señala el
 10 artículo 1° del Código Civil: "La ley es una
 11 declaración de la voluntad soberana"

12 Respecto de los actos de vandalismo y
 13 evasión, tal como lo ha dicho el doctor Silva
 14 Romero, ellos corresponden al ejercicio de
 15 potestades constitucionales que son exclusivas
 16 del Estado, del Estado central, de las policías
 17 nacionales, también de los inspectores
 18 municipales y de los tribunales de justicia.
 19 Por tanto, las omisiones del Estado en esas
 20 áreas son necesariamente omisiones del Estado
 21 como ente soberano. Respecto de las potestades
 22 de policía, no existe un contrato. El Estado

1 las debe ejecutar porque así lo mandan la
2 Constitución y la ley.

3 Es posible que la duda acerca de la
4 naturaleza jurídica del Plan Maestro y de los
5 contratos de concesión haya surgido en la
6 manera en que Chile acompañó inicialmente estos
7 documentos al expediente.

8 Como se puede ver en pantalla, los
9 documentos responden 001B y R0303. A primera
10 vista, parecieran ser lo que se ve a la
11 izquierda, un contrato, como si se tratara de
12 un contrato entre privados, y a la derecha,
13 algo así como una presentación PowerPoint. Pero
14 lo cierto es que los documentos completos
15 tienen una apariencia completamente distinta y
16 ayudan a entender qué son estos documentos. Lo
17 que está en la izquierda de la pantalla,
18 corresponde a la resolución mediante la cual se
19 aprobaron los nuevos contratos de concesión, y
20 si se puede observar en la esquina izquierda
21 superior del párrafo de lo que está destacado,
22 se puede leer incluso, la toma de razón por la

1 Contaduría General de la República respecto de
2 esa resolución que no es una resolución exenta.

3 También lo demostramos, y no voy a ahondar
4 demasiado acá, durante los alegatos de
5 apertura, que el Plan Maestro es un acto
6 administrativo, así lo reconocieron por lo
7 demás los testigos de la propia República de
8 Chile, y que también consta en una resolución
9 dictada por mandato legal. Por mandato legal
10 obligatorio habría que agregar.

11 De hecho, las hojas de firma de estos dos
12 documentos también lo ratifican. El contrato de
13 concesión está firmado por los ministros de
14 Hacienda y de Transporte. Ni que decir de la
15 resolución que mencionamos y exhibimos en el
16 alegato de apertura, que lleva la firma de
17 cinco ministros.

18 No voy a volver mucho sobre el punto de lo
19 que ya vimos en el alegato de apertura, pero
20 quiero recordar que de acuerdo a la ley bases
21 de administración del Estado, el artículo 3°
22 dice que: "Los actos administrativos gozan de

1 presunción de legalidad, de imperio y
2 exigibilidad frente a sus destinatarios, desde
3 su entrada en vigencia autorizando su ejecución
4 de oficio por la autoridad administrativa".
5 Estos actos, como dice el inciso segundo: "Son
6 actos que emanan de decisiones formales de
7 autoridades dotadas con poderes y con
8 facultades" Por lo tanto el carácter de acto
9 soberano de ellos es indudable desde el punto
10 de vista del derecho chileno.

11 En cuanto al objeto de los contratos de
12 concesión, estos también confirman que son
13 actos soberanos. En Chile, cuando el Estado
14 otorga una concesión, lo que hace es ejecutar
15 una de las funciones que solo le competen al
16 Estado.

17 Lo que se exhibe es la ley 18.696. Hemos
18 hablado mucho de ella durante la audiencia. Es
19 la ley que regula el sistema y el servicio de
20 transporte. Y allí se dice que los contratos de
21 concesión, esta es la ley modificada por la
22 20504 del año 2011 que fue la que permitió

1 terminar los contratos de concesión, y que es
2 lo que estaba vigente al momento de firmarse
3 los contratos, dice que: "Los contratos tendrán
4 por finalidad satisfacer el interés público."
5 Por lo tanto, nuevamente, estamos hablando de
6 potestades exclusivas del Estado en lo que dice
7 en relación con los contratos de concesión.

8 Y finalmente, de acuerdo a la misma ley, en
9 los contratos el Estado retuvo facultades
10 exorbitantes. En un contrato de concesión como
11 este, como los que son materia de este juicio,
12 las partes no son iguales. De hecho, de acuerdo
13 al artículo tres sépties de la ley 18.696: "Es
14 obligatorio que las bases de licitación
15 contengan causales de modificación unilateral
16 de los contratos de concesión por parte del
17 Ministerio de Transportes y
18 Telecomunicaciones."

19 Y también se faculta, al presidente de la
20 República, a ponerles término anticipado, a su
21 sola discreción y sin necesidad de causal
22 expresa.

1 Desde nuestro punto de vista, no hay
2 entonces dos interpretaciones respecto de la
3 manera en que Chile ha actuado en este caso.

4 SEÑOR SILVA ROMERO: Sigo con la segunda
5 pregunta, o el segundo tema que fue planteado
6 por el doctor Garibaldi el primer día, y tiene
7 que ver con el estándar mínimo de trato.

8 Primero simplemente quiero recordar una
9 filmina número 99 que presentamos en el alegato
10 de apertura donde se ve en referencia a los
11 casos Rusoro y Azurix. Rusoro en especial diría
12 que no hay diferencia entre el trato mínimo y
13 el trato justo y equitativo de la inversión y
14 la consecuencia que nosotros hemos deducido de
15 esa jurisprudencia es que, en nuestro caso, esa
16 protección incluye la protección de las
17 expectativas legítimas del inversionista.

18 Ahora, el doctor Garibaldi planteó la
19 pregunta de saber si el test aplicable es aquel
20 que la conducta del Estado debe chocar, o al
21 menos sorprender, en una manera que va más allá
22 de lo que sería jurídicamente aceptable, para

1 traducir de alguna manera, si allí se recogería
2 también la posibilidad de analizar si se
3 respetaron o no las legítimas expectativas. Yo
4 creo que la respuesta de Chile fue sí y
5 nosotros estamos de acuerdo con eso.

6 Desde el punto de vista fáctico, habría
7 simplemente que agregar que nosotros
8 consideramos que en este caso se dan los hechos
9 para que se considere que las omisiones y
10 acciones de Chile chocan o sorprenden.

11 En cuanto a las omisiones, todos los
12 compromisos que no se respetaron, y en cuanto a
13 las acciones vale la pena recordar, una vez
14 más, los diferentes argumentos sobre
15 discriminación que hemos formulado, y verán
16 ustedes una línea en la pantalla con el señor
17 Muñoz, donde él reconoció que cuando se le
18 quitan los cinco servicios a Alsacia y Express
19 se le pasan a operadores chilenos y a ellos sí
20 se les da flota, flota que nunca se le dio a
21 Alsacia y Express. Y también recordarán
22 ustedes, miembros del Tribunal, que las dos

1 pruebas importantes que habían sometido los
2 demandantes para probar la discriminación, el
3 testimonio de Rosa Palma y el informe de
4 Quantil, pues están en el expediente. Ustedes
5 no pudieron escuchar ni al testigo -- ni a la
6 testigo ni al perito porque la contraparte no
7 los llamó a declarar.

8 Tercera pregunta, entiendo de la Profesora
9 Stern sobre el estándar de la protección y
10 seguridad plenas.

11 Ya aclaré que nosotros estamos haciendo
12 todas las pretensiones que ustedes conocen en
13 el expediente, no solamente esta. Y estamos de
14 acuerdo con el planteamiento de que el test de
15 esa protección coincidiría con una obligación
16 de medios.

17 Y allí ustedes recordarán la referencia que
18 se hace comúnmente al caso AAPL contra Sri
19 Lanka, donde de alguna manera se presenta el
20 test que se debe aplicar. Y nosotros decimos
21 que en esta audiencia quedó claro que, por lo
22 menos si pensamos en el tema de la evasión y

1 del vandalismo, Chile no hizo lo que debía
2 hacer: es decir no cumplió con su obligación de
3 medios. El ejemplo de las cámaras: se habían
4 comprometido a 700 cámaras; solamente
5 instalaron 273. Es uno entre muchos que se
6 pueden presentar también en cuanto al
7 vandalismo.

8 Y con esto le paso la palabra al doctor
9 Bofill para la respuesta a la cuarta pregunta
10 sobre el derecho chileno.

11 SEÑOR BOFILL: Gracias. Con su venia, señora
12 Presidenta.

13 Voy a comentar brevemente la pregunta
14 hipotética que planteó el doctor Garibaldi
15 respecto del caso hipotético en que en una
16 sociedad anónima en Chile, hubiera un 92 por
17 ciento de accionistas que son extranjeros,
18 inversionistas extranjeros si se quiere, y un 8
19 por ciento de accionistas chilenos.

20 Debemos recordar que en caso solo se han
21 ejercido pretensiones de los accionistas, los
22 hermanos Ríos. Acá no se ha planteado ninguna

1 pretensión que derive o que pertenezca a ningún
2 claim que pudieran ejercer las compañías. Por
3 eso sostenemos que es correcta la forma en que
4 se formuló el waiver o la renuncia en este
5 caso.

6 Pero ya que la pregunta es de derecho
7 chileno, me parece que hay dos cosas que es
8 importante destacar. Aquí lo que se aplica es
9 la ley 18046 sobre sociedades anónimas. Esa ley
10 dice que: "La administración de la sociedad a
11 la que pertenece una sociedad anónima a un
12 directorio que es elegido -- que es elegido por
13 los dueños que es la junta de accionistas."

14 De acuerdo al artículo 39 el inciso tercero,
15 que es el que me interesa destacar, dice que:
16 "Todos los directores, aunque sean elegidos por
17 determinados grupos o clases de accionistas, se
18 deben, en sus decisiones como directores, al
19 interés social en primer lugar y a todos las
20 accionistas en segundo lugar." Es decir, como
21 dice la norma, no pueden votar de alguna manera
22 a pretexto de que lo hacen de la manera en que

1 lo quisieran aquellas personas que lo
2 designaron, siempre tienen que mirar el interés
3 de la sociedad y de todos los accionistas.

4 Y finalmente, esta es la razón por la cual
5 el artículo 42, esto se aplica tanto a los
6 directores como a los gerentes y altos
7 ejecutivos de la compañía, tienen prohibido
8 todo lo que dice que es relevante que esta
9 destacado en pantalla: adoptar políticas o
10 decisiones que no tengan por fin el interés
11 social.

12 Sería una decisión contraria al interés
13 social, por lo tanto, una renuncia de las
14 compañías a acciones y pretensiones que le
15 pertenecieran a ellas, para los efectos de
16 beneficiar a las hermanas Ríos y permitirles
17 que demandaran acá. Lo mismo vale para las
18 prohibiciones de los números 5 y 7 de ese mismo
19 artículo 42.

20 Creo que con eso respondo desde nuestro
21 punto de vista, las preguntas sobre el derecho
22 chileno.

1 SEÑOR SILVA ROMERO: Con esto, las preguntas,
2 señora presidenta, miembros del Tribunal, y
3 creo que tenemos que cambiar de presentación.
4 Mil disculpas.

5 Entiendo que los bundles están por llegar.
6 Ahí llegaron.

7 Con la venia, señora presidenta.

8 PRESIDENTA KAUFMANN-KOHLER: Sí, por favor.

9 SEÑOR SILVA ROMERO: Señora presidenta,
10 miembros del Tribunal: vamos a dividir nuestro
11 alegato de clausura en tres partes.

12 Primero, su servidor les hablará de ciertas
13 conclusiones que resultan de los
14 interrogatorios de los testigos; luego, mi
15 compañero el doctor García Represa hablará de
16 ciertas conclusiones que resultan de los
17 interrogatorios de los peritos; y finalmente,
18 el doctor Jorge Bofill, va a hacer una
19 interpretación general y conclusión general de
20 lo que diremos José Manuel y yo.

21 Y en cuanto a los testigos, yo quisiera
22 hacer 7 series de observaciones.

1 Primero, quería hablar sobre las objeciones
2 preliminares de Chile. De entrada ya el doctor
3 Bofill explicó el tema de la renuncia, y me
4 corresponde a mí hablar del tema de la
5 prescripción. Y lo primero que quiero decir es
6 que el testimonio de Carlos Ríos confirmó desde
7 el punto de vista fáctico dos argumentos que
8 hemos realizado: Primero, que las violaciones,
9 omisiones y acciones de las que se trata en
10 este caso son continuas y que, por lo tanto,
11 cualquier plazo de prescripción solo puede
12 comenzar a correr cuando la violación cesa. Y,
13 como dice el mismo Carlos Ríos, eso todavía no
14 ha ocurrido. Dijo, por ejemplo, "Que la
15 violación se ha causado, se causa y se está
16 causando."

17 También Carlos Ríos en su declaración,
18 confirmó que en cuanto a la reclamación sobre
19 expropiación, se trata de un acto compuesto y
20 que en todo caso en la fecha de la entrevista
21 que él dio, de la que se habló muchísimo
22 durante su interrogatorio, la expropiación no

1 había ocurrido todavía. Esa fue su
2 interpretación de la entrevista durante el
3 interrogatorio que se le hizo.

4 Segundo punto, sobre el tema de la
5 prescripción, es que sería extraordinario que
6 un Tribunal Arbitral de inversiones como este
7 llegara a la conclusión de que los reclamos se
8 han prescrito sobre la base de un artículo de
9 prensa bastante contestable, como lo dijo el
10 mismo Carlos Ríos en su declaración. De tal
11 manera que si de lo que se trata es de buscar
12 fechas, nuestra alegación es que seamos serios
13 y hablemos de las fechas de este caso con más
14 detalle.

15 ¿Y cuáles son las fechas? Hay una primera
16 fecha, y es una carta que manda José Ferrer de
17 la que habló el doctor Carlos Ríos en el
18 interrogatorio quejándose de todos los
19 elementos que estaban afectando las economía de
20 las concesiones. Es una carta del 14 de febrero
21 de 2014. ¿Cuándo se responde dicha carta? Dicha
22 carta la responde Patricio Pérez, que fue

1 testigo ante ustedes, el 27 de febrero de 2014.
2 Si ustedes cuentan 39 semanas -- perdón, 39
3 meses a partir del 27 de febrero de 2014,
4 llegan al 27 de mayo de 2017. Y la solicitud de
5 arbitraje se presentó el 26 de mayo del 2017,
6 es decir un día antes a la expiración de los 39
7 meses.

8 Pero esa es la solicitud de arbitraje.
9 Entonces, la pregunta que ustedes se deben
10 formular: ¿y qué pasó con la notificación de
11 controversia?

12 La notificación de controversia se notificó,
13 como pueden ver ustedes, el 10 de mayo de 2016.
14 Supongamos que no aceptan ustedes la teoría del
15 acto continuo, porque no aceptan ustedes la
16 teoría del acto compuesto, y supongamos que la
17 fecha relevante es la de la notificación de
18 controversia que es cuando los inversionistas
19 se quejan formalmente bajo el Tratado de lo que
20 está ocurriendo. Si ustedes cuentan 39 meses a
21 partir del 10 de mayo para atrás, llegan según
22 mis cálculos, a diciembre del 2012

1 aproximadamente. Entonces, si se trata de
2 buscar fechas, las fechas no son las que han
3 dicho la contraparte y mucho menos la de ese
4 artículo de prensa que fue discutido durante
5 mucho tiempo.

6 Segunda serie de observaciones: la audiencia
7 confirmó que Chile se comprometió a mantener el
8 equilibrio económico del contrato. Aquí solo
9 quiero mencionar algo que yo creo ya debe ser
10 obvio para ustedes en este punto. Primero,
11 ustedes recordarán que Patricio Pérez confirmó
12 que ese principio fue discutido y acordado
13 durante la negociación de los nuevos contratos
14 de concesión; también ustedes recordarán que el
15 objetivo de dicho compromiso, que es mantener
16 la continuidad en el servicio público, fue
17 confirmado tanto por el ministro Gómez-Lobo
18 como por el señor Patricio Pérez; y tercero,
19 ustedes recordarán esa línea de preguntas que
20 también llevó a alguna pregunta de la
21 Presidenta del Tribunal sobre aquellas cartas
22 que enviaron las compañías pidiendo que se

1 revisara la situación de desequilibrio de las
2 concesiones que nunca fueron respondidas por el
3 ministro Gómez-Lobo.

4 A nuestro modo de ver, él no supo ni pudo
5 explicar qué había pasado en las
6 circunstancias.

7 Tercera serie de observaciones sobre los
8 testigos: la audiencia confirmó que Chile no
9 combatió la evasión con medidas adecuadas. Un
10 primer punto fue cómo Patricio Pérez reconoció
11 que el objetivo era de llegar a una evasión de
12 menos del 9 por ciento. Otro punto interesante:
13 los testigos resistieron un poco a esta línea
14 de preguntas, pero al final aceptaron tanto el
15 señor Pérez como el señor Muñoz, que el Estado
16 es corresponsable del control contra la
17 evasión. El hecho de que en el contrato se haya
18 dicho que los operadores también deben hacer
19 algunos esfuerzos para controlar la evasión no
20 significa que el Estado no debe hacer nada, es
21 un deber legal y constitucional, como lo decía
22 el doctor Bofill.

1 Tercer punto, hasta antes de la ley de marzo
2 del 2018, confirmamos que las fiscalizaciones
3 solamente podían ser hechas por los
4 carabineros. Desde marzo del 2018 los
5 operadores pueden fiscalizar, es decir bajar a
6 pasajeros que no han pagado el billete del bus.
7 Pero eso solo se hizo en marzo de 2018, y la
8 concesión de Alsacia terminaba en octubre de
9 2018, la concesión de Express terminaba en
10 junio del 2019. El Estado, entonces, no hizo su
11 parte. Y vemos aquí extractos de lo que
12 conversamos con el señor Gómez-Lobo y lo que se
13 conversó con el señor Mac Allister, nuestro
14 testigo. Por ejemplo, no se construyeron todas
15 las zonas pagas que el Estado se había
16 comprometido a construir.

17 Y por último, sobre este tema, subrayar que
18 las compañías sí hicieron su parte, sí lucharon
19 contra la evasión. Y fue particularmente
20 llamativo que la empresa que contrataron
21 Alsacia y Express para ayudarles en el tema de
22 la evasión, fue una empresa a la que el

1 ministro Gómez-Lobo como él dijo durante su
2 interrogatorio, el ministro le dio un premio,
3 es decir es una empresa muy bien considerada en
4 Chile.

5 Dos puntos sobre el tema de la
6 infraestructura: primero, insistir sobre el
7 hecho de que el Plan Maestro fue un documento
8 importante durante las negociaciones. Ustedes
9 recordarán cómo ese documento fue mencionado en
10 el documento de trabajo que se utilizó para
11 negociar los nuevos contratos de concesión. Y
12 recordarán, como Patricio Pérez reconoció, que
13 el Estado se comprometió para con los
14 operadores hacer los mejores esfuerzos posibles
15 para que por lo proyectado en ese plan se
16 ejecutara; y segundo también recordarán como el
17 ministro Gómez-Lobo aceptó que la
18 infraestructura casi no evolucionó entre el
19 2014 y 2017. Recordarán cómo yo le mostré unas
20 tablas que mostraban que no había mucha
21 diferencia entre lo que había en el 2014 y lo
22 que había en el 2017 y en estas filmas

1 ustedes encuentran esa conversación.

2 Quinta serie de observaciones, sobre el
3 vandalismo.

4 Dos comentarios en este momento: primero,
5 las compañías fueron víctimas desprotegidas del
6 vandalismo, y eso lo confirmó el señor Muñoz,
7 lo confirmó también nuestro testigo el señor
8 Mac Allister; y segundo, el señor Mac Allister
9 también confirmó que el vandalismo era todavía
10 más difícil en aquellas fechas donde había
11 eventos especiales, sobre todo los fines de
12 semana, cuando hay partidos de fútbol,
13 etcétera.

14 Sexta serie de informaciones o conclusiones
15 que provienen de los interrogatorios de los
16 testigos, el tema del aumento de flota. Sobre
17 esto, dos comentarios.

18 El señor Mac Allister confirmó en múltiples
19 -- aparte de su interrogatorio la necesidad de
20 flota. ¿Por qué? Porque la infraestructura no
21 era la que se necesitaba y eso dañó a los buses
22 antes de tiempo. Y segundo, por el vandalismo.

1 Y segundo, el señor Gómez-Lobo no nos
2 explicó el motivo real cuando se le comentó el
3 tema de la flota para rechazar las solicitudes
4 que a él se le hicieron de renovación de la
5 flota.

6 Y séptima y última serie de observaciones,
7 esta vez sobre la expropiación de los cinco
8 servicios de las compañías de forma
9 discriminatoria. Tres observaciones.

10 Primero, no..., quedó probado que no existe un
11 récord de este famoso grupo de trabajo que
12 habría hecho el análisis antes de expropiar los
13 cinco servicios. Esto lo reconoció el señor
14 Muñoz ante preguntas de la presidenta del
15 Tribunal, y lo que resulta de este intercambio
16 es la arbitrariedad de la decisión.

17 Segundo comentario, el mismo señor Muñoz
18 reconoció que este retiro -entre comillas- de
19 servicios de una concesionaria fue una acción
20 totalmente novedosa, es decir nunca había
21 pasado antes, lo que sugiere también
22 arbitrariedad.

1 Y tercero, repetir el tema de la
2 discriminación. Tanto el ministro Gómez-Lobo
3 como el señor Muñoz reconocieron que los cinco
4 servicios se les había dado a operadores
5 chilenos y que a ellos se les dio más flota
6 para poder operar, flota que no se les dio a
7 nuestros clientes..., a las concesiones de
8 nuestros clientes.

9 Y con esto le paso la palabra, con la venia,
10 al doctor García Represa.

11 SEÑOR GARCÍA REPRESA: Con la venia, señora
12 presidenta y miembros del Tribunal.

13 Entiendo que tenemos todos un poco más
14 fresco lo que ha sucedido en los últimos días
15 con los expertos, pero voy a tratar de resumir
16 algunos puntos que han sido llamativos. No voy
17 a poder abordar todas las cuestiones de
18 cuantificación ni todos los incumplimientos
19 obviamente, pero sí espero darles una impresión
20 de lo que creemos que ha sido relevante en esta
21 audiencia respecto de los interrogatorios de
22 los expertos.

1 Un primer comentario general. Habrán visto
2 ustedes que en algún caso un poco forzado, en
3 otro espontáneamente, los expertos en
4 transporte de Chile y los expertos de Price en
5 esta audiencia han reconocido por primera vez
6 que trabajan todos ellos para el Estado. ¿Y por
7 qué digo que trabajan para el Estado o para
8 operadores chilenos? Cuando a Transporte
9 ustedes escucharon que el profesor Willumsen ha
10 estado trabajado para operadores chilenos. Este
11 es un mercado muy competitivo, creemos que ha
12 habido discriminación clara contra los
13 operadores colombianos favoreciendo a los
14 operadores chilenos. Bueno, eso creemos que
15 tendría que haber sido revelado en su momento.
16 Ni siquiera dijo el nombre de la empresa para
17 la que ha trabajado.

18 El doctor Silva reconoció que trabaja para -
19 - o ha trabajado recientemente para el DTPM. En
20 un primer momento parece que dijo que había
21 trabajado hace tiempo, luego dijo: "No, que fue
22 hace poco pero fue ad honorem". Y, de hecho, si

1 uno mira la página web del DTPM verá que es
2 parte del equipo del rediseño del Transantiago.

3 Esa web, si ustedes la buscan hoy, resulta
4 que lo bajaron; no lo van a poder ver. Pero esa
5 web, si van al sistema de archivo de webs les
6 permite ver que a marzo de 2018 el señor Silva
7 aparece junto con el testigo Patricio Pérez,
8 por ejemplo como uno de los miembros de esa
9 comisión del DTPM. Y como ustedes saben, el
10 doctor Silva ha utilizado data del DTPM sin
11 verificarla de forma independiente.

12 También hemos sabido que
13 PricewaterhouseCoopers, por ejemplo, ha estado
14 trabajando para el DTPM. Ha estado trabajando
15 para el DTPM en 2017. Escucharon cómo
16 reconocieron que hicieron entrevistas a
17 empleados de las compañías en 2017 con este
18 arbitraje en curso, sin decirles que lo que les
19 dirían esos empleados sería utilizado luego por
20 PricewaterhouseCoopers en este arbitraje, lo
21 que desde nuestro punto de vista crea un
22 conflicto de interés sumamente grave y, pues

1 conviene decirlo, que nuestros clientes se
2 reservan todos sus derechos respecto de las
3 actuaciones de PricewaterhouseCoopers en este
4 caso.

5 Otro punto que creo relevante, y perdonen
6 antes de ir a los aspectos económicos, un punto
7 relevante es que no han escuchado ninguna
8 pregunta a los expertos en transporte de BRT
9 Transconsult sobre el modelo de demanda. Ellos
10 han realizado sobre la base de ciertos insumos
11 que han calculado un modelo de demanda, que es
12 el que les va a indicar a ustedes cuál es la
13 demanda, los ingresos que luego podrían tener
14 las compañías en función del número de
15 pasajeros, y les va a indicar a ustedes el
16 número de buses adicionales que eran
17 necesarios. Sobre eso no hemos escuchado
18 absolutamente nada en esta audiencia.

19 Pasando a los expertos en cuantificación,
20 habrán escuchado hoy día que hay acuerdo en
21 cuanto al modelo operativo y financiero que han
22 utilizado los expertos de the Brattle Group

1 para calcular los daños de los demandantes, lo
2 que nos parece significativo y confirma, como
3 ustedes habrán escuchado, el rigor que han
4 aplicado los expertos de the Brattle Group.

5 Volviendo un momento ahora, y así entrando
6 en algunas especificidades, ustedes recordarán
7 que uno de los grandes argumentos de Chile en
8 este caso es que no hemos probado la causalidad
9 del daño. Sobre eso voy a hacer dos
10 comentarios.

11 Primero, nosotros hemos probado la causa
12 positiva del daño. Lo que pretende Chile, lo
13 que trató de hacer en este caso es demostrar la
14 causa negativa, es decir un eximente de
15 responsabilidad porque según ellos nuestros
16 clientes no saben operar un negocio de buses o
17 tomaron decisiones irresponsables que les
18 llevaron a la quiebra.

19 Bueno, el eje principal, el sustento, el
20 pilar, vamos a llamarlo así, de esa causalidad
21 negativa que debería demostrar Chile, puesto
22 que Chile tiene la carga de demostrar esa

1 causalidad negativa, es PricewaterhouseCoopers.
2 Voy a ahorrarme comentarios sabiendo que esto
3 es un transcript público sobre lo que hemos
4 vivido estos días. Simplemente diré que
5 claramente hemos visto que los expertos de
6 Price no han analizado causalidad. Lo que les
7 han dicho es: "Esto es una foto de lo que ha
8 pasado", y a partir de ahí han derivado
9 conclusiones que no se sustentan puesto que en
10 ningún momento han considerado y aislado el
11 impacto de ciertos eventos para ver si son o no
12 son la causa.

13 Y han escuchado tanto a Brattle como a
14 Versant decirles que para la causalidad hay que
15 utilizar un but-for, hay que aislar cuál es el
16 hecho que se quiere verificar si ha causado un
17 daño o no. Verificar qué habría sucedido con y
18 sin ese hecho y, a partir de ahí, concluir
19 sobre la causalidad. Eso no lo ha hecho
20 PricewaterhouseCoopers.

21 Más allá de eso, verán -- recordarán que
22 Price hace comparaciones entre operadores.

1 Reconoce que son distintos pero no hace ningún
2 ajuste. Les presenta a ustedes unas gráficas
3 que no son desde luego fiables.

4 Ustedes recordarán también que
5 PricewaterhouseCoopers insiste mucho en la
6 deuda, la consideran onerosa y excesiva. Y por
7 lo tanto lo que hemos visto aquí es que por lo
8 visto Merrill Lynch, JP Morgan, todos los
9 bonistas, todos sus asesores, los demandantes,
10 no saben lo que hacen, o no sabían lo que
11 hacían en 2011. Según dice Price, solo ellos
12 tenían la bola de cristal para saber que esta
13 operación era riesgosa.

14 Lo que en ningún momento hace Price es
15 ponerse en la situación en la que estaban los
16 demandantes al momento de tomar decisiones, y
17 habrán escuchado tanto del doctor Ríos como de
18 Brattle que había motivos válidos aprobados por
19 Moody's o verificados por Moody's que
20 demostraban que era una emisión de bonos
21 razonable con una cobertura de riesgo adecuada,
22 de riesgo cambiario. Nada de eso ha sido

1 desmontado por Price, como hemos visto.

2 Voy a pasar a la filmina 39. Un aspecto
3 relevante ya entrando en el tema de la evasión.
4 Ustedes habrán escuchado que el profesor
5 Willumsen reconoce que una tasa de inspecciones
6 razonable es entre 1,5 y 5 por ciento por cada
7 mil pasajeros. Esto es 15 a 50 pasajeros
8 inspeccionados por mil. No está en disputa que
9 al momento de la firma de los contratos o
10 posteriormente a la firma a la vigencia de
11 los contratos, perdón, Chile estaba
12 inspeccionando un pasajero entre mil. O sea, 15
13 veces menos del mínimo que reconoce el profesor
14 Willumsen 50 veces menos de lo que reconoce
15 el profesor Willumsen.

16 Nuestros expertos, para que no haya ninguna
17 duda, concluyeron de forma independiente que en
18 este caso se podía exigir a Chile tener una
19 tasa de inspecciones de 2,8 por ciento, que
20 está dentro del rango de lo razonable que dice
21 el profesor Willumsen. Y esto es importante
22 porque para llegar a ese 2,8 los expertos de

1 BRT Transconsult han calculado qué debería
2 haber hecho el Estado para llegar a ello,
3 cuántos fiscalizadores deberá haber el Estado
4 contratado. Son 760 fiscalizadores los que
5 habría necesitado el Estado.

6 Hemos escuchado al profesor Willumsen decir
7 que hubo campañas de fiscalización que hizo el
8 Estado por momentos aislados. ¿Por qué no hizo
9 esas campañas el Estado desde diciembre del año
10 2010 con la nueva ley antievasión?

11 Y eso es muy relevante porque se ha creado
12 la impresión de que en este caso estamos
13 pidiéndoles a ustedes que asuman que de un día
14 al siguiente, en una noche de repente habría
15 habido mucha más gente dispuesta a pagar el
16 pasaje. Eso no es lo que les estamos diciendo.

17 Lo que les estamos diciendo es que desde que
18 inicia la negociación de los nuevos contratos,
19 desde que el Estado le está diciendo a los
20 contratistas: "Les voy a transferir más riesgo
21 de lucha contra la evasión, pero no se
22 preocupen porque hay un upside que va aparejado

1 con ellos, y es que si ustedes, si hay más
2 demanda...", como todo el mundo pensaba,
3 "...ustedes van a tener un 75 por ciento de
4 ingreso variable.

5 Desde ese momento el Estado sabía que tenía
6 que hacer cumplir la ley. Es lo único que
7 estamos pidiendo. La evasión -- perdón, la
8 tarifa está fijada por la ley. La ley dice: "Es
9 obligación de los usuarios pagar la tarifa del
10 transporte público". Lo único que tenía que
11 hacer Chile era ejecutar el mandato legal que
12 se había dado a sí misma.

13 La audiencia confirmó también que Quantil
14 tiene razón. Ustedes vieron cómo el señor Silva
15 penó para justificar la respuesta que han dado
16 a Quantil. Quantil tiene razón que
17 Metropolitana fue autorizada en enero de 2017 a
18 operar con intervalos irregulares. El problema
19 en la respuesta que ha dado el señor Silva es
20 que utiliza una data que le dio el DTPM que
21 está manipulada para hacer aparentar que hay
22 muchos más intervalos regulares. ¿Esto a qué

1 va? Al tema de la discriminación. Y el tema de
2 la discriminación en los indicadores, que a su
3 vez tiene un impacto en los ingresos de las
4 empresas. Y aquí para concluir le recordaré que
5 este un caso de ingresos de las compañías que
6 no se materializaron por actos u omisiones
7 imputables al Estado en numerosas ocasiones
8 imputables a la falta de protección, a la falta
9 de cumplimiento de la propia norma que se dio
10 el Estado chileno.

11 Muchas gracias.

12 SEÑOR BOFILL: Gracias, señora presidenta.

13 La interpretación que Chile ha querido dar a
14 sus obligaciones, compromisos e incumplimientos
15 flagrantes para construir sus argumentos
16 principales tiene un error de base. Su gran
17 premisa es que solo se puede examinar si Chile
18 cumplió o no sus obligaciones a partir de los
19 textos de los contratos de concesión.

20 Como demostramos en la apertura, esa premisa
21 es falsa, y no hemos escuchado durante toda la
22 audiencia ni una sola palabra de Chile

1 refutando que en Chile las leyes vigentes al
2 tiempo de la celebración de los contratos son
3 parte integral de los mismos. En realidad, que
4 en un arbitraje de esta naturaleza el Estado de
5 Chile se vea obligado a argumentar de esa
6 manera demuestra la ausencia de razones que lo
7 justifiquen.

8 Me quedan cinco minutos, me acaban de
9 mostrar. Voy a tratar de abreviar todo lo que
10 pueda.

11 La prueba rendida en esta audiencia ha
12 demostrado también que la historia que relató
13 Chile en sus memoriales no es verdadera. El
14 ministro Gómez-Lobo reconoció que la
15 estabilización del Transantiago después de su
16 caótico inicio requirió de grandes inversiones
17 del Estado para poder subsidiar el sistema del
18 Transantiago.

19 Esos... los problemas que él relató como
20 fundamento de la necesidad de los subsidios son
21 los mismos que hemos escuchado que se han
22 mantenido a lo largo de toda la historia del

1 Transantiago: infraestructura, evasión,
2 vandalismo.

3 El alto costo que tenía el sistema del
4 Transantiago -- el alto costo que tenía el
5 sistema del Transantiago llevó a Chile a
6 rediseñar el sistema, que fue lo que nos relató
7 el testigo Patricio Pérez. El propósito de ese
8 rediseño era disminuir el costo del sistema
9 para Chile y transferir algunos riesgos a los
10 operadores. Ese fue el sentido de las leyes que
11 se dictaron durante el año 2011 y de las que
12 hemos hablado tan latamente durante la
13 audiencia, en particular la 20.504, que fue la
14 que autorizó a terminar los contratos
15 originales y a generar nuevos contratos con un
16 modelo de ingresos completamente distinto.

17 Pero aquí es fundamental recordar esto. Esa
18 misma ley dotó al Estado de potestades más
19 claras para adoptar medidas que le permitieran
20 cumplir su obligación de mantener o, en su
21 caso, restablecer el equilibrio económico de
22 los nuevos contratos de concesión, más allá de

1 los meros términos del contrato. Lo que hemos
2 escuchado y lo que se puede ver en esa ley es
3 absolutamente claro en ese sentido.

4 Y en paralelo, y cumpliendo la obligación
5 que le imponía el artículo 20 de la ley 20.378,
6 el Ministerio de Transportes desarrolló el Plan
7 Maestro de Infraestructura que apuntaba a
8 resolver los problemas de infraestructura y
9 evasión que enfrentaba el sistema. Fue así como
10 las compañías aceptaron firmar los nuevos
11 contratos de concesión. Así se llegó a los
12 nuevos contratos de concesión.

13 Con lo que no podían contar las compañías y
14 los demandantes es que luego de firmarlos Chile
15 levantaría las manos y no haría nada más para
16 cumplir su parte de las obligaciones.

17 El ministro Gómez-Lobo nos relató en la
18 audiencia que cuando él asumió en marzo del año
19 2014 los problemas del sistema eran exactamente
20 los mismos problemas que había tenido desde
21 2005 y los mismos problemas que había en el año
22 2011: infraestructura, vandalismo y evasión.

1 Lo paradójico es que el ministro Gómez-Lobo
2 tampoco hizo nada; de hecho, él mismo reconoció
3 no haber respondido nunca las cartas que le
4 enviaron las compañías en las cuales se
5 referían a esos mismos problemas. Y durante su
6 período la tasa de evasión alcanzó el histórico
7 34,6 por ciento que él terminó reconociendo. Y
8 esto que es una reclamación relevante de parte
9 de los demandantes es importante recalcarlo:
10 esa evasión histórica solo se explica por la
11 total inacción de Chile. Aquí se ha querido
12 levantar una caricatura, que es que las
13 compañías y los demandantes esperaban que la
14 evasión cayera drásticamente desde el 30 de
15 abril del año 2012 al 1 de mayo del año 2012.
16 Pero eso es una caricatura, porque lo que se
17 quiere es hacer un argumento ad absurdum de
18 esta parte.

19 La ley antievasión es del año 2010, de
20 diciembre del año 2010. Chile tuvo 17 meses,
21 miembros del Tribunal, para prepararse para
22 cumplir sus obligaciones de acuerdo a los

1 contratos para poder bajar la evasión. De
2 hecho, no tenía por qué esperar a los nuevos
3 contratos para los efectos de implementar la
4 evasión.

5 El ministro Gómez-Lobo nos dijo que durante
6 su período se había aumentado un 400 por ciento
7 la cantidad de personal policial en la calle.
8 En el contrainterrogatorio terminó reconociendo
9 que en realidad lo que había originalmente era
10 un 20, y después hubo 80 para fiscalizar
11 millones de pasajeros y muchos millones de
12 viajes al día en el sistema del Transantiago.

13 El señor Muñoz, don Guillermo Muñoz, el
14 director del DTPM, además agravó el sistema --
15 agravó el problema cuando, interpretando el
16 contrato de concesión para inventarse una
17 facultad que no existía, expropió cinco
18 servicios de aquellos que generaban más
19 ingresos. Y lo que en realidad nos sorprendió a
20 todos en la audiencia fue que él además inventó
21 una limitación a esa facultad que se había
22 creado. Y dijo: "Como yo no podía expropiar más

1 del 5 por ciento, le dejé a Alsacia...”, como si
 2 fuera un regalo, “...el 112 nocturno”, que era un
 3 servicio que solo generaba costos. Él mismo fue
 4 el que rechazó el último esfuerzo realizado por
 5 las compañías para intentar resolver el
 6 problema cuando las compañías le ofrecieron --
 7 estoy terminando. Cuando las compañías le
 8 ofrecieron renovar flota que costaba 1.100
 9 buses que costaban 100 millones de dólares. Él
 10 dijo que no lo hizo por razones
 11 presupuestarias. Pero el ministro Gómez-Lobo
 12 nos dijo que solo en evasión lo que tenían que
 13 inyectar al año, al año, eran 150 millones de
 14 dólares; aquí estamos hablando de 100 millones
 15 de dólares para seguir operando durante cinco
 16 años, haciendo un esfuerzo adicional que venían
 17 haciendo.

18 Si el señor Muñoz hubiera aceptado esa
 19 propuesta, miembros del Tribunal, no estaríamos
 20 acá.

21 Por lo tanto, nos parece que la causa del
 22 desastre en la cual se encuentran las compañías

1 está fuera de toda discusión en este arbitraje.
 2 No necesitamos especular sobre los motivos que
 3 haya tenido Chile o haya querido tener Chile
 4 para los efectos de su total inacción frente a
 5 los problemas del sistema del Transantiago,
 6 porque los incumplimientos están claros y no
 7 admiten ninguna duda.

8 Y por último quiero terminar, señora
 9 presidenta, diciendo que la señora
 10 subsecretaria de Relaciones Exteriores en su
 11 alegato de apertura acusó a esta parte de una
 12 persistente falta de respeto respecto del
 13 Estado de Chile. Sin embargo, esa aseveración
 14 no refleja la forma en que aquí se desarrolló
 15 la historia. De hecho, la señora subsecretaria
 16 habló de muchas cosas pero no habló de este
 17 caso.

18 Yo respetuosamente me atrevo a plantear ante
 19 ustedes que si alguien puede estar ofendido por
 20 la historia del Transantiago y por la forma en
 21 que se originó y desarrolló este conflicto, son
 22 los demandantes, no el Estado de Chile. Muchas

1 gracias.

2 PRESIDENTA KAUFMANN-KOHLER: Gracias.

3 Bien. ¿Vamos a seguir inmediatamente o
 4 quieren 5 minutos de pausa? No, podemos
 5 adelantar. Sí, por favor.

6 ALEGATO DE CLAUSURA DE LA DEMANDADA

7 SEÑOR DI ROSA: Gracias Señora Presidenta.

8 Nosotros también comenzaremos con las preguntas
 9 del Tribunal. Me referiré primero a la pregunta
 10 del Dr. Garibaldi sobre el impacto de
 11 accionistas minoritarias de Alsacia bajo el
 12 derecho Chileno y de una renuncia de parte de
 13 las empresas de los recursos internos. Bajo el
 14 Artículo 41 de la ley 18.046 que es la ley de
 15 sociedades anónimas de Chile los directores y
 16 cito “responderán solaridariamente de los
 17 perjuicios causados a la sociedad y a los
 18 accionistas por sus actuaciones dolosas o
 19 culpables.” Cierro la cita. Los directorios de
 20 las empresas tienen en consecuencia el deber de
 21 velar por los intereses de todos sus
 22 accionistas, incluyendo los minoritarios. Ante

1 una renuncia de las empresas a procedimientos
 2 locales los accionistas minoritarios tendrían
 3 la posibilidad de reclamar las
 4 responsabilidades de los directores que
 5 hubiesen votado a favor de dicha renuncia y de
 6 la administración. Y de por ejemplo, de
 7 conformidad con el mismo Artículo 41 de la ley
 8 de sociedades anónimas un accionista
 9 minoritario puede demandar a los directores de
 10 la empresa y en general a la administración por
 11 los perjuicios que le hayan sido causados
 12 directamente por las decisiones u omisiones de
 13 la administración. El Artículo 41 dispone la
 14 responsabilidad de los directores así como de
 15 la administración y adicionalmente el Artículo
 16 133 bis de la misma ley permite que el 5 por
 17 ciento de los accionistas de una sociedad
 18 presenten en nombre y beneficio de la sociedad
 19 una demanda por perjuicios contra los
 20 directores de la sociedad y en general a la
 21 administración por cualquier daño sufrido por
 22 los accionistas como consecuencia de una

1 determinación de la empresa. Este es un esbozo
 2 muy básico, seguramente ampliaremos sobre el
 3 tema en nuestro escrito post - audiencia
 4 proporcionando citas y quizás un análisis mas
 5 completo. Le cedo ahora la palabra a mi colega
 6 Patricio Grané quien tratará algunas de las
 7 otras preguntas del Tribunal.

8 SEÑOR GRANÉ LABAT: Señora presidenta,
 9 miembros del Tribunal: intentaré abordar seis
 10 preguntas del Tribunal, pero creo que siendo
 11 realista podré cubrir quizás únicamente cuatro.

12 De alguna forma ya hemos tratado varias de
 13 estas preguntas el primer día cuando fueron
 14 planteadas. De todas formas quisiera enfatizar
 15 algunos de estos puntos por la importancia que
 16 tienen en este caso en particular.

17 Es indiscutible que el estándar legal
 18 aplicable en este caso es el nivel mínimo de
 19 trato según el derecho internacional
 20 consuetudinario, incluyendo trato justo y
 21 equitativo y protección y seguridad plena.

22 El Tratado dispone, además, con respecto a

1 estas dos protecciones en su artículo 942 que
 2 los conceptos de trato justo y equitativo y
 3 protección y seguridad plenas no requieren un
 4 tratamiento adicional o más allá de aquel
 5 exigido por ese nivel y no crean derechos
 6 sustantivos adicionales. Es decir, el lenguaje
 7 característico que existe en los tratados
 8 cuando se está diciendo: "Esto no es un
 9 estándar autónomo".

10 Es también incuestionable que ese nivel
 11 mínimo de trato impone estándar legal alto, y
 12 con esto voy a la pregunta del señor Garibaldi.
 13 Y esto es una violación que no logran
 14 establecer los demandantes en este caso.

15 El señor Garibaldi preguntó por qué se le
 16 califica de alto a ese estándar, y pregunta
 17 también qué sería un estándar no alto. Es alto
 18 en el sentido que requiere una conducta extrema
 19 por parte de un Estado para que constituya una
 20 violación de las obligaciones de derecho
 21 internacional de ese Estado. Y recordará este
 22 Tribunal que bajo ese estándar una conducta

1 violatoria del nivel mínimo de trato requiere,
 2 en palabras del Tribunal en el caso Mesa que
 3 algunos miembros del Tribunal conocen muy bien,
 4 y leo en inglés, requiere "complete lack of
 5 transparency and candor in the administrative
 6 process; lack of due process leading to an
 7 outcome which offends judicial propriety; and
 8 manifests failure of natural justice in
 9 judicial proceedings".. (En español) Y mas
 10 recientemente en el caso -- el Tribunal en el
 11 caso Clayton contra Canadá dijo, y vuelvo a
 12 citar en inglés, (Interpretado del inglés)
 13 "Even when State officials are acting in good
 14 faith there will sometimes be not only
 15 controversial judgments but clear-cut mistakes
 16 in following procedures, gathering and stating
 17 facts and identifying the applicable
 18 substantive rules. State authorities are faced
 19 with competing demands of their administrative
 20 resources and there can be delays or limited
 21 time, attention and expertise brought to bear
 22 in dealing with issues. The imprudent exercise

1 of discretion or even outright mistakes do not
 2 as a rule lead to a breach of the international
 3 minimum standard."

4 Es decir un supuesto error, imperfección o
 5 contradicción en la conducta de Chile, aun si
 6 hubiese existido lo cual no ha existido en
 7 este caso-, no constituye una violación de sus
 8 obligaciones bajo el derecho internacional y
 9 bajo el Tratado.

10 El nivel mínimo de contrato bajo derecho
 11 internacional consuetudinario requiere mucho
 12 más que eso. Y el señor Garibaldi también
 13 preguntó a Chile que identificara qué sería un
 14 estándar no alto. Un estándar no alto es uno
 15 que se constituye en violación por un mero
 16 error, imperfección o una contradicción en la
 17 conducta de Chile. Un estándar no alto también
 18 es aquel que impone una responsabilidad
 19 objetiva al Estado. Pero ese no es el estándar
 20 aplicable en este caso. En vez para que este
 21 Tribunal declare que el Estado chileno ha
 22 violado sus obligaciones internacionales bajo

1 el Tratado, debe concluir con base en la prueba
2 y no en meras afirmaciones de los demandantes
3 que Chile le ha otorgado a la inversión de los
4 demandantes un trato tan injusto y sorprendente
5 que sea inaceptable bajo el derecho
6 internacional.

7 Debe concluir este Tribunal que las medidas
8 y supuestas omisiones de Chile en este caso
9 constituyen una falta o denegación tan grave,
10 manifiesta o de tal magnitud que atente contra
11 los cánones judiciales.

12 Para darle el crédito a los argumentos
13 infundados de los demandantes, el Tribunal
14 tendría que estar convencido que las medidas
15 del DTPM y del MTT son irracionales,
16 caprichosas, manifiestamente injustas, ilícitas
17 o idiosincráticas, arbitrarias más allá de una
18 simple aplicación contradictoria o
19 cuestionable, carentes absolutamente del debido
20 proceso, al punto de chocar contra el sentido
21 de idoneidad judicial.

22 Todos esos son calificativos que el Tribunal

1 conoce bien; son calificativos que no nos
2 estamos inventando sino que surgen de la
3 jurisprudencia.

4 Expectativas legítimas. Otra pregunta
5 también del señor Garibaldi. En respuesta a la
6 pregunta del señor Garibaldi, reiteramos lo que
7 dijimos el primer día de la audiencia. Y
8 reiteramos además en apoyo a la jurisprudencia
9 que hemos citado en nuestros escritos, la cual
10 incluye la decisión de la Corte Internacional
11 de Justicia en el caso ELSI, al cual el señor
12 Garibaldi hizo referencia. La Corte explicó en
13 ese caso que una conducta arbitraria bajo el
14 derecho internacional público -y cito-: "No es
15 tanto algo opuesto al imperio de una ley, sino
16 opuesto al imperio de la ley. Se trata de un
17 desprecio intencional del debido proceso, un
18 acto que ofenda o como mínimo sorprenda al
19 sentido de propiedad jurídica."

20 Como citamos el primer día, es posible
21 considerar expectativas legítimas pero no como
22 un requerimiento bajo el nivel mínimo de trato.

1 Porque la protección de expectativas legítimas
2 de los inversores no son derecho internacional
3 consuetudinario, y los demandantes no han
4 podido establecer lo contrario. Y nuevamente,
5 en palabras del Tribunal en el caso Mesa contra
6 Canadá, y la mayoría de los Tribunales NAFTA,
7 que también Mesa cita, dicen: the failure to
8 respect and investors legitimate expectations
9 in and of itself does not constitute a breach
10 of Article 1105" -- ser tomados en cuenta
11 cuando se analizan otros componentes de lo que
12 sí es parte del estándar de nivel mínimo de
13 trato.

14 Me refiero ahora a la protección de
15 seguridad -- seguridad y protección plena, que
16 fue objeto de una pregunta de la Profesora
17 Stern. Chile está de acuerdo con la Profesora
18 Stern, lo cual no es de sorpresa, cuando dice
19 que evasión y vandalismo son tratados más
20 apropiadamente bajo la protección de seguridad
21 y protección plena y no tanto trato justo y
22 equitativo.

1 Esta obligación, seguridad y protección
2 plena, está también atado al nivel mínimo de
3 trato al igual que trato justo y equitativo. Y
4 como bien observó la Profesora Stern, esa
5 obligación impone el deber del Estado de
6 adoptar las medidas razonables dentro de sus
7 posibilidades para proteger a los
8 inversionistas. Ese estándar requiere, como
9 dije el primer día, debida diligencia y no
10 opone perdón, no impone una obligación de
11 resultado.

12 Los demandantes, sin embargo, le están
13 exigiendo a este Tribunal que condene al Estado
14 chileno bajo este estándar por no lograr el
15 Estado erradicar la evasión y el vandalismo del
16 Transantiago. Nadie, ni los propios
17 demandantes, niegan que la evasión y el
18 vandalismo son actos de terceros. Los
19 demandantes ya no niegan que el Estado adoptó
20 medidas y destinó recursos y desplegó esfuerzos
21 para combatir la evasión y el vandalismo.

22 Lo que los demandantes continúan alegando

1 aparentemente es que esas acciones y esfuerzos
2 del Estado no fueron suficientes. Pero el
3 Tratado y el derecho internacional
4 consuetudinario no imponen obligaciones de
5 resultado en materia de evasión y vandalismo, o
6 vandalismo.

7 Y este, miembros del Tribunal, no es un caso
8 en el que el Estado se ha cruzado de brazos,
9 constituyéndose en un mero espectador de la
10 destrucción de la inversión de los demandantes
11 por las actuaciones de terceros.

12 El expediente en este caso está repleto,
13 repleto de prueba que acredita las acciones del
14 Estado, desde el inicio de la concesión y hasta
15 la fecha. El hecho que tanto la evasión como el
16 vandalismo continúen siendo un problema en
17 Santiago, problema que el Estado no niega, no
18 puede llevar a la conclusión que Chile ha
19 violado sus obligaciones bajo derecho
20 internacional público.

21 Y voy a abordar ahora la cuarta pregunta, y
22 quizás me quede tiempo para abordar alguna de

1 las otras dos. Y con esto me refiero a
2 expropiación indirecta, que fue una pregunta de
3 la Profesora Stern del primer día.

4 En respuesta a la pregunta de la Profesora
5 Stern, Chile explicó que el Tribunal por
6 mandato expreso del anexo 9C del Tratado, debe
7 considerar el carácter de la acción
8 gubernamental, porque es relevante según el
9 Tratado mismo. En este caso, ese carácter es
10 inminentemente contractual y por lo tanto no es
11 de carácter gubernamental, soberano o
12 exorbitante, como argumentan los demandantes en
13 esta audiencia y lo han hecho nuevamente hace
14 un rato y que lo han intentado de equiparar a
15 lo que estaba siendo examinado en el caso
16 Burlington, Ecuador, que tan bien conocen los
17 miembros de este Tribunal.

18 Pero en todo caso, si la conducta fuera
19 considerada en ejercicio del ius imperis en
20 lugar del ius gestionis, el párrafo 3B del
21 anexo 9C aplicaría y excusaría la conducta de
22 Chile, y ustedes lo tienen en pantalla, y ese

1 párrafo establece que salvo en circunstancias
2 excepcionales, no constituyen expropiaciones
3 indirectas los actos regulatorios no
4 discriminatorios de una parte, que son
5 diseñados y aplicados para proteger objetivos
6 legítimos de bienestar público.

7 Ha quedado demostrado que los actos de Chile
8 en este caso, aun si se consideran
9 regulatorios, no son discriminatorios y son más
10 bien diseñados y aplicados para proteger
11 objetivos legítimos del bienestar público. En
12 este caso, un servicio de transporte urbano de
13 buena calidad y continuidad.

14 En todo caso, los demandantes ni siquiera
15 mencionan la causalidad en su alegato de
16 apertura cuando se refirieron al estándar legal
17 de expropiación. Cuando se analiza la
18 causalidad en este caso, y a pesar de lo que
19 han escuchado del señor García Represa, no se
20 puede más que concluir que el impacto económico
21 de los actos atribuibles a Chile no tuvo un
22 efecto devastador en la inversión de los

1 demandantes y es ese el estándar que deben
2 probar los demandantes.

3 Ellos tienen la carga de la prueba y no han
4 cumplido con esa carga de la prueba. La
5 evidencia establece además que esos actos no
6 interfirieron con expectativas inequívocas y
7 razonables de la inversión de los demandantes.

8 De hecho, las expectativas que los
9 demandantes dicen, dicen haber tenido, están
10 muy lejos de ser inequívocas o razonables. Pero
11 aun si existía interferencia por parte de Chile
12 en la inversión que es un hecho negado, esa
13 interferencia no tuvo un impacto económico
14 devastador en la inversión de los demandantes
15 que le haya causado la destrucción o una
16 privación sustancial del valor de su inversión.

17 Quiero muy brevemente en los cinco minutos
18 que me quedan abordar dos temas adicionales:
19 eliminación de servicios es uno de ellos y esto
20 es en respuesta a una pregunta del señor
21 Garibaldi del primer día. Y era una pregunta
22 que iba dirigida a los demandantes, y preguntó

1 si la demandada -- perdón, si la demandante
 2 confirma estas alegaciones de la demandada
 3 sobre la satisfacción de cualquier daño a
 4 través del pago que se hizo por la eliminación
 5 de los servicios, a través de un aumento del
 6 PPT. Y la segunda parte de la pregunta decía: y
 7 si mantienen la pretensión por expropiación o
 8 eliminación de servicios. De ser el caso,
 9 preguntó el señor Garibaldi cuál es la base
 10 jurídica de esa pretensión en ese momento. Y la
 11 verdad es que no hay ninguna base legal para
 12 mantener esa pretensión. Primero, porque no ha
 13 habido expropiación y segundo porque se ha
 14 pagado una compensación y las empresas han
 15 otorgado un total y absoluto finiquito y lo ha
 16 hecho de forma expresa y por escrito.

17 No voy a repetir los argumentos que hicimos
 18 el primer día cuando explicamos justamente cuál
 19 había sido lo que había llevado a ese pago de
 20 compensación a través del aumento del PPT del
 21 finiquito, también observé que esa compensación
 22 tenía carácter retroactivo al 1° de abril del

1 2017. Nada de eso ha sido negado por los
 2 demandantes y por buena razón, porque no lo
 3 pueden negar. Sin embargo, siguen hablando de
 4 expropiación en este caso. Y lo hemos visto en
 5 los últimos días. Pero es importante enfatizar
 6 que la eliminación de esos cinco servicios no
 7 es una expropiación. Chile eliminó los
 8 servicios de las empresas en ejercicio de sus
 9 potestades contractuales y en consecución de su
 10 obligación de velar por el interés público y
 11 asegurar la continuidad de los servicios, de
 12 nuevo, de conformidad con las disposiciones del
 13 contrato, disposiciones que los demandantes no
 14 han citado. Pero nosotros sí lo hicimos en la
 15 apertura y lo volveremos a hacer ahora. Esas
 16 disposiciones contractuales le permiten a Chile
 17 ajustar las frecuencias en algunos servicios
 18 para liberar buses y ajustar el programa de
 19 operación para redistribuir la flota
 20 disponible. Y esto está en los contratos en el
 21 anexo 3.

22 Y esto siempre y cuando, Chile, el DTPM,

1 siempre que no reduzca más de un 5 por ciento
 2 los kilómetros comerciales previstos en esos
 3 programas de operación. Los demandantes no
 4 niegan que se le haya reducido de los servicios
 5 en más del 5 por ciento de los kilómetros
 6 comerciales previstos. Es decir, cuando Chile
 7 eliminó esos cinco servicios lo estaba haciendo
 8 de nuevo de conformidad con las disposiciones
 9 contractuales, no constituye una expropiación.

10 Y última observación sobre esta pregunta. Es
 11 que Chile tomó esta decisión porque el mal
 12 desempeño de las empresas no era un resultado
 13 de déficit de flota, como argumentaban, y por
 14 lo tanto no se solucionaría con el aumento de
 15 flota de reserva que estaban solicitando los
 16 demandantes -- perdón, las empresas en ese
 17 momento.

18 Y eso, como hemos visto estos días y lo
 19 volveremos a ver en nuestros alegatos de
 20 clausura si el tiempo lo permite, es
 21 consecuencia del mal desempeño y está también
 22 corroborado por el hecho de que los fines de

1 semana las empresas continúan operando mal, a
 2 pesar de que tienen el doble de la flota. Lo
 3 comprueba también el hecho de que las compañías
 4 tenían un mal desempeño antes del 2014, cuando
 5 no alegaban que tenían un déficit de flota. Y
 6 lo confirma además el hecho que luego de la
 7 eliminación de los servicios cuando tenían más
 8 flota disponible porque se habían relajado las
 9 exigencias de los programas de operación,
 10 seguían desempeñando por debajo del promedio y
 11 del nivel a aceptable.

12 La sexta pregunta que quería abordar era
 13 justamente sobre el desempeño durante los fines
 14 de semana en mayor detalle. Dado que este es un
 15 tema sumamente importante, pero en lugar de
 16 hacerlo en el minuto 20 segundos que me queda
 17 restantes, preferiría reservar la respuesta
 18 para los alegatos -- perdón para los escritos
 19 postaudiencia ya que no quiero pasar muy rápido
 20 sobre este tema. Sin embargo, y esto lo digo
 21 sin perjuicio de que lo abordemos brevemente en
 22 nuestro alegato de apertura de 30 minutos -- de

1 cierre, perdón. Y con eso y con 50 segundos
2 restantes concluimos las respuestas a las
3 preguntas del Tribunal.

4 PRESIDENTA KAUFMANN-KOHLER: Gracias.

5 SEÑOR GRANÉ LABAT: Si la señora presidenta
6 me permite, pasaríamos entonces ahora a los
7 alegatos de cierre.

8 Y quizás quiero iniciar con algo que
9 normalmente no sería necesario decir, pero
10 lamentablemente en este caso lo voy a decir, y
11 es que por limitación de tiempo no vamos a
12 poder cubrir todos los temas. Y esto lo
13 hacemos, sin embargo, con una reserva absoluta
14 de derechos, y lo digo para evitar que los
15 demandantes aleguen luego que al no cubrir
16 algún asunto ahora de alguna forma Chile está
17 concediendo o abandonando alguno de sus
18 argumentos, y por supuesto eso no es el caso.
19 Lo que no podamos abordar hoy lo trataremos en
20 nuestros alegatos -- perdón, en nuestros
21 escritos postaudiencia.

22 PRESIDENTA KAUFMANN-KOHLER: Me parece que

1 era un acuerdo de las partes de dedicar 30
2 minutos a los alegatos de cierre, y claro que
3 no son alegatos finales de cierre, como vienen
4 los escritos postaudiencia. Y si no veo.

5 SEÑOR GRANÉ LABAT: Perfecto.

6 PRESIDENTA KAUFMANN-KOHLER: No veo
7 dificultad.

8 SEÑOR GRANÉ LABAT: Muchas gracias, señora
9 presidenta.

10 Causalidad, es un tema que hemos puesto
11 sobre la mesa como uno de los temas clave. Y ha
12 quedado demostrado en estos días que todas las
13 acciones tomadas por Chile fueron razonables y
14 estuvieron justificadas en criterios técnicos y
15 contractuales y no pudieron ser la causa de la
16 pérdida y la situación financiera que enfrentan
17 los demandantes. Ahora, quiero empezar haciendo
18 énfasis en los nuevos contratos, porque los
19 nuevos contratos deben ser el punto de partida
20 del análisis que vaya a realizar el Tribunal.
21 Son esos contratos los que contienen los
22 derechos y obligaciones de las partes y los que

1 han guiado la conducta de Chile en todo momento
2 desde la firma de esos contratos, incluso
3 antes.

4 Como el propio señor Ríos reconoció, y
5 ustedes tienen la cita del señor Ríos en
6 pantalla, ellos también reconocen que esos
7 contratos son los que establecen las nuevas
8 reglas de juego que firmaron de forma muy
9 consciente, pero parece que han olvidado alguno
10 de los compromisos que asumieron las partes
11 bajo esos contratos. Y uno de los principios
12 que ha observado el MTT y el DTPM con gran
13 puntualidad y esmero ha sido el principio de la
14 calidad de la prestación de los servicios. Y es
15 eso lo que ha guiado las decisiones del DTPM y
16 el MTT. Si es cierto que Alsacia y Express o
17 los demandantes creían realmente que el Estado
18 había asumido ciertos compromisos durante las
19 negociaciones, por ejemplo, en materia de
20 evasión y de infraestructura, se habrían
21 asegurado de plasmarlo expresamente en el
22 contrato, porque esas son las nuevas reglas del

1 sistema. Y especialmente lo hubiesen hecho
2 considerado la cláusula de exclusión 10.3 de
3 los contratos sobre la cual los demandantes no
4 han dicho absolutamente nada en este arbitraje.
5 Y esa cláusula establece, como lo ven en
6 pantalla, que los compromisos son las que están
7 contenidos en el contrato, lo que esté fuera no
8 puede constituir una obligación de las partes.
9 Y dice el segundo párrafo además que ninguna
10 representación, suposición, promesa,
11 entendimiento, condición o garantía que no sea
12 establecida en este contrato de concesión ha
13 sido hecha o puede servir de base para la
14 interpretación de cualquiera de las partes de
15 este contrato de concesión.

16 Eso, miembros del Tribunal, insistimos, es
17 una disposición muy importante de los contratos
18 que no ha sido abordada por los demandantes, y
19 es porque es devastador para el caso y las
20 teorías de los demandantes el hecho que los
21 contratos no contengan disposiciones que
22 respalden los argumentos de los demandantes

1 sobre supuesta demanda garantizada, sobre
2 supuesta reducción de evasión a ciertos
3 niveles, sobre construcción de infraestructura
4 a su cabalidad bajo el Plan Maestro y otros.

5 También ha quedado demostrado que los
6 demandantes pretenden que el equilibrio
7 económico contractual se interprete como un
8 principio absoluto general que va más allá del
9 contrato y aísla a los operadores de los
10 riesgos incluso de su propia gestión. Pero el
11 principio de equilibrio económico contractual
12 no aísla a los operadores de esos riesgos,
13 incluido los problemas de gestión. Y no
14 garantiza un EBITDA determinado o mínimo, como
15 pretenden los demandantes, pero que no tiene
16 ningún respaldo en el texto contractual.

17 De nuevo, por limitaciones de tiempo nos
18 vamos a reservar las observaciones más
19 detalladas sobre este principio para nuestros
20 escritos postaudiencia. Y además hemos visto
21 mucho sobre esto durante estos días.

22 De la misma forma, en los escritos

1 postaudiencia trataremos en detalle las
2 decisiones y errores de los demandantes y sus
3 empresas que causaron la ruina financiera de
4 las mismas y las cuales fueron expuestas y
5 confirmadas esta semana.

6 Sobre intervalos irregulares, no tenía
7 intención de referirme a intervalos irregulares
8 en esta presentación por limitaciones de
9 tiempo, pero como el señor García Represa ha
10 sugerido que los datos sobre los cuales se basó
11 el doctor Silva para hacer su observaciones y
12 análisis sobre los intervalos irregulares y
13 regulares ha sido información "manipulada", fue
14 la palabra que utilizó el señor García Represa,
15 por el DTPM, quería hacer simplemente la
16 observación que hacemos un rechazo categórico
17 de la sugerencia que puede estar implícita en
18 esa afirmación del señor García Represa
19 diciendo que los datos han sido manipulados por
20 el DTPM. En todo caso, si algo se expuso sobre
21 eso en estos días de audiencia es que el señor
22 Mac Allister cometió varios errores cuando él

1 presentó en sus declaraciones testimoniales
2 ejemplos de supuestos intervalos irregulares
3 que habían sido adoptados por el DTPM
4 contrario a lo que establece la directriz del 4
5 de julio del 2014. Y tendremos oportunidad de
6 resaltar en mayor detenimiento esos errores
7 cometidos por el señor Mac Allister.

8 Ahora, quiero pasar a las excusas de los
9 demandantes que ya hemos abordado esta semana y
10 en nuestros escritos. Hemos demostrado que
11 estas excusas pretenden transferirle la
12 responsabilidad al Estado chileno, pero que no
13 tienen sustento en la prueba contemporánea ni
14 tampoco en los contratos. Y conocemos bien esas
15 excusas: infraestructura, déficit de flota,
16 vandalismo, manipulación de los indicadores ICR
17 e ICF. Pero como quedó demostrado en estos
18 días, ninguna de estas excusas explica el mal
19 desempeño de Alsacia y Express y su situación
20 financiera. Veamos, por ejemplo, algunos. El
21 tema de evasión. No pudo existir ninguna
22 expectativa legítima por parte de las empresas

1 de que la evasión se reduciría al 9 por ciento.
2 Si las empresas o los demandantes creían que
3 existía compromiso de reducción de evasión a un
4 9 por ciento y más aún de forma inmediata, se
5 lo hubiesen reclamado al DTPM en el momento
6 casi de forma inmediata también, pero no lo
7 hicieron. Y no lo hicieron, porque la verdad es
8 que nadie tenía la expectativa de que el Estado
9 se iba a comprometer a reducir la evasión a un
10 9 por ciento. El señor Bofill presenta esto
11 como una caricatura que hemos presentado
12 nosotros.

13 Pero los cálculos de daños de los
14 demandantes están basados en el supuesto de que
15 la evasión iba a caer de un 24,5 por ciento en
16 mayo del 2011 a 9 por ciento al día siguiente.
17 Entonces, si existe una caricatura, es la
18 caricatura que ellos han dibujado.

19 Ahora, los demandantes estos días han citado
20 el documento R-296, que es el documento de
21 trabajo, y lo presentan como un comodín. Pero
22 este documento no dice lo que los demandantes

1 alegan. No hay ahí un compromiso o una promesa
2 por parte del Estado de reducir la evasión a un
3 9 por ciento ni mucho menos de hacerlo al día
4 siguiente de la firma de los contratos.

5 Lo que está en el R-269 no es lo que
6 pretenden los demandantes, no es un compromiso
7 de reducción de la evasión al 9 por ciento,
8 sino que es un punto de partida en un proceso
9 de negociación que termina en un contrato. Y
10 recordarán que lo que se establece ahí es un
11 benchmark. Y esa es la palabra que aparece en
12 ese documento en la sección D7, si mal no
13 recuerdo. Un benchmark del 9 por ciento de
14 evasión que se eliminó y no consta en los
15 contratos finales.

16 Si los demandantes creían que existía un
17 compromiso de reducción a 9 por ciento, lo
18 hubieran incluido en el contrato. Especialmente
19 considerando la cláusula 10.3 que les he
20 presentado y resaltado. Además, el tema de que
21 el Estado no tiene un incentivo económico para
22 luchar contra la evasión y que incluso que

1 fomenta la evasión, creo que eso ya ha quedado
2 rechazado de manera muy contundente. El
3 documento que trataron, -- perdón que
4 introdujeron en los días anteriores a la
5 audiencia, el PROJETO 39, que es el C-730
6 también ha quedado demostrado que no tiene
7 ningún fundamento, que fue erróneo.

8 El documento que presentó Chile en respuesta
9 a ese C-730, que es el R-876, es una
10 presentación del mismo PROJETO 39, la firma
11 brasilera ante el DTPM -- perdón, PROJETO 34
12 que hizo una presentación de ese estudio que
13 fue encargado por el panel de expertos, no es
14 un estudio del DTPM como sugirió si mal no
15 recuerdo el señor García Represa en su
16 interrogatorio. En esa presentación de ese
17 estudio al panel de expertos, hay un
18 reconocimiento por PROJETO 34 que su conclusión
19 que a mayor evasión menor subsidio, simplemente
20 no se sostiene.

21 De todas formas, hemos identificado de las
22 medidas que ha tomado el Estado chileno en

1 materia de lucha contra la evasión. Eso no es
2 negado. Lo que ahora tratan de argumentar es
3 que esos esfuerzos no son suficientes, pero esa
4 no es la obligación de Chile. Repetimos y es
5 innegable, no existe aquí una obligación de
6 Chile de reducir la evasión a ciertos niveles,
7 no existe una obligación de resultado, ni bajo
8 derecho internacional ni tampoco bajo el
9 contrato.

10 Se puso en evidencia en esta audiencia que
11 los peritos de BRT Transconsult basan su
12 informe en materia de evasión en un análisis
13 que no es riguroso, que está basado en
14 observaciones aisladas, superficiales e
15 incompletas. Algunas de esas están basadas en
16 llamadas telefónicas a conocidos, si mal no
17 recuerdo a Cape Town y a la ciudad de México.
18 Esos mismos peritos de transporte llegan a
19 conclusiones legales sin ser abogados y a veces
20 basados en sus (feelings), fue si mal no
21 recuerdo, la palabra que utilizó el doctor Hook
22 para explicar por qué había concurrido que

1 había existido una expropiación en este caso.
2 Dijo: "It was my feeling".

3 Las empresas tienen el índice más alto de
4 evasión porque no han tomado las medidas más
5 efectivas para combatirla. También vimos eso en
6 el contrainterrogatorio del señor Mac Allister
7 en materia de torniquetes y en materia de zonas
8 pagas. Construcción tardía en un mecanismo que
9 se reconoce como ser efectivo en la lucha
10 contra la evasión y que los demandantes tenían
11 el derecho bajo el contrato de pedir la
12 construcción de zona paga. No han podido
13 acreditar que se haya rechazado ni una sola
14 solicitud de parte del Estado en construcción
15 de zona paga. Lo mejor que pueden hacer es
16 argumentar que una de las solicitudes demoró en
17 ser construida, pero lo que no cuentan es la
18 solicitud que se hizo para la construcción de
19 esa zona paga estaba acompañada de una serie de
20 otras solicitudes que el DTPM estaba también
21 atendiendo al mismo tiempo para darle
22 justamente atención a las solicitudes de los

1 demandantes en varios aspectos y no únicamente
2 en construcción de zona paga.

3 Último punto sobre evasión. Según BRT
4 Transconsult, dijeron que una empresa
5 normalmente incluiría en su business plan las
6 proyecciones de evasión. Lo que sorprende en
7 este caso no es únicamente que no haya una
8 proyección de reducción de evasión, sino que ni
9 siquiera tenemos un business plan que refleje
10 cuál haya sido, -- cuál hubiese sido esa
11 proyección de evasión por parte de las
12 empresas. Y aquí volvemos al 9 por ciento. Es
13 que simplemente no existe ningún fundamento
14 para argumentar que la expectativa en este caso
15 era que el Estado iba a garantizar una
16 reducción de la evasión al 9 por ciento. El
17 Plan Maestro -- pese al intento del señor
18 Bofill, que es un intento tardío además y
19 también inútil de dotar al Plan Maestro de un
20 carácter de obligatoriedad legal que no tiene,
21 lo cierto sigue siendo que bajo derecho chileno
22 por las razones que expuso Chile en su dúplica

1 no tiene ese carácter obligatorio, y la prueba
2 es muy amplia, es prueba documental, es prueba
3 legal basado en el verdadero carácter de ese
4 plan. Siguen insistiendo en el tema de que es
5 un acto administrativo. Chile ha demostrado que
6 el acto administrativo no impone esa obligación
7 que ellos pretenden darle simplemente por
8 tildarlo de acto administrativo, que nosotros
9 decimos no es tal, es un acto de gobierno. Pero
10 aun siendo un acto administrativo, eso no
11 significa automáticamente que se constituye en
12 una obligación legal del Estado de entregar
13 todas las obras contenidas en ese Plan Maestro.

14 Y llama la atención además que ese Plan
15 Maestro que ellos dicen que es tan importante y
16 que constituía la base de las expectativas
17 legítimas de los inversionistas cuando firmaron
18 el contrato, el señor Hook -- perdón el doctor
19 Hook, recordarán dijo que cuando pidió el Plan
20 Maestro, no lo podían encontrar en la empresa.
21 ¿Tomó tiempo encontrar el Plan Maestro que
22 supuestamente era la base de las expectativas

1 legítimas para una inversión de cientos de
2 millones de dólares? Simplemente no es creíble
3 que los demandantes cuando firmaron los
4 contratos pensaban que el Estado se estaba
5 obligando, obligación legal, a construir todas
6 las obras de infraestructura a cabalidad
7 contempladas en ese Plan Maestro.

8 Y nuevamente, si la ejecución de esas obras
9 de infraestructura era crítica para Alsacia y
10 Express, lo razonable, cualquier inversionista
11 razonable, hubiese sido incorporar esa
12 obligación en los contratos, de nuevo, máxime
13 que existía esa cláusula 10.3 en el contrato
14 que dice que lo que no está en el contrato no
15 obliga a las partes. Pero no lo hicieron, no
16 hay nada en el contrato que hable del Plan
17 Maestro, salvo la disposición a la que me
18 referí hace unos minutos que le permite a los
19 operadores solicitar la construcción de zonas
20 pagas. Y esa es la única parte en la cual se
21 menciona el Plan Maestro en relación con zonas
22 pagas en el contrato. Y como he dicho no existe

1 evidencia que el Estado haya denegado ninguna
2 solicitud de construcción de zona paga
3 realizada por los demandantes.

4 Última observación sobre el Plan Maestro. Y
5 es otra observación que hizo el doctor Hook. Y
6 dijo que él no podía opinar sobre el carácter
7 legal del Plan Maestro, reconociendo que no es
8 abogado, pero dijo que salvo ese documento no
9 hay ningún otro documento sobre el cual puedan
10 estar basadas las expectativas de los
11 operadores de la construcción de la
12 infraestructura. Eso es algo que dijo el doctor
13 Hook. Y reconoce que no hay ningún otro
14 documento en el cual se pueda basar esas
15 expectativas, y eso como parte del
16 conainterrogatorio del doctor Hook.

17 Y en todo caso, como ha demostrado Chile,
18 existe en este caso amplia prueba sobre las
19 mejoras e inversiones realizadas por Chile en
20 esta materia.

21 Voy a pasar rápidamente a -- voy a tener que
22 saltarme algunos temas para permitir que mis

1 colegas aborden los -- sus temas. Quiero quizás
 2 únicamente hacer observación sobre flota, muy
 3 brevemente, para mencionar que primero BRT
 4 admite que hasta el 2013 el tema de déficit de
 5 flota no era tal. Pero aun durante ese periodo
 6 los operadores eran los peores en el sistema
 7 cuando no alegaban que tenían déficit de flota.

8 Hemos hablado del tema del fin de semana que
 9 incluso con menos exigencias, con el doble de
 10 la flota, no pueden operar. Observación breve
 11 sobre declaración del señor Mac Allister en
 12 conainterrogatorio, donde por fin aborda el
 13 tema del mantenimiento durante el fin de
 14 semana, y mientras que en su segunda
 15 declaración había sugerido que la mitad de la
 16 flota que estaba en mantenimiento, es decir,
 17 mil buses estaban en mantenimiento durante el
 18 fin de semana y que por eso no podían cumplir
 19 con los planes de operaciones más relajados en
 20 el conainterrogatorio admitió que no era
 21 cierto. Dijo que a lo sumo podría haber 800
 22 buses, después dijo 400 buses. Y aun 400 es una

1 afirmación que simplemente no está demostrada.
 2 No hay ninguna prueba documental que acredite
 3 que hay 400 buses que están siendo mantenidos o
 4 reparados durante los fines de semana.

5 Dos observaciones más sobre flota. Y la
 6 primera es la flota auxiliar. Si realmente los
 7 demandantes creían que el déficit de flota en
 8 el 2016 era lo que le causaba la imposibilidad
 9 de cumplir con sus propios planes de operación,
 10 la solución estaba a su alcance: podían
 11 aumentar la flota auxiliar, tenían el derecho
 12 de hacerlo bajo el contrato. Nada impedía que
 13 adquirieran esa flota adicional. No lo hicieron
 14 porque no querían pagar la flota adicional
 15 auxiliar. Querían que el Estado les financiara
 16 y que el Estado corrigiera los errores de mala
 17 administración de flota que tenía esa flota
 18 antigua que no estaba recibiendo el
 19 mantenimiento adecuado. No es racional que un
 20 inversionista que está alegando haber perdido
 21 cientos de millones de dólares por no tener
 22 flota, no haya hecho una inversión de unos

1 cuantos millones de dólares para tener la flota
 2 que supuestamente era la causante de su mal
 3 desempeño.

4 Con esto voy a saltarme lo demás y haciendo
 5 la última observación, 30 segundos para decir:
 6 el estándar legal aplicable. Lo he dicho antes,
 7 pero quiero reafirmarlo porque la estrategia de
 8 los demandantes a través de este arbitraje y
 9 esta audiencia no ha sido la excepción, ha sido
 10 perderse en el detalle para distraer quizás la
 11 atención de lo que es fundamental y es que el
 12 estándar legal aplicable en este caso merece
 13 mucha más atención de lo que le han dado porque
 14 saben que no tiene ninguna posibilidad de
 15 demostrar que las conductas del Estado en este
 16 caso violan ese estándar internacional alto
 17 bajo derecho internacional.

18 Y con eso le cedo la palabra a mi colega
 19 Gaela Gehring.

20 SEÑORA GEHRING FLORES: Gracias.

21 Los demandantes le solicitan al Tribunal que
 22 condene a Chile al pago de 355 millones de

1 dólares. Como explicamos durante los alegatos
 2 de apertura, aun si este Tribunal determina que
 3 tiene jurisdicción y que Chile ha violado sus
 4 obligaciones bajo el Tratado, existe un
 5 obstáculo importante para que los demandantes
 6 puedan ser compensados. Los expertos en daños
 7 de los demandantes lo reconocen, y de hecho lo
 8 explicaron ayer, cuando dijeron: "If the value
 9 of the company falls below the debt, there is
 10 nothing left for the shareholders."

11 En el transcurso de la audiencia el Tribunal
 12 pudo ver cómo Alsacia aumentó su nivel de deuda
 13 en 137 millones de dólares en el año 2011
 14 mediante la emisión de un bono por 646 millones
 15 de dólares. También quedó demostrado que cuando
 16 Alsacia emitió el bono, los demandantes sabían
 17 que vendría una modificación de los contratos
 18 de concesiones entonces existentes. Y hemos
 19 visto además que la mayor parte de la deuda
 20 adicional incurrida por Alsacia fue utilizada
 21 para pagar gastos asociados a la transacción
 22 por aproximadamente 20 millones de dólares, y

1 80 millones de dólares fueron cedidos en
 2 calidad de un préstamo a otra empresa de los
 3 demandantes para que estas adquirieran a
 4 Express, préstamo que nunca fue pagado a
 5 Alsacia.

6 Existen diferencias críticas entre los
 7 expertos sobre los insumos con los que se
 8 construye el escenario but-for y sobre lo que
 9 eso significa para los demandantes. Los
 10 demandantes sugieren que tendrían derecho a 335
 11 millones de dólares en daños, y en realidad una
 12 vez se corrigen los supuestos sobre los que los
 13 expertos de los demandantes construyeron su
 14 escenario but-for, los demandantes no tienen
 15 derecho a indemnización alguna.

16 Ayer los expertos en daños de los
 17 demandantes dijeron que para realizar su modelo
 18 de daños, y cito: We have taken the operating
 19 data and the formulas in the contract. Sin
 20 embargo, hoy quedó claro que los expertos de
 21 los demandantes construyen su escenario but-for
 22 no mediante la exclusión de los efectos de las

1 posibles violaciones, sino en base en un
 2 escenario mejor que el but-for, un escenario
 3 que contempla perfección en índices de
 4 operaciones, el ICR, el ICF, el ICT. Cien por
 5 ciento efectividad en la lucha contra la
 6 evasión y un contrato que no existe. Ese punto
 7 amerita una pausa. El mundo but-for por todo lo
 8 que hace no puede borrar el contrato que rige
 9 las concesiones. Y eso es lo que están haciendo
 10 los demandantes especialmente con su invención
 11 de los créditos por esfuerzos propios.

12 Los nuevos contratos contemplan ajustes del
 13 PPT en el marco de los procesos de revisión
 14 programada, sin embargo, las causales son
 15 taxativas: se establecen en la cláusula 5.2.2
 16 de los nuevos contratos y no incluyen el tipo
 17 de ajuste por el que los demandantes reclaman.

18 Para responder a una pregunta del profesor
 19 Garibaldi sobre el supuesto 50/50 split de
 20 créditos de evasión, ese concepto simplemente
 21 no existe en los contratos. Les ruego revisar
 22 con detenimiento toda la cláusula 5 de los

1 nuevos contratos. No van a encontrar ni una
 2 referencia a esa invención de los demandantes
 3 de un 50/50 split, menos la idea de que el
 4 concesionario recibiera un bono cuando el IPK
 5 ha bajado. Los demandantes y sus expertos
 6 incluyen flujos que deriven un supuesto
 7 reconocimiento de esfuerzos en la lucha contra
 8 la evasión en el escenario but-for, y esos
 9 flujos representan 115 millones de dólares en
 10 daños. No se puede otorgar tanto dinero en
 11 daños en base a lo que los demandantes hubiesen
 12 querido que establecieran los nuevos contratos,
 13 o a como consideran hubiesen sido una mejor
 14 manera de incentivar la lucha contra la
 15 evasión. Aun el escenario but-for tiene límite.

16 Los expertos de los demandantes en
 17 lugar de hacer un análisis independiente
 18 se contentan con basar los conceptos que
 19 afectan de manera más significativa su
 20 modelo de daños en instrucciones recibidas
 21 de los abogados de los demandantes, o
 22 instrucciones de otros expertos, como los

1 expertos BRT Transconsult de ser posible.
 2 Escuchamos cómo Brattle explicó lo
 3 siguiente, y cito: "we have been
 4 instructed that the time bar does not
 5 apply here and we should be looking at
 6 cashflows right away". Cito: "We also have
 7 different assumptions on whether the
 8 companies should be allowed a PPT credit
 9 for their work in reducing fare evasions.
 10 We have an instruction to assume
 11 50 per cent credit for their own efforts".
 12 Cito: "The indicators we have used are
 13 99.7 ICT and no discounts from ICR and
 14 ICF, which is a legal instruction we got
 15 based on the transport experts' report".
 16 Cito: "We have used pre-judgment interest
 17 at 8 per cent, an instruction reflecting
 18 Alsacia and Express's costs of borrowing."

19 En sus reportes también replican esas
 20 instrucciones y otras.

21 Miembros del Tribunal: esto no es una
 22 demanda seria, es abusiva y se debe
 23 rechazar en su totalidad.

1 Y cedo el micrófono a mi colega Paolo
2 Di Rosa.

3 SEÑOR DI ROSA: Señora presidenta,
4 entiendo que los demandantes se excedieron
5 unos minutos en sus presentaciones. En
6 todo caso, voy a ser muy, muy breve. Voy a
7 tratar muy brevemente el tema
8 jurisdiccional y luego unas observaciones
9 finales.

10 Con respecto a la objeción
11 jurisdiccional sobre prescripción, nos
12 extendimos mucho en la entrevista -- en el
13 conainterrogatorio con el señor Ríos
14 precisamente porque considerábamos
15 importante que él confirme muchas de las
16 cosas que dijo en el artículo. Y lo hizo y
17 entonces no voy a extenderme más en eso
18 ahora, lo vamos a hacer quizás en el
19 escrito de postaudiencia. Lo que sí quiero
20 resaltar es que el señor Ríos dijo que no
21 recordaba si la entrevista con El Mercurio
22 había sido oral, pero el artículo
23 expresamente indica que las respuestas del

1 señor Ríos fueron enviadas desde, y cito,
2 "desde Colombia por escrito". Es el anexo
3 R-375 primera columna, quinto párrafo.
4 Esto sugiere que el artículo contiene una
5 transcripción directa de respuestas
6 escritas enviadas por el señor Ríos al
7 periodista. En todo caso, en la medida en
8 que existían dudas sobre la precisión del
9 artículo, confirmó el señor Ríos en esta
10 audiencia, el contenido de esa entrevista
11 en El Mercurio.

12 Pasamos ahora a unas breves
13 observaciones finales. Exhortamos
14 nuevamente al Tribunal, tal como lo
15 hicimos en nuestro alegato de apertura, a
16 tomar un paso atrás y evaluar este caso a
17 nivel macro. Una pregunta que cabe hacer
18 es si pueden razonablemente los
19 integrantes del Tribunal concluir que los
20 testigos de Chile que (vieron) esta semana
21 que son ex funcionarios del MTT y DTPM
22 actuaron en forma irracional, mezquina,
23 maliciosa, discriminatoria, desrazonable o

1 arbitraria contra las empresas de los
2 demandantes.

3 Otra pregunta pertinente y que sigue
4 sin respuesta es: ¿qué incentivo o
5 motivación habrían teniendo esos
6 funcionarios del MTT y del DTPM para
7 maltratar a las empresas de los
8 demandantes o discriminar contra ellas? No
9 obstante que en nuestro alegato de
10 apertura habíamos identificado esto como
11 una laguna importante, que hace poco
12 creíble su historia, ni los testigos ni
13 los abogados de los demandantes abordaron
14 este tema durante la audiencia.

15 Todo lo que el Estado de Chile hizo en
16 materia de Transantiago en lo que afecta a
17 los demandantes fue razonable y
18 justificable dentro de sus posibilidades y
19 sus recursos. Con respecto a la evasión o
20 cualquiera de los otros temas que hemos
21 Tratado en este arbitraje, la cuestión no
22 es si el Estado pudo haber hecho más; la
23 cuestión es si el Tratado exigía que el

1 Estado hiciera más.

2 Y en este caso no es así por dos
3 motivos, con la articulación de los cuales
4 cerramos nuestra presentación. Primero,
5 porque los criterios del Tratado no
6 exigían más de lo que el Estado
7 razonablemente hizo dentro de sus
8 posibilidades y en vista de sus
9 limitaciones de recursos. Dentro de lo que
10 permitía su presupuesto, Chile hizo
11 muchísimo para apoyar al Transantiago y a
12 sus operadoras, por ejemplo, por medio de
13 subsidios y de aquellas obras e
14 iniciativas que sí emprendió. El segundo
15 motivo es que la vara que se debe utilizar
16 para evaluar la conducta de los
17 funcionarios chilenos y del Estado de
18 Chile en general no requiere más que la
19 conducta haya sido racional y que no haya
20 sido arbitraria o discriminatoria. Como
21 bien lo manifestó el Tribunal en el caso
22 AES contra Hungría, el estándar aplicable
23 a los Estados bajos los tratados de

1 inversión no es un estándar de perfección.

2 La cuestión entonces es si el Tribunal
3 considera que debe punir a Chile mediante
4 una declaración de responsabilidad y una
5 indemnización. En ese caso, el Tribunal
6 estaría censurando la labor realizada por
7 los funcionarios de Chile que declararon
8 esta semana ante el Tribunal y a la vez
9 premiando a los demandantes, que han
10 administrado a Alsacia y Express de una
11 forma imprudente y riesgosa, que han
12 actuado siempre exclusivamente en
13 beneficio propio y en desmedro de otros.
14 Los testigos y la prueba documental
15 demuestran las numerosas medidas que los
16 demandantes adoptaron en detrimento de los
17 usuarios del Transantiago y de las propias
18 empresas, y en beneficio de los propios
19 demandantes. Más aún, el señor Ríos le
20 confesó al Tribunal el viernes pasado sin
21 remilgo alguno que no tiene la más mínima
22 intención de pagarle a los bonistas de
23 Alsacia si este Tribunal llegase a

1 brindarle a las demandantes una
2 indemnización en este arbitraje. Ello
3 significa que los demandantes buscan
4 recibir una indemnización de cientos de
5 millones de dólares a costo de los
6 bonistas de Alsacia, pero más que nada a
7 costa de los contribuyentes chilenos, de
8 la ciudadanía de un país que tiene
9 recursos limitados, pero que hace mucho
10 con lo que sí tiene. Y ese, señora
11 presidenta y estimados miembros del
12 Tribunal, sería un resultado deplorable.
13 Porque este no es el tipo de situaciones
14 para los cuales fueron diseñados estos
15 tratados de protección de inversión y
16 porque en definitiva este no es el tipo de
17 conducta estatal que merece ser
18 caracterizado como un incumplimiento del
19 derecho internacional.

20 Con eso cerramos nuestra presentación,
21 señora presidenta y miembros del Tribunal.
22 Gracias.

23 PRESIDENTA KAUFMANN-KOHLER: Gracias

1 a ustedes, gracias a los abogados de los
2 demandantes también. Propongo que tomemos
3 cinco minutos antes de abordar los temas
4 procesales. No durará mucho, pero sería
5 agradable hacer una pequeña pausa y
6 también para los estenógrafos.

7 (Pausa para el café.)

8 PRESIDENTA KAUFMANN-KOHLER: Gracias a
9 ustedes, gracias a los abogados de los
10 demandantes también. Propongo que tomemos cinco
11 minutos antes de abordar los temas procesales.
12 No durará mucho, pero sería agradable hacer una
13 pequeña pausa y también para los estenógrafos.

14 (Pausa para el café.)

15 ASUNTOS DE PROCEDIMIENTO

16 PRESIDENTA KAUFMANN-KOHLER: Sí, ahora bien
17 llegamos al final de la audiencia que siempre
18 es un momento agradable.

19 El Tribunal quiere hacer algunas sugerencias
20 respecto a las etapas siguientes del
21 procedimiento.

22 Primero, esto resulta de la Resolución

1 Procesal 1, dentro de dos semanas, es decir el
2 30 de abril, las partes tratarán de acordar
3 cualquier corrección a las transcripciones. Y
4 al mismo tiempo, podrían hacer indicaciones de
5 pasajes confidenciales en la grabación y en la
6 transcripción también.

7 Segundo paso, al mismo tiempo, es decir
8 hasta el 30 de abril, los demandantes tendrán
9 la oportunidad de someter documentos de
10 respuesta a la carta de Alsacia al DTPM del 30
11 de enero de 2019 y el anexo. Y después las dos
12 partes podrán hacer comentarios sobre la carta
13 y el anexo y posibles documentos de respuestas
14 en sus escritos post audiencia.

15 Tercer paso, el tema de la confidencialidad
16 que se planteó durante el día de hoy de ciertas
17 informaciones presuntamente protegidas. ¿Podría
18 hacer la demandada una solicitud de
19 confidencialidad indicando los motivos de la
20 confidencialidad y los pasajes precisos que
21 serían protegidos? Dentro -- posiblemente el
22 mismo plazo de dos semanas hasta el 30 de

1 abril.

2 Y en otras -- en las dos semanas siguientes

3 podrán responder los demandantes. Y después, si

4 todavía hay una divergencia de vista, el

5 Tribunal la resolverá y podremos publicar las

6 transcripciones.

7 El paso siguiente serían los escritos post

8 audiencia. Habíamos dejado abierta la necesidad

9 de escritos post audiencia, pero nos parece

10 considerando la complejidad del caso, y también

11 la cantidad testimonio y especialmente de

12 pruebas de expertos, que nos ayudaría tener

13 escritos post audiencia.

14 El objetivo no es repetir los memoriales

15 anteriores que son muy profundizados, pero más

16 destacar los aspectos importantes de pruebas

17 testimoniales aportadas esta semana y ponerlas

18 en el contexto del caso y de la posición de

19 cada parte.

20 Respecto del contenido, además, el Tribunal

21 posiblemente formulará algunas preguntas por

22 escrito, como lo mencioné ayer, lo más tarde la

1 semana próxima. Tenemos que - (hacer) una

2 conversación, creo.

3 También nos parece que no necesitamos

4 exposiciones muy extensas. Sería útil tener más

5 memoriales concisos, que no significa que no

6 van a ser efectivos. Y hemos pensado en algo

7 como 80 páginas, o 35, 40.000 palabras. Algo en

8 este rango.

9 Tenemos en mente un solo memorial por cada

10 parte y los memoriales sometidos

11 simultáneamente. El plazo -- el plazo es su

12 elección. Pensamos en 4, 6 semanas algo así.

13 Pero no sé, posiblemente ya lo han conversado.

14 Después de los memoriales post audiencias no

15 podemos excluir en este momento que el Tribunal

16 tendrá solicitudes de informaciones

17 adicionales, pero incluso a los expertos de

18 daños, como lo hemos discutido con ellos hoy,

19 invitándole a proporcionar respuestas, si es

20 posible conjuntas, a ciertos escenarios

21 específicos de daño que el Tribunal daría.

22 Pero salvo que se realice esta necesidad de

1 información complementaria, el Tribunal después

2 procedería con la preparación del Laudo. Es

3 difícil decir ahora -- de dar una indicación de

4 tiempo. Saben que el caso es complejo e

5 intensivo en términos de hechos y de peritaje

6 especialmente. Pero lo que haremos es dar una

7 indicación de nuestro progreso de manera

8 regular, posiblemente la primera vez dos meses

9 después de los escritos post audiencia. En este

10 momento tendremos una idea más clara del tiempo

11 necesario.

12 Hay una etapa más, que es después de los

13 escritos post audiencia. Las partes someterán

14 las declaraciones de costos y los términos ya

15 los hemos descrito en el párrafo 40 de la

16 Resolución Procesal 8, así que no voy a

17 repetirlo.

18 Estas son las propuestas del Tribunal. No sé

19 si necesitan un tiempo para consultarse con sus

20 equipos o si quieren reaccionar inmediatamente.

21 SEÑOR SILVA ROMERO: Gracias, señora

22 presidenta y miembros del Tribunal.

1 Lo único quizás que hay que comentar es el

2 tema de los plazos por parte nuestra -- de

3 resto estamos de acuerdo con lo que acaba de

4 exponer. Para ser totalmente fidedigno,

5 habíamos conversado en el doctor Di Rosa hace

6 un rato y la propuesta que habíamos hecho

7 nosotros en cuanto al posthearing brief era de

8 75 páginas, pero bueno, entre 75 y 80 no hay

9 ninguna diferencia. Y el plazo que había

10 propuesto esta parte era hacia el 15 de junio

11 para el alegato de post audiencia.

12 SEÑOR DI ROSA: Señora presidenta: nosotros

13 estamos en general de acuerdo con eso. Habíamos

14 acordado 75 páginas, quizás podamos acordar un

15 número preciso de palabras y se lo comunicamos.

16 (Pausa.)

17 PRESIDENTA KAUFMANN-KOHLER: ¿Qué más?

18 ¿Estamos de acuerdo sobre 75 páginas 15 de

19 junio y los otros términos que describí hace un

20 momento?

21 SEÑOR DI ROSA: Sí, señora presidenta. Una

22 sola precisión que es que nosotros

1 propondríamos que aparte de las respuestas de
2 las demandantes a estos nuevos documentos, que
3 por cierto no se han presentado todavía al
4 expediente que yo sepa, y lo vamos a hacer
5 inmediatamente.

6 PRESIDENTA KAUFMANN-KOHLER: Ah, lo
7 siento. Pensaba que ya estaba.

8 SEÑOR DI ROSA: No se había hecho todavía,
9 no se le había asignado un exhibit number, pero
10 lo que sí propondríamos es que aparte de eso,
11 no haya ningún nuevo -- que no haya nuevos
12 anexos con los posthearing brief.

13 PRESIDENTA KAUFMANN-KOHLER: Sí, no lo
14 dije, pero era implícito y estará explícito en
15 la Resolución Procesal postaudiencia.

16 ¿Hay otras preguntas -- Sí, yo tengo otro
17 comentario. Si pueden subir al box todas las
18 presentaciones de los alegatos y también las
19 presentaciones de peritos.

20 ¿No hay nada más de mis coárbitros? ¿No?
21 Entonces, ¿tienen las partes preguntas,
22 comentarios, quejas? (Risas.) Es el momento

1 para quejarse.

2 SEÑOR SILVA ROMERO: Ninguna queja, señora
3 presidenta.

4 Y simplemente aprovechar este momento para
5 agradecerle al Tribunal la paciencia, la
6 dedicación y también agradecerle a la
7 contraparte el buen ambiente durante esta
8 audiencia.

9 PRESIDENTA KAUFMANN-KOHLER: Gracias.

10 SEÑOR DI ROSA: Igual de nuestra parte,
11 señora presidenta, queremos agradecer mucho al
12 Tribunal, a Mercedes, a los traductores y
13 estenógrafos y a la contraparte también. A
14 pesar del estrecho espacio que hemos tenido
15 creo que ha sido relativamente civilizada la
16 audiencia.

17 PRESIDENTA KAUFMANN-KOHLER: Civilizada,
18 sí. (Risas.)

19 (Pausa.)

20 PRESIDENTA KAUFMANN-KOHLER: Bien. Ahora
21 queda para mí agradecer la colaboración de
22 todos, una colaboración amable y eficaz al

1 mismo tiempo. Agradezco especialmente la
2 colaboración de los intérpretes, de los
3 estenógrafos. También la conducta muy
4 profesional de los debates escritos y orales
5 por los abogados y sus equipos de ambas partes.
6 Es un verdadero placer trabajar con abogados y
7 equipos de este nivel. Y agradezco también la
8 asistencia de los testigos y expertos y la
9 presencia de los representantes de las partes.

10 Y con eso puedo cerrar esta audiencia y
11 desear a todos un buen viaje, un poco de
12 descanso. Gracias.

13 (Es la hora 19:03)

1 CERTIFICADO DEL ESTENOTIPISTA DEL TRIBUNAL

2
3 Quien suscribe, Paul Pelissier, Taquígrafo
4 Parlamentario, estenógrafo del Tribunal, dejo
5 constancia por el presente de que las
6 actuaciones precedentes fueron registradas
7 estenográficamente por mí y luego transcritas
8 mediante transcripción asistida por computadora
9 bajo mi dirección y supervisión y que la
10 transcripción precedente es un registro fiel y
11 exacto de las actuaciones.

12 Asimismo dejo constancia de que no soy
13 asesor letrado, empleado ni estoy vinculado a
14 ninguna de las partes involucradas en este
15 procedimiento, como tampoco tengo intereses
16 financieros o de otro tipo en el resultado de la
17 diferencia planteada entre las partes.

18
19 Paul Pelissier, Taquígrafo Parlamentario
20 D-R Esteno

21