PCA CASE No. 2019-46

IN THE MATTER OF AN ARBITRATION
BEFORE A TRIBUNAL CONSTITUTED IN ACCORDANCE WITH THE
TRADE PROMOTION AGREEMENT BETWEEN THE REPUBLIC OF PERÚ AND
THE UNITED STATES OF AMERICA
- and -
THE UNCITRAL ARBITRATION RULES 2013

- -x
In the Matter of Arbitration Between: :
:
THE RENCO GROUP, INC., :
:
Claimant, :
:
and :
:
THE REPUBLIC OF PERÚ, :
:
Respondent. :
- -x

PCA CASE No. 2019-47

IN THE MATTER OF AN ARBITRATION
BEFORE A TRIBUNAL CONSTITUTED IN ACCORDANCE WITH THE CONTRACT OF STOCK TRANSFER BETWEEN EMPRESA MINERA DEL CENTRO DEL PERU S.A. AND DOE RUN PERU S.R. LTDA, DOE RUN RESOURCES, AND RENCO, DATED 23 OCTOBER 1997, AND THE GUARANTY AGREEMENT BETWEEN PERU AND DOE RUN PERU S.R. LTDA, DATED 21 NOVEMBER 1997
- and -
THE UNCITRAL ARBITRATION RULES 2013

- -x
In the Matter of Arbitration Between: :
: :
1. THE RENCO GROUP, INC. :
2. DOE RUN RESOURCES, CORP. :
: :
Claimants, :
: :
and :
: :
1. THE REPUBLIC OF PERÚ :
2. ACTIVOS MINEROS S.A.C. :
: :
Respondent. :
- -x

VIDEOCONFERENCE HEARING ON ARTICLE 10.20.5 OBJECTIONS AND BIFURCATION, Volume 1
Friday, June 12, 2020

The hearing in the above-entitled matters convened at 9:12 UTC-4 (Washington, D.C.) before:

JUDGE BRUNO SIMMA, President of the Tribunal

DR. HORACIO GRIGERA NAÓN, Co-Arbitrator

MR. J. CHRISTOPHER THOMAS QC, Co-Arbitrator

ALSO PRESENT:

Registry, Permanent Court of Arbitration:

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Secretary of the Tribunal

MS. ISABELLA URÍA, Assistant Legal Counsel

Assistant to the Tribunal:

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C O N T E N T S

P R O C E E D I N G S

PRESIDENT SIMMA: Good morning, everybody, or good afternoon. Welcome to this Hearing on Preliminary Objections in the Treaty Case at the beginning.

May I just start with two provisos. The first one, you will notice that I am wearing a tie, of course, but not a jacket. This has to do with the fact that here in Munich the temperature is around 30 degrees Celsius, and my office is in full sunlight, so I hope you will bear with me. And of course, the great thing about videoconferencing is that any one of you can pretend that it is also very hot where you are and get rid of some superfluous whatever piece you're wearing, okay, so that's fine with me, of course.

Secondly, this Hearing is being webcast live, but there will be a short broadcasting delay in case anyone refers to things that are confidential, and that's why a little pause will then come in, and--well, we don't expect that to happen, but just in case, you know...

If counsel have checked that all their members are connected, which seems to be the case, let's have another introduction because we are not really all the same people here; there are some people missing. It's good to know who is here and who is not here.

I start with the Tribunal. Well, here we are.

Professor Horacio Grigera Naón, Chris Thomas, myself. There is Martin somewhere, there is Heiner Kahlert.

And, Martin, will you please just introduce all the other names of the people serving this Hearing?

SECRETARY DOE: Yes, certainly.

Also on the line we have my colleague Isabella Uría, Assistant Legal Counsel at the PCA; and Alejandra Martinovic, Case Manager at the PCA; and our Interpreters today are Sylvia Colla and Daniel Giglio, and Court Reporters we have David Kasdan, Dante Rinaldi, Leandro Iezzi, and Luciana Sosa.

And then we also have our friends from Law In Order supporting this Hearing and the Webcast that we are currently doing.

PRESIDENT SIMMA: Thank you.

Are there any problems with regards to the Hearing Schedule that we received from Martin?

May I ask Respondent?

MR. HAMILTON: Thank you very much, Mr. President, Members of the Tribunal.

I might add a technical note. For some reason, our connection from White & Case in Washington was disconnected when we went into the main session, and so we only this moment have been connected, but we've been reading the transcript of the initial comments by the

President.

We have no comment on the Agenda at this time. Thank you.

PRESIDENT SIMMA: And now you are fine; right? You are connected and everything? Okay.

MR. HAMILTON: Correct.

PRESIDENT SIMMA: Mr. Kehoe?

MR. KEHOE: Yes, good morning, Mr. President and Members of the Tribunal, Martin, everyone else.

We have no comments to the Schedule. We're ready to proceed.

PRESIDENT SIMMA: Okay. Would you please just state and introduce the members of your team present.

Mr. Kehoe, why don't you start?

MR. KEHOE: Sure. Thank you.

So, first is Joshua Weiss. I'm looking for him on the screen. And Mr. Weiss is the Head of Litigation and Arbitration for The Renco Group, the Claimant in this case.

We have David Weiss out of King & Spalding's Houston office. He raised his hand in the lower-right corner.

We have Isabel Fernández de la Cuesta; she's with me in New York.

We have Louie Llamzon in the D.C. office; Louie's

shaking his head up and down.

Helena Formoso from our Houston office.

And then Luisa Gutiérrez, also from our Houston office.

PRESIDENT SIMMA: Thank you very much.

Mr. Hamilton for the Respondent.

MR. HAMILTON: Thank you very much, Mr. President. Good afternoon to you, good morning to the other Members of the Tribunal who may be on the other side of the ocean.

For Respondent, I'm Jonathan Hamilton of White & Case in Washington, D.C., where I'm joined by Francisco Jijón and Jonathan Ulrich.

We're also joined by Andrea Menaker in London and Estephanía San Juan in Miami.

In addition, we are joined by two representatives of the Special Commission for the Defense of the Peruvian State, Mr. Ricardo Ampuero and Shane Martínez, each of them connecting from Lima.

Thank you.

PRESIDENT SIMMA: Thank you very much.

With regard to the hearing schedule, I think everybody knows that today we'll have Opening Statements on each side on the Treaty Case. Tomorrow we'll have the rebuttal on the Treaty Case and short hearings or Parties'

arguments on the bifurcation in the Contract Case. Of course, the Parties are free within their time modules to spend the time on topics at their discretion. There will be the time monitored by the PCA.

We have a number of questions that are called "etiquette." I already mentioned, yes, tie yes, jacket no, but the rest, Martin, could you take care of the other etiquette issues, please?

SECRETARY DOE: Sure.

As we've discussed previously, we'd ask, in order to just keep the grid small and keep people visible, to have only the members of each side who are actively participating or making a presentation have their audio and video on at any given moment in time, alongside the three Members of the Tribunal there.

And then I think the drill on the technical side we've already covered previously. Please let us know if there are any incidents off-line, and we'll try to deal with them as quickly as we can.

I think that's it.

PRESIDENT SIMMA: Thank you, Martin.

So, any question by a Party on anything procedural before we give the floor to Respondent?

Mr. Hamilton?

MR. HAMILTON: No, Mr. President. Thank you.

PRESIDENT SIMMA: Mr. Kehoe?

(No response.)

PRESIDENT SIMMA: Mr. Kehoe, just whether there is any procedural or other matters that you want to raise before we start.

MR. KEHOE: I am very sorry. My mouse was accidentally up on the Transcript for some reason, and I couldn't get it down, but no, I have no other comment to make before we start.

PRESIDENT SIMMA: Okay. Thank you very much. I think we are ready.

And I give the floor to Respondent for its Opening Statement, and I believe Mr. Hamilton will start.

Mr. Hamilton, you have the floor, sir.

MR. HAMILTON: Thank you very much, Mr. President.

We will take a moment before we begin to project the presentation.

PRESIDENT SIMMA: Okay.

MR. HAMILTON: And just for avoidance of doubt, Mr. President, are you able to see our presentation as well?

PRESIDENT SIMMA: Yes.

MR. HAMILTON: Thank you very much.

PRESIDENT SIMMA: And I note that you also have

the same presentation attached to your last e-mail; right?

MR. HAMILTON: That's correct, Mr. President.

PRESIDENT SIMMA: Thank you.

(Pause.)

MR. HAMILTON: Just a final moment for a technical matter. Thank you.

(Pause.)

OPENING STATEMENT BY COUNSEL FOR RESPONDENTS

MR. HAMILTON: Mr. President, Members of the Tribunal, good morning. As I mentioned, I'm Jonathan Hamilton of White & Case.

I'm joined today in our Opening Statement by my partner, Andrea Menaker, in connection with these cases arising out of the La Oroya Metallurgical Facility in Peru.

There are two issues and petitions that will be heard by this Tribunal today and tomorrow, and I will briefly summarize. Today we will hear preliminary objections arising under the Peru-U.S. Trade Promotion Agreement, and the Republic of Peru has demonstrated Renco's failure to comply with the Treaty's temporal restrictions. Those include a non-retroactivity requirement and a prescription requirement which we will explain in detail.

Peru did not consent to arbitrate such claims,

and the Treaty mandates dismissal of the Claims and the case.

Tomorrow, we will discuss the parallel case arising under contract and the issue of bifurcation of that proceeding so that we can appropriately focus on threshold contractual issues related to who are the Parties to the Contract, who has consented to arbitration, and those issues will be addressed tomorrow.

At the outset, the Republic of Peru has some opening marks in Spanish.

(Overlapping interpretation with speaker.)

MR. HAMILTON: I will try again with the permission of the Tribunal.

(Pause.)

MR. HAMILTON: Mr. President, we will revert to the English language. Thank you very much and take our time into account accordingly.

Members of the Tribunal, as I stated, we have--we are here to hear objections of the Republic of Peru arising under the Peru-U.S. Treaty of 2009, as well as in connection with the proceeding related to a 1997 contract.

The Treaty has an objective to promote private investment between the United States and Peru. It also provides, among other things, for other objectives, including the promotion of development, the reduction of

poverty, the protection of labor rights, as well as the protection and conservation of the environment. These objectives align with the policies, laws, and conduct of the Republic in connection with these matters.

La Oroya is a town in the Andes in central Peru where Renco acquired a metallurgical complex through subsidiaries, the local entity being called Doe Run Peru, pursuant to a contract in 1997. And from years before the entry into force of the Treaty, the antecedence and core facts and issues of this dispute were already joined.

In fact, from years ago, at the national and international level, there has been exceptional range of criticism of Renco for its record of environmental contamination. And as of 2007, children of La Oroya demanded broad complaints against Renco and related and entities and executives in the United States courts with serious claims related to contamination and damage to their health.

Consistent with the Treaty at each moment, Peru has looked to balance the various objectives of the Treaty, to protect investment and to protect the environment and its people. Indeed, Peru reasonably expects that Investors will respect its laws, its environment, and its people.

Peru also expects respect for the requirements of

the Peru-U.S. Treaty. The Treaty contained important conditions and limitations on the consent of Peru to arbitrate, and we will be addressing some of those key issues here today.

Next slide, please.

As a starting point, Peru liberalized its economy in the 1990s. It adopted policies and laws to facilitate development and investment. In this context, Peru set about a privatization program; and, as part of that privatization program, it included certain mining sector interests, and in particular the Metallurgical Facility of La Oroya, which was then under the auspices of Centromin, an entity today known as "Activos Mineros."

La Oroya was sold to a Renco subsidiary pursuant to a Stock Purchase Agreement in 1997 which we referred to as "the Contract." The Parties to that contract were Centromin, a Peruvian State entity, now Activos Mineros, and Doe Run Peru, a local entity. Neither Renco nor its intermediate company DRRC were or are Parties to that Contract as we will discuss in greater detail tomorrow. There was also a guarantee in place between the Republic of Peru and the same entity Doe Run Peru, again Renco and DRRC not parties to that Agreement, either.

Following various issues related to contamination at La Oroya and emissions that were affecting the

population, Peruvian children brought suit against Renco starting in 2007. The first case was filed in 2007 by 137 Peruvian citizens through next friends. These were claims in Missouri State Court, seeking recovery from defendants, the Renco and related entities and executives, for injuries and damages and losses suffered by each and every plaintiff in connection with contamination at the metallurgical complex in the region of La Oroya, Peru.

The defendants in those proceedings which have grown over time and include many more plaintiffs, Peruvian citizens, do not include the Republic of Peru as a defendant, do not include Activos Mineros as a defendant, and do not include the local Renco entity Doe Run Peru, the counter-party in the underlying contract.

So, from 2007 to today, the core elements of this dispute have been joined.

As a matter of fact, even in 2008, before the Treaty had ever entered into force, Renco recognized through a Doe Run Peru internal management review, which is in the record as R-34, that its non-compliance with environmental regulations in Peru would force the stoppage of operations in La Oroya.

So, from 1997 through 2009, when the Treaty came into force, the environmental issues were joined. The debate over the U.S. litigation was joined. In fact, Peru

had already taken an early position on that litigation, and so the core issues and really the root and seeds of what is before you, Tribunal, were all joined before the Treaty entered into force on February 1, 2009.

Renco promptly pursued a treaty claim centered on pre-Treaty issues, and its claims in Renco I, as set out in a notice of December 2010 and subsequently a Statement of Claim of April 2011 and an Amended Statement of Claim of August 2011 included treaty claims and contract claims. And the consequences of that initial case, which we referred to as "Renco I," were that all claims were dismissed, and now the treaty claims have been renewed in a different package in Renco II. The core contract claims have been renewed in the parallel Contract Case designated as Renco III.

Renco promptly used the Renco I case as a shield in the U.S. litigation. In fact, after it provided its initial notice letter but before it had even commenced arbitration, Renco ran straight to the U.S. courts in Missouri and sought removal to federal courts based on the alleged existence of an arbitration proceeding. And, as you can see in Exhibit R-23, a memorandum and order from the Federal Court in Missouri, Renco made that filing on December 29, 2010, virtually immediately after it had essentially sent its trigger letter because it was using

the Treaty Case as a shield. And, as we will see, the Treaty Case and the Contract Case are all shields to try to dump onto the backs of the Peruvian people the misconduct of Renco.

Next slide.

Peru pursued a range of objections in Renco I. They included an objection related to Renco's violation of the waiver requirement in the Treaty. Arguments about temporal violations of the Treaty and arguments about threshold contractual issues. There's no surprise and nothing that new in these objections.

The Tribunal in Renco I dismissed the case on the basis of the violation of the waiver requirement of the Treaty. The temporal issues are pending before you today based on the pleadings in Renco II. The threshold contractual issues are pending before you, Members of the Tribunal, in the case of Renco III. So, it is in your hands, Members of the Tribunal, to resolve these objections that have been raised over time by Peru, have yet to be resolved, and go to the heart of issues of consent to arbitration and the scope and structure, if there are any future proceedings of obvious cases, despite Peru's serious objections.

Now, it's important to note that Peru repeatedly insisted to be heard on its waiver objections in Renco I.

As a matter of fact, in 2011, Peru raised concerns about the scope of the mandatory waiver and the scope of the consent to arbitrate. In 2014, Peru satisfied a filing deadline, arguing that Renco continues to violate its own obligations, including the waiver condition. In 2015, Peru continued and repeatedly requested to be heard related to ongoing violations of the waiver requirement, ultimately leading to briefing and hearing on the waiver issue in 2015.

What did Renco do at the same time? Well, first of all, Renco filed its initial Statement of Claim of April 2011 with waivers that did not comply with the Treaty.

In August of 2011, when Renco refiled its Statement of Claim due to fundamental flaws in its initial filing, it withdrew a waiver as to one entity which it withdrew from the case, but it otherwise maintained its non-compliant waiver. It then repeatedly over time tried to delay and defer the right of the Republic of Peru to be heard on this issue, and repeatedly said that the issue should be heard later in this proceeding. It stated that Peru should raise its other objections in its Counter-Memorial.

So, Renco repeatedly tried to stop Peru from being heard on its waiver objection. What was the outcome

of Renco I? In a partial Award of July 2016 subsequently integrated as part of a Final Award in November of that year, the Tribunal dismissed all Claims due to Renco's breach of the Treaty requirement. The Tribunal found that Renco has failed to comply with the formal requirement of the Treaty and failed to establish the requirements for Peru's consent to arbitrate. There is no suggestion here that Renco's reservation in its waiver was inadvertent. In fact, Renco knew that it was unacceptable and insisted to maintain a waiver that was non-compliant.

The Tribunal also emphasized that Peru has sought to vindicate its right to receive a waiver; and it, therefore, concluded that Renco's claims must be dismissed.

After losing Renco I, Renco started to try again this time by dividing treaty claims and contract claims into two vehicles, the two cases this Tribunal.

The Parties reached a Framework Agreement, initially a consultation protocol, very limited in scope, subsequently a broader Framework Agreement. It touched on a range of issue, including facilitating amicable consultations, and various comments regarding the 2007, onwards U.S. liquidation, ongoing liquidation proceedings, credits in the ongoing liquidation proceeding, as well as the sovereign right of the State of Peru pursuant to the

treaty to establish its own levels of domestic environmental protection.

Next slide.

The Parties were unable to resolve the disputes through consultations, and Renco, therefore, commenced in October of 2018 the Treaty Case and the Contract Case, and we are here before you, Members of the Tribunal, to emphasize that the Treaty Case violates Treaty restrictions, as we will now discuss in detail, as well as problems with the Contract Case which violates the Contract.

Next slide.

We're going to discuss three elements in detail regarding the Treaty objections:

First, the fundamental requirements of the Treaty before the Tribunal;

Second, the relevant timeline; and

Third, the application of the facts to those temporal restrictions and discussion of related precedents.

Peru brings preliminary objections pursuant to Article 10.20.5 of the Treaty.

And please continue to the next slide.

Pursuant to the Treaty, Peru duly notified its objections on December 3rd, 2019, underscoring that

Respondent hereby notifies its request for the Tribunal to decide, on an expedited basis, objections that the dispute is not within the Tribunal's competence. It bears noting that we gave a collegial heads-up to our counterparts that we would be making that filing and the scope of that filing.

So, what are those objections? Well, first of all, it's important to emphasize the role of the Non-Disputing Party: The United States Government.

Under the Peru-U.S. Treaty, there is a specific role for the Non-Disputing Party. It may provide comments related to the interpretation of the Treaty. It is not there to be utilized as a weapon. It is not there to be abused by Claimants through lobbying. It is not there to be disruptive of the rule of law-based system for resolving disputes. It is there to play a role of Non-Disputing Party. Peru and the United States have outstanding bilateral relationships, and we underscore, on behalf of the Republic, our deep respect for the United States Government and for its appropriate role in this proceeding and in Treaty proceedings. And, indeed, the United States Government has provided a statement to this Tribunal dated March 6, 2020, which sets out the position of the United States Government; and as we will see, its alignment with the position of the other Party to that

Treaty, the Republic of Peru.

There are two key temporal requirements before the Tribunal. The first is the issue of non-retroactivity. Under Article 10(1) 13, the Treaty does not bind any party in relation to any act or fact before the date of entry into force of this Agreement. As the U.S. had underscored, there must exist conduct of the State after that date which is itself a breach. And as we will explore, where acts after the entry into force of the Treaty are rooted in pre-existing dispute, that is not sufficient to overcome the restriction on non-retroactivity.

Key dates to keep in mind: February 2009, when the Treaty came into force.

The second focus of Peru's temporal objections relates to prescription, Article 10.18(1), the provision which requires that no claim may be submitted to arbitration if more than 3 years have elapsed from the date on which the Claimant first acquired or should have first acquired knowledge of the breach. The U.S. has underscored that the Treaty's limitations period is a clear and rigid requirement that is not subject to any other qualification. Clear and rigid, not to be changed by a claimant for its own ends.

The prescription date calculated by default,

October 23rd, 2015. The adjusted date that the Parties I believe concur on, November 13, 2013, derives from a consultations period and express agreement of the Parties.

I mentioned earlier there was a Framework Agreement that addressed various issues, and among other things, it related to this issue of statute of limitation or prescription issues during a given period, and so that is the basis for this adjusted period. Peru is respecting the Framework Agreement that the Parties negotiated with respect to various issues.

So, what does this mean in terms of the timeline before you, Members of the Tribunal? The requirements provide that you take into account this period of time spanning 15 at this point, basically 20 years. The Treaty came into force on February 1, 2009, taking into account the prescription period as well as an agreed consultation period that reaches the date of November 13, 2013.

So, having established these parameters, let's take a look at the timeline of the allegations that Renco has raised and how they fall afoul of these temporal restrictions.

Now, to make this as simple as possible, we looked to the allegations of Renco. And Renco initially filed its Statement of Claim in 2018. In Peru's submission last December, we provided an annex, including

quotations of all of the different factual allegations that Renco raised in a document that it chose to call its "Statement of Claim."

And, as you can see depicted on Slide 26--and this is from Peru Figure B--this indicates all of those allegations of Renco; and, as you can see, the vast majority of them pre-date the entry into force of the Treaty. There's then a category from the date of entry into force of the Treaty prior to the prescription date, and then there's a dining nub at the end of "other" which we will address in detail.

Now, to give Renco the benefit of the doubt, Renco then decided to add additional factual allegations in its pleading in this phase of this proceeding, and so you can look to Figure E submitted by the Republic of Peru, and what you see here is that, once again, the vast majority of all the actual allegations raised by Renco pre-date the entry into force of the Treaty. And that's no surprise because these issues are all rooted in that period of time.

There, then, is a collection of events--prior slide, please--prior slide, please--a category of pre-prescription allegations. And again the nub of the nubs, a piece that they cling to that postdated the prescription date.

Now, how does this vis-à-vis the requirements of the Treaty?

Next slide.

So, you can see how the vast majority of Renco's allegations pre-date the Treaty's entry into force. There is then this much smaller category that comes after the Treaty but before the prescription date, and then, finally, that nub of nubs in the other category.

What are these three categories? Let's zoom in and look at them in greater detail.

The allegations that Renco emphasizes prior to the entry into force of the Treaty, go to those core issues that I discussed earlier in the overview for this Hearing. They go to four issues about failure to comply with environmental obligations, about State laws related to the ability of the State to give extensions for environmental compliance in the mining sector. They go to the violation of environmental regulations by Renco. They go to the underlying lawsuits in Missouri brought by Peruvian children alleging contamination by Renco. They go to the financial crisis which also is relevant to Renco's allegations.

All of these issues and the State's conduct with respect to these issues pre-dates the entry into force of the Treaty.

As a matter of fact, Renco, in its own Memorial on liability in Renco I, its own arguments underscored how these issues pre-dated the entry into the Treaty, discussing compliance issues as of December 2008, extensions of time, and also an emphasis on the collapse of their revenues in the year 2008.

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As a matter of fact, contemporaneous statements from 2009, so this is a month after the entry into force of the Treaty, Doe Run Peru's own representative and a contemporaneous statement to the Republic of Peru emphasized the sudden and unexpected fall in metal and byproduct prices since October 2008 causing a dramatic income reduction; and so, again, all of these issues predating the Treaty.

Next.

The second category, those allegations which postdate the Treaty, pre-date the prescription deadline, again, we see issues that stem from the original underlying issues, and those facts relate to continuing to see more extensions for environmental compliance, an issue that dated back years. DRP ceased operations and stopped paying creditors, blaming the financial crisis, among other things. Peru even granted another extension, and Renco, as it always said before the Treaty came into

force, never enough for Renco.

DRP, Doe Run Peru, the local Renco entity, entered a bankruptcy process that is creditor-controlled, not State-controlled, and the Ministry sought and filed a credit for non-compliance with environmental obligations.

As of 2011, that credit was reversed by a commission; Renco nonetheless raised this issue in Renco I; an INDECOPI Tribunal subsequently upheld the Ministry's credit, and an administrative court upheld the credit. All of these facts pre-date the prescription deadline.

And the extension of compliance deadlines, it was limited by a pre-Treaty decree, so it was mere bonus cooperation by the Peruvian State that there was additional extension for Renco, rather Renco's subsidiary Doe Run Peru. Again, that's reflected in contemporary documentation.

Next.

Next.

Finally, we reach this final category, the allegation that Renco raises as a fact that postdates the prescription. It pre-dates the default prescription date, but postdates the adjusted prescription dates. And what you have here is a leftover additional appeal regarding the Ministry's credit for failure to invest per

environmental obligations. This is a 2015 Supreme Court decision. But let's take a look at this issue in context.

As we've already discussed, Members of the Tribunal, the Ministry asserted its credit in the local bankruptcy regarding the longstanding and pre-Treaty failures of Renco--of Doe Run to satisfy its local environmental obligations, and there have been years, years of local issues related to this credit. As a matter of fact, there had been a reversal followed by upholding the credit, upholding the credit, upholding the credit, upholding the credit. Nothing new.

The issue was raised in Renco's first case back in 2010-2011. After they lost Renco I, they came back again with it and tried to refresh and renew--put a little makeup on it and create a new claim that cannot be the basis for satisfying the temporal requirements of the Treaty. It was nothing more than the same old thing.

Next slide.

So, Members of the Tribunal, as we have summarized, the underlying facts of this case go to core issues that pre-date the entry into force of the Treaty. For that reason, the treaty requirements are clear and rigid and cannot be satisfied by the factual allegations of Renco. As a matter of fact, Members of the Tribunal, this goes to the heart of Peru's consent. Peru has not

consented to arbitrate these claims, and the case must be dismissed. In fact, what we see is nothing more than one of myriad ways that Renco has sought to invent claims or reinvent claims as a way to shift onto the backs of the Peruvian people issues and claims against Renco and its executives arising out of contamination in La Oroya.

Ms. Menaker is now going to explore further the application of the treaty standard to these four facts in connection with relevant precedents.

Thank you.

PRESIDENT SIMMA: Thank you.

(Pause.)

MS. MENAKER: So, as Mr. Hamilton noted, I'm going to just discuss in a bit more detail now the legal framework and bases for dismissal of Renco's claims on the basis of the violation of the non-retroactivity principle as well as the non-compliance with the prescription period set forth in the Treaty.

And I'll go rather quickly over the specific provisions of--you've seen them before, and I trust that you are very familiar with them. But to begin with the non-retroactivity requirement or principle, that, of course, is a principle of international law set forth in the Vienna Convention, that absent any particular language to the contrary in a treaty would apply regardless. And

there, of course, the provision supports that the Treaty itself would not bind a Party with respect to any act or fact which takes place or took place before the date of the entry into force of the Treaty.

And for the avoidance of any doubt, the Parties to the U.S.-Peru TPA, put this language expressly into that Treaty, and you can see that, that's for greater certainty, just for the avoidance of doubt that general international law principle of the non-retroactivity of treaties will apply here.

And as Mr. Hamilton also mentioned, the Treaty does contain a specific mechanism for the non-disputing seat Party to make submissions on issues of treaty interpretation, and that's important, of course, as you know because, in accordance with the Vienna Convention, Article 31 reads A and B, any subsequent agreement of the Parties or any subsequent process of the Parties with respect to the interpretation of the Treaty shall be taken into account by the Tribunal.

And the United States, in its submission, of course, has emphasized that the principle of non-retroactivity of treaties, indeed, does apply to this specific treaty; and, therefore, in order to find liability or jurisdiction, there has to be conduct of the State after the date of the Treaty's entry into force

which, itself, constitutes a breach of the Treaty.

Now, importantly, this prohibition also extends to conduct that postdates the entry into force of the Treaty but is deeply rooted in pre-Treaty acts or facts, and a number of tribunals have addressed issues of this nature. And you can see, for instance, in the Berkowitz versus Costa Rica Case under the CAFTA, which contains the same provision as in our Treaty, the Tribunal emphasized that pre-Treaty acts and facts cannot form the foundation of a finding of liability, even if there are post-entry-into-force acts or facts, as long as the pre-entry acts or facts are the basis for the Claim or the--excuse me, the liability is dependent upon those pre-entry acts or facts.

And so, in order to be justiciable, the breach has to have--cannot have deep roots in the pre-entry-into-force or the pre-prescription period event. It has to be independently actionable, and that's what you'll see here is simply not the case; that notwithstanding the few acts or facts that Renco identifies that may have occurred either after the entry into force of the Treaty or after the prescription period. Those are the breaches that they allege are so deeply rooted in those pre-entry-into-force acts and facts, that it is not an independent stand-alone breach that is

justiciable.

And this also came into play in the Berkowitz Case which, again dealt with both non-retroactivity as well as prescription periods, and that Tribunal--if you can go to the next slide, please--the Tribunal stated there that pre-entry-into-force conduct cannot be relied upon to establish the breach in circumstances where the post-entry-into-force conduct wouldn't otherwise constitute an actionable breach in its own right.

So, if you took away that pre-entry-into-force acts and facts, if the post-entry-into-force acts on their own cannot stand alone and constitute an independent breach, then the finding of liability and the finding of jurisdiction would run afoul of the non-retroactivity principle.

And Renco acknowledges this legal principle, so the Parties are in agreement over this. And you can see here they agreed with the Berkowitz Tribunal's explanation of that principle, and they discuss it--and I'll be discussing the case in more detail later; but, as you can see here, they state that it properly held that it did not have jurisdiction over the Claimants' expropriation claims because whatever happened post-entry-into-force conduct which was, in that case, a decision by a court setting compensation, that the Respondent's alleged breaches of

the Treaty with respect to the compensation process including the alleged delay in offering compensation was not separable from the expropriatory conduct that took place before the entry into force of that Treaty.

Now, I will move on to the prescription period to just discuss that and the legal foundation for the prescription requirement.

As you well know, the Treaty contains a 3-year prescription period which prohibits claims from being submitted to arbitration if more than 3 years have elapsed from the date on which the Claimants first acquired or should have first acquired a constructive knowledge of the breach that is alleged, a knowledge of the loss or damage incurred as a result.

And as Mr. Hamilton emphasized, the Contracting Parties, the United States and Peru, agree that this requirement is a strict rigid requirement that is not subject to suspension, prolongation or any other qualification. So, some of those other types of principles that apply in other judicial systems with respect to statute of limitations or prescription period simply are not applicable to the prescription period set forth in this Treaty because the Parties have conditioned their consent to arbitrate with compliance with this particular provision.

Now, as noted, the date is triggered by the first time that the Claimant knew or should have known. So, whether they had actual or constructive knowledge of both the breach and that they have suffered a loss or damage, they don't have to fully appreciate the full extent of the damage, nor did they have to have suffered the full extent of the damage at the time in order for that period to begin running. And many tribunals have recognized this, as have the Parties to the Treaty.

So, as the Mondev Tribunal said, for instance, that a claimant can have knowledge of loss or damage even if the amount or the extent of the loss or damage cannot be precisely quantified.

Similarly, in the Corona Materials versus the Dominican Republic Case, that Tribunal also affirmed that it is not necessary that you have to fully particularize your legal claims, so you may know that there is a breach or you may have constructive knowledge that there is a breach without being able to fully particularize the legal claims because the date runs from the date that you first had knowledge or constructive knowledge of both the breach and/or--and that you have incurred some damage, even if you don't know the full extent. It's your first appreciation of the breach and loss or damage that matters.

And on this, the United States fully concurs with Peru, that you can have knowledge of loss or damage, even if the amount or the extent of the loss or damage cannot be precisely quantified, even if the full financial impact is not immediate or is not known at the time.

And so, as a result of this, a claimant cannot evade the prescription period simply by alleging that the conduct has either continued or it's worsened over time, or it's changed in some manner that can give rise to ostensibly a different claim with perhaps different damages or greater damages. That is impermissible because you would then be able to essentially constantly push back the prescription period. You have to look at the very first time when you first acquired or should have acquired knowledge of the potential breach and some damage, even if the entirety of the Claim can change over the course of time.

And again, this is something that not only Peru has said but that the United States's treaty partner agrees with Peru; and, therefore, you can't first acquire knowledge on multiple dates or consistently on a recurring basis, first acquiring knowledge. There has to be a beginning date upon which you first acquire knowledge that there is a potential damage and that you incur damage as a result of that breach. So, subsequent transgressions

arising from a continuing course of conduct, as I noted, do not renew the limitations period because otherwise the limitations period would essentially become meaningless and ineffective.

So, in order to determine whether Renco's claims run afoul of both the non-retroactivity principle and the prescription period as we contend they do, what the Tribunal needs to do is to look at the essence of Claimants' claims, it needs to itself determine what is the basis for Claimants' claims. And, in doing that, it does not simply have to accept how Claimants have formulated their case. Just because Claimants say, "no, our claim is based on this event that post-dates the entry into force of the Treaty or on this event that falls after the or before the prescription period," that's insufficient because again, you cannot allow a claimant to simply reformulate its claim in a way to take into account a recurring breach or an alleged continuous breach or to reformulate a previous time-barred breach in order to bring it within the jurisdiction of the Tribunal.

So, it's this Tribunal's job essentially to look and find the essence of the Tribunal's case--the Claimants' case, and to then determine that, in our view, that it is, in fact, precluded on the basis of being untimely.

So, let me talk about their claims in particular and the bases for their claims. And they have three claims: An unfair treatment or a fair-and-equitable-treatment claim, an expropriation claim, and a denial-of-justice claim. And so, I will talk about them in turn with respect to both the non-retroactivity principle and also the prescription period. And I'll spend slightly less time on the non-retroactivity principle, not because, as Mr. Hamilton showed, many, many of the acts and facts pre-date the entry into force of the Treaty, but just because everything that runs afoul of the non-retroactivity principle necessarily is also time-barred by the prescription period.

So, when you look at what happened before the Treaty entered into force, and you look at the bases for the fair-and-equitable-treatment claim and the expropriation claim, you can see that they are both mired in pre-Treaty acts and facts. And you will see here, as Mr. Hamilton was explaining, when DRP took over La Oroya it expected obligations, environmental obligations, and it had to comply with those obligations within a certain period of time pursuant to what is called a "PAMA." And during the course of its ownership, it sought extensions for that PAMA deadline, which originally was 10 years.

So, they took over in 1997. In 2007, the PAMA would have expired by that time. They were supposed to have completed all of the environmental remediation as well as investments in environmental equipment and the like in order to bring the plant up to standard. And during that time they sought numerous extensions in order to push out that date.

And in 2004, the Supreme Court set a maximum limit for the extension of environmental obligation.

So, at that point, it became known that you can only extend the PAMA for so long; and, after that, you cannot do so.

And so, DRP did seek an extension. They sought a 5-year extension, and they were granted a 2-year and 10-month extension. And they complained in the first Renco Case. A major component of that case, as you will see, is they complained that this was an allegedly draconian extension, that there was no way that they could have completed their PAMA obligation, the remaining one, in this period of time. But they felt that they should have received a longer extension, but they only got this two-and-a-half year extension, and that caused problems for them because, as you can see, first, you have the Missouri Lawsuits being filed, but then also you have the financial crisis in 2008; and, at that time, as you also

saw with the memo that Mr. Hamilton showed, the copper prices decreased substantially, and so they were not earning proceeds from the plant or not to the extent that they could then invest them in this environmental remediation and the like, and they were also burning through money and they went to their banks to seek a further line of credit. And the banks basically said "Well, no, we're not going to extend a further line of credit unless you get a PAMA extension. Because otherwise, if you're not complying with the PAMA, you can be shut down, and you can be put out of business."

So, if they clearly would not want to extend money to a company that was in breach of its obligations to the State in this respect, and then it was only after that that the Treaty then enters into force.

So, you can see here the crux of the fair-and-equitable-treatment argument that Renco made in the first case and again that they make here, is that they say, well, no, what happened is after the Treaty entered into force, what we did is we asked for a PAMA extension--and could you please go to the next slide, please?--we sought an extension, and we didn't get it, and so that is the problem. That's really the crux of our fair-and-equitable-treatment plan. But that can't be. That can't be, because we know when you saw in the

previous slide that already they had sought extensions, there was a law that said you're not going to give further extensions. We can only give extensions to a certain date, and they asked for the 5-year extension, they got the 2-year 10-month extension, and then post-Treaty into force, what happens is Peru, the MEM, rights to--and I'm sorry, post prescription period--in response to a further request for an extension of the PAMA obligations, the MEM answers, and what do they say? They say, "No, we can't give you a further extension because look at that law. That law from 2005 says we can't give any further extension. It's not possible to grant a new extension within the legal framework." That act cannot possibly give rise to a new claim that is not time-barred, and this is exactly like Corona Materials, where in that case you also had a license, for instance, that had been denied, and that took place before the prescription period.

But the Claimant brought a claim and said, "Well, we wrote in--we wrote a letter and we asked them to reconsider." And they so they said that's later, that pushes out the time, and the Tribunal quite correctly said, "well, no, that doesn't push on the time. The Respondents' failure to reconsider the refusal of the grant of a license is nothing but an implicit confirmation of its previous decision." And so too here. You can't

say that the MEM's failure to reconsider its decision not to grant a further extension thereby is a new measure that postdates the prescriptive period and allows them to bring a claim. Any Claimant could then constantly ask for reconsideration of earlier decisions and just do it after or within the time frame, the prescriptive period and then say, "Well, that's a new measure because they failed to reverse what they had done or they reconfirmed what they had done previously," so that is clearly impermissible.

And in Mondev, actually, way back before I said the same thing where they emphasized, that Tribunal emphasized that the mere fact that earlier conduct has gone unremedied or unredressed when a treaty enters into force does not justify a tribunal applying the Treaty retrospectively to that conduct, and any other approach would suggest both the inter-temporal principle in the Law of Treaties and the basic distinction between a breach and reparation which underlies a law of State responsibility that it would be contrary to those principles.

So, then, if we look at their expropriation claims, what is the crux of their expropriation claim? The crux of the expropriation claim is that La Oroya stopped operating. The creditors put La Oroya into bankruptcy, and then the creditors voted to liquidate La Oroya rather than to try to reorganize it. They voted to

liquidate. And Renco says, "Well, although the creditors voted to liquidate," and that included, by the way, DRC, which is a Renco-affiliated company, but putting that aside because that's more of a merits issue--they say the MEM had a lot of votes, and the reason why they had a lot of votes and were able to vote for liquidation is because they were a creditor, and the reason why they were a creditor is because their credit was recognized by the Bankruptcy Court. And so the reason why the MEM had a credit as Mr. Hamilton explained is because they put in a credit when La Oroya went into bankruptcy, for simplicity's sake, essentially they said, "well, DRP was supposed to do these PAMA obligations, this environmental remediation and obligations. They didn't do it, so we have a credit to that extent because we're now going to have to take it back, we're going to have to spend the money to do that thing." So the credit was in that amount.

And DRP felt that that should not qualify as a credit under the Bankruptcy Law, so that's what they're complaining about.

However, if you look here, that's the crux of their expropriation claim, but again all of the acts and facts pre-date the entry into force of the Treaty and certainly the prescription period.

And I go back to that memo of Renco's or DRP's back in 2008, which Mr. Hamilton showed, and you can see here that they're saying that the financial crisis has hit, metal prices have dropped. So they know what is happening. They say, "We're being pressed to renegotiate contracts, we don't have money coming in. Under the circumstances we don't have the money to complete the PAMA, there's not financing to complete our PAMA obligations. Non-compliance with the PAMA is going to force us to stop operations and then they could declare us in breach of the PAMA obligations before year-end, and the bank might not then--would restrain the use of the revolving loan facility."

So, all of these things again is--their expropriation claim is deeply rooted in their non-compliance with the PAMA obligation, by their deadlines. That's what gave rise to the bankruptcy. That's what gave rise to the MEM's credit, and that's what ultimately gave rise to what they contend is the expropriation, but you cannot rule on the expropriation without ruling on the legitimacy of those pre-acts and facts, pre-Treaty into force acts and facts, namely the non-compliance with the PAMA obligations, the not granting the extension for those, and then everything that came after that.

And you can see that they fully appreciated the ramification of their non-compliance way back before the Treaty even entered into force.

When I look more particularly now at the prescription period, and how all of these--and before I go off on that, I will just to be clear, that was with respect to our arguments with regard to the non-retroactivity principle which preclude Claimants' fair and equitable treatment and expropriation claims whereas the prescription period violations preclude both those unfair treatment, expropriation, as well as their denial-of-justice claim, which is why I didn't speak about the latter in the former series.

So, speaking about the prescription period, as Mr. Hamilton noted, the prescription cut-off date is November 13, 2013. And just a simplistic way to look at this is that Renco filed its Notice of Intent in this proceeding on August 12, 2016. So, in accordance with the Treaty, it would have been entitled to file a Notice of Arbitration 3 months after that, in needs to wait month s, so that would have been November 13th.

Excuse me. That would have been November 13th, 2016, but at that point in time, the Parties decided that they were going to engage in the consultations, they had the Framework Agreement. So, essentially, although Renco

could have filed and then the Parties could have agreed to suspend the arbitration during that period of time, instead they said, "Okay, hold off filing but we won't count it against you." And so, when they filed their Notice of Arbitration eventually in October 2018, the Parties had agreed that the prescription period is as of that earlier date of November 13, 2016.

So, when you look here the additional acts and facts that occurred between the Treaties entry into force and the prescription cut-off date are the following, and this is where, as I mentioned earlier, where DRP asked for the additional extension and it's denied, then DRP closes La Oroya, stops operating La Oroya, the PAMA deadline expires. The DRP is placed into bankruptcy. MEM asserts its credit. DRP opposes MEM's credit.

And then you have the INDECOPI Tribunal recognizing MEM's credit, and then the DRP creditors vote to liquidate La Oroya--excuse me, DRP. And you have a local court proceedings where the Court upholds the INDECOPI Tribunal's recognition of the MEM's credit, and then you have the prescription cut-off date.

And you can see here, when you compare what Renco filed in the First Arbitration, Renco I, on fair and equitable treatment and expropriation is exactly--excuse me, with respect to fair and equitable treatment, it's

nearly identical to what they filed in this case, and that shows that it is precluded by the prescription period. The only changes they made were to take out one paragraph which is now part of the Contract Case and to erase a couple of footnotes that have dates in them and then some non-substantive editorial changes.

And you can see that there is really no debate because Renco concedes that they acknowledge that both their fair-and-equitable-treatment claims and their expropriation claims have not changed from the First Arbitration until this one, and they instead say that because those claims, in their view, were timely, did not run afoul of the prescription period when they filed Renco I that, therefore, they should be deemed timely in this case. And that is their argument. Their argument is not--they don't even try because they cannot show that these claims are not time-barred pursuant to the 3-year prescription period. They are. But they are asking this Tribunal to ignore the Treaty's express language, the time--the prescription period, and instead to grant some sort of an exception to allow them to bring their claims on the basis that when they brought their claims in Renco I, that they were timely then.

And I'm going to talk about that in just a moment because they do that on the basis of two theories. One is

that the prescription period was suspended when they filed Renco I, and the second is on an abuse-of-rights theory. So, I will revert to that in just a moment; but, before I do that, I will just address the denial-of-justice claim.

And the disputing parties also agree with respect to the interplay between denial of justice and the prescription period that, while a legally distinct injury can give rise to a separate limitations period, a continuing course of conduct, of course, cannot renew the limitations period, and you saw this also in the Corona Materials Case that I discussed earlier where the Claimant in that case raised a denial-of-justice claim on the basis that their denial of a license was not reconsidered, and they claimed that was on a denial of justice. And that Tribunal rejected that allegation claim and said that the exhaustion of local remedies will not give rise to a legally distinct injury unless the institution to whom appeal has been made has committed a new breach.

So, you need to have an independent breach by the judiciary in order to claim a denial of justice, and it cannot simply be a claim that extends the time period without the suffering of a legally distinct injury arising out of that claim.

Here, Renco has not even alleged that it has suffered any distinct injury or breach arising from

exhaustion of remedies as to the MEM's credit. And as I mentioned earlier, you first had the INDECOPI Tribunal that recognized MEM's credit--this is clearly before, earlier--then you have a court that recognizes the credit. And then what do you have within the time period? You have here in November 3rd, 2015, Renco says that the Supreme Court summarily rejected DRP's appeal. But they say the appeal lacked clarity and precision; and that with the Supreme Court's rejection, DRP exhausted all local remedies under Peruvian law against the MEM credit, and that this, therefore, constitutes a denial of justice.

The only other allegations with respect to the actions of the Supreme Court is, again, challenging the very underlying the recognition of the MEM's credit. They said the credit the MEM asserted in DRP's bankruptcy is patently absurd. And therefore no one would uphold this credit, and the judicial reasoning is incoherent that it has to be explained by incompetence or improper bias, and that constitutes a denial of justice.

But two other adjudicatory bodies had already recognized the MEM's credit before this time.

So, here what you can see again, you have the bankruptcy, you have initially a bankruptcy commission, an INDECOPI Bankruptcy Commission, that reverses the credit, but then that goes to the INDECOPI Tribunal that accepts

the credit, it upholds it. You go to the Fourth Administrative Court which upholds the credit. Then you have the prescription cut-off date, and you have the two other courts, the Superior Court of Lima, about which Renco doesn't even mention, and the Supreme Court, both of which uphold the credit.

And here, reviewing the correctness--if you could just go back to the prior slide--reviewing the correctness of that Decision, the upholding of the credit, that would involve reviewing the pre time-bar conduct because the credit was already upheld. It was already in the bankruptcy proceeding that's going on. They recognized the MEM's credit. It's upheld. They're acting on the basis of that credit. The creditors are voting. Everything already has happened. They've already suffered any harm that they've suffered because of recognition of that credit. One cannot later look at these Court Decisions and look at the so-called "correctness" of those court decisions under the guise of a denial of justice without ruling on the pre-act--the earlier acts and facts.

And it would be really akin to the case of--say in the case of an expropriation where a municipality, for instance, takes some property. And imagine that the Claimant in that case doesn't immediately even challenge the taking. It's in arbitration, it doesn't challenge

it--but later it goes to court, it challenges the expropriation and it loses, and it appeals and it loses, and its appeal is during that time frame. If that Claimant would later bring a denial-of-justice case, to challenge the expropriation, that ought to be time-barred. That should be time-barred. The expropriation occurred earlier, and just because that Claimant chose to bring a court case later to challenge that expropriation should not restart a clock. They didn't suffer any additional injury after bringing that court case pursuant to the expiration. Their injury was suffered earlier. They can't make it timely by turning it into a denial-of-justice claim. By turning their expropriation into a denial-of-justice claim they can't make their claim timely. They can't do that unless the Court itself did something independently, independent from the expropriation, to give rise to the denial-of-justice claim that caused them damage.

And that, in fact, is what happened in the Berkowitz Case; right? That's why in that case, the Tribunal says, there, the expropriation was time-barred, but later there is a court decision that sets compensation for that expropriation. The Tribunal says, "Okay, if you want to challenge the amount of compensation through a denial-of-justice claim, you can do that because that

didn't exist before. But to the extent you want to challenge the expropriation, you can't do that. You can't do that through the back door of a denial-of-justice claim. To the extent you want to challenge even the delay because you have to give prompt, adequate and effective compensation." But it wasn't prompt compensation. This took years and years, they said you can't do that through the back door of a denial-of-justice claim because you already suffered that earlier. It had been a long time before that Court Decision came down and awarded you compensation. And so, if you wanted to challenge that delay, you should have done that earlier, even though it was not in the guise of a denial-of-justice claim and the guise of an expropriation claim but you didn't do that and you can't do it through the back door of a denial-of-justice claim.

But there in that case the Court had done something that was independent, that was different from what had happened before. Again, they provided the exact amount of compensation so they could challenge only that amount of compensation. Here, this Court didn't do anything different. All it did is it's upholding the credit. They don't suffer any additional injury as a result--independent injury as a result of these court cases. And that's why they can't turn their expropriation

claim into a denial-of-justice claim through the back door by just latching on to a later-in-time court case.

And you can see, I will just briefly discuss two other cases where denial of justice also were not deemed to be--were deemed to be time-barred.

You can see again just--there the Claimant filed the Motion for Reconsideration for the denial of its license and just because that lasted it wasn't responded to, the Tribunal said, "No, you can't bring a denial-of-justice claim, there was no valid basis for treating the alleged denial of justice as distinct from the non-issuance of the environmental license, just like here, there was no basis for treating the alleged denial of justice as distinct from the upholding of the MEM credit which had been upheld for years previously."

PRESIDENT SIMMA: May I briefly interrupt you. I see under Slide 66, I see it says--it speaks of Corona Materials. Does that have any meanings, or is it just an abbreviation in your filing, or what? Corona Materials Timeline because the term "Corona" came up a little later; right? Is that a technical term?

MS. MENAKER: The name of the case, the name of the Claimant in that case was Corona Materials.

PRESIDENT SIMMA: No, no, just I see on the timeline on your Slide sixty--I think it's Slide 66--

MS. MENAKER: Yes.

PRESIDENT SIMMA: --the page number is hard to see. It says--speaks just the headline is "Corona Materials Timeline." I just wonder what "Corona" means in that regard here.

MS. MENAKER: It's just the timeline of events that occurred in that case, Corona Materials versus Dominican Republic.

PRESIDENT SIMMA: Okay. Thank you.

MS. MENAKER: Does that answer your question?

PRESIDENT SIMMA: Yes.

MS. MENAKER: So, in that case, again like ours, the Tribunal found that the alleged breaches of the alleged denial of justice, it related to the same theory of liability as the earlier time-barred claim.

And you see the same thing in ATA versus Jordan, where there you had a commercial Arbitral Award. And in that case--if you go back to one slide, please--you have a commercial arbitration between ATA and a State-owned company regarding potential--regarding liability for the failure of a dike. And ATA is found not to be liable for that, and part of their counterclaim is upheld. And then the counter-party to that commercial arbitration files a case in court in Jordan to annul that award, and that case is filed before the entry into force of the Treaty.

So, the Court doesn't rule on that annulment until after entry into force. And the Court actually then does annul the Award. Also, Jordanian law provided that if an award is annulled, automatically the arbitration clause in the underlying contract is similarly extinguished, and so the Claimant brought a claim, and the Tribunal found that the Claimant could not challenge the annulment of the Award because the dispute over the validity of that award pre-dated the entry into force of the BIT.

And then the only reason they were able to bring a claim regarding the extinguishment of their right to arbitrate because that they did not suffer that loss until the Court ruled because the legislation itself had not applied to their particular Arbitration Clause, and they would not have suffered that loss until the Court of Appeals actually annulled that Arbitral Award and, thereby, extinguished their right to arbitrate.

And again, if you look at what that Tribunal explained there holding in the following manner, they said again that the Claimant in that case, just like the one here and just like the Claimant in Corona Materials and Berkowitz, they were attempting to present a denial of justice as an independent violation, but that would fail because the occurrence is part of a dispute which

originated before the proper date before the date in question.

So, now, finally, I want to go back to Claimants' really last argument, which is, despite the fact that its claims clearly are time-barred by the 3-year prescription period, they nevertheless say that they should be able to proceed because that suspension, that prescription period should be suspended, for the entire duration of basically the Renco I arbitration. And they--essentially the essence of their claim is that, because these claims allegedly--and this is taking, putting aside the non-retroactivity principle, but putting aside the objections based on that, but they're saying because these claims would have been timely with respect to the prescription period, had we brought them in Renco I, you should take the date of our Notice of Arbitration in Renco I and count the 3-year prescription period from that date.

And so, let's look first at the fact that that simply is irreconcilable with the language of the Treaty here because it is clear that a claim is only submitted to arbitration once a Notice of Arbitration, with all of its prerequisites, including a valid waiver, is filed. And it's from the date of the Notice of Arbitration that the 3-year prescription period starts to run.

So, Article 10.18(1), for instance, says "no claim may be submitted to arbitration if the 3-year period has lapsed." The other articles make it clear that by submitting a claim to arbitration, what is meant is submitting a Notice of Arbitration that complies with all of the preconditions that are set forth in the Treaty, which means you need to, for instance, provide a Notice of Intent 90 days before the submission of a claim to arbitration.

So, just like a claimant, if the time prescription period was running out, a claimant could not simply skip over the Notice of Intent, immediately file its Notice of Arbitration and say, "Well, it counts from the date of the Notice of Arbitration, we didn't have time to wait the 90 days." You can't do that because that Notice of Arbitration is not valid. The Claim has not validly been seen submitted to Arbitration of that date because it was not accompanied by a Notice of Intent 3 months earlier.

The same thing for a waiver, if you submit a Notice of Arbitration with a defective waiver, that claim has not properly been submitted to arbitration, and therefore the 3-year prescription period does not run from that date.

That's made quite clear by the Renco I Tribunal,

including by the Renco I Tribunal because, in its holding in the Partial Award, it states that its submission of a valid waiver is a condition and limitation on Peru's consent to arbitrate, and that's precisely what's set forth very expressly in the Treaty. And, therefore, that leads to a clear timing issue because, if no compliant waiver is served with a Notice of Arbitration, Peru's offer to arbitrate has not been excepted, there's no arbitration agreement, and the Tribunal is without authority whatsoever.

So, one cannot suspend the prescription period, as Renco has asked you to do because that is not only contrary to the express terms of the Treaty as I have just shown because a Claim is not submitted to arbitration unless you have a Notice of Arbitration that comports with all of the preconditions of submission to a claim, and the Contracting Parties also agree in that regard because the limitations period, that three-year limitations period is clear and rigid, is not subject to suspension or any other qualification.

Now, Renco argues that while it would accord with the object and purpose of prescription periods generally if we would suspend or if this Tribunal would suspend the prescription period, but again the object and purpose of a treaty cannot override the explicit language of the

Treaty. In fact, the ordinary words of the Treaty have to be read in accordance with the object and purpose. It's not as if you read the ordinary words of a treaty and then you override them with what you perceive to be the object and purpose of the Treaty.

And the limitations period--again, it's written in plain terms, it doesn't contemplate suspension or tolling--and even if in a particular claimant's perspective they may deem it to be unfair or arbitrary, all prescription periods at some point become arbitrary if you're one day over or above the line. One can always argue there has to be a cutoff somewhere, but that is no reason to disregard a prescription period, and that is because they do serve a valid purpose because they're a legitimate legal mechanism to limit the proliferation of historic claims.

And again, even if one would find that it doesn't serve a particular object and purpose in any particular case, one can always argue if you are on one side or the other, but you can't override the express terms of the Treaty by imposing upon it one's own subjective view of what it regards to be a more valid object and purpose than one of the clear objects and purposes, which is set forth right there.

Now, Renco also argues, well, look at municipal

law regime. There are so many that do allow you to suspend the prescription period or allow you to toll a statute of limitations under certain circumstances. For instance, when the defendant or the Respondent is aware of a Claim and they say and that's the case here, we were aware of the Claim because it had been brought in Renco I. But again, none of that jurisprudence is applicable here at all because domestic law just simply doesn't apply, and it certainly can't supersede the express requirements.

And if you go back one slide, please, the Treaty is clear that what applies here, what the Tribunal must apply is the Agreement itself and only applicable rules of international law, not international law that overrides the express terms of the Agreement, and certainly not municipal law.

The Tribunal, for instance, again in Corona Materials versus Dominican Republic also said there very expressly that municipal law cannot be considered as part of the law applicable to the examination of the time-bar objections, and the Treaty the Tribunal in Feldman versus Mexico--again, that's under the NAFTA--has the same 3--year prescription period--the Claimants there also tried to rely on many domestic laws that allowed tolling of statute of limitations, and the Tribunal properly rejected that--noting, of course, there are other systems

in which you can toll or you can suspend prescription, statute of limitations.

But the Treaty, the NAFTA, in that regard and here the same exact provision in this Treaty adopts the receipt of the Notice of Arbitration rather than any other previous statute at the critical point in time that stops the running of the statute of limitations. And, in this regard, the Treaty again is a lex specialis that's to perceive principles of international law. And even apart from that, even if it didn't--and it certainly does--Renco has not even shown that its abuse theory is a general principle of international law. A general principle of law requires a certain level of recognition and a certain level of consensus as to the contents of that principle.

Abuse, on the other hand, does not satisfy those criteria.

It's, moreover, subject to a very high threshold to show an abuse of right, and it's very, very rarely applied. As you can see from these different sources, including one commenting on the Statute of the International Court of Justice noting that abuse has to be rigorously prevented, and the threshold is quite high and quite possibly exacting. And it's only in very exceptional circumstances that any tribunal would apply abuse to disavow a Party of its rights.

And, in this regard, investment tribunals have applied abuse theories to Claimants' misconduct; essentially, when a claimant has tried to take advantage of a treaty to which it has no right. And essentially, it has applied where a claimant has reconstituted itself under the law of another country in order to gain protections of a treaty to which it otherwise wouldn't have had access to, and generally speaking it was after the measure in contention had already occurred or after a dispute had been reasonably foreseeable.

So, a dispute arises, the Claimant doesn't have any treaty rights, but then it runs and reconstitutes itself under a different law and brings a treaty claim, and that is contended to be an abuse of right. Quite frankly, in many of those cases, there would be a lack of jurisdiction as well.

Here, in any regard, the abuse theory does not apply as a matter of law, as we've shown, because there is a lex specialis here, and they have not shown--Renco has not shown that about of a general principle of law that would apply in this case or in any case. But regardless, on a factual basis, it simply doesn't apply. Renco argues that we--that Peru abused its rights because it did not in a timely manner raise its objections as to Renco's waiver, and it contends, had it done so, it asks the Tribunal to

take as a matter of fact that Renco immediately would have corrected the defects in its waiver, and then even if the Claim--it would have corrected the defects in its waiver and then they would not have any time problems, prescription time problems, its Claim would have been timely.

So, obviously that's a lot of accepting their inferences with no influential basis, and on a very threshold issue--

PRESIDENT SIMMA: Ms. Menaker, excuse me--

MS. MENAKER: The fact is that Peru did diligently raise and pursue its treaty-waiver objection in the first Renco arbitration that Renco's arguments rest on this faulty premise that we were late in raising them, and that caused them prejudice because then by the time the Tribunal decided the waiver objection and they had to file a new arbitration, their claims were time-barred.

PRESIDENT SIMMA: Ms. Menaker?

MS. MENAKER: Yes.

PRESIDENT SIMMA: I think your time is up. I did my own timekeeping. I hope I'm under the control of Martin, but I think Mr. Hamilton started at 15:22 after all the interruptions and problems with the Spanish, so please wind up, okay?

MS. MENAKER: Sure. I will do so in just a few

minutes. I'm very short.

Mr. Hamilton went through the chronology on the waiver, and so you have that here, but I would just point out two things. First is that the Tribunal in the Renco I Case was not even constituted--if you go back one slide, please--was not constituted until April 2013, which also explains why there is that gap. But again, in the very first time when we raised an issue as to scope of the mandatory waiver, we raised an issue as to the scope, and we said it doesn't--the problem was it doesn't waive other proceedings with respect to the same measure. They were certainly put on notice.

But also, back when the Tribunal does finally agree to hear the waiver objection as a preliminary question under the UNCITRAL Rules, it was Renco that then sought reconsideration of that Decision. They fought tooth and nail not to have this objection heard preliminarily.

So, it really lies ill in their mouth now to come back and say we didn't raise it early enough, when at every juncture they fought us not to have this objection heard.

And as we said, we had no obligation to even raise it until our Counter-Memorial on the merits, which would have happened way after all of these events, but we

took the initiative to keep raising it as Preliminary Objection and asked the Tribunal to hear it as such.

Now, Renco, the Tribunal, as you will see, specifically held that it was not abusive for us to raise the waiver objection. And Renco, of course, their objection in this case rests on their assertion that we had acted abusively in Renco I. But look at what the Renco I Tribunal says, it says: "Peru has sought to vindicate its right by raising its waiver. It has not abused its rights, and it does not accept the contention that our waiver is tainted by--objection is tainted by an ulterior motive evade its duty to arbitrate Renco's claim." And the Tribunal didn't hold that invoking the prescription requirement in a later proceeding would be an abuse. To what they said was that Peru again, we sought to vindicate our right, and it wouldn't rule out the possibility that it might be found, but the Tribunal could not prevent Peru from exercising in the future what it then considers to be its legal rights.

And so, to the extent that this dicta in Renco I reflects that that Tribunal's discomfort was the consequences of its own rulings, that can't justify having this Tribunal disregard the Treaty's plain language because there was nothing abusive about raising the waiver objection in Renco I as well as non-compliance with other

things like the time bar in Renco I, and there is nothing abusive about raising non-compliance with the non-retroactivity and temporal restrictions in this arbitration.

Now, Renco also, if we go to Slide 85, they basically are--the slide right before that, please--Renco is wrongly presuming that Peru acted improperly essentially by not allowing them to belatedly remedy their defective waiver; right? Because Renco, when they're asking now whether you call it suspension of the time period or whether you call it remedying of defective labor, it's the same thing. What they want is they want the Critical Date to date back from their Renco I Notice of Arbitration instead of their Renco II Notice of Arbitration. So, the compliant waiver was put in place with this Notice of Arbitration.

And if the Tribunal were to deem that the claim was submitted as of the date of the earlier Notice of Arbitration, the one with the defective waiver, whether through a suspension theory or whether through an abuse theory, that would be akin to stating that the Tribunal itself could require a respondent to accept that the Claimant remedy its defective waiver.

Now, both Peru and the United States were very, very clear that the discretion of whether to permit a

claimant to proceed directly to remedy an ineffective waiver lies with the Respondent, and a Tribunal cannot remedy an ineffective waiver. And the date of the submission of an effective waiver is the date on which the arbitration commences, and it's for the Respondent, and not the Tribunal, to waive any deficiency in that regard.

So, again, to the extent that Renco is asking this Tribunal through either a serious suspension or abuse to consider that its original Notice of Arbitration as the date from which the prescription period should start running that is akin to saying that the Tribunal has the power to remedy a defective waiver and not the Respondent, which is contrary to the clear treaty language and also contrary to the express agreement of the Parties to the Treaty.

So, with that, I thank you for your attention, and I will close.

PRESIDENT SIMMA: Thank you, Ms. Menaker.

This brings an end, the pleading of the Respondent.

I just note that you had 8 minutes of overtime, so to say, which, of course, the Claimant can also make use of if it needs.

Now we have a break for 30 minutes, but we start again--and Martin, please help me with the translation of

what I say into the other time zones. We start again at 5:30, Hague time, Munich time, which means?

SECRETARY DOE: Which would mean 11:30 in Washington, D.C.

PRESIDENT SIMMA: Okay. Thank you very much.

I will hear you again, see you again at 5:30. Thank you.

(Recess.)

PRESIDENT SIMMA: Thank you very much. Thanks for being back in time.

Before I give the floor to the Claimant, I give the floor to Martin for a technical explanation.

Martin, go ahead.

SECRETARY DOE: Just very briefly, I think the explanation for the interpretation audio issue that we were experiencing earlier was just the fact that you need to select the appropriate channel as between the English or Spanish before making an intervention in the other language there; otherwise, it does interpret both as being the same language and outputs both audios equally. Nevertheless, I think we can deal with that as soon as it arises if we do have any further interventions that need to be interpreted into the other language.

PRESIDENT SIMMA: Okay. Thank you, Martin. So, can we go back to Mr. Kehoe. I think he is the one who

starts.

MR. KEHOE: Yes, Mr. President. I'm prepared to start. I was told that you had a few words to say, so we don't vote our slides out. We'll have them loaded right now.

PRESIDENT SIMMA: Okay, go ahead.

I have a nice-looking slide in front.

MR. KEHOE: Okay, so I have control now of the slides now, Mr. President. I'm prepared to proceed.

PRESIDENT SIMMA: Please go ahead, sir.

OPENING STATEMENT BY COUNSEL FOR CLAIMANTS

MR. KEHOE: Thank you. Mr. President, I'm going to stay on this cover slide for just a couple of minutes and respond to something that we heard this morning that I hadn't originally planned to address, but I will, so I'll perhaps take two or three minutes from the eight that we got earlier today to respond to some of the environmental allegations that we heard at the outset.

Cerro de Pasco founded the La Oroya mine back in 1922. In 1974, the Peruvian Government expropriated the Complex, and Centromin, a State-owned oil company, operated it until 1997. So, for over seven decades, Cerro de Pasco and Centromin contaminated the soil in and around the City of La Oroya with heavy metals, including lead. In 1997, a complex and its surrounding areas was

considered to be one of the most polluted areas on the entire planet.

Now, this is not just me saying it. It is documented by NGOs and others. In the record of this case, Exhibit C-2, is an article from Newsweek in 1994 entitled "How Brown is My Valley?", and I'm going to quote to it for a minute. This is what Newsweek reported. It said: "Richard Kamp figured that he had seen the worst wastelands the mining industry was able to create, but that was before Mr. Kamp, an American environmentalist and a specialist on the U.S.-Mexican border, laid eyes on La Oroya, home to Centromin, Peru's biggest state mining company. Last month, as his car rattled towards the town through hills that were once green, Kamp fell silent. Dusted with whitish powder, the barren hills looked like bleached skulls. Blackened slag lay in heaps on the roadside. At La Oroya, Kamp found a dingy cluster of buildings under wheezing smelter smokestacks. Pipes poking out of the Mantaro River's banks sent raw waste escalating into the river below. He said: "'this is a vision from hell.'"

So, to address these horrific condition, Peru decided to privatize the Complex and require a new owner, a new Investor, to install numerous and expensive upgrades to cure or help to cure this environmental catastrophe,

and yet no company would consider bidding on the Complex because of its environmental conditions and the potential liability associated with those conditions such as third-party claims, for example, of injury. So, as a critical inducement to encourage bidders to consider purchasing the Complex to entice Investors, Centromin and Peru agreed to share responsibilities for the environmental conditions with an ultimate purchaser."

The Claimant here, through its investment, took on this monumental task, and Doe Run Peru, the Investment, complied with its contractual obligations and made significant additional investments to improve the conditions, the environmental conditions in La Oroya. It completed 15 out of 16 environmental projects, spending over $300 million in the process, and yet after spending over $300 million with only one project to go, a sulfuric acid plant that would have greatly reduced additional pollution, Peru took measures to treat this Investor's investment unfairly and inequitably and ultimately expropriated its investment, and its courts denied it justice. So, Peru's State-owned mining company--Peru and its mining company created this environmental mess. And then in breach of its international obligations, prevented the Investor from its efforts and its successful efforts to a very large degree before it was prevented them

finishing them of fixing this environmental problem.

So, with that, I'm going to turn to our legal argument here today.

Mr. President and Members of the Tribunal, I am going to address the first point that you see on the screen. Essentially we have three, as you heard from Peru, main points. First, Renco's claims are not time-barred.

Second, Renco's claims do not violate the retroactivity principle, and you're going to hear from my partner Mr. Louis Llamzon on that point.

And finally, Peru did not invoke the expedited review procedure under Article 10.25 of the Treaty in breach of the Treaty, and you'll be hearing about that from my colleague, Mr. Cedric Soule.

So, moving to the first point, which I will be handling, that Renco's claims are not time-barred, there are three main points here. The first one is the Claimants submitted its Request for Arbitration concerning the fair and equitable treatment and expropriation claims to Peru. And when it did that, it suspended the three-year limitations period under international law.

Secondly, Respondents' objection to this FET claim and expropriation at this point, and I'll explain why, is clearly an abuse of right, and this provides a

second reason why the Tribunal should reject Peru's objections. And, finally, Renco's denial-of-justice claim is not time-barred. I deal with that separately even though these all relate to time bar because Renco did not assert a denial-of-justice claim in the first Renco case. That claim was not yet ripe because Renco had not exhausted all of its local remedies yet. It had held out hope that the Courts might fix the denial of justice, and thus Peru's objection, as you heard this morning, to the denial of justice is a different objection than its objections to fair and equitable treatment and expropriation.

So, now moving to the first point, the reason that the statute of limitations in this case is suspended is because there is no lex specialis. We heard this morning and this afternoon from counsel for Peru that the Treaty expressly provides that there is no suspension or tolling of a limitations period, and that is simply incorrect, as I will review it here. Second, because there is no lex specialis, we look to international law, customary international law and principal international law. We'll start by observing the object and purpose of a limitations period, and then we'll move on most importantly to the relevant and dispositive international law which confirms that limitation periods are suspended

when a Party submits a claim to arbitration.

So, I'm going to begin with the fact that there is no lex specialis. The Treaty does not address the question of whether after filing a claim timely the claim may be suspended.

You'll see on the slide here the essence of Peru's arguments, and you heard it today, so I can move through this relatively quickly, is that the Treaty governs, and the Tribunal should not look to customary international law. The Treaty supersedes General Principles of International Law, and we understand that, and we don't disagree, that if the issue here were lex specialis, then we probably wouldn't even be here, but it's not.

Peru improperly rests its case on lex specialis because the overwhelming authority under international law supports the Claimants' position that limitations periods are suspended upon filing of a claim, especially one that's filed timely, as this one was, and no one disputes that it was filed timely.

So, as a result, Peru is compelled to argue, incorrectly, that the Treaty itself precludes suspension or tolling when it clearly does not. We heard it time and time again today. Nowhere in the Treaty does it address the question of suspension or tolling, and I'll review

with you in a moment, the process, the gyrations that Peru goes through to make this argument. It merges and cobbles together Articles 10.16 of the Treaty, which relates to the submission of a claim to arbitration, and then 10.18, which deals with consent. They're two completely different issues.

Peru argues that if the Tribunal finds that the conditions of Respondents' or the Claimants'--yeah, Respondents' consent to arbitrate are not met, it's as though the Investor never filed the arbitration in the first place, and this is not accurate. Peru hasn't cited to any authority for this novel proposition under international law. We believe there is none.

In fact, Peru did not meaningfully raise this lex specialis argument in its belated Memorial on 1025. Rather, Peru raised lex specialis for the first time in its March 26, 2020, response to the short four-page submission by the United States.

And before going to the substantive issue, I need to divert for a second and make a point on the procedural issue.

The United States did not argue or suggest in its submission that the issue of suspension of a limitation period is lex specialis. So, Peru took advantage of the submission by the United States and improperly filed a

30-page brief that was largely a reply to Renco's Counter-Memorial, together with 12 pages of an appendix for a total of 42 pages. This was a more lengthy submission than its original Memorial with lex specialis as a new argument, new exhibits, new legal authorities, and the Respondent mostly responded to Renco's Counter-Memorial and far, far less to the comments by the United States.

The reason I say this, Mr. President, is that Peru did this after the Tribunal rejected Peru's request for two rounds of briefing. We didn't have two rounds of briefing, I partly because Peru filed its Memorial 17 days after it should have, but in any event, we just have one round of briefing, which makes its submission commenting on the U.S. submission an improper Reply, but obviously I need to deal with it, and so I will, so now back to the substance.

Peru focuses heavily on the contention that--I seem to have lost the ability to move the slide.

(Pause.)

MR. KEHOE: I don't know if I need to click on it.

Yeah, I got it back. Thank you.

So, on Slide 9, Peru focuses heavily, as we heard this morning, on the contention that the limitation period

is a clear and rigid requirement that's not subject for prolongation or early qualification. Now, that's Peru's position. The United States stated that, but again, the United States did not say that this is lex specialis. This is the United States's position. But we know that it cannot be lex specialis because Peru's own conduct--as you heard this morning--proves that there can be a suspension or a prolongation or a tolling of the arbitration period because the Parties to this arbitration, in fact, did that. They reached agreements to suspend and toll the limitations period under the Treaty during the consultation period that both counsel referred to today so the Parties could try to potentially work out their differences before Renco filed this arbitration.

And Peru noted this in its Memorial on Preliminary Objections where it says: "Indeed, in 2016, Renco requested that Peru accept that time had stopped running for purposes of the temporal requirement during the First Arbitration." And later, the Parties entered into a Consultation Agreement and the subsequent framework, and they agreed to temporarily freeze the prescription clock, and Peru has adjusted the Treaty date accordingly. And they say again: "Among other thing, the Framework Agreement provided for tolling of the prescription period." If the Treaty were lex specialis,

they could not have done that.

Sorry, I'm just having trouble with the slides.

Peru said it again, we can see on Slide 10. Indeed--on Slide 11, apologies: "As noted above, the parties entered into the Consultation Agreement on 10 November '16 and a Framework Agreement on March 14, 2017, under which they agreed to temporarily toll the prescription period. In particular, they agreed to waive their respective rights to assert any statute of limitations, latches or other limitations or defense based on the passage of time."

So again, if the Treaty truly were a lex specialis, and any type of freezing or tolling were simply not permitted--and the Treaty again is between the United States and Peru, not obviously Peru and Renco--then Peru would not have been able to enter into this Agreement. But the reason that Peru could and did agree to suspend and toll and freeze the statute of limitations is because doing so is not lex specialis.

Now, moving to Peru's specific argument on the lex specialis, to the actual language of the Treaty that also refutes Peru's newfound lex specialis agreement.

Again, Peru's argument here, and we heard it both this morning and then right at the end of the presentation, because the Renco Tribunal found that it

lacked jurisdiction under Article 10.18, it is though Renco never submitted a claim to arbitration in Renco I, such that this Tribunal cannot consider the fact that Renco submitted its claim timely.

You can see it here on the slide; I don't need to read it. I will note that we heard a hypothetical this afternoon, so while I'm on this slide I'll say it. Counsel said that Article 10.16 has conditions to submission of a claim. At least 90 days before submitting the Claim, the Claimant shall deliver a written Notice of Intent, and Renco did that. Provided six months has elapsed since the signing, the Claimant may submit a claim.

And Number 4, a claimant shall be deemed to have submitted a claim to arbitration when the Claimants' notice or request for arbitration referred to in Article 3 is received by the Respondent. And Peru argued that if the Notice provision was not complied with, for example, then the Party would not have submitted--then the Claimant would not have submitted its claim to arbitration. And we agree with that. If the notice provision is not complied with, then there would be no submission to the arbitration--to a claim to arbitration.

And then counsel said, "and it's the same thing with waiver," but it's not the same thing with waiver.

Waiver is in Article 10.18, and Article 10.18 does not go to when a claim is submitted. Article 10.18 goes to the issue of consent.

So, the fact that the Tribunal found in Renco I that Peru did not consent to the arbitration because the written waiver was technically defective does not change the reality that Renco properly submitted a claim to arbitration when it did--and when it did so under Article 10.16, the statute of limitations stopped running under settled principles of international law, including customary international law, and we heard references to municipal law--and I'll get to this.

The point is that civilized nations, most of which we are aware, recognize that, upon the filing of a claim, the statute of limitations is suspended, and that rises to the level of customary international law. Parties often submit a claim to a tribunal that the Tribunal ultimately concludes that is not subject to arbitration for various reasons, including potentially jurisdiction, but that does not mean that the Claimant never submitted the Claim to arbitration in the first place.

One of the conditions of consent is that the Claim be submitted within three years of when the Claimant first acquires knowledge, and Renco satisfied that

condition.

A second and different condition to consent is that the Respondent must have received a valid waiver, and the Tribunal in Renco I, by a majority, found that Renco did not meet this condition or that it could not unilaterally cure, and thus Peru did not consent to arbitration. But nothing in the Treaty suggests or remotely states that a lack of consent with respect to a written waiver failure implicates in any way the legal analysis of whether the statute of limitations is suspended upon the timely submission of a claim to arbitration under Article 10.16.

So, through its lex specialis argument, Peru improperly attempts to import words and notions into the Treaty that do not exist. They say that Treaty expressly calls for this; it does not. And, as I mentioned at the outset of my presentation, this is very important because if the Treaty itself is not lex specialis, which it's not, then the Tribunal, again, will thus be guided by customary international law.

And I'd like to spend just another minute on this before I move on.

So, as you know from our papers and I just mentioned, the Majority of the Tribunal found that the highlighted language at the bottom of the waiver caused

the waiver to be defective. Renco obviously submitted a waiver; this language was added; and, as a result of this seeming defect, the Tribunal found that Peru did not consent to jurisdiction. That's certainly how Peru argued its case in Renco I, and that is how the Tribunal understood it as clearly reflected in its Final Award. If the issue is whether Peru consented to jurisdiction as a result of the technical defect, and that is a very different question from whether Renco submitted its claim to arbitration.

We see this, for example, in Paragraph 73 of the Award, where the Tribunal says: "This is so because compliance with Article 10.18.2 is a condition and limitation upon Peru's consent," and, of course, the heading of Article 10.18.2 relates to consent. And then, of course, they say that is an essential prerequisite to the existence of an arbitration agreement and, hence, the Tribunal's jurisdiction.

And the United States, in its submission, reaffirmed this, that waiver is a requirement in Article 10.18.1 as a condition of consent to arbitrate a claim. The U.S. did not state in its submission in this case that the waiver language is relevant to when a Party is deemed to have submitted its claim to arbitration.

And focusing back for a second on 10.18, we

agreed that the three-year limitation period is lex specialis. That is clearly stated, but we obviously do not agree that it is lex specialis; we took a legal question of whether the timely filing of a claim under Article 10.16 can cause that to be suspended. If the Parties of this Treaty had wished to deviate from settled principles of international law, Members of the Tribunal, and agree instead that under no circumstances could the three-year period suspend or toll or freeze the limitation period, they could have easily written that into the Treaty, but the United States and Peru did not do that.

And I also note this is a comprehensive and quite detailed Treaty with annexes and with, for example, many footnotes that explain and clarify the text. It took great pains to be as clear as they could in stating what the intent was.

In fact, Footnote Number 5 on Page 10-14 of the Treaty expressly references customary international law. It says: "For greater certainty for purposes of this Article, the term 'public purpose' refers to a concept in customary international law."

So, obviously, the United States and Peru were aware of and familiar with the principles of customary international law when drafting and signing the Treaty. Again, if they wished to deviate from customary

international law, they would have made that clear in the Treaty. And again, they did not. And because this Treaty is not lex specialis, the Tribunal again will be guided by principles of international law, which is where I'll move to now.

Now, before--I said I'll move there now. Leading into international law, I'd like to spend a few minutes on the object and purpose of limitations periods because it informs why international law is what it is. And, of course, this Tribunal doesn't need to be shown Article 31 of the Vienna Convention, so I'll move on.

But the object and purpose--some of the object and purpose of this Treaty, one is, for example, to promote economic development in Peru. You see this on Slide 21. And another--and you heard this from counsel today--is to ensure a predictable legal and commercial framework for business investment. Consistent with this objective and purpose, the Tribunal should take into account the underlying object and purpose of statutes of limitations periods, which generally is to require diligent prosecution of a known claim when the evidence is relatively fresh.

So, we see this, for example, in the Vannessa Ventures versus Venezuela Case, where the Tribunal said, and you can see it: "The Arbitral Tribunal considers that

the purpose of such a statute of limitations provision is to require diligent prosecution of known claims and ensuring that the claim will be resolved when the evidence is reasonably available and fresh."

Now, Renco timely initiated the Renco I arbitration, and it put Peru on notice of these claims. In fact, because Peru waited for more than three years to raise its waiver objection--and I'm going to get to that in a second--Renco filed a 182-page Memorial on the Merits with four Witness Statements, three Expert Reports, 186 exhibits, 64 Legal Authorities--all laying out its case in great detail and in a timely fashion. There is no question that it diligently prosecuted the case while the evidence was fresh, and Peru engaged in that process every step of the way, just as it is now, in both cases with International Counsel from White & Case.

We see the same thing in the Corona Materials case versus the Dominican Republic, which quotes the Berkowitz case, so both cases stand for this proposition. An ineffective limitations period would fail to promote the goal of ensuring availability of sufficient and reliable evidence as well as providing legal stability and predictability, so this is the object and purpose of limitations periods.

We see it again in Bin Cheng. The focus of these

principles and writings is on relative prejudice to a Respondent. If a Claimant unduly delays in bringing its claim through apathy or negligence, and the evidence becomes stale making it difficult for a Respondent to defend itself, well, then the limitation period serves its purpose. But when the Claimant did not delay in presenting its Claim and it put the Respondent on full notice of the Claim, as Renco did here, the purpose of the limitation falls away. And so, with that backdrop now, I'm going to move to international law, which again confirms that when a Party files and puts a respondent on notice of a claim, it suspends the limitations period.

We see this, for example, in the Gentini Case. I'm going to start with arbitration awards as help in understanding principles of international law. What that Tribunal pointed out is that the presentation of claim to a competent authority will interrupt the running of the prescription.

You see it again in the case of H. Williams versus Venezuela. Reinforcing the object and purpose of the limitations period and saying we think due notification to the debtor Government marks the proper date. It puts the Government on notice and enables it to collect and preserve its evidence and prepare its defense. That's CLA-20.

We see it again in the Giacopini Case. The principles of prescription finds its foundation in the highest of equity, the avoidance of possible injustice to the defendant. In the present case, full notice having been given to the defendant, no danger of injury exists, and the rule of prescription fails.

And yet again, the Tribunal in the Tagliaferro Case, makes the point that the responsible constituent authorities knew at all times of the wrongdoing, and it went on to say: "When the reason for the rule of presentation ceases, the rule ceases, and such as the case now."

In its ostensible submission responding to the comments of the United States, Peru argues that, and we heard it again today, but in that submission they argue that Renco's reliance on the Feldman versus Mexico case was misplaced because the Tribunal in that case required showing of extraordinary circumstances to bring about a suspension of a limitations period, and we have two responses to that.

First, with due respect to the Feldman versus Mexico Tribunal, it is the only one to apply an exceptional circumstances standard to this issue of which we are aware.

And, second, even if the exceptional

circumstances govern, which we respectfully say it does not, but even if it were to, the facts of this case clearly and easily meet that standard. You can see it on the screen. An acknowledgment of the Claim would probably suspend the limitations period. But any other behavior short of such formal and authorized recognition would only, under exceptional circumstances, be able to bring about the interruption of the running of the limitations or stop the Respondent State from presenting a regular limitations defense. Such exceptional circumstances include long, uniform, consistent, and effective behavior of the competent State organs which would recognize the existence and the possibility and also the amount of the Claim. This is exactly what we have here. Peru participated in Renco I from the very day that Renco filed its notice of arbitration.

In addition to international awards, suspension of limitations upon the filing of a claim is a general principle recognized as I mentioned earlier, by civilized nations making it part of customary international law, and yet another international-law principle support the Claimants' argument here.

Now, we detailed this relatively extensively in our Memorial at Pages 35 and 36, but I'm just going to spend a few moments on it.

The laws of these jurisdictions and others causes the suspension of a limitation period upon the filing of the Claim timely to suspend the limitation period. And I'll give you just a few for examples.

The first one is Peru. Its Civil Code provides that the statute of limitations shall be tolled by service of process on a debtor or any other notice given to a debtor even if by an incompetent court or authority.

Now, again, these were in our Memorials, and Peru has not challenged any of it. We see it again in the Civil Code of Argentina, which says: "The statute of limitations shall be tolled upon the filing of a petition with a court authority, even if such petition is defective."

Civil Code of France: "Any legal action, even a summary proceeding, interrupts the time limitation period. The same applies when the legal actions are brought before a contract without jurisdiction when the act of referral to the Court is quashed on account of a procedural defect." I mean, the law of France couldn't be more directly on point.

And again, this is all in our Memorial at Pages 35 and 36.

Civil Code of Germany: "The limitation period is suspended by the filing of proceedings for performance or

assessment of the claim."

Civil Code of Spain: "Initiation of a case before a court suspends the limitation period."

Civil Code of Portugal: "The limitation period is suspended by summons or any other judicial notification even if the Court lacks jurisdiction, and even if the summons is subsequently annulled."

The Law Commission in the United Kingdom, the Limitation on Actions, Paragraph 2.94, "Time ceases to run against the Claimant when he or she commences proceedings; that is, when a claim form is issued by the Court at the Claimant's request."

And the Supreme Court of the United States similarly held that, "in a suit on a right created by Federal law, filing a complaint suffices to satisfy the statute of limitations."

This customary international law is reflected in Article 45 of the ILC Draft Articles on State Responsibility, the Commentary. You can see on the slide where the writing as the Rapporteur to the International Law Commission, Judge Crawford put it this way. He said: "A claim will not be inadmissible on grounds of delay unless the circumstances are such that the injured State should be considered as having acquiesced in the lapse of time--or--or the Respondent State has not been seriously

disadvantaged." I'm going to stop there. Peru clearly has not seriously been disadvantaged by a suspension of the tolling period. Peru is not been disadvantaged at all, let on alone seriously, and the timely notice enabled Peru to gather its evidence and prepare its case, as it's obviously done, so I will continue on.

Judge Crawford's commentary continues: "International courts generally engage in a flexible weighing of relevant circumstances in a given case, taking into account such matters as the conduct of the Respondent State and the importance of the rights involved." Peru's conduct in asserting this objection in this case is abusive, and I'll get to that. And the rights that the Claimant seeks to protect here are clearly very important.

Moving on to the next sentence, the Commentary says: "The decisive factor in whether the--the decisive factor in whether the Respondent State has suffered any prejudice as a result of the delay in the sense that the Respondent could have reasonably expected that the claim would no longer be pursued." Here, again, the analysis clearly calls for a suspension of a limitations period. Peru has suffered no prejudice, and clearly and obviously it did not think that Renco had abandoned its claim.

Peru's response to the Claimants' analysis on these international-law principles is founded in only five

pages of Peru's alleged comments to the submission by the United States, which was actually a reply to our submission, and notably nowhere in any of those five paragraphs does Peru attempt to refute any of these international law arguments. Instead, they rest their entire case on lex specialis. They say the Treaty itself prevents it. But as I've already shown you, that is not the case.

So, now moving to abuse of rights, to be clear, Peru does not have the right to challenge Renco's--no--yeah, does not have the right to challenge Renco's argument for all of the reasons that I just said above. It does not have the right. But even if such a right were to exist, the Tribunal should deny Peru's objection on the doctrine of abuse of rights. As you saw on our papers and as I reviewed with you earlier, we included the additional language in the waiver, which the Tribunal found prevented consent. Peru had countless opportunities to object to this language, but it did not do so, even as it raised other objections. Peru had access and knowledge of this reservation of right, but it never raised it, and I'm going to address that because we heard a lot about it today.

We heard from Peru today that it raised this issue early, and I'll get to that, but let's just see what

the Tribunal in the Renco I case has to say about this, and again that Tribunal lived through this.

The Tribunal has been troubled by the manner in which Peru's waiver objection has been raised in the context of this arbitration. The arbitration has already been afoot for quite some time before Peru filed its Memorial. By this stage, over four years had passed since Renco filed its Notice of Arbitration, and I'll jump down.

Clearly, it would have been preferable for all concerned if Peru had raised its waiver objection in a clear and coherent manner at the very outset of the case. Instead, they emerged piecemeal over a relatively lengthy period of time.

That's what happened in this case. You didn't experience it obviously, but you're going to have to assess whether Peru is telling you the facts correctly or whether we are, but you can be guided by what this Tribunal said.

Now, Peru said in its Memorial that it raised concerns early about the procedural and jurisdictional issues, alluding or suggesting that Renco's reservations of rights at the bottom of its written waiver is what Peru was raising. This is demonstrably false. And this morning, we heard the same, but in much, much more detail, that Renco knew that the objection was afoot, which is

just factually untrue.

Renco claimed--Peru claimed this morning, when it was on Slides 10, 11, and 12 and then later in the afternoon that Peru stated that there was no surprise here, that Peru insisted on being heard and that it was blocked at every corner with respect to raising its reservation of rights objection. This is just false. It's revisionist history. It's unsupported, and it's completely wrong.

As you just saw on Slide 35, the esteemed and obviously independent tribunal, an unbiased Tribunal, which actually sided with Peru on the technical jurisdictional issue and dismissed the case stated that Peru did not raise its waiver objection in a clear and coherent manner at the outset of the proceeding. Instead, they emerged piecemeal.

Peru argued this point that it's arguing to you to the earlier Tribunal. It argued in Renco I: "We've been trying to raise this all along. You guys just haven't been listening." And the Tribunal just absolutely rejected that, I mean this was fully briefed, and you can see. The Tribunal said no, Renco's notice of arbitration was filed, April 4, 2011; Notice of Arbitration was filed on August 11. Both documents contained Renco's waiver including the reservation of rights. Yet, Renco's

compliance with the formal and material requirements of Article 10.18(2)(b) was not put in issue until Peru filed its notification of preliminary objections on March 21, 2014, nearly three years after Renco submitted its claim.

And again, we also heard this morning amazingly and inaccurately, that Renco knew--this is at around Slides 10 and 11, I didn't look up at the time, but it was around there, that Renco knew that the additional waiver language was unacceptable, but Renco insisted on maintaining that language. That is an egregious misstatement of the facts. Renco was completely unaware of Peru's objection to the additional language at the bottom of the waiver until Peru finally, over three years later, actually told Renco and the Tribunal what Peru was talking about. Prior to that time, Peru did not raise the objection of this additional language in a manner that anyone could understand what it was saying. Renco didn't know; the Tribunal couldn't figure it out. It was vague.

And it may not have even been referring to the additional language. The waiver could have been referring to what Peru was saying at other times, which is that the bankruptcy proceeding down in Peru was a violation of the waiver. But we don't know. I mean, one could infer that Peru was playing games with the Claimants and with the Tribunal and, frankly, with the rule of law itself. I

never heard even Peru state other than today that Renco somehow knew what Peru's objection was with respect to this language in the waiver.

In fact, once Peru made its objection known and clear after piecemealing and vagaries for three years, Renco repeatedly offered to delete that additional language from the waiver. Peru says that we went full steam ahead, we knew it was wrong, and we didn't care. That's factually inaccurate. And I'll get cites to the record for that because I couldn't imagine that it would have been said today, but in rebuttal tomorrow, we'll have it. We asked to just delete it, thought it was superfluous, and Peru said, no, we're not going to agree to let you delete this. So, the majority of the Tribunal felt that it needed to dismiss the case--the entire Tribunal agreed that it needed to--no, the majority agreed that it needed to dismiss the case. One tribunal member felt that Renco should have been permitted to cure the technical defect without Peru's consent, but the two other arbitrators didn't agree with that. And again, this Tribunal is not in a position to know who is telling the truth here.

But, again, you should be extraordinarily comfortable in understanding the facts here based on a very esteemed Tribunal that lived through this, and you

can be informed by what the Renco I Tribunal said when you're assessing the relative truthfulness of the allegations of both sides.

So, after Renco or after Peru refused to accept Renco's request that it be allowed to just delete the language, the Tribunal obviously became aware of what was going on. And Peru did not abuse its rights, according to that Tribunal, by asserting its claim. It was troubled by the way that Peru did it, but it found that Peru didn't abuse its rights in asserting that claim.

But that's not the issue here. What's happening here is Peru is now turning around in these subsequent proceedings after its lengthy delay and its troubling conduct, and it's arguing that the limitations period has expired, even though there is no prejudice to it, and this is disingenuous, and this is wrong at every level. Peru should have heeded the admonition from the Renco I Tribunal and accepted that the limitations period is suspended. Abuse and injustice would prevail over what is just and right if Peru were to successfully avoid its international obligations in this case as a result of suspicious and troubling conduct. There is no right which could not in some circumstances be refused recognition on the grounds that it has been abused.

So, even if Peru abused--had this right to

challenge the limitations period, which it does not because international law supports Renco's position, but even if it did, the abuse of rights doctrine precludes Peru from exercising such a right here.

The Renco Tribunal was quite attuned to this issue, that this Tribunal, you respective Members of the Tribunal, now confront. And perhaps anticipated based on Peru's troublesome conduct in that case that Peru would do exactly what it's doing here with its preliminary objections in this case. The Renco I Tribunal went out of its way in the Award to state what we see on the slide in front of you.

The Tribunal said: "In reaching this conclusion, the Tribunal does not wish to rule out the possibility that an abuse of rights might be found to exist if Peru were to argue in any future proceeding that Renco's claims were now time-barred under Article 10.18(1). To date, Peru has suffered no material prejudice as a result of the reservations of rights in Renco's waiver. However, Renco would suffer material prejudice if Peru were to claim in a subsequent proceeding--arbitration that Renco's claims were now time-barred."

Again, the Tribunal had already decided by a majority to dismiss on jurisdictional grounds. It did not need to make this unanimously supported statement that you

see on the slide and that you saw on the prior slide, but it did. The facts of this case are so unique and so disturbing that an injustice to Renco from Peru exercising a right that it claims to have is so abusive and so unjust that the Tribunal took the time and the effort to provide this analysis in its Award because it saw this issue for what it was. It saw it firsthand in realtime. The Tribunal, as I said, lived through Peru's conduct, and I think we all sort of figured out what their ultimate motivation was.

Now, I apologize, but my screen is not moving forward. I'll try to click the button.

Okay.

And the Tribunal went on to say that the "abuse of rights" doctrine is an aspect of the principle of good faith and is well-established--it's a well-established general principle of international law. The doctrine has been cited and applied on numerous occasions by international courts and tribunals.

And here, I said these words previously but they're not my words, I would not be as eloquent as Sir Hersch Lauterpacht, but he said: There is no right, however well-established, which could not, in some circumstances, be refused recognition on the grounds that it has been abused.

I will move through this quickly.

The Tribunal in Venezuela Holdings versus Venezuela observed the same. In the interest of time, I won't read it aloud, and we see it again here on Slide 44 in CLA-30, where the Tribunal held that the "abuse of rights" theory applies to ICSID proceedings, and has been applied by several ICSID and non-ICSID tribunals in investment cases. It is our contention that Peru's conduct in asserting this limitation defense rises to the level of bad faith, and I don't say that lightly at all, but there is no need to prove bad faith for a showing of an abuse of rights. We don't need to prove that. But we see this, for example, in the Philip Morris versus Australia Case, where the Tribunal said that.

Rather, than the need for the showing of bad faith as Bin Cheng notes in his book on the general principles of law as applied by international courts, the focus--and I've been saying this sort of throughout, is on whether the exercise of the right is in pursuit of a legitimate interest, which it's not here, and also whether in light of the obligations assumed by the State, the exercise of the right is calculated to prejudice the rights and legitimate interests of the other party, which is exactly what Peru is doing.

And here is the same standard. This is from the

Renco I Award. It's quoting to the Saipem versus Bangladesh Case, and it repeats exactly what I said before. So, in the interest of time, I am going to move to the third and final part of my presentation, which is that the denial-of-justice claims are not time-barred.

So, here on the Slide 49, Renco puts--Peru puts forward its case as to why the denial-of-justice claim is time-barred, and we heard it this afternoon in the argument, essentially, that Renco first knew of any alleged breach or loss of damage before the relevant prescription date, and that it can't rely on the later 2015 Supreme Court Decision to circumvent the statute of limitations for denial of justice, and then down in the next paragraph Page (drop in audio) of the Memorial, they make the same point, that in Renco's words, the breach would have materialized and been known by the time of the first court decision.

But Peru's objection to Claimants' denial-of-justice argument is equally as baseless as its limitations objection to the fair and equitable treatment and expropriation claims that I just reviewed with you. The essence of Peru's argument here is that Renco should have brought its denial-of-justice claim when the First Instance Court of Appeal in Peru rendered its Decision on the MEM claim, and you're going to hear the facts about

this from my colleague Mr. Llamzon in a few minutes so I'm going to not get into the facts very much, but their legal argument is that we should have just filed a treaty claim once the first instance Appellate Court made its Decision. But Peru's objection again misses the mark because a denial-of-justice claim is not ripe until an investor has exhausted all of its local remedies, or the Investor believes that any attempt to do so would be futile. This is a substantive issue that precludes the filing of a denial-of-justice claim.

So, in this case, Renco chose to exhaust all of its local remedies. It did not make the determination that to do so would be futile. It held out hope that perhaps the Appellate Court or different Appellate Court or the Supreme Court would right the wrong of the First Instance Appellate Court. So, Peru is just legally incorrect, in our estimation, when it states that a denial of justice breach materializes with the first-court decision.

Now, unlike Peru, the Claimant bases its limitation analysis on the date that the Peruvian Supreme Court upheld the improper decision of the Lima Supreme Court, and that occurred in November of 2015. Nine months later, the Claimant sent Peru the Notice of Arbitration. And then three months after that, on November 10, the

Parties entered into the consultation period that Peru has referenced and put into the record and that I reviewed with you, where the Parties to this arbitration agreed to suspend and toll the statute of limitation period to engage in settlement discussions. And those lasted for about two years, ending in October 2018, and then Renco filed its claim 8 days later.

So, Renco's submission of the claim for denial of justice to arbitration would have been timely even if the Parties had not entered into a Tolling Agreement by which they suspended the statute of limitations because three years had not yet run from that point. But taking into account the two years that were suspended under the Treaty, obviously the claim was well within the three-year statute of limitations.

And I'm going to move through these Legal Authorities pretty quickly.

First, we see that in the submission of the United States, the United States agrees with us that the statute of limitations doesn't begin to run on denial of justice until all domestic remedies have been exhausted.

We see this from Professor Paulsson in his book, Denial of Justice. Same thing, in the case of denial of justice, finality is thus a substantive element of the international delict, and he quotes to Judge Crawford

commentary for the International Law Commission in the ILC Articles as well: "An aberrant decision by an official lower court in the hierarchy, which is capable of being reconsidered, does not itself amount to an unlawful act." That's just sort of like black-letter law on denial of justice.

And we see this from the Tribunal, the esteemed Tribunal, in the Chevron-Ecuador Case: "It's well-settled that a claimant asserting a claim for denial of justice committed by a State's judicial system must satisfy, whether as a matter of jurisdiction or admissibility, the requirement as to the exhaustion of local remedies, or as now better expressed, a substantive rule of finality."

Peru attempts to, unsuccessfully, distract, I hope, this Tribunal from this well-settled law by citing to the ATA Case and other cases that do not deals with of limitations questions for denial of justice. They are ratione temporis issues, not limitations issues, as the slide shows. And the same was the issue in Mondev. It was not a limitations issue in a denial-of-justice case. It was a ratione temporis issue.

And so, the Claimants--the Respondents, once again just as they did with the exact word lex specialis versus principles of international law, they seem to--missed the law.

So, with that, Members of the Tribunal, I'm going to hand the floor to my colleague, Mr. Louie Llamzon.

Thank you.

PRESIDENT SIMMA: Thank you, Mr. Kehoe.

Mr. Llamzon, you have the floor.

(No audio.)

MR. LLAMZON: I'm sorry.

PRESIDENT SIMMA: You were on mute?

MR. LLAMZON: Yes.

Can you hear me now?

PRESIDENT SIMMA: Yes.

MR. LLAMZON: Well, Mr. President, once more and Members of the Tribunal, good evening and good afternoon.

In the next 13 minutes, I will discuss Peru's second objection, which is that the Claimants' claims allegedly violate the principle of non-retroactivity.

My presentation is divided into three parts. First, I will recount the key facts of this case and how Peru's conduct, conduct that we believe breached the Treaty, occurred after the Treaty entered into force on February 1st, 2009; and, for that reason, do not violate the non-retroactivity principle.

And, second, I will go through the international law that applies to the question of non-retroactivity to show that Renco's claims fall well within the temporal

limits of the Treaty and of customary international law. The only test the Treaty provides is whether the acts, facts or situations that form the basis for Renco's claims "ceased to exist" before the Treaty came into effect, and they did not.

And, finally, I will discuss the legal theory Peru proposes for this case.

So, Peru's entire argument on non-retroactivity really rests primarily on one case: Berkowitz versus Costa Rica. Peru isolates a few words in that case and says that this Tribunal must analyze whether the Claims Renco is making has "deep roots" in pre-Treaty actions or whether or not it's "severable" or whether it's "independently actionable," and then proceeds to say that Renco's claims should all be considered by law as having pre-dated the Treaty. We say that reading is wrong and it doesn't comport with either the Treaty or with customary international law.

So, we begin with that first point, which is that Peru's breaches occurred after the Treaty entered into effect on February 1st, 2009, putting them outside any plausible non-retroactivity violation.

So, under the most basic test on retroactivity, the Tribunal is to consider the measures identified as breaches of the Treaty and to ask whether those alleged

breaches occurred when the Treaty was in force. The U.S.-Peru Trade Promotion Agreement entered into force on February 1st, 2009, so that's the reckoning of the point.

You have our pleadings on the facts, so I don't need to really recount these in detail. I would commend Pages 4 through 13 of our Counter-Memorial on 10.20.5 objections in particular, which discuss the facts I will be going through here.

Renco's claims concerned three core measures:

First, in March 2009, after the Treaty entered into force, DRP requested and should have been granted an extension in order to complete its 16th and final PAMA obligation, as was its right under the Stock Transfer Agreement. So, our first claim is that Peru's refusal to grant that extension is a violation of the Treaty.

Second, in February 2010, Peru's Ministry of Energy and Mines--and I will shorten this, I'll say "MEM," as others have--stopped a $163 million credit for the same PAMA obligation that it blocked, abused its position on the creditor's Committee, and resisted all of DRP's reorganization proposals. So, our second claim is that Peru forced DRP into bankruptcy in violation of the Treaty and that these actions were measures tantamount to an expropriation of Renco's investment.

And then, third, starting in November 2011,

Peru's judiciary failed to nullify the $163 million credit that MEM improperly obtained, and we believe that Peru's judiciary committed a denial of justice when it failed to nullify the MEM credit.

So, we go now to our first claim.

As you know from our pleadings, on March 5th, 2009, DRP, which as Mr. Kehoe said, is Renco's investment in Peru, requested an extension to complete the 16th and final PAMA project, and PAMA is the acronym that in English means the Environmental Adjustment and Management Program.

So, the PAMA are projects designed to address environmental concerns, and this 16th and last PAMA was a Sulfuric Acid Plant that was to be built for well over $100 million.

So, at this point, 15 other PAMA had already been completed at the cost of hundreds of millions of dollars, but as this 16th project was to be financed and built, the Global Financial Crisis, which, as you will remember, first struck the U.S. and Europe and then the rest of the world in late 2008 occurred.

So, normally a financial crisis is not a basis for force majeure but in the case of the stock transfer agreement, a broad clause exists that considers the DRP's PAMA obligations to be deferred if the performance is

delayed, hindered or obstructed by extraordinary economic operations. Renco maintains that the Global Financial Crisis widely considered as the worst economic crisis the world faced since the Great Depression in the 1930s is clearly an extraordinary economic alteration.

So, it asked MEM to recognize its rights under the Agreement to an extension to complete the Project.

Now, obviously, we're not focused today on whether the refusal to allow an extension violates the Treaty or not--that's a question for the merits--but the request, which was made on March 5th, 2009 and the failure to grant the request, which was made March 10th, 2009--and it's what you see in the first two bullets--those unquestionably occurred after the Treaty took effect. So, Peru does not assert that these facts--does not deny these, and you will find Peru's denial of the DRP's request in Exhibit C-6.

And just to run through the other key facts, on March 27, 2009, which is also after the Treaty entered into effect, MEM and DRP then agreed to grant a PAMA extension via a draft MOU, but Peru never executed the MOU. Instead, what happened was that DRP requested a PAMA extension again on July 6, 8, and 15, and MEM rejected all of them.

In September 2009, the Peruvian Congress passed a

law granting DRP a PAMA extension. But MEM again issued regulations undermining that law.

Also, in 2009 and after the Treaty entered into effect, Peru engaged in a smear campaign against Renco, and these include reckless statements made by the President of Peru about DRP. These were made in July 2010.

So, the PAMA deadline itself expired in October 2009. That's also significant. Even the deadline of the PAMA obligation falls within the period after the Treaty took effect. We believe that Peru's refusal to grant the PAMA extension is what caused DRP to fall into bankruptcy.

Now, for the second claim. Peru's abuse of its position on the Creditors Committee during DRP's bankruptcy, which we say forced DRP into liquidation. After the Treaty came into effect in February 2009, one of DRP's unpaid concentrate suppliers initiated voluntary bankruptcy proceedings in Peru. This was in February 2010, as you see this in the first bullet.

Then in September 2010, MEM took the position that the same PAMA project, the sulfuric acid plant, that it had unlawfully blocked from completion by refusing to grant the extension was nonetheless still an obligation that the DRP owed to it. And because it was supposed to

take $163 million to build the plant, MEM wanted the credit in the bankruptcy proceedings for that full amount, so this memorandum credit, in our view, really is an absurd self-dealing credit. But because of its size, 163 million, that credit was enough to make MEM the largest creditor of the DRP, freeze out the legitimate creditors, and make reorganization impossible.

MEM got the credit; and as a creditor, MEM then voted against reasonable restructuring plans DRP proposed in April and May 2012, resulting in DRP's liquidation in July of 2012. Again, none of these events even come close to the February 2009 threshold of when the Treaty took effect.

Finally, our denial-of-justice claim. This again relates to that MEM credit I just discussed. DRP opposed the MEM credit; and INDECOPI, Peru's bankruptcy regulator, actually initially agreed that this was not a credit. Its Bankruptcy Commission sustained the DRP in February 2011. But when MEM appealed, INDECOPI's Bankruptcy Chamber reversed the Commission's Decision in November 2011. DRP then went to Peruvian courts which objected DRP's challenge, and upheld the credit first in administrative action in October 2012, and then in Lima Superior Court in a split 3:2 vote in July 2014, and then in the Supreme Court of Justice of Peru which denied its final appeal in

November 2015. And we say that, in sustaining a clearly unlawful credit, Peru's judiciary committed a denial of justice.

Now, before I leave this first part of my presentation, let me just note two things:

First, Peru does not seem to be arguing that Renco's denial of justice claim violated the non-retroactivity principle. So, regardless of what you decide on Peru's retroactivity arguments, that claim should proceed to the merits.

Second, throughout its pleadings, Peru has been in the habit of recasting Renco's claims to making it suit its own narrative--we heard it this morning again--that somehow all of the key facts that form the basis of our claim occurred before the Treaty took effect. But that's not proper. As is the standard practice before international courts and tribunals, this Tribunal should, of course, make an objective determination of what the dispute in this case is really about, but in doing so, you must give attention to the formulation of the Claimant, and in particular to the facts that the Claimant identifies as the basis for its claims, and so the facts that I have just recapped should be given particular attention and weight.

Now, for the second part of my presentation,

which is that Renco's claims fall well within Article 10.1.3 of the Treaty as well as customary international law.

Now, the facts that serve as the basis for our claims fall within the right side, we say, of the February 1, 2009 dividing line, and we submit that all of Peru's Treaty breaching conduct occurred after that, and really that should be that. That's the test. But for the sake of argument, I will now focus for a few minutes on the law on non-retroactivity because the only real counter Peru has made on non-retroactivity is based on a gross misreading really of one case. In our view, it's good to go through these customary principles and the Treaties and find at least some common ground at the beginning.

And that beginning is the Treaty itself, and you see in the slide Article 10.1.3 of the TPA, and it sets out the temporal scope of the Treaty. And because it's a key text, let me read it into the record. Article 10.1.3 says: "For greater certainty, this chapter does not bind any party in relation to "any act or fact that took place" or "any situation that ceased to exist" before the date of entry into force of this Agreement."

Let me break that down a little bit. On the one hand, you have "any act or fact that took place" or "any situation that ceased to exist," meaning consummated and

completed acts, facts or situations before the Treaty entered into force. In those cases, you cannot raise claims because they were already consummated and completed. On the other hand, any act, fact, or situation that has not ceased to exist, meaning it may have started before the Treaty entered into force but the act continues after entry into force, you can release these acts, facts, and situations because they are continuing or composite acts.

Now, you may have noticed that in Peru's submissions, even this morning, Peru does not really address the words "cease to exist" in the Treaty, and you can understand why because, if Peru is right with its theory, as long as pre-Treaty acts and facts in situations exist, that may potentially have been a breach of the Treaty, that now insulates Peru from liability once the Treaty comes into force because supposedly the root of the dispute already exists or because it's inseparable, but that would meet with "continuing acts" doctrine and the kind of breaches that are actually covered by this 10.1.3 impossible.

So, I should stress that Renco is really not raising claims about measures taken by Peru before February 1st, 2009, so we're not even seeking to employ the "continuing breach" principle. But as I mentioned,

even if we were to do so, we would be well within our rights because Peru's acts and the situation the Parties find themselves in did not cease to exist after February 1st, 2009.

Now, the text of Article 10.1.3 consciously draws from the text of the Vienna Convention on the Law of Treaties, and you see on the slide that puts both texts side by side, they are virtually identical. The only difference is that first highlighted section. The identity between the TPA and the Vienna Convention means that the non-retroactive principle in the TPA is consistent with custom, and the Vienna Convention largely being expressive of custom, and so to elaborate on what non-retroactivity means, we should also have recourse to custom.

Now, as for the highlighted section, Article 10.1.3 starts with the phrase "for greater certainty," and this provision in the TPA is intended to defeat any attempt to argue that the Treaty isn't consistent with normal rules of customary international law.

And you see here, just in case there is any doubt about this because I don't think this is in doubt, you see on the next slide an explanation from the United States in this proceeding on what it believes is the meaning of "for

greater certainty."

In its submission to the Tribunal, the U.S. confirmed that "the phrase 'for greater certainty'" signals that the sentence it introduces reflects what the Agreement would mean even if that sentence were absent. And then the U.S. cites the Vienna Convention, which it says "it has recognized since at least 1971 as an 'authoritative guide' to treaty law and practice," so I will refer to the Vienna Convention as an expression of at least these rules of customary international law.

Now to the next slide, yes.

What does the Treaty as well as custom say about non-retroactivity? As you would have seen in our pleadings, we identify a number of basic principles that we don't think are controversial. And for your convenience, we summarized those in the slide. We think three basic principles are relevant in this case:

First, "a claim for a breach of a treaty must be based on conduct attributable to the State that occurred when the Treaty was in force, and so here conduct by Peru or attributable to Peru from February 1st, 2009, onward."

Second, "a tribunal can consider facts, acts, and omissions that occur before a Treaty's Effective Date when assessing whether State conduct occurring after the Treaty entered into effect violated the Treaty."

Third, "an internationally wrongful act that begins before the Treaty entered into effect, but continues after the Treaty entered into effect, violates the Treaty, and those that are continuing are composite breaches."

Again, Renco is not even claiming that what we're seeking is a continuing breach. We would be doing so if we said, for example, that there was an extension we were entitled to under a Stock Transfer Agreement that was denied before February 1st, 2009, and continued to be denied after. In that case it would still not violate non-retroactivity. That's not even the case here.

We are pointing to a request made and a denial given in March 2009. We start with that first rule and it's a claim for breach of a treaty must be based on conduct attributable to the State that occurred when the Treaty was in force. This is uncontroversial, you see Article 28 on non-retroactivity under the Vienna Convention. It follows that same rule that we see in 10.1.3 of the Treaty. The same distinguishing of completed versus continuing or composite acts.

Next, you see the ILC Articles on State Responsibility, Article 13 of which states that a State must be bound by the obligation at the time the act occurs.

So, the second temporal rule now. Taking Article 13 of the ILC Articles again, the Commentary to Article 13 confirms that facts occurring prior to the entry into force of a particular obligation may be taken into account where those are relevant. And then you see in this next slide, the Mondev Case, where the Tribunal held that: "It does not follow that events prior to the entry into force of NAFTA may not be relevant to the question whether a NAFTA Party is in breach of Chapter 11 obligations by conduct of that Party after NAFTA's entry into force."

The Tribunal then went on to say: "Events or conduct prior to the entry into force of an obligation for the Respondent State may be relevant in determining whether the State has subsequently committed a breach of the obligation. But it must still be possible to point to conduct of the State after that date which is itself a breach." I think we're in agreement with the other side on that.

So, Mondev is a good example, actually, of the second rule I was mentioning. There, the City of Boston expropriated an investment in a parking lot before NAFTA entered into force. And after NAFTA entered into effect, the Investor initiated a lawsuit against the City and won, but an appellate court vacated the verdict. The Tribunal

held that the measures of expropriation could not violate NAFTA because they occurred and "ceased to exist" before NAFTA entered into effect.

But that Tribunal held that the Investor's claim for denial of justice did not violate the non-retroactivity principle because that claim, the denial-of-justice claim, was based on judicial measures that occurred after NAFTA entered into effect.

So, we now go to the third temporal rule, which speaks of continuing or composite acts, and here again we drown ourselves in the text of Article 10.1.3 of the TPA, which provides that conduct must have "ceased to exist" before the Treaty's entry into force for it not to be actionable. To "cease" indicates that the act was already occurring before the key date. The act stops before that date, then it will have "ceased to exist" before that date and will not violate the Treaty. But if the conduct continues, it falls within the scope of the Treaty. So, an internationally wrongful act with Peru that begins before the Treaty entered into force on February 1st but continues after violates the TPA.

And we see this identical rule in the Vienna Convention in Article 28, and then the ILC Commentary to the Vienna Convention elaborates on this very clearly, and so I will quote it: "If an act or fact or situation which

took place or arose prior to the entry into force of a treaty continues to occur or exist after the Treaty has come into force, it will be caught by the provisions of the Treaty. The non-retroactivity principle cannot be infringed by applying a treaty to matters that occur or exist when the Treaty is in force, even if they first began at an earlier date."

And by the way, Article 14 of the ILC Articles contains the same concept, "continuing act."

So, an application of that third temporal rule is found in Feldman versus Mexico where a "permanent course of action" that started before NAFTA entered into force and went on after that date became a breach of NAFTA from that date on.

An even clearer example of a continuing act is found in the Chevron versus Ecuador commercial cases decided in 2008. That claim concerned undue delay. Chevron's subsidiary initiated seven breach-of-contract claims in Ecuador between 1993 and 1994 and that was four years before the U.S.-Ecuador BIT entered into effect. The Claims concerned breaches of contract by Petroecuador that occurred even earlier, so decades earlier in the 1980s.

And then in late 2006, after all seven of those cases had laid dormant for over 10-years, Chevron

initiated a claim alleging that this undo delay constituted a denial of justice. And Ecuador, like Peru here, raised the retroactivity objections and advanced similar arguments about how the Claims were based essentially on conduct that pre-date the BIT. Ecuador argued that the Claims ultimately concerned breaches of contract from the 1980s and a lot of lawsuits and related delays that had already started 4 years before the Treaty entered into force, but the Tribunal rejected those arguments. Properly, the Tribunal held that Chevron's claims were based on conduct that continued to exist after the BIT entered into force.

So, Chevron's claim was based on State conduct that had begun before the Treaty entered into effect but continued after. That conduct had not ceased to exist and was, therefore, within the temporal scope of the Treaty.

Now, before I go to my last section of my presentation, let me say again, we do not--do not even make claims that Peru's breaches are continuing breaches. But if we did, we would still fall well within the scope of the Treaty.

Now, for my final section, in an effort to dodge the customary international law and non-retroactivity, as we were just discussing it, Peru invents a false legal standard based on Berkowitz versus Costa Rica. Now, we

believe that it's a wrong standard; but, even if it's wrong, Renco would meet that standard anyway.

What Peru has done in its submissions is extract a few key phrases from the Berkowitz Case which talk about breaches that might be alleged as having occurred after the Treaty came into force, so here it's CAFTA, but actually were not that because they were not "independently actionable" or "separable" from or "deeply rooted" in conduct that occurred prior to the Treaty entering into force. So I've extracted three paragraphs. It's the three places where you see those words in that award, and you see the language Paragraph 246 here, and then in the next slide, you see Paragraphs 253 and 269, so they all have these buzzwords, "independently actionable," "separable," and "deeply rooted."

According to Peru, this Tribunal should look at the measures on which Renco bases its claims. And even if they occurred after the Treaty entered into force, it should analyze whether those measures are deeply rooted and independently actionable and inseparable from the facts and conduct that pre-dates the Treaty.

But what's noticeably absent from Peru's submissions is really any discussion of the facts of that case, and once we go through the facts, it becomes clear exactly what the Tribunal means. That case concerned

direct expropriations, Costa Rica had issued a legal decrees formally taking the Investor's property before CAFTA entered into effect, so the Claimants sought compensation for those takings. The Tribunal found that those claims were based exclusively upon acts that occurred and "ceased to exist" before CAFTA entered into force. So, this is actually an example of that first temporal rule. A tribunal does not have jurisdiction over a claim based exclusively on State conduct that occurred before the Treaty entered into effect.

And the point here is that even if there are some lingering effects of the breach and that these effects are felt after the Treaty took effect, the fact of the taking had already been completed and the taking had "ceased to exist" by the time the Treaty entered into force.

Peru's views of the "buzzwords," as I call it, does not really address the following:

First, a Tribunal can consider pre-Treaty acts and facts when assessing whether later conduct violates a treaty. That was the second rule.

Next, wrongful acts that began before a treaty entered into effect will violate that Treaty if they continue after that Treaty enters into force. That's the third rule.

And then the critical distinction between

continuing acts allowed under the Treaty and consummated acts whose effects continue to be felt, that's in Berkowitz.

And to sum up, Peru's non-retroactivity argument is wrong for three reasons:

First, none of the Claims are based on measures taken before the TPA entered into force in February 2009.

Second, even if we somehow assume that the Claims are based on facts that occurred before the TPA took effect, as long as some of those acts and facts took place after, Renco would still be squarely within the TPA's text and customary international law because the "situation" did not "cease to exist" before the TPA took effect.

Peru's attempt to use Berkowitz versus Costa Rica to overwrite customary international law must fail because that case concerned measure that were already consummated before the Treaty entered into force, and really bears no resemblance to the case that you have before you.

And with that, I now hand it over to my colleague, Cedric Soule.

PRESIDENT SIMMA: That you, Mr. Llamzon.

Before I give the floor to Mr. Soule, I think I have to clarify a method. My reference to the time spent by speakers for the Respondent might have been a bit unclear. Of course, it's entirely in the hands of teams

how they want to spend or divide up the time available as a whole, which is three hours. So, if teams today, if Parties today go beyond the 90 minutes that are just on the plan, that is fine, and at the end of today they're going to make a time count, and then see what amounts of time are left for tomorrow.

Okay. Thanks. With that clarification, I give the floor to Mr. Soule.

MR. SOULE: Thank you, Mr. President.

Can you hear me?

PRESIDENT SIMMA: Very well.

MR. SOULE: Mr. President, Members of the Tribunal, in the few minutes that we have left, I want to address our third point, which is that Peru didn't invoke the expedited review procedure under Article 10.20.5 of the Treaty. Peru barely mentioned this in their opening. I guess when you're on thin ice you skate fast; right? But I think it's worth spending a few minutes to look at this carefully because we believe that Peru's objections are not admissible.

Next slide.

The provision is up on the screen for you, Article 10.20.5, and we say that a good-faith interpretation of this provision requires three things: It requires that the Respondent state its objection, that

Respondent pleaded its objection, and that it request that that objection be decided on an expedited basis, and that it do all that within 45 days of the Tribunal's constitution.

Now, Mr. Hamilton earlier said that they had duly notified their objections. We don't think that's true, based on the language of Article 10.20.5.

Next slide.

What Peru did, is on the 45th day after the Tribunal was constituted, on December 3rd, they sent a letter saying that they had objections. They didn't state what the objections were, and they just said that they would plead them later in further detail. Renco objected. We said that they had not properly triggered the expedited review mechanism under Article 10.20.5, and that the objections were not admissible. The Tribunal wrote back and said that they would allow the objections to proceed but that the issue would be decided later at the Hearing, so here we are, and we maintain that those objections are not admissible because Peru, who loves to say that they have respect for the Treaty, didn't actually trigger the expedited review mechanism.

Next slide.

Article 10.20.5 of the Treaty doesn't provide for this two-step process that Peru is using whereby they

state that they have an objection within 45 days of the Tribunal's constitution and then plead that objection and actually state what that objection is at a later date. As Peru has said many times, the object and purpose of Article 10.20.5 is to efficiently and cost efficiently address certain Preliminary Objections. So, again, a good-faith reading of Article 10.20.5 requires that you state the objection and that you brief the objection within the 45-day deadline.

Next slide.

To understand Article 10.20.5, I think it's helpful to look at this slide, and the interpretation that the United States gave to the phrase "making of a claim," that was in a different context, yes, but we were trying to interpret what you needed to do within the three-year limitations period under Article 1117 of NAFTA. And the United States said that it wasn't sufficient to notify your intent to submit a claim to arbitration. They said that a submission of a claim to arbitration is what makes the Claim, is what effectuates making of a claim for purposes of that provision. We say that that analysis is useful here. Under Article 10.20.5 of the Treaty, Peru has to make an objection, and it didn't make an objection, it merely notified its objection, as Mr. Hamilton said again this morning. And we say that that's not enough,

and that that doesn't trigger the expedited review procedure.

Next slide.

Every other Respondent that has taken advantage of this mechanism has fully pleaded their objections within 45 days of the Tribunal's Constitutions. Guatemala did it, El Salvador did it, Dominican Republic did it, Korea did it, Panama did it. You have the examples on the slide. Every single Respondent pleaded their objections, and that means that they all understood that Article 10.20.5, its exact wording, required them to do that. Peru did not.

Next slide.

So, this is the paragraph in Peru's letter that they actually left out from their slides this morning. So, when you say that Article 10.20.5 requires you to state the objection, plead the objection, but let's assume that that's not even the standard. The standard is that you have to state your objection. Peru didn't even do that. Look at the highlighted language on the screen. I don't even understand it. It says: "The measures that Claimant alleges breached the Treaty occurred either before the Treaty's entry into force and Claimant first acquired or should have first acquired knowledge concerning a breach and loss or damage arising there from

before the relevant prescription period." There is a typo somewhere in that sentence. They either mean "and" so both all of the measures are deficient under the retroactivity and the time bar, which is not true because we know that Peru is not criticizing our denial of justice objection on the basis of the non-retroactivity principle, or they meant or, either/or, in which case we don't know which measure runs afoul of which principle, so they're actually not stating their objections.

And the last sentence says: "To the extent that the Treaty Statement of Claim references allegations that arose after the relevant time period, claims based thereon appear to be impermissible." They're not saying they are or they aren't, they're saying appear as well as for related reasons. We don't know what those reasons are.

So, Peru doesn't state what the objections is, Peru doesn't plead the objections, and for those reasons, we say Peru didn't invoke the expedited review mechanism under Article 10.20.5. Mr. Hamilton earlier said that they gave us a collegial heads-up. Our response to that is so what? There was a rule under the Treaty, you didn't comply with it, your objections are not admissible.

And with that, I hand it over to Ed Kehoe to conclude Claimant's submissions.

PRESIDENT SIMMA: Thank you, Mr. Soule.

The floor is for Mr. Kehoe for a conclusion.

MR. KEHOE: Thank you, Mr. President. We will conclude without any further comments in the interest of time. Thank you very much.

PRESIDENT SIMMA: Thank you, Mr. Kehoe.

Now, this brings an end the pleadings of the Parties and leaves us with a break, and the question of--the question of questions by the Tribunal.

May I suggest that we have a much shorter break because it won't take the Tribunal half an hour to make up its mind as to whether and what questions it wants to put, so I suggest if that's fine with the Parties, that we have a 5 minutes' break, then come back either with some questions or not. Okay.

Mr. Hamilton, would that be fine with you, not having a 30 minutes' break?

MR. HAMILTON: Thank you very much.

(Overlapping speakers.)

MR. HAMILTON: Thank you very much, Mr. President.

We actually have a question, which is whether the Tribunal is going to share questions with us that each side will then consider overnight and address during our rebuttal tomorrow, or do you have something else in mind? And that may impact a response to the question about how

long the break is. Thank you.

PRESIDENT SIMMA: Mr. Kehoe?

MR. KEHOE: We have no objection to a 5-minute break.

PRESIDENT SIMMA: Okay. I think we just go into our Chamber and figure out the answer to Mr. Hamilton's question, so I don't really see what difference it would make how we come out on, Mr. Hamilton. I think five minutes' break would be sufficient, so let's break for 5 minutes, which means let's be back at 7:25 my time. Martin, please? That would be what?

SECRETARY DOE: That would be correct.

PRESIDENT SIMMA: In six minutes' time.

SECRETARY DOE: Everybody should have a timer in any event that will let you know when we're coming back.

PRESIDENT SIMMA: All right. So, we retreat more or less.

SECRETARY DOE: Indeed. I think momentarily we will be all be sent to our breakout.

(Brief recess.)

QUESTION FROM THE TRIBUNAL

PRESIDENT SIMMA: Okay. Thank you for being back.

The Tribunal has come up with one single question and would actually prefer you to come up with answers, if

you do it by tomorrow. The question is as follows:

With regard to the three-year prescription limitation period, it has not really been made clear whether Parties regard this as an issue of jurisdiction or an issue of admissibility. So, if you could just spend a little time tomorrow on clarifying that, that is the only question we have.

So, is there any further matter? Otherwise, today's exercise would come to an end.

May I ask Mr. Hamilton.

MR. HAMILTON: We only--thank you for your question, Members of the Tribunal, which we will address tomorrow. The only comment that I have is a practical one, which is that, in reviewing the Schedule, it comes to mind that the Tribunal questions tomorrow are indicated to follow the rebuttal round in the Contract Case, and I simply want to hold out that, from Respondents' point of view, if the Tribunal has any questions on the Contract Case prior to the rebuttal, we could try to address it in the rebuttal round. Of course, if you have any questions later or at any time, we're glad to address them at the time, as well.

Just a practical thought that some of the things that you hear, notwithstanding, Mr. Kehoe and I are usually able to agree on many commonsensical things, so

that's a practical observation. Would it be helpful for the Tribunal in the Contracts section to go to the rebuttal tomorrow? Something for you to think about.

Thank you.

PRESIDENT SIMMA: Thank you, Mr. Hamilton.

Mr. Kehoe?

MR. KEHOE: I agree with Mr. Hamilton. I'm happy for the Tribunal to decide whatever it would like to do in that regard.

And I do have one other practical question, and it won't be the end of the world however the answer turns out, but I note on the Schedule tomorrow that we have a break at 12:30 after Claimants' Opening Statements, and then we come back after 30 minutes, and we have the Respondents' rebuttal and the Claimants' rebuttal.

And all I would note--and again, we will live with it if we have to, but the Respondent gets 30 minutes of a break to prepare--to respond and rebut what it's heard from us and we don't get any time at all, it just gets handed right over to us, so maybe we could have a five-minute break at that point.

PRESIDENT SIMMA: Mr. Hamilton?

MR. HAMILTON: Sure. Understood.

PRESIDENT SIMMA: Fine.

MR. KEHOE: Thank you.

PRESIDENT SIMMA: Okay. That is fine, Mr. Kehoe?

MR. KEHOE: Yes. Thank you very much.

PRESIDENT SIMMA: Wonderful. So everybody is satisfied, so why don't we break.

So, I wish you a good rest of the day, a good afternoon or good evening, and we will see each other tomorrow same time, 5:00 p.m., which is 11--I don't know. Martin, what is it in Washington?

SECRETARY DOE: It will be 9:00 a.m. once again in Washington and New York, and 3:00 p.m. in The Hague and Munich.

PRESIDENT SIMMA: And thanks for your cooperation. I think the first day has worked beautifully. Thank you very much and see you tomorrow.

SECRETARY DOE: And we will open the breakout rooms once again in case anybody wishes to stay there for a little while after we close for today.

MR. KEHOE: Thank you. Bye-bye.

PRESIDENT SIMMA: Thanks again.

(Whereupon, at 1:33 p.m., the Hearing was adjourned until 9:00 a.m. the following day.)

CERTIFICATE OF REPORTER

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

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

DAVID A. KASDAN