



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 2  
Saturday, June 13, 2020

The hearing in the above-entitled matters convened  
at 9:00 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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1  
2 PRESIDENT SIMMA: Thank you very much. Let me  
3 open the second day of the Hearing in our cases, and we  
4 start with rebuttal presentations.

5 And if you don't have any organizational thing  
6 to raise right now, which looking at Mr. Hamilton, it  
7 doesn't seem to be the case, Mr. Kehoe, any organizational  
8 item?

9 MR. KEHOE: No, sir.

10 PRESIDENT SIMMA: Okay. Then I give the floor  
11 to Respondent for the rebuttal in the Treaty arbitration.

12 MR. HAMILTON: Mr. President, if I might, we do  
13 have one organizational matter--

14 PRESIDENT SIMMA: All right.

15 MR. HAMILTON: --which is the President  
16 mentioned the calculation of the use of a three-hour  
17 period of time, and we wanted to ask if the Secretary  
18 could advise the status of the clock.

19 PRESIDENT SIMMA: Martin?

20 SECRETARY DOE: Sure. I can do that quickly.

21 The Claimants have used an hour and 40 minutes  
22 thus far, and the Respondent has used an hour and 38  
23 minutes until now.

24 PRESIDENT SIMMA: Very well. Okay.

25 MR. HAMILTON: Shall I proceed, Mr. President?



1 PRESIDENT SIMMA: Please do.

2 MR. HAMILTON: Thank you very much.

3 REBUTTAL ARGUMENT ON TREATY ARBITRATION BY COUNSEL FOR  
4 RESPONDENT

5 MR. HAMILTON: Good morning to the President and  
6 the Members of the Tribunal, the PCA staff and also our  
7 counterparts. Good morning to you all. Buenos días.

8 Next slide, please.

9 Members of the Tribunal, what are we talking  
10 about when we're talking about The Renco Group and its  
11 management of the La Oroya Complex in the Central Andes of  
12 Peru? You don't need my words. You can read what has  
13 been pending in a case in court in Missouri dating back  
14 prior to the entry into force of the Treaty to 2007. And  
15 I'll just refer you to Exhibit R-17, a pleading in that  
16 case brought against Renco and various Renco entities and  
17 executives, and it states: "Sulphur dioxide, emitted an  
18 excessive level from the La Oroya Complex damages the  
19 circulatory and respiratory systems, increases mortality  
20 and is linked to lung cancer, especially when present  
21 along with elevated levels of particulate matter. During  
22 the course of their ownership, operation, use, management,  
23 supervision, storage, maintenance, and/or control of  
24 operations of their metallurgical complex, the defendants  
25 negligently, carelessly and/or recklessly made decisions

1 while located in the states of Missouri and/or New York.  
2 Defendants' actions and omissions caused the release of  
3 these toxic substances and resulted in plaintiffs'  
4 exposure to these toxins and harmful substances." And  
5 defendants did so, big surprise, for their own financial  
6 benefit.

7 That issue related to Renco's violations of the  
8 air quality in La Oroya are at the heart of everything in  
9 front of you, Members of the Tribunal. You heard  
10 information yesterday that was grossly out-of-context from  
11 my counterparts, and information dating back two decades  
12 or more, but this is the reality of the dispute that has  
13 been pending since well before the Treaty came into force,  
14 and this is the responsibility that Renco has spent years  
15 and years trying to evade by shifting responsibility for  
16 its wrongdoing onto the backs of Peru and the Peruvian  
17 people.

18 Before you at this time, Members of the  
19 Tribunal, is a very concrete set of issues related to the  
20 Treaty. And let's be clear: It is Renco that disregards  
21 the Treaty.

22 We're going to first look at the treaty  
23 requirements and Renco's disregard of those requirements.

24 It was telling that, yesterday, Renco  
25 included--can we please go to the slide that says: "Renco

1 disregards the Treaty"--sorry, there's a slight  
2 technological lag, Members of the Tribunal--"Renco  
3 disregards the Treaty."

4           Yesterday, Renco cited excerpts from the  
5 Preamble to the United States-Peru Treaty. It was curious  
6 that it did so because it did the exact same thing five  
7 years ago in a hearing about its treaty violations in the  
8 Renco I case; and, in the Renco I case, as here yesterday,  
9 Peru reminded the Tribunal that the Treaty includes a  
10 range of objectives that must be considered in balance.  
11 Indeed, you can read the Transcript from that first  
12 hearing and see where we made the exact same comments.  
13 There is a lot of déjà vu to what is going down in this  
14 Hearing.

15           Peru is the Party of the rule of law in this  
16 proceeding. Renco is the Party that seeks to evade the  
17 plain language obligations that any Investor when pursuing  
18 rights under the Treaty.

19           Indeed, at this time when the mere concept of  
20 globalization and the approach of resolving disputes to a  
21 Rules-based system established by treaties are under  
22 assault. This is not the time for tribunals to rewrite  
23 treaties, bend the rules to an investor that already was  
24 found to have violated the Treaty, and to do so based on  
25 the whims and desires of a polluting corporation.

1           This issue before you, Members of the Tribunal,  
2 is not that complicated. The Treaty states, the Treaty  
3 mandates, the Treaty instructs temporal requirements and  
4 limits the consent of the State to arbitrate based on  
5 those requirements, and the Parties to the Treaty  
6 underscore that those requirements must be followed. And  
7 there are only two Parties to this Treaty--the United  
8 States of America and the Republic of Peru--and Renco has  
9 no comfort from the submission of the United States  
10 Government as the Non-Disputing Party.

11           In the face of these clear Treaty requirements,  
12 Renco brings the smog that it put into the air of La Oroya  
13 into this sacred Treaty proceeding, and it is asking you,  
14 Members of the Tribunal, to do nothing less than to  
15 rewrite the Treaty. That's the way Renco operates. They  
16 want to rewrite laws. They want to rewrite periods of  
17 time to comply with environmental regulations. They want  
18 to rewrite treaties. They want to do nothing less than  
19 take plain and clear Treaty language--the United States of  
20 America calls it clear and rigid--and they want to pull  
21 out their track changes and add comma, "unless," "unless"  
22 the polluting corporation wants to change the  
23 requirements, "unless" the corporation lost the previous  
24 case and wants to now suffer no consequences for it. That  
25 is not what the Treaty says, and that is not what the

1 Tribunal is authorized to do. Renco does this by bringing  
2 a fog of international law, trying to confuse, trying to  
3 rewrite the Treaty. They did the exact same thing in  
4 Renco I.

5           Meanwhile, outside this space of the Treaty  
6 proceeding where the rule of law must prevail, there's  
7 still a tawdry world of constant lobbying with cozy  
8 corporate insiders affiliated with Renco trying to shape  
9 the outcome of this dispute.

10           And, finally, in this context, the fog of false  
11 allegations, false allegations against Peru and false  
12 allegations against its counsel. Totally inappropriate.  
13 Peru objects in the strongest manner possible to the  
14 allegations and dubious terminology that we heard  
15 yesterday. And it can all be boiled down to a phrase that  
16 we heard thrown around by Renco yesterday. "So what?",  
17 Renco said, "So what that Peru was collegially engaged in  
18 consultations?" And they're asking this Tribunal to say:  
19 "the Treaty requires X, so what?" It summarizes their  
20 entire case in two words: "So what?"

21           And let's look at these false factual  
22 allegations, because they are revealing as to what Renco  
23 is really up to here, and what really is not that  
24 complicated a set of issues.

25           Regarding the issue of waiver, Renco disregards

1 the procedural history. Renco emphasized time and  
2 again--and it had a slide where it cited to a stray phrase  
3 in Renco I alleging that Peru never raised its waiver  
4 objection until September of 2014-2015. That is false.  
5 It's absolutely false. If there's any thought to the  
6 contrary, it's not based on facts. Renco says it was  
7 completely unaware of Peru's objections. That is  
8 inaccurate. Peru raised the waiver issue promptly.

9 Now, let me be clear.

10 The waiver obligation, just like the temporal  
11 restrictions, is absolute, clear and rigid. States have  
12 no obligation to raise in the first week or month or year  
13 their jurisdictional objections in a proceeding. It would  
14 be, as "ismundo arebes" (phonetic) if States were under a  
15 specific obligation like that that is not stated anywhere  
16 in the Treaty.

17 But, in any event, Peru raised the waiver issue  
18 promptly. As a matter of fact, Peru referred specifically  
19 to the compulsory waiver and the scope of the mandatory  
20 waiver and the scope of the consent to arbitrate, although  
21 it had no obligation to do so, in 2011.

22 Next slide.

23 So, Renco is simply disregarding the early  
24 procedural history of the case. In fact, Renco filed an  
25 Amended Statement of Claim in August of 2011. It withdrew

1 through the Claimant, withdrew a waiver, but intentionally  
2 maintained a non-compliant waiver, and during that same  
3 month, August 2011 through September of 2011, Peru twice,  
4 in correspondence, referred to the waiver issue.

5 Now, after that, the Tribunal was subsequently  
6 stated in April of 2013. During the meantime, there was  
7 no Tolling Agreement, there was no agreement of any type.  
8 And once the Tribunal was constituted, there was a First  
9 Session. The Parties engaged in vigorous debate and  
10 discussion about the Schedule for the case and established  
11 a procedural schedule.

12 Next slide.

13 Renco also disregards Peru's compliance with the  
14 procedural schedule. Under the Procedural Agreement and  
15 what Renco repeatedly requested is that Respondent raised  
16 its--any jurisdictional objections in its  
17 Counter-Memorial. That's what Renco was after. Peru did  
18 not waive for its Counter-Memorial. The very first filing  
19 that Peru made in Renco I after the Procedural Order, it  
20 filed on time, and it complied, and it stated the waiver.  
21 And it stated--and I'm citing to our correspondence of  
22 March 2014: "Renco has presented an invalid waiver in  
23 this proceeding because it does not conform with the  
24 language required by the Treaty."

25 So, Renco continues to perpetuate the falsehood

1 in front of this Tribunal that somehow a State that  
2 diligently raised an objection clearly provided for by the  
3 Treaty, clearly supported by the interpretation of the  
4 United States of America, and they're trying to put it  
5 onto your backs, Members of the Tribunal, to disregard  
6 temporal requirements under the Treaty by somehow blaming  
7 Peru for diligently raising a waiver requirement years  
8 ago. It's completely out of line with what the Treaty  
9 contemplates.

10 As a matter of fact, even after that first  
11 filing, again and again and again Peru requested to be  
12 heard, and I refer your attention to Slide 7, a whole  
13 series of requests. The waiver turns on a narrow set of  
14 facts involving a single paragraph, flaws which have not  
15 been cured, references to ongoing violations of the waiver  
16 requirement. If Peru's waiver objection is not heard and  
17 decided now, it will result in an extraordinary waste of  
18 resources. That is what Peru said.

19 What did Renco do? Renco repeatedly tried to  
20 stop Peru from being heard. It insisted that this issue  
21 be punted until later in the proceedings during the merits  
22 phase, that Respondent will have every opportunity to  
23 raise its other objections in the Counter-Memorial.

24 So, think about this, Members of the Tribunal.  
25 Renco invented a false story, completely false, that



1 somehow Peru secretly hid a waiver objection. Peru  
2 satisfied every obligation under the Treaty. It satisfied  
3 every obligation under the Procedural Order. It  
4 repeatedly, repeatedly, repeatedly requested to be heard,  
5 and Renco repeatedly tried to obey, and we all know why.  
6 Because the later it's delayed, the more they say, oh, how  
7 unfair it to us it would be, so they're doing nothing more  
8 now than trying to cast aspersions on the State for  
9 diligently raising an objection which prevailed.

10 Now, let's be clear. Renco I decided for Peru.  
11 Absolutely and clearly. Renco violated the Treaty. And  
12 as I explained yesterday, there was no indication  
13 according to the Tribunal that Renco did do so  
14 inadvertently. The Renco I Tribunal did not find any  
15 abuse, and they did not find or rewrite the Treaty to  
16 allow Renco to cure. So, what is Renco doing? Having  
17 failed in Renco I with its last-minute abuse and cure  
18 arguments, Renco is coming to you and they're saying,  
19 Members of the Tribunal, we want you, who weren't part of  
20 the previous case, to disregard the Treaty's objections  
21 before you, and we want you to go back and decide that  
22 there was abuse, when it was already decided by a prior  
23 Tribunal there was not abuse. And they want you, Members  
24 of the Tribunal, to allow Renco to cure its intentional  
25 misuse of a waiver. They want you to give you them the

1 cure. They want to you add extra language to the Tribunal  
2 to which the United States of America and the Republic of  
3 Peru do not agree.

4 So, this entire approach of Renco is to escape  
5 clear prescription requirements in the Treaty by creating  
6 an inaccurate story and trying to put onto Peru's back  
7 Renco's prior treaty violation. It cannot be the right  
8 thing to do.

9 And these inaccurate procedural history parts of  
10 Renco's case play out as well with Peru's timely raising  
11 of temporal objections before this Tribunal. As we  
12 pointed out, Peru raised temporal objections long ago in  
13 the first Renco Case. There's no surprise that there are  
14 such concerns.

15 Now, what does the Treaty say? The Treaty says,  
16 if a Respondent requests. Renco says--according to Renco  
17 the Treaty says to make and brief its objections. That is  
18 not what the Treaty says. And the United States  
19 submission gives no support to Renco and does not buy into  
20 Renco's effort to misuse the Feldman Case.

21 Renco also miscites precedents. It misuses RDC  
22 v. Guatemala. We saw a glitch yesterday including RDC v.  
23 Guatemala. Look, everybody always does it the same way.  
24 No. There is not a mould, and the reason there is not a  
25 mould is because there is no itemized requirement.

1 Whereas, for instance, if you file Notice of Arbitration  
2 under the UNCITRAL Rules, it indicates various core  
3 elements that you should include.

4           You know, take note, Members of the Tribunal,  
5 Renco chose to call its Notice of Arbitration in this case  
6 a "Statement of Claim." Then it came later and said,  
7 "Well, that wasn't really our Statement of Claim. We're  
8 going on to give more information, more experts, more  
9 witnesses." And, in fact, in this phase of the case they  
10 did so. They added additional factual allegations to try  
11 to escape their prescription problems. Yet they turn  
12 around and want to rewrite the Treaty requirement to stop  
13 Peru from being heard.

14           Now, think about it. They want to stop Peru  
15 from being heard on this issue. We will be heard on this  
16 issue. It's simply a question of when, just as with the  
17 waiver issue.

18           And let's also be clear that Peru triggered the  
19 Treaty's expedited mechanism. A little bit of context is  
20 useful here. The Framework Agreement that the Parties  
21 negotiated, not a mere tolling agreement, said various  
22 things including that if the Parties were unable to reach  
23 a final solution, they would consider a sole arbitral  
24 proceeding. There were discussions between the Parties  
25 about how to manage these parallel claims. As a matter of

1 fact, in Peru's Preliminary Response of January 2019, Peru  
2 said Renco cannot apply the Treaty retroactively. Renco's  
3 claims are time-barred.

4           There also was procedural coordination. We  
5 specifically put into the joint letter of October 17,  
6 2019, language that said the Parties will coordinate with  
7 the Tribunal as to the date of constitution. That was  
8 specifically designed, as we discussed with this Tribunal  
9 last January, to allow the Parties to explore how to  
10 manage these parallel proceedings in a reasonable way that  
11 respects due process, and that's why Peru repeatedly  
12 sought conference calls and repeatedly tried to consult on  
13 these issues.

14           And, in fact, the day before we filed our  
15 request, we were in discussions, and we thought that there  
16 was going to be an agreement on the date of constitution  
17 so that the Parties could agree more broadly on how to  
18 manage these two cases effectively. Instead, of course,  
19 we went ahead and filed our request, which was ready and  
20 waiting, and here we are.

21           So, what we really see is Renco déjà vu. They  
22 want to disregard the Treaty and prevent Peru from being  
23 heard. They did it in Renco I. They tried to prevent  
24 Peru from being heard about Renco's treaty violations.  
25 They failed. They failed.

1           Now, what are they doing here?

2           (Overlapping interpretation with speaker.)

3           MR. HAMILTON: What we have before you, Members  
4 of the Tribunal, is a lot of factual allegations that  
5 plainly pre-date the Treaty. We have a much smaller  
6 category of allegations that are prior to the Prescription  
7 Date. And, finally, we have the nub of the nub of the  
8 nubs, which is an appeal of an appeal of an appeal, and  
9 they're left with this one, 2015 Supreme Court rule. It  
10 cannot be the case, Members of the Tribunal that you have  
11 the authority to rewrite the prescription language of the  
12 Treaty and in any way let Renco get away with this  
13 approach to its claims.

14           Ms. Menaker is going to address a few points on  
15 non-retroactivity, on prescription and denial of justice.

16           Thank you.

17           PRESIDENT SIMMA: Thank you, Mr. Hamilton.  
18 Ms. Menaker, the floor is yours.

19           MS. MENAKER: Thank you, Mr. President, good  
20 afternoon, Members of the Tribunal, good morning.

21           So, I will begin very briefly addressing the  
22 non-retroactivity points. Yesterday, you heard Renco  
23 state that Peru has invented a false legal standard based  
24 on Berkowitz versus Costa Rica; but Peru, the United  
25 States, and even Renco previously all agreed that the

1 legal standards set forth in the Berkowitz Case is the  
2 correct one, and namely that is that the post-entry into  
3 force alleged acts or facts that are deeply rooted in and  
4 that are not independently actionable from the earlier  
5 acts or facts cannot sustain a claim.

6 And that's what we have here with respect to  
7 Renco's fair and equitable treatment and expropriation  
8 claims because both of those claims are deeply rooted in  
9 and not independently actionable from the MEM's granting  
10 of its last PAMA extension which occurred before the  
11 Treaty's entry into force.

12 And again, I remind the Tribunal--or I reference  
13 again the Tribunal to the Berkowitz Case where the  
14 Tribunal stated that the Tribunal itself needs to look at  
15 the essence of the Claimants' claim. It can't just accept  
16 how the Claimant has formulated its claim.

17 And if you could go back one slide, please.

18 If you look at Renco I. In Renco I, Renco  
19 stated the essence of its fair-and-equitable-treatment  
20 claim was that in May 2006, Renco sought an extension for  
21 its comma deadline. It sought a five-year extension but  
22 it was only granted an extension of two-and-a-half years  
23 which Renco characterized as being draconian and imposing  
24 numerous conditions that were onerous conditions which  
25 significantly expanded the costs and the complexity of the

1 PAMA obligations. That was the four essences of the  
2 fair-and-equitable-treatment claim. Now, in Renco II, it  
3 seeks to reformulate that claim by saying that the breach  
4 which actually began in March 2009 when Peru refused to  
5 recognize Renco's right under the FTA to complete its PAMA  
6 obligations, in other words, refused to recognize its  
7 rights to get another alleged extension of these PAMA  
8 deadlines.

9 Similarly, for its expropriation claim, in  
10 Renco I, Renco stated that Peru's failure to grant Doe Run  
11 Peru an effective extension resulted in the expropriation  
12 of Renco's investments. They are again referencing the  
13 May 2006 extension in saying that was not an effective  
14 extension. They needed twice as long.

15 And now what do they say? They say that the  
16 PAMA deadline expired in October 2009, Peru's refusal to  
17 grant the PAMA extension caused DRP to fall into  
18 bankruptcy. Both claims are deeply rooted in and are not  
19 independently actionable from the May 2006 alleged refusal  
20 or the refusal of the MEM to grant an extension that was  
21 in Renco's mind sufficient when, in May 2006, the MEM  
22 stated no, you're only going to get a two-year, ten-month  
23 extension. It never again changed that extension. That  
24 was the cause, that was the crux of the  
25 fair-and-equitable-treatment claim of the expropriation

1 claim.

2           And now just as in the Corona Materials Case,  
3 what has happened since that time has not changed the  
4 essence of the Claim. Just as in Corona Materials where  
5 Respondents' failure to reconsider a refusal to grant a  
6 license was nothing other than an implicit confirmation of  
7 its previous decision, here, it's the same thing. The  
8 MEM's refusal to grant a further extension is no different  
9 than what happened before and cannot revise a claim that  
10 that existed prior to the entry into force of the  
11 Tribunal. And notably, yesterday, Renco simply ignored  
12 the Corona Materials Case in its opening.

13           Now I'll turn to prescription; and, to begin to  
14 answer the Tribunal's question of yesterday, there is no  
15 doubt that the prescription period is jurisdictional. It  
16 is not a question of admissibility. It is a question of  
17 jurisdiction. This is clear from the Treaty's language  
18 itself, particularly the title.

19           First, if you look at Article 1017, which is  
20 entitled, "consent of each Party to arbitration," it  
21 states that: "A Party's consent to the submission of a  
22 claim in accordance with this Agreement, which means in  
23 accordance with the requirements in the Agreement." Then  
24 you have 10.18, which is titled, "the conditions and  
25 limitations on consent of each Party." Again, it says:



1 "No claim may be submitted to arbitration if more than  
2 three years have elapsed." That's in Paragraph 1.  
3 Paragraph 2 is the waiver requirement. Both of those are  
4 conditions and limitations on consent to arbitrate which  
5 are inherently jurisdictional.

6 And, indeed, tribunals uniformly have recognized  
7 that the prescription period is a jurisdictional  
8 requirement.

9 So, if you look at the Renco I Tribunal, for  
10 example, there, the Tribunal began by, again, looking at  
11 the title of 10.18 which I just read and saying that the  
12 title itself makes clear because the title is "conditions  
13 and limitations on consent of each Party," and it makes  
14 clear that the requirements, both prescription  
15 requirements in 10.18(1) and the waiver requirement in  
16 10.18(2) go to the Tribunal's jurisdiction.

17 Similarly, in the Corona Materials Case that I  
18 just discussed, that dealt with the prescription period,  
19 that Tribunal also quoting the United State's submission  
20 favorably, said that the Claim was time-barred and,  
21 therefore, the Tribunal lacked jurisdiction over the  
22 Claim.

23 In Glamis Gold, it's a NAFTA Case, that NAFTA  
24 also contains a three-year prescription provision just  
25 like this Treaty, and there that Tribunal held that the

1 limitations period in objection about the limitations  
2 period is a plea as to the jurisdiction of the Tribunal.

3 Now, before going into its arguments concerning  
4 the suspension of the prescription period or abuse with  
5 respect to the prescription period, Renco argued yesterday  
6 that its claim was not time-barred because it had  
7 submitted its claim in Renco I, and the statute of  
8 limitations or the prescription period would run from that  
9 date.

10 And it argued here that our argument, that  
11 Peru's argument that it could not do so because it never  
12 actually submitted a claim to arbitration in Renco I  
13 because that claim, that Notice of Arbitration, was  
14 accompanied by a defective waiver, they said that that  
15 merges and cobbles together Article 10.16 which relates to  
16 the submission of a claim to arbitration and Article 10.18  
17 which deals with consent, the prescription period and the  
18 waiver.

19 And Renco argued that these are two completely  
20 different issues that Peru hasn't cited any of the  
21 authority for this novel proposition under international  
22 law. The allegedly novel proposition is that the Claim  
23 that is submitted with the defective waiver has not been  
24 submitted to arbitration and, therefore, the prescription  
25 period cannot begin to run from the Date of Submission of

1 that Notice of Arbitration. But to the contrary, there is  
2 ample authority that says just that.

3           So, I would draw the Tribunal's attention to,  
4 again, the Corona Materials Case. There, the Tribunal  
5 held, and I quote: "A notice of arbitration that is  
6 unaccompanied by a valid waiver does not constitute a  
7 claim--does not constitute a claim--the claim will be  
8 considered to have been submitted on the date of the valid  
9 waiver."

10           Similarly, the Waste Management I Tribunal,  
11 another tribunal operating under the NAFTA, that contains  
12 the same waiver provisions and time-bar prescription  
13 period, held that, in that case, the Claimants' claim was  
14 dismissed for lack of jurisdiction because it had  
15 submitted an improper defective waiver, and that owing to  
16 the breach by the Claimant of one of the prerequisites to  
17 submission of a claim that is deemed essential in order to  
18 proceed with the submission of a claim to arbitration. In  
19 other words, that the Claim was not submitted to  
20 arbitration because it was accompanied by a defective  
21 waiver.

22           And the Renco I Tribunal recognized just as much  
23 when it said that the submission of a defective waiver  
24 will lead to a clear timing issue because if no compliant  
25 waiver is served with a Notice of Arbitration, the

1 Tribunal has no authority because no claim has been  
2 submitted to arbitration.

3 Yesterday, Renco also argued that this  
4 notwithstanding, one ought to override the express  
5 language of the Treaty by looking to its purported object  
6 and purpose, which it contended was in Renco's favor.  
7 And, as I stated yesterday during my Opening, one cannot  
8 overwrite the express language of a Treaty by reference to  
9 the purported object and purpose. Instead one must  
10 interpret the language in light of the object and purpose.  
11 You don't overwrite the express language with reference to  
12 a perceived object and purpose.

13 But, nevertheless, Renco's theory would actually  
14 subvert the object and purpose of the Treaty, and in  
15 particular, the objective of both the waiver and the  
16 time-bar provisions, and you can come up with any number  
17 of examples, but as just one. If you can imagine a  
18 claimant that submits a claim--submits a Notice of  
19 Arbitration with a defective waiver, one, that perhaps on  
20 its face comports with the language of the Treaty, but  
21 that they don't discontinue parallel claims in local  
22 court, and then the prescription period runs. Their claim  
23 is dismissed for lack of jurisdiction or a non-compliant  
24 waiver. They then lose in court. They refile a claim in  
25 arbitration with a Notice of Arbitration with a compliant

1 waiver and then argue well, they're not time-barred  
2 because they filed their Notice of Arbitration years back,  
3 and the prescription period should run from that time.

4           You see, that's subverts the object and purpose  
5 of having the time period and of requiring the submission  
6 of a valid waiver at the time that one submits a claim to  
7 arbitration.

8           Now, moving to Renco's theory of suspension,  
9 Renco argues that Peru's statement as well as the United  
10 States's shared agreement which also has been endorsed by  
11 multiple tribunals including but not limited to the  
12 Feldman Tribunal, the Corona Materials Tribunal, that the  
13 limitations period is a clear and rigid requirement that  
14 is not subject to any suspension, prolongation or other  
15 qualification; that that is somehow inconsistent with the  
16 Party's Framework Agreement.

17           Now, in the Party's Framework Agreement, as  
18 Mr. Hamilton has described, that was a period of time  
19 after Renco filed its Notice of Intent for this  
20 arbitration before it filed its Notice of Arbitration when  
21 the Parties were inferring and negotiating over a  
22 multitude of issues, including how to coordinate the two  
23 claims, and Peru agreed there not to raise a defense of  
24 statute of limitations for that period of time during the  
25 negotiations. Peru has upheld that Agreement. There is

1 no allegation whatsoever from Renco that it hasn't. And,  
2 indeed, there are no measures that occurred during that  
3 period of time that formed the basis for Renco's claim.

4 But Peru says, nevertheless, look, Peru, in that  
5 documents, so-called suspended the limitations period or  
6 agreed to waive its right to put forward a suspension  
7 defense, and isn't that inconsistent with the notion that  
8 the time the prescription period cannot be suspended? But  
9 there is no inconsistency whatsoever. Because saying that  
10 the limitations provision is a jurisdictional requirement,  
11 that it is a clear and rigid jurisdictional requirement  
12 that is not subject to suspension, simply means that the  
13 Respondent--doesn't mean that the Respondent cannot waive  
14 its right to make an objection. It's the same thing for a  
15 waiver requirement under 10.18(2). That's also  
16 jurisdictional.

17 In both cases, the Tribunal cannot remedy the  
18 issue. The Tribunal cannot remedy a defective waiver.  
19 The Respondent, on the other hand, can choose to allow the  
20 Claimant to submit a different waiver and agree that it  
21 will not raise an objection on that basis. It could  
22 choose to do that, just like a respondent could choose not  
23 to raise a limitations objection, but that doesn't mean  
24 that the Tribunal can remedy a defective waiver, and on  
25 the Respondents' behalf waive that objection, that

1 jurisdictional requirement, nor can it refuse to apply the  
2 prescription period when the Respondent has raised an  
3 objection to jurisdiction on that basis.

4 And it's for this reason that all of the  
5 municipal bonds that Renco discussed yesterday are simply  
6 irrelevant. The Treaty's requirement is express, it's a  
7 strict requirement, it's not subject to suspension by the  
8 Tribunal just like the waiver requirement is not subject  
9 to remedy by the Tribunal. It's a condition of  
10 Renco's--excuse me, of Peru's consent to arbitrate, and it  
11 can't be disregarded by importing rules from other legal  
12 systems.

13 And in this regard, yesterday, Renco discussed  
14 the Feldman versus Mexico Case, which is simply irrelevant  
15 to these issues. And if you look at that case--I don't  
16 have much time, so I won't get into detail, but that case  
17 was dealing with the issue of estoppel. And in  
18 Paragraph 55, the Tribunal summarized the Claimants'  
19 arguments. The Claimants' arguments there, they said:  
20 "It would be appropriate in the case if the Respondent  
21 State discourages the Claimants from filing a lawsuit, and  
22 a clear example is if the defendant expressly agrees not  
23 to raise a defense based on a statute of limitations or  
24 makes other representations of promises or other actions,  
25 then they should be estopped from later arguing raising an

1 objection based on a statute of limitations."

2           Nothing like that happened here. So, in that  
3 case, the Tribunal was looking at the issue. They were  
4 saying basically the Claimants were arguing that it was  
5 entitled to some VAT or tax refunds, and they were saying,  
6 well, Mexican officials told us that they were going to  
7 pay us those refunds, and so we held off filing an  
8 arbitration claim, but then they never paid us, and now we  
9 filed, and they're telling us we are out of time, and the  
10 Tribunal rejected that. They said it's a clear  
11 limitations period. The only possible may be in  
12 extraordinary circumstances where that wouldn't apply  
13 would be if you had a formal agreement with a government  
14 official that was of a significantly high level, and it  
15 was formalized like a settlement agreement, and then they  
16 revoked their word, but nothing like that is that basis  
17 here.

18           So, in short, as Mr. Hamilton was saying,  
19 dismissal is a necessary consequence of the Treaty and of  
20 Renco's conduct and not of any purported abuse by Peru.  
21 And Mr. Hamilton has described, and I talked yesterday  
22 about the fact that Renco did not commit any abuse in  
23 Renco I by raising its waiver objection, and that the  
24 Tribunal agreed with Peru in that regard.

25           Yesterday, Renco argued that, while Peru did not



1 abuse its rights according to the Renco I Tribunal by  
2 asserting it waiver claim, it found that Peru didn't abuse  
3 in rights in asserting that claim, but that's not the  
4 issue here. That's exactly the issue here. Because  
5 Renco I, they filed their claim with a defective waiver.  
6 We object on the basis of that defective waiver. We are  
7 found to have raised that objection in good faith not to  
8 abuse any right, and in accordance with the Treaty's  
9 strict jurisdictional requirements the Renco I Tribunal  
10 dismisses the Claim for lack of jurisdiction.

11 Renco then files a new claim here in this  
12 arbitration with the compliant waiver. Pursuant to all  
13 the authorities that I just discussed, of course, the  
14 submission of that claim to arbitration dates from the  
15 date of that Notice of Arbitration that contains the  
16 compliant waiver. It's a direct consequence of the fact  
17 that they filed a non-compliant waiver early on and that  
18 that claim had never been submitted to arbitration. It's  
19 a direct consequence of their act of submitting that  
20 defective waiver and a direct consequence of the Renco I's  
21 dismissal of that claim and not a consequence of any abuse  
22 by Peru.

23 Finally, just a few words on the  
24 denial-of-justice claim.

25 First, yesterday, to clear up a few things, to

1 make clear, Peru is not saying that Renco should have  
2 brought the denial-of-justice claim earlier, nor is Peru  
3 denying that a denial-of-justice claim requires the  
4 exhaustion of local remedies. What Peru is saying is that  
5 the essence of the denial-of-justice claim is exactly the  
6 same as the Claim that is time-barred. And like I said in  
7 reference to the Berkowitz Tribunal, this Tribunal needs  
8 to look at what is the absence of the Claim.

9           And you can see here in Renco I the formulation  
10 of the expropriation claim was that Peru violated the  
11 Treaty because it directly or indirectly expropriated  
12 Renco's investments because it recognized the assertion of  
13 an allegedly baseless claim by the MEM in the INDECOPI  
14 bankruptcy proceedings. That's the MEM's credit of  
15 \$163 million they said that was recognized in the  
16 bankruptcy proceedings and that led to the expropriation.

17           What have they done now? They simply  
18 reformulated that claim into a denial-of-justice claim by  
19 saying that Peru's judiciary failed to nullify that  
20 credit. But all that is alleged is that the Court failed  
21 to reverse the earlier action. There is no independent  
22 action of the Court that is actually challenged. It's  
23 simply the failure to reverse what's alleged to have been  
24 a treaty breach, which is time-barred. And as  
25 Mr. Hamilton noted, Renco already has filed a Statement of

1 Claim that ought to contain all of the facts in support of  
2 its allegation. There is nothing to support a  
3 denial-of-justice claim by the Court, so this is  
4 akin--indeed, akin--to the Corona Materials Case, where  
5 Respondents' failure to reconsider, to change the status  
6 quo by reversing the denial of a mining permit was deemed  
7 insufficient to constitute a denial-of-justice claim.

8 Here, too, the Court's simple refusal to reverse  
9 the earlier decisions that had been in place for a long  
10 time to recognize the MEM credit cannot give rise to an  
11 independent denial-of-justice claim.

12 So, thank you for your attention.

13 PRESIDENT SIMMA: Thank you, Ms. Menaker.

14 This brings to an end the Respondents' rebuttal  
15 claim, and we have now a 30-minute break. That means that  
16 we are going to assemble again at--Martin, can you help  
17 me?

18 SECRETARY DOE: I think it's going to be 23 past  
19 the hour.

20 PRESIDENT SIMMA: 23 past the hour, right, so  
21 4:23.

22 SECRETARY DOE: 4:23 in Europe and it will be  
23 10:23 for those who are in Eastern time.

24 PRESIDENT SIMMA: Okay. Thank you.

25 (Recess.)



1 they did agree to do so under the Stock Purchase  
2 Agreement, and that's part of our claim, and we repeatedly  
3 asked Peru to join the lawsuit and defend and indemnify  
4 the Claimants in this case against the allegations because  
5 Peru and Activos Mineros are actually liable for the  
6 ultimate Award or jury verdict or settlement, and that  
7 issue, of course, is for another day because they refuse  
8 to join the lawsuit.

9           Secondly, at Slides 4 through 6, Peru claims  
10 that it raised, claims quite emotionally that they raised  
11 the waiver issue early and that we're misrepresenting the  
12 facts when we say they didn't. To believe that, you would  
13 need to disbelieve the Arbitration Tribunal in Renco I  
14 because, as I showed you yesterday--and it's Exhibit R-8  
15 in their award--I showed you yesterday at Slides 35  
16 through 40 a number of quotes from that Tribunal, and I  
17 ask you to please read that award, if you would.

18           And especially at Slide 37 where that Tribunal,  
19 and I'm going to read it: "Yet Renco's compliance with  
20 the formal and material requirements of Article 10.18 was  
21 not put in issue until Peru filed its notification of  
22 Preliminary Objections on March 21st, 2014, nearly three  
23 years after Renco had submitted its claim to arbitration."

24           What I found confusing about the argument this  
25 morning is that when arguing that the notice of the

1 defective waiver was timely, the counsel showed you on  
2 Slide 6--

3 (Audio drop.)

4 PRESIDENT SIMMA: There was a problem with  
5 understanding, but why don't you continue. Maybe it was  
6 just an instant.

7 MR. KEHOE: Okay. Sorry.

8 PRESIDENT SIMMA: Can you speak?

9 MR. KEHOE: I can.

10 PRESIDENT SIMMA: It's fine.

11 MR. KEHOE: Okay. No--I guess what I'm saying  
12 is that I was confused by the argument this morning that  
13 it was timely because on Slide 6, the PowerPoint that was  
14 presented today, you saw language which, where it said  
15 Renco has presented an invalid waiver in this proceeding  
16 because it does not conform with the language required by  
17 the Treaty, and that's right. But the date on that, on  
18 Slide 6 and accurately is March 14--I mean March 2014.  
19 That's the date that I just read to you from where the  
20 Tribunal said that's the first time that this was put in  
21 issue. So, it seems based on the argument that we heard  
22 this morning, Peru finally agrees that the first time it  
23 put this issue in play was in March 2014.

24 And then on Slide 7--I just want to make sure  
25 that you're not confused by the advocacy and the dates.

1 On Slide 7, there are five other examples of very clear  
2 reference to the waiver--the reservation of rights with  
3 the waiver, but that's April of 2014 and October of 2014.  
4 They're all after March of 2014.

5 So, it seems now that we're in agreement that  
6 the first time they actually clearly vocalized this was  
7 after March of 2014. I'm just perplexed as to how that  
8 fact that we heard this morning supports the Respondents'  
9 argument that it raised it earlier. It didn't.

10 Third is the abuse-of-rights argument. Peru  
11 argues that there could be no abuse of rights here because  
12 the Tribunal did not find an abuse of rights in Renco I,  
13 and they say that we argue that's not the point, and they  
14 said, yes, it is the point. No, it's not the point. It  
15 sort of misstates our argument, and I would like to make  
16 it clear. The Tribunal in Renco I was very disturbed by  
17 the conduct of Peru in waiting so long. The issue in that  
18 case was the statute of limitations.

19 And we were worried about withdrawing and  
20 deleting the language in the waiver even though we thought  
21 it was superfluous because we were afraid that Peru would  
22 then turn around and say, "All right, now this case is  
23 over, we don't agree you can delete it." We disagree, and  
24 we don't agree. So we said, "Well, darn, we're willing to  
25 do it, it's superfluous, we don't need it, we don't want

1 it now. Now, three years after we filed our Memorial  
2 you're finally telling us you have a problem with it, and  
3 they wouldn't agree." And so, we had no choice but to let  
4 the Tribunal rule on whether it made the entire waiver  
5 defective. One Member of the Tribunal thought that we  
6 should be allowed to cure and, frankly, so do we. I mean,  
7 it was a unique case, the first of its kind, but we didn't  
8 have to go there; right? We offered to delete it, and  
9 Peru said "no."

10 So, that's the context, and then we wound up  
11 losing, and now Peru is asserting a limitations defense.  
12 But we discussed this with the Renco I Tribunal, and this  
13 ties back to the comment yesterday. So, counsel yesterday  
14 morning said in the opening: There is no suggestion here  
15 that Renco's reservation in its waiver was inadvertent.  
16 In fact, Renco knew that it was unacceptable and insisted  
17 to maintain the waiver that was non-complaint, and I said  
18 that's inaccurate. We offered to delete it. I didn't  
19 imagine anyone would say that, so let me come back in  
20 rebuttal and put the record straight, to let me do that.

21 In a hearing with the Renco I Tribunal, I was at  
22 a procedural hearing; Peru was saying they must have some  
23 ulterior motive for keeping that ulterior language, and so  
24 I said, now in rebuttal but I will respond very briefly to  
25 the point that I heard this morning, which was that if the



1 "reservation of rights" language didn't serve any more  
2 than the Treaty already provided, why isn't Renco just  
3 striking it? I mean, why hang on to something so tightly.

4 So, I said, the answer to that question lies in  
5 the fact that Peru has not raised this formal defect issue  
6 until long after Procedural Order Number 1. And when we  
7 received their 1024 submission, which was the March 2014  
8 submission that I just mentioned, we had no idea that they  
9 objected to this formal defect until then, which was just  
10 recently. We did understand that they objected to the  
11 local bankruptcy proceedings where Doe Run was defending  
12 itself, but we had no idea that they would take issue with  
13 the reservation of rights that we think the Treaty allows  
14 anyway. It's superfluous. It's superfluous language;  
15 that's what we were saying.

16 So, if we could "with assurance strike the  
17 language now with assurance that Peru would not then bring  
18 another claim such that we're now in breach of the statute  
19 of limitations, we would strike it. It is superfluous, so  
20 it's wrong for Peru to argue that because we're hanging on  
21 to something we must have an ulterior motive, and it must  
22 mean something when we're telling you it doesn't. But as  
23 I say, if Peru would commit no harm no foul, no statute of  
24 limitations issue, we would gladly strike it."

25 So, that's on the record on the Transcript in

1 Renco I. It was a hearing on the--I need my glasses. I  
2 can't see the date. Oh, here, Friday, June 12, 2020.

3 And so, that brings me to what I showed you on  
4 Slide 39 yesterday, when the Tribunal in Renco, when  
5 rendering its Award said: "While this Tribunal cannot  
6 prevent Peru from exercising in the future what it then  
7 considers to be its legal right, the Tribunal can and does  
8 admonish Peru to bear in mind that if the scenario should  
9 rise, Renco's submission that Peru's conduct with respect  
10 to its late raising of the waiver objection constitutes an  
11 abuse of right. Keep that in mind. In the unanimous view  
12 of this Tribunal, justice would be served if Peru accepted  
13 that this time stopped running for the purposes of Article  
14 10.18 when Renco filed its Amended Notice of Arbitration  
15 on August 9, 2011."

16 So, that's the point we're making. And then  
17 secondly, let me go on. It's Slide 40. And when the  
18 Tribunal said again: "In reaching this conclusion, the  
19 Tribunal does not wish to rule out the possibility that an  
20 abuse of rights might be found to exist. If Peru were to  
21 argue in any future proceeding that Renco's claims were  
22 now time-barred under 10.18, to date Peru has suffered no  
23 material prejudice as a result of the reservation of  
24 rights waiver. However, Renco would suffer material  
25 prejudice if Peru were to claim in a subsequent

1 arbitration that Renco's claims are now time-barred under  
2 Article 10.18."

3           So, those are the facts. That's the way this  
4 played out. It was raised late. We offered to delete it.  
5 Peru rejected it. They're the ones that caused the delay  
6 by raising the waiver question so late. We easily could  
7 have fixed it within the limitations period. We had  
8 plenty of time before that in the case, but they didn't.

9           And fifth, and final point for me before I hand  
10 it over--and I'm not sure who is going next--I think it's  
11 Mr. Llamzon--is to the question of whether the limitations  
12 issue is one of admissibility or jurisdiction. So, two  
13 parts to this answer.

14           The first is, we believe the better view is that  
15 the prescription theory should be treated as one of  
16 admissibility; and if I may, the reason we believe this is  
17 that the question of admissibility is that in  
18 international law in particular and in the practice of the  
19 ICJ, many investment tribunals hold that the traditional  
20 distinction is that an objection to jurisdiction concerns  
21 the authority and the power of a tribunal to decide a case  
22 before it, whereas an objection to admissibility concerns  
23 a defect in a particular claim, so that is our position.  
24 But at the same time we are aware that both the United  
25 States and Peru have taken the position that it's

1 jurisdictional, and, of course, we heard the presentation  
2 this morning where some tribunals have found that  
3 prescription is jurisdictional.

4 And on that point I would like to note that  
5 Renco's defense to the Treaty's three-year prescription  
6 period applies equally, whether it's an objection on  
7 admissibility--whether it's an admissibility issue or a  
8 jurisdictional question, and the reason is twofold:

9 First, under Article 26 of the Vienna  
10 Convention, Parties are bound to act in good faith in  
11 exercising their treaty rights and the performance of  
12 their respective obligations under a treaty. And because  
13 this Arbitration Agreement arises and derives from a  
14 treaty, the Parties must, under Article 26 of the Vienna  
15 Convention, exercise their rights in good faith. The  
16 principle of good faith precludes an abuse of rights and  
17 process, and it precludes conduct that lacks candor to the  
18 material advantage of one Party or to the material  
19 disadvantage of another party. Such conduct is not only  
20 shameful, it undermines the legitimacy of the arbitral  
21 process. As I said, I had two points. That's the first.

22 The second is, tribunals for over a hundred  
23 years have applied the principle of good faith to justify  
24 a tribunal's jurisdiction. There are circumstances in  
25 domestic realms in different situations where a court may

1 find differently, but in the international arbitration  
2 realm, for a hundred years, that has been the case. They  
3 have applied the principles of good faith to find  
4 jurisdiction. And this, of course, ties to the arguments  
5 that I made yesterday.

6 We see this most recently in the case of Chevron  
7 versus Ecuador where the Tribunal stated: "The Tribunal  
8 has taken fully into account that the principle of good  
9 faith may be more cautiously applied to justify a  
10 tribunal's jurisdiction as compared to other  
11 non-jurisdictional issues. Nevertheless, there is no  
12 reason why the same principle of good faith should not  
13 apply to jurisdiction (or admissibility) as well as to the  
14 merits. It did so in the Kunkle arbitration decided  
15 almost a century ago," and that Tribunal was comprised of  
16 the late Johnny Veeder, Professor Vaughan Lowe and, of  
17 course, Professor Naón. And with that, I will--unless you  
18 have any questions--I'll hand the floor over to my  
19 colleague.

20 PRESIDENT SIMMA: I don't have any questions or  
21 request for questions.

22 ARBITRATOR THOMAS: I do.

23 PRESIDENT SIMMA: Please go ahead.

24 ARBITRATOR THOMAS: Mr. Kehoe, may I just ask  
25 you one question of clarification, and it dealt with the

1 question--I think I the way I made a note of it, I won't  
2 follow the Transcript, but you said that the objection is  
3 to the formal nature of the waiver was something which  
4 arose later on, and you then went on to say something like  
5 we did understand that they had problems with the--

6 (Overlapping proceedings.)

7 MR. KEHOE: Yes.

8 ARBITRATOR THOMAS: --subsequent proceedings.

9 MR. KEHOE: Yes.

10 ARBITRATOR THOMAS: Could you just explain to me  
11 what was the nature of the objection to the ongoing  
12 bankruptcy proceedings?

13 MR. KEHOE: I'm glad you asked you. You know,  
14 in the interest of time I didn't want to get into it, but  
15 I'm glad you asked it.

16 So, you heard from Mr. Llamzon yesterday that  
17 MEM, the MEM credit--that Doe Run Peru went into  
18 bankruptcy and that the Government asserted a credit for  
19 the cost of \$163 million to complete the final PAMA  
20 project and then asserted a credit in the bankruptcy and  
21 took it over. It's part of our denial-of-justice claim.  
22 Doe Run Peru was defending itself as a debtor in the  
23 bankruptcy, and Peru was sending us messages, letters,  
24 saying you're violating the waiver provisioning because  
25 Doe Run Peru is engaging in litigation outside the

1 arbitration process, and our position was Doe Run Peru is  
2 entitled to defend itself as a debtor in bankruptcy, and  
3 that doesn't violate the waiver, so it had nothing to do  
4 with the written aspect of the waiver. It was the  
5 action--you know, we need two pieces; you need a valid  
6 written waiver, and then you need to comply with the  
7 waiver.

8           So, we had no idea that there was any question  
9 about--every time they said "waiver," they were talking  
10 about the bankruptcy. It wasn't until March that they  
11 finally said, now we're talking about--they never said we  
12 had two waiver objections, both a formal defect and your  
13 action. And so that's where the confusion was. When they  
14 said the word "waiver" early on, it was all in the context  
15 of Doe Run Peru defending itself as a debtor in  
16 bankruptcy. And we still don't think that. You may need  
17 to deal with it, but we don't think that's a violation of  
18 the waiver. You can't hamstring a third party from  
19 defending itself.

20           PRESIDENT SIMMA: Thank you, Mr. Kehoe.

21           You may pass the baton on to--is it Mr. Llamzon?

22           MR. KEHOE: I think it's Mr. Llamzon, yes.

23           PRESIDENT SIMMA: Thank you.

24           MR. LLAMZON: Thank you, Mr. President and  
25 Members of the Tribunal.

1           So, I will be discussing the retroactivity  
2 principle again.

3           The discussion so far under retroactivity really  
4 feels, at least to me, like two ships passing in the  
5 night. Both sides are supposedly applying Article 10.1.3  
6 of the Treaty, but our interpretations are entirely  
7 different.

8           So, Peru seems to take a position that once a  
9 dispute could be identified pre-February 1, 2009, the  
10 non-retroactivity principle would apply the capture even  
11 post the 2009 breaches, February 2009 breaches, because  
12 the subsequent acts were rooted in or cannot be decided  
13 independently of these prior acts. And we say that that  
14 interpretation would be entirely inconsistent with the  
15 "continuing breach" doctrine in Article 10.1.3 and in  
16 customary international law because acts that would have  
17 been a breach that continue when the Treaty is effective  
18 do not violate non-retroactivity. They would have not  
19 ceased to exist in the words of Article 10.1.3.

20           But I thought our colleagues actually on the  
21 other side gave a very helpful illustration of our  
22 differences by using the Corona Materials case both  
23 yesterday and this morning. So, if you have a claim  
24 that's based on a denial of a license, you cannot make  
25 that claim pass the non-retroactivity test by making the



1 same request again and asking for reconsideration; and  
2 there they made their Request for Reconsideration before  
3 the Treaty took effect, and the State did not respond, and  
4 then they claimed--the Investor claimed there that the  
5 non-response after the Treaty took effect was a breach.  
6 So, you can't manufacture a claim that meets the  
7 non-retroactivity requirement in that way. We agree. You  
8 know, as with everything, the continuing breach doctrine  
9 is subject to an abuse; an abuse of rights is possible.

10 But that's really not our case here. It's not  
11 even close, actually. We have three claims, and I  
12 discussed them yesterday, but in the interest of time,  
13 let's take Renco's first claim because Peru seems to  
14 consider this first claim to be the worst violator of the  
15 non-retroactivity rule and the set of facts from which  
16 everything else stems, according to them.

17 And so, let's assume also that Berkowitz is  
18 right, because Berkowitz is the other key case. And I  
19 would commend you to read that case very closely, and  
20 there they say let's assume that Berkowitz is right. We  
21 must identify independently actionable facts, acts and  
22 situations after February 1, 2009, but to be even more  
23 precise, the test in Berkowitz--and you find this in  
24 Paragraph 237 of the Interim Award--is, and I quote: "Can  
25 that alleged breach be evaluated on the merits without

1 requiring a finding going to the lawfulness of pre-Treaty  
2 conduct. Okay.

3 So, the question under Berkowitz is: Can  
4 Renco's fair-and-equitable-treatment claim be evaluated on  
5 the merits without requiring a finding about the  
6 lawfulness of conduct before February 2009? So, Peru  
7 alleges that there are no such acts, but the reality is  
8 actually the opposite. The source of all our claims are  
9 acts Peru committed after February 1st, 2009.

10 And as I discussed yesterday, our  
11 fair-and-equitable-treatment claim is based on an  
12 extension right that we say was unfairly denied. Now,  
13 this extension right is different than the extension we  
14 sought in May 2006. That extension was sought for  
15 multiple PAMA projects, not just the 16th PAMA, all but  
16 one of which were subsequently completed in the  
17 intervening years, and then the Global Financial Crisis  
18 occurred in late 2008.

19 And so, the request that we made in March 5th,  
20 2009, was a very different request from the one that was  
21 made in 2006. This 2009 request covered only one project  
22 because Renco had completed all the others. And more  
23 importantly, its basis was different; it's based on the  
24 ongoing Global Financial Crisis.

25 So, there's a fundamental difference between

1 Corona Materials and this case. And Renco's request in  
2 March 2009 was not simply seeking a reconsideration of its  
3 2006 request.

4 Now, but even more importantly--and I really  
5 must emphasize this--that March request and denial is just  
6 one fact, okay? The fair-and-equitable-treatment claim is  
7 based on many other facts all of which unquestionably  
8 postdate February 2009 and can be an independent source of  
9 breach. Now, there was a pattern of conduct after  
10 March 10, 2009, independently actionable conduct, so that  
11 one can make an evaluation of the merits of those claims  
12 without needing to determine the lawfulness of any  
13 pre-February 1st, 2009, conduct, which is really what  
14 Berkowitz is all about.

15 You have a draft MOU that was negotiated between  
16 DRP and Peru on March 27, 2009, where a compromise was  
17 struck involving the capitalization of DRP's debt in  
18 return for an extension. In fact, in April 2009, DRP and  
19 the Government held a press conference announcing that the  
20 solution had been reached, but ultimately the MOU was not  
21 signed.

22 And then, in July 2009, Peru appointed a  
23 Technical Commission that concluded that a 20-month  
24 extension was needed to complete the plant plus time to  
25 secure financing.

1           And then, crucially, in September of 2009,  
2 Peru's Congress passed a law granting DRP an extension of  
3 13 months to complete the 15th PAMA Project. But in  
4 October 2009, it intervened again. It passed implementing  
5 regulations that undermined the new law, for example, by  
6 requiring DRP to pay 100 percent of its gross  
7 proceeds--sorry--not profits, but gross proceeds--into a  
8 trust to be used to fund the completion of the Project,  
9 which is an outrageous requirement. That made completion  
10 of the 16th project impossible.

11           So, it's a series of acts, acts that taken  
12 either individually and especially collectively we say  
13 amount to a violation of the fair-and-equitable-treatment  
14 standard of the Treaty. And these fall within the  
15 independently actionable standard of Berkowitz. They do  
16 not require the Tribunal to make a finding going to the  
17 lawfulness of Peru's pre-February 1st, 2009 conduct. And  
18 so even assuming that Berkowitz is entirely correct, and  
19 you have valued our claims on that basis, we would still  
20 meet the threshold easily.

21           And with that, I pass the baton on to my  
22 colleague Cedric Soule.

23           PRESIDENT SIMMA: Thank you, Mr. Llamzon.

24           And the floor is now for Mr. Soule.

25           MR. SOULE: Thank you, Mr. President. Can you

1 hear me?

2 PRESIDENT SIMMA: Yes, fine.

3 MR. SOULE: Thank you, Mr. President, Members of  
4 the Tribunal.

5 I'm going to address again our last point, which  
6 is that Peru hasn't invoked the expedited review mechanism  
7 under Article 10.20.5.

8 It's remarkable that, in its presentation today,  
9 Peru would accuse Renco of seeking that Peru not be heard  
10 when, in fact, Peru has been heard. We've heard their  
11 objections. We're at a hearing, so this is not about  
12 preventing Peru from being heard. This was about  
13 complying with the treaty requirements, which Peru says it  
14 attaches great importance to.

15 It's also remarkable that Peru this morning  
16 would have been outraged by what we said yesterday, which  
17 is simply that procedural consultations do not displace  
18 the treaty requirements. The clear treaty requirements  
19 that to invoke the expedited review procedure you need to  
20 state and plead your objection.

21 And it is remarkable still that, in their  
22 rebuttal, in their Slide 10, Peru doesn't even state  
23 Article 10.5 in full. They cut it to suit their own  
24 argument. Article 10.20.5 says that the Respondent must  
25 make an objection and request that that objection be

1 decided under the expedited review procedure, and Peru has  
2 not done that. In fact, you will note they haven't  
3 responded to our characterization of their December 3  
4 letter as not even having stated what their objection was,  
5 let alone pleaded it.

6 I would just refer you to a few of the Legal  
7 Authorities that Peru has cited on this issue. They cited  
8 to RLA-14, which is Kenneth Vandeveld's treatise on U.S.  
9 International Investment Agreements. He says that to  
10 invoke this expedited review procedure, the Respondent has  
11 to raise an objection. It hasn't raised an objection in  
12 their December 3, 2019, letter.

13 They cite to another article, RLA-15, by a  
14 former ICSID counsel, Senior Counsel. He says that  
15 Respondent has to make an application, uses the word  
16 "application." They haven't made an application. They  
17 haven't stated what the objection was. They just said we  
18 have an objection, we will plead it later. That's not  
19 what the standard requires.

20 And then they accuse us of "misusing"--those are  
21 their words--RDC versus Guatemala, and that's RLA-12. We  
22 invite you, Members of the Tribunal, to look at RLA-12.  
23 It's a letter that sets out clearly what the objection is.  
24 It cites to case law. And it was sufficiently clear and  
25 well-articulated that the Claimant in that case was then

1 able to respond, which was not the case here because Peru  
2 has to file their actual objection 17 days later on  
3 December 20th, way past the 45-day deadline.

4           So, for those reasons we believe that Peru has  
5 not invoked the expedited review procedure. Mr. Hamilton  
6 this morning said that this was not the time for the  
7 Tribunal to rewrite the Treaty or to bend the rules.  
8 Indeed, it would be a significant departure from  
9 Respondents' State practice and from everything that has  
10 happened on all of these cases for this Tribunal to allow  
11 Peru to invoke the expedited review procedure on the basis  
12 of their vague December 3 notice.

13           And with that, I pass it back to my colleague,  
14 Mr. Kehoe, to conclude our rebuttal.

15           PRESIDENT SIMMA: Thank you, Mr. Soule.

16           Mr. Kehoe?

17           MR. KEHOE: Thank you, Mr. President.

18           I do not have any comments other than just a  
19 parting since I mentioned the name of the Tribunal and  
20 it's not clear to me how well you can all see the slides  
21 when they're presented, but of course, I'm sure you know  
22 the Tribunal in Renco I was comprised of Yves Fortier,  
23 Toby Landau, and Michael Moser as the Chair. I just want  
24 to mention that.

25           And with that, we finish our rebuttal.





1 the treaty issue that we had not heard before, and I will  
2 simply say that we encourage the Tribunal to take a look  
3 at the material violation of the waiver provision that  
4 Mr. Thomas apparently has picked up on because it does,  
5 indeed, as Mr. Kehoe admitted, form part of their  
6 denial-of-justice issue. And in any event, the record is  
7 quite clear that Peru more than satisfied its obligations  
8 by timely flagging the waiver issue, and please disregard  
9 the (sound interference) from my counterpart regarding the  
10 factual record.

11 We now turn to the Contract Case. Parallel to  
12 the Treaty Case is the Contract Case brought by the Renco  
13 group and Doe Run Resources against the Republic of Peru  
14 and Activos Mineros, a State entity formerly known as  
15 Centromin. Members of the Tribunal, as I stated at the  
16 outset, on the first hearing date, it is in the hands of  
17 this Tribunal right now to determine how the treaty and  
18 contract claims will go forward in this case. And, in  
19 both cases, it's clear that the objective of Renco is to  
20 drag them out in an inappropriate manner to avoid core  
21 issues from being timely heard, the exact same approach  
22 they took by trying to defer the waiver issue in the  
23 previous case because they wished to avoid their days of  
24 reckoning while they wait to see what happens with the  
25 Missouri litigation and use you as a mere fall-back plan,

1 Members of the Tribunal. It's not acceptable as a treaty  
2 case, and it's not acceptable in the Contract Case.

3 Next slide.

4 Members of the Tribunal, the Republic of Peru  
5 and Activos Mineros do not seek bifurcation often or  
6 lightly. As a matter of fact, if you look at the totality  
7 of the Republic of Peru's investment arbitrations, they  
8 have not routinely sought bifurcation. As a matter of  
9 fact, in our significant experience over many years  
10 advising the Republic of Peru, the Renco Cases are quite  
11 unique in terms of seeking bifurcation or separating core  
12 issues out, and that's due to the very particular nature  
13 of this overarching dispute.

14 And so, Peru does not raise bifurcation lightly.  
15 It certainly is the case that there are States around the  
16 region of Latin America and the world that always seek  
17 bifurcation. It's just part of the process, it's part of  
18 an effort to drag things out. That is not the case here.  
19 Here, there is a very serious issue that the Tribunal  
20 needs to consider up front, and the widely understood  
21 factors relevant to considering bifurcation are plainly  
22 satisfied. It is a set of threshold contractual issues  
23 that are prima facie serious and substantial, distinct  
24 issues from the core claims of the case, and it will  
25 dispose of all or an essential part of the Claims.

1           And the fundamental issue is depicted in a  
2 figure that we provided previously to the Tribunal. This  
3 is the fundamental issue: A serious misalignment of the  
4 Parties.

5           Let's look at these step by step: The Contract.

6           The Parties to the Contract--please stay with  
7 the prior slide, if you would--the Parties to the Contract  
8 are DRP and Activos Mineros, formerly Centromin. Doe Run  
9 Resources Corporation and The Renco Group are not parties  
10 to the Contract. They simply are not parties to this  
11 Contract and cannot avail themselves of the Arbitration  
12 Clause. Activos Mineros nor Peru ever consented to  
13 arbitrate with them this sort of dispute.

14           Similarly, the Guaranty in question terminated  
15 in 2001. Here, again, DRP is a Party, Republic of Peru is  
16 a Party, but not the Claimants before you. So, if you  
17 look, then, to the Contract Case, you see that this  
18 arbitration is misaligned because DRRC and Renco Group are  
19 the Claimants but they're not parties to the Contracts  
20 they're claiming upon.

21           And similarly, by the way, look to the  
22 defendants in the Missouri litigations, and here you see  
23 that the Parties to the Contract--DRP, Activos Mineros and  
24 as to the terminated Guaranty, Republic of Peru--are not  
25 parties to the Lawsuits in Missouri that are the real

1 focus of Claimants' case and the real focus of their  
2 concerns in general.

3 Next slide.

4 So, the Contract dispute as set forth in the  
5 Notice of Arbitration centers on a claim by the  
6 non-parties Renco and DRRC that Activos Mineros and Peru  
7 have a contractual obligation to defend lawsuits--in other  
8 words, to go and defend them for U.S. tort claims brought  
9 against non-parties to the Contract.

10 To decide these issues, Tribunal, there are two  
11 categories of issues that you will have to confront. The  
12 first are threshold contract issues: Who are the Parties  
13 and consent to arbitration.

14 Then there's the application of the Contract.  
15 This is a whole other category of legal, environmental,  
16 technical, financial, and scientific issues.

17 Next slide.

18 So, these two categories of issues are easily  
19 divisible. On the one hand, is there a basis for  
20 arbitration before this Tribunal? It is a fundamental  
21 threshold issue. There is a fundamental misalignment  
22 between the Claimants and the consent to arbitrate.

23 Punto finale, separately is an entire universe  
24 and swathe of other issues relating to the Missouri  
25 litigations, relating to the conduct and management of La

1 Oroya under control of Renco over many years, and so there  
2 are a whole range of issues. And even beyond this rough  
3 illustrative list that we've indicated on Slide 4, there  
4 are a whole swathe of evidentiary issues, starting with  
5 the fact that Renco has full access to the Missouri  
6 litigations and Peru does not. We raised this issue in  
7 the earlier procedural phase of this case, and the issue  
8 was deferred.

9 So, they have access to a whole mega universe of  
10 issues related to the Missouri litigation and related to  
11 these legal, environmental, et cetera, issues, and Peru  
12 does not. So, we're looking at issues that can be easily  
13 divisible to threshold issues versus the whole universe of  
14 issues that will arise in the application of the Contract.

15 So, if you look at the face of the contract  
16 itself, it's quite clear. The Parties are Centromin, now  
17 Activos Mineros, and Doe Run Peru, and the Parties to the  
18 now terminated Guaranty, Doe Run Peru and Peru. It's very  
19 clear from the language of the documents themselves, and  
20 it's very clear in the Arbitration Clause between the  
21 Parties.

22 Next slide.

23 So, just to be clear, the Claimants before you  
24 are not parties to the Contract, had no involvement in the  
25 Guaranty. As a matter of fact, this has all been deeply

1 briefed years ago in Renco I where the Tribunal did not  
2 find it necessary to decide that issue.

3           And, you know, the fact that Renco I Tribunal  
4 chose to decide on a threshold issue, it never reached  
5 these other issues that were deeply briefed before it.  
6 The Parties have argued and argued, and Peru insisted to  
7 put the record of those materials into the case, and we  
8 voluntarily did so.

9           And, in Renco I, it was very clear, based on  
10 expert testimony, that Renco itself has no rights under  
11 the Contract, not entitled to invoke the relevant  
12 indemnity provisions, and that the role as Guarantor, it  
13 was a short, four-term--four-day period of time, that  
14 those obligations of Renco were extinguished when Renco  
15 was released from its Guaranty four days after the  
16 Contract was concluded, and we're now 22 years later.

17           So, fundamentally, Members of the Tribunal,  
18 there is a serious and grave misalignment of the Parties  
19 to the case and the Parties to the Contract. It must be  
20 addressed up front.

21           Mr. Jijón will now explore in further detail the  
22 relationship of these factors and these threshold issues.

23           Thank you.

24           PRESIDENT SIMMA: Thank you, Mr. Hamilton.

25           Mr. Jijón, you have the floor.

1 MR. JIJÓN: Thank you very much.

2 PRESIDENT SIMMA: I think there is a problem  
3 with echoes. Now there is a problem that we don't hear  
4 you. We still cannot hear you.

5 (Pause.)

6 PRESIDENT SIMMA: It echoes.

7 It looks like Mr. Jijón was--

8 MR. JIJÓN: One of the victims of working in the  
9 office even socially distant from Mr. Llamzon is that I  
10 have been able to co-opt his screen. Hopefully, you can  
11 see and hear me now.

12 PRESIDENT SIMMA: Perfect.

13 MR. JIJÓN: Thank you.

14 All right. I will move very quickly through the  
15 application of the bifurcation standard.

16 I think the first key point here is that there  
17 is really no question before this Tribunal as to the  
18 discretion of an arbitral tribunal to bifurcate. This is  
19 very clear from the UNCITRAL Rules and has been made clear  
20 in numerous cases that are before the Tribunal.

21 The bifurcation factors have been laid out in  
22 Philip Morris versus Australia and applied in various  
23 different cases. There is a three-part test:

24 First, whether an objection is prima facie  
25 serious and substantial?

1           Second, whether the objection can be examined  
2 without pre-judging or entering the merits?

3           And third, whether the objection, if successful,  
4 would dispose of all or essential parts of the Claims  
5 raised?

6           Now, these are questions that are to be decided  
7 on the facts of each case, and obviously as Mr. Hamilton  
8 recognized, Peru does not bring these objections lightly.  
9 It does so in this case because all of these factors are  
10 met.

11           Next slide.

12           First, with respect to the serious and  
13 substantial factors. Here, the issue the Tribunal  
14 considered is whether an objection can succeed. That  
15 issue is serious and substantial where a tribunal cannot  
16 prima facie exclude that this objection might be  
17 successful. That's the Philip Morris Tribunal again. And  
18 other tribunals, including those cited on your Slide 11  
19 have highlighted that it is not necessary for a tribunal  
20 to conclude at this stage that the objection is founded,  
21 only that it might be.

22           Next slide, please.

23           Now, in this case, that is exactly what Peru and  
24 Activos Mineros have done to this point. Claimants in  
25 their response to the bifurcation requests have gone to



1 great length to argue that they are, in fact, Parties;  
2 that they are entitled to rights under the Contract and  
3 Guaranty. With respect, that is not relevant at this  
4 stage. What is relevant is whether these objections might  
5 be successful.

6 And here, we see that on its face, the Contract  
7 specifies what the role of Claimants was. They were  
8 intervenors, not parties. The Additional Clause of the  
9 Contract specified what their role as Guarantors of the  
10 Contract entailed.

11 Next slide, please.

12 And as Mr. Hamilton noted, Peru in Renco I  
13 already briefed significant Peruvian law to demonstrate  
14 that the mere participation as intervenors and the  
15 Additional Clause was not sufficient to constitute making  
16 Claimants Parties. This really should be of no surprise  
17 to the Members of the Tribunal. We've all seen cases, for  
18 instance, where someone will sign a contract as a witness,  
19 for instance. That does not automatically make them a  
20 Party to that Contract. The issue is whether, as a matter  
21 of law, they are a Party.

22 Now, just for your reference, the question of  
23 who is a Party to the Contract has also been addressed  
24 numerous times, including in other documents that the  
25 Tribunal has before it. The Guaranty itself refers to

1 Centromin and Doe Run Peru as the Parties to the Contract.  
2 Likewise, the MOU that has been cited at various times by  
3 Claimants in the Renco II proceeding, it also specifies  
4 that the Contract was between DRP, Doe Run Peru, and  
5 Centromin now Activos Mineros.

6 In addition, Peru is not a Party to the  
7 Contract. It was a Party to the Guaranty. However, the  
8 Guaranty is null and void. On your screen, you will see  
9 Slide 16. Slide 16 shows the Assignment Contract of 2001  
10 where Doe Run Peru assigned rights to another entity, an  
11 affiliate called "Doe Run Cayman." This was done without  
12 the express authorization of Peru; and that, therefore, as  
13 a matter of Peruvian law, that voided the Guarantee.  
14 Again, this was all briefed in Renco I.

15 And again, these are not issues that the  
16 Tribunal has to decide now. It merely has to see that  
17 Peru is bringing these objections in good faith as it has  
18 over many years, and therefore, they are prima facie,  
19 serious and substantial.

20 Going forward to the next factor, whether the  
21 objection is intertwined with the merits.

22 Now, here, it's important to see that tribunals  
23 consider whether objections pre-judged the merits. This  
24 was--next slide, please--this was set out in Philip Morris  
25 versus Australia and Mesa Power and Pey Casado. Two

1 important things to note, here this does not mean that  
2 there has to be a complete and utter break between the  
3 objection and the merits; rather, as the Tribunal in Mesa  
4 Power put it, whether the objection can be answered  
5 without going into the full array of facts pertinent to  
6 the merits; as the Tribunal in Pey Casado recognized,  
7 there might be some degree of overlap between the evidence  
8 relevant to the objection and to the merits.

9           And I think this leads to us an important  
10 conclusion: We need to be very careful not to let the  
11 word "merits" become some sort of shibboleth that is  
12 enough to get rid of any objection and prevent  
13 bifurcation. A claimant can't simply, for instance, say  
14 that a legal issue that is the basis for an objection  
15 constitutes a merits issue. The question really is for  
16 the Tribunal to look at whether the issues are distinct  
17 from the liability issues. It is not correct to say that  
18 what a claimant or even a respondent has characterized an  
19 issue as in a different context to be dispositive of  
20 whether it can be bifurcated.

21           Next slide, please.

22           The key issue we have to remember is that  
23 bifurcation is intended to promote efficiency. Obviously,  
24 what we do not want to see in any proceeding is exactly  
25 what has happened over the course of many long years in

1 the dispute with Renco. There has been many years things  
2 were dragged out. Now we see how the Renco I efforts to  
3 avoid waiver are being thrown around again, and the key  
4 issue here is important to see whether we can narrow the  
5 issues in such a way as to make the case more efficient.

6 Next slide, please.

7 As Mr. Hamilton noted, there are basically two  
8 key issues before the Tribunal and Peru's objections, who  
9 are the Parties and what is the scope of the consent to  
10 arbitrate. That is very different from the issues that  
11 the Tribunal will have to address to determine liability.  
12 When it comes to liability, there is a range of different  
13 technical, financial, scientific, legal, environmental  
14 issues, including the entire list that you see on your  
15 slide.

16 For one example--next slide, please--only to  
17 take the question of what is the proper interpretation of  
18 the Contract's indemnity provisions. This alone will  
19 require significant analysis as to the timing of the  
20 various third-party claims, what is their nature, what was  
21 Doe Run's responsibility for those, what was Doe Run  
22 Peru's responsibility, and a series of complicated  
23 technical and evidentiary issues as well as access to the  
24 myriad and millions of pages filed in the proceedings  
25 before Missouri which, as Mr. Kehoe noted this morning,

1 Peru, of course, is not a Party; likewise Activos Mineros.

2 Next slide, please.

3 Finally, as to the question of whether the  
4 objections will dispose of part of the Claim, here, the  
5 issue is whether we can narrow the dispute. This, again,  
6 has been seen in the Philip Morris Case, Mesa Power, and  
7 Glamis Gold. We do not have to see in order to justify  
8 bifurcation that the objection would completely end the  
9 arbitration. It is sufficient for the purposes of  
10 deciding whether to bifurcate that the Tribunal conclude  
11 that it might narrow the scope of issues.

12 However, in this case, the fact is, if the  
13 objections are found to be correct, then the entire  
14 dispute will disappear. And the reason for that is  
15 because consent, as we all know, is fundamental. On your  
16 slide, you will see the colorful language by Mr. Park:  
17 "Consent (even of implied from circumstances) remains the  
18 cornerstone of arbitration."

19 Claimants have suggested that even if the  
20 Tribunal were to rule that Respondents' objections are  
21 founded, that would not result in a total dismissal of the  
22 case because some sort of liability under the Peruvian  
23 Civil Code would remain. It is important to note that is  
24 clearly not correct. Consent is consent. The Respondent,  
25 without going into whether there would be liability under

1 the Civil Code merely notes that if Claimant is asserting  
2 there is some other basis for Respondents' consent in  
3 these cases other than the Contract and the Guaranty, it  
4 has not said what that is. Clearly if Peru and Activos  
5 Mineros have not given sufficient consent under these  
6 instruments, the Tribunal does not have jurisdiction. And  
7 if the Tribunal does not have jurisdiction, it must  
8 dismiss the Claims. This is precisely what respondents  
9 have asked be considered as a preliminary matter, and  
10 these issues can be resolved in limine. That would result  
11 in these cases not going forward and continuing to drag on  
12 unnecessarily.

13 Thank you very much, Mr. President and Members  
14 of the Tribunal.

15 PRESIDENT SIMMA: Thank you, Mr. Jijón.

16 Mr. Hamilton, are you going to add to this, or  
17 is this the entirety of the Opening Statement?

18 We can't hear you.

19 MR. HAMILTON: We will rest there and reserve  
20 our time. Thank you.

21 PRESIDENT SIMMA: Thank you very much. That  
22 gets us to the Claimants' Opening Statement, and I call on  
23 Mr. Kehoe.

24 MR. KEHOE: Yes, Mr. President. I think we just  
25 need a minute for my colleague to load the files, the

1 PowerPoints. Thank you.

2 (Pause.)

3 MR. KEHOE: I'm ready to begin, Mr. President.

4 PRESIDENT SIMMA: Go ahead.

5 OPENING STATEMENT ON CONTRACT ARBITRATION BY COUNSEL FOR  
6 CLAIMANTS

7 MR. KEHOE: So, the Claimants oppose bifurcation  
8 because we believe that it will lead to inefficiency; I  
9 think both Parties agree that that's an important. It  
10 will lead to inefficiency in resolving this dispute  
11 between the Parties that has lasted for quite a long time,  
12 and we believe that the factors that tribunals consider in  
13 deciding whether to bifurcate a case all countenance  
14 against bifurcation of these three particular objections  
15 that Peru wishes to bring forward as preliminary  
16 questions. I will explain why the Respondents', we  
17 believe, contractual objections are so intertwined with  
18 merits that it makes bifurcation impractical. And then my  
19 colleague, Isabel Fernández de la Cuesta, will handle the  
20 other two components of the standard that the Glamis Gold  
21 Tribunal set forth and that many tribunals follow, which  
22 is to focus on the substance of a Claim and potential  
23 inefficiencies.

24 So, beginning with the first point, which is  
25 that these facts are going to greatly intermingle--for

1 some reason I can't see the slide numbers, so it makes it  
2 hard to--I guess I'll just move along. It would be  
3 helpful to see the slide numbers. Sorry.

4 PRESIDENT SIMMA: It's not visible, apparently.

5 MR. KEHOE: Oh, you can't see the slide numbers  
6 either?

7 PRESIDENT SIMMA: No.

8 MR. KEHOE: Is there anyway, Heleina, that you  
9 can pull the PowerPoint higher up so that we can see the  
10 slide numbers at the bottom?

11 MS. FORMOSA: I could do that, but I can't. I  
12 see it on my screen.

13 Martin, is this a potential setting with Zoom?

14 SECRETARY DOE: I don't believe so. I think it  
15 has more to do with the particular aspect of your screen  
16 that you're sharing.

17 MS. FORMOSA: Okay.

18 MR. KEHOE: We see it now.

19 MS. FORMOSA: You see them now?

20 PRESIDENT SIMMA: Yeah.

21 MR. KEHOE: Thank you.

22 So, you just heard them, I don't really need to  
23 repeat them, although I'm here, so I will--that the  
24 Respondents argue is that we're not parties to the Stock  
25 Transfer Agreement, Peru didn't consent, and that



1 Claimants have no substantive rights under these  
2 agreements.

3 Okay. So, Slide 5.

4 So, as I mentioned, tribunals have developed  
5 these three criteria and the over-reaching issue of  
6 fairness and procedural efficiency governs, and now I'm  
7 going to move to the fact that--and I'll move through it  
8 quickly because Mr. Jijón already did it. I'm on the  
9 first of those criteria which is that the objection must  
10 not cause too much intertwining of the preliminary  
11 objections with the ultimate merits in the case. And our  
12 concern with this Request for Bifurcation--and I'll get to  
13 it in a minute--is that the substantive allegations that  
14 Peru is making here will essentially be a merits argument,  
15 and so I'm going to move through--I think it's pretty  
16 clear to the Tribunal; we take the position that we are  
17 signatories to the Contract. The Renco Consortium made an  
18 investment in this mine and smelter, and it's logical to  
19 think that, between the different agreements, that it  
20 didn't protect itself.

21 So, you've heard about the Additional Clause,  
22 I'm going to move through it, it's in our papers. It's  
23 our position that we are signatories to the Contract, and  
24 I think it's hard to disagree with the fact that we're  
25 signatories when we actually signed it.

1 I'll go back.

2 That's signing the Stock Purchase Agreement,  
3 signed by Jeffrey Zelms of Doe Run Peru and Marvin Koenig  
4 of Renco. And then we move to the Additional Clause.  
5 Again, Renco. The names wouldn't be mentioned there were  
6 it not relevant for some type of substantive rights.

7 And again, so the Claimants won the bid for the  
8 Complex; we're here on Slide 11 already, and you can see  
9 on the slide the State acknowledges and guarantees that  
10 the Special Committee acknowledges that the Renco  
11 consortium, including Renco and Doe Run Resources, the  
12 Claimants here, were awarded the bid. Now, the various  
13 interrelated transactions associated with the Claimants  
14 winning the bid by signing the Stock Transfer Agreement,  
15 the Guaranty Agreements, and the other agreements all came  
16 with various rights and liabilities that are at the heart  
17 of this dispute. The Claimants argue they have  
18 substantive rights. Whether or not the Claimants have  
19 substantive rights and to what extent is a question for  
20 the merits phase of the case, but certainly it's  
21 intertwined with their request for the Preliminary  
22 Objections.

23 And now I'm just going to go into a few details.

24 To support its objection, or to support its  
25 Request for Bifurcation, we see some examples in its

1 submission to this Tribunal of why Peru believes that it  
2 is appropriate, and they make a series of legal arguments,  
3 and we heard some of them this morning. They're found at  
4 Paragraphs 29 to 36 of their submission.

5           So, we see here, for example, at Paragraph 32,  
6 it states: "In Renco I, for example, Peru  
7 established"--first of all, that's a misuse of the word.  
8 It didn't "establish" anything. The Tribunal didn't  
9 decide any of this. Peru argued. "On the basis of legal  
10 analysis, authorities and expert opinion the following  
11 with respect to the Contract," and there's a long  
12 paragraph. One of the pieces of it says that Peru could  
13 have not breached any obligation to Renco under the  
14 Contract because Renco has no rights or obligations. We  
15 just fundamentally disagree with that legal analysis, and  
16 we have submitted our own Expert Reports and our own legal  
17 analysis to provide that Renco is--does have substantive  
18 rights under the Contract.

19           And, you know, I make that point simply because  
20 again this goes to the merits. I didn't make a slide for  
21 all of these. I'm just going to mention them here.

22           In Paragraph 34 of their submission, Respondents  
23 state that the Claimants' position concerning the rights  
24 and obligations as Parties referenced in the Guaranty are  
25 superficial arguments, "superficial agreements," and

1 likewise are at odds with the analysis of the Peruvian law  
2 conducted in Renco I. Right, conducted by Peru. We  
3 disagree with that.

4 But my point is, these are all intermingled with  
5 the merits. My colleague is going to get to the other two  
6 factors.

7 They say again at Paragraph 35 in their  
8 submission: "The Guaranty was subsequently rendered null  
9 and void," you heard counsel mention this, "as a matter of  
10 Peruvian law and can no longer be the source of any rights  
11 or obligations," so we disagree with that. But that is  
12 sort of at the heart of the case; I mean, the Stock  
13 Transfer Agreement and the Guaranty and the additional  
14 paragraphs are merits.

15 You know, I agree to some degree with Mr. Jijón;  
16 you know, you just can't say "merits" and have everything  
17 go away, but their argument is a merits argument. In  
18 fact, they characterize it themselves as merits.

19 In their submission to you on Page 9, the  
20 heading is "merits." And they say: "The Claimants Fail  
21 to Establish a Valid Legal Relationship Among the  
22 Parties." We think we have established a valid legal  
23 relationship, and we will, but that is a merits question,  
24 and Peru, at least when it made its submission to you,  
25 agreed with that.

1           So, moving to the second objection, that they  
2 did not consent to arbitrate, how does that relate to the  
3 merits? This is a mirror image of the First Objection, in  
4 our opinion; they argue that they did not consent because  
5 the Claimants are not parties to the agreement and,  
6 therefore, they should be bifurcated, and so I really  
7 don't have much more to say on this issue other than it's  
8 a mirror image of the earlier one.

9           And one additional point. Claimants'  
10 request--and Mr. Jijón referred to this--in this  
11 Arbitration--our Request for Arbitration also contains  
12 claims for unjust enrichment and contribution under the  
13 Peruvian Civil Code which fall within the broad, very  
14 broad, Arbitration Clause. And they're obviously not  
15 contract-based claims, but they derive--you have  
16 jurisdiction over them because of the broad arbitration  
17 clause, and the Respondent doesn't seek to bifurcate the  
18 unjust enrichment and the contribution claims.

19           So, even if this Tribunal were to bifurcate the  
20 issues relating to the alleged annulments and the various  
21 rights and the extent to which Renco and Doe Run resources  
22 have rights and obligations under the Contract and if you  
23 were to determine that somehow they have no rights under  
24 the Contract, it is our position that, under the broad  
25 arbitration clause, you would still need to determine the

1 extent to which they are entitled to compensation under  
2 the Peruvian Civil Code for unjust enrichment and  
3 contribution.

4           Turning to the third and final basis upon which  
5 Peru makes its application for a preliminary decision is  
6 that we don't have any substantive rights under the  
7 Contract, and this really kind of ties back to their first  
8 point because they don't agree with our legal positions on  
9 certain issues, we don't have any rights under the  
10 Contract.

11           So, I just put a long quote here. This is  
12 Paragraph 43. They say: "Claimants' claims relate to the  
13 indemnity clause and the Missouri Lawsuits. They're  
14 inadmissible because they're not parties to the Contract  
15 or the Guaranty. That's their first objection and that we  
16 have no rights thereunder. In fact, the specific rights  
17 and obligations related to third-party claims run  
18 expressly only to the Investor or the Company and not to  
19 non-parties. Respondents have no obligation to arbitrate  
20 the extension of the indemnity clause (or any other  
21 clause) to Claimants with respect to the U.S. lawsuits."

22           Now, we disagree with this, but whether or not  
23 the Claimants have substantive rights under the Stock  
24 Transfer Agreement and the Guaranty is intertwined with  
25 the ultimate merits of the dispute. And as I said, it's

1 also extraordinarily--well, the Peruvian Civil Code is  
2 also extraordinarily relevant because even to the extent  
3 that you found that somehow they have no rights under the  
4 Contracts, we still have a very broad arbitration clause,  
5 and the issues that you would be deciding in determining  
6 the Claimants' rights under the Contract, whether or not  
7 things were annulled or one expert is right or the other,  
8 you're going to need to deal with.

9           And then I guess the environmental issues that  
10 counsel this morning went through, all of these issues  
11 that we could get rid of, all of these environmental  
12 issues, it's our position that those environmental issues  
13 are going to come up in the issue of unjust enrichment and  
14 contribution anyway. We believe that Peru is going to  
15 have to contribute to any potential jury Award or  
16 settlement in the St. Louis case one way or the other.

17           And with that, actually--yeah, I think I've just  
18 said what was on Slide 18, and here again, we see that, in  
19 its submission, with respect to its third ground for  
20 seeking bifurcation, Peru puts as the heading "merits."  
21 Claimants fail--actually, I misspoke. When I said earlier  
22 and when I just said that this was in their submission for  
23 bifurcation, I misspoke. This was their submission in  
24 response to--this was their response in January of 2019 to  
25 the arbitration.

1           So, in any event, they claim that Claimants  
2 failed to establish a valid legal relationship among the  
3 Parties and that it's a merits argument. And with that,  
4 I'm going to hand it to my colleague, Isabel Fernández de  
5 la Cuesta.

6           PRESIDENT SIMMA: Thank you, Mr. Kehoe.

7           The floor is to Ms. Fernández de la Cuesta.

8           Ms. Fernández de la Cuesta, you have the floor.

9           MS. FERNÁNDEZ de la CUESTA: Thank you,  
10 Mr. Chairman.

11           I'm going to address the two remaining reasons  
12 why bifurcation is not relevant in this case, and they are  
13 that the contractual obligations lack substance--I'm  
14 sorry, the contractual objections lack substance, and that  
15 bifurcating this proceeding would result in significant  
16 procedural inefficiencies.

17           Pardon me, I'm having some issues with the  
18 screen, so just give me one second, please.

19           PRESIDENT SIMMA: Of course.

20           (Pause.)

21           MS. FERNÁNDEZ de la CUESTA: Okay, so turning to  
22 why Respondents' three objections lack substance. Let's  
23 focus on the First Objection, which is that Claimants are  
24 not Parties to the Stock Transfer Agreement and the  
25 Guaranty Agreement. And Mr. Kehoe just told you that they



1 are. That they signed this Agreement, and we take the  
2 position that Claimants signed this agreement, they are  
3 Parties to those agreements and they have contractual  
4 rights under those agreements, including the right to  
5 arbitrate the dispute and the right to have Activos  
6 Mineros and Peru assume liability for those losses.

7 And at a minimum, Claimants are third-party  
8 beneficiaries of the Guaranty because the Guaranty  
9 acknowledges them as a winning consortium of the Mesa-La  
10 Oroya bid, and it recognizes that Claimants had  
11 established Doe Run Peru as part of the stock transfer  
12 transaction, and so they have, first of all, rights under  
13 those agreements, and because these objections lack  
14 substance, it is inappropriate for bifurcation.

15 Now, the same goes for the second objection,  
16 which is that Respondent haven't consented to arbitration,  
17 and we showed you also that Peru is a Party to the  
18 Guaranty Agreement, that Activos Mineros is a party to  
19 this Stock Transfer Agreement. And as you can see on the  
20 screen, Article 12 or Clause 12 of the Stock Transfer  
21 Agreement contains a broad arbitration clause that  
22 requires any dispute between the Parties derived in  
23 relation to this Contract to be resolved by arbitration  
24 under the UNCITRAL Rules.

25 Now, in addition to that, the Arbitration Clause

1 is separable from the rest of the agreement under Peruvian  
2 law as well as under well-settled principles of  
3 separability under international arbitration practice;  
4 and, therefore, all of the signatories remain Parties to  
5 the Arbitration Agreement, even if they were no longer  
6 Parties to the Agreement, which they actually are.

7 So, Claimants continue to have, first of all,  
8 right under those agreements, including the right to  
9 arbitrate. And in any event, Respondents are still bound  
10 to arbitrate Claimants' extra-contractual claims for  
11 contribution and unjust enrichment because those are  
12 claims in relation to the Stock Transfer Agreement and,  
13 therefore, fall within the scope of the arbitration  
14 provision.

15 Now, moving to Objection 3, that Claimants lack  
16 substance--excuse me that, Claimants lack substantive  
17 rights under the indemnity provision and other provisions  
18 of the Stock Transfer Agreement, this objection, too,  
19 lacks substance, but what's more important is that these  
20 objections cannot be heard and decided without getting  
21 deep into the merits of the case.

22 Now, Respondents' assumption of liability under  
23 Article 6 or Clause 6 requires the Respondents to assume  
24 liability for third-party damages and claims relating to  
25 environmental contamination regardless of which member of

1 the Renco Consortium or affiliated companies or  
2 individuals are sued. And the Plaintiffs in the United  
3 States have targeted Renco and Doe Run Resources in the  
4 St. Louis lawsuits, and Clause 6 covers these lawsuits.  
5 And so, Activos Mineros has an obligation to assume  
6 liability, any liability imposed on Claimant, and Peru has  
7 guaranteed that obligation, and that's where it lacks  
8 substance.

9 And now, let me move to the final factor, and  
10 let me explain why bifurcation would result in  
11 procedural--significant procedural inefficiencies. And  
12 there are two reasons for that:

13 The first one--and this is key--is that  
14 bifurcation would still require this Tribunal to hear  
15 extensive legal and factual issues during this preliminary  
16 phase as a matter of Peruvian law.

17 And the second reason is that this extensive  
18 evidence is actually intertwined with the merits.

19 So, if the Tribunal bifurcates, it will need to  
20 hear extensive evidence on these factual issues that I  
21 just said because it will need to do so to interpret the  
22 Agreement. Under Peruvian law--and you have this on the  
23 screen--contracts must be interpreted and performed  
24 according to the common intent of the Parties, and this  
25 common intent must be discovered not through a mere

1 reading of the text, but rather through an adequate  
2 interpretation, and this is what Dr. Trazegnies testified  
3 in Renco I.

4 Now, that adequate interpretation cannot be  
5 based on simple proof of what the text says but rather it  
6 must be analyzed in its context. And so, as a result of  
7 this interpretation rule, Peruvian law relies heavily on  
8 extrinsic evidence to establish the context of an  
9 agreement and the Parties' intent in concluding or signing  
10 that Agreement. And so, the Tribunal would have to hear  
11 to decide this objection issues of contract interpretation  
12 and would have to hear all of this evidence on that point.

13 Now, Respondents dispute these principles, and  
14 you heard that again a moment ago. They argue that the  
15 structural instruments speak for themselves and that no  
16 consideration of additional questions is needed, and they  
17 showed you a few slides on this.

18 Now, this is incorrect. In the merits phase, we  
19 will show you why, but for purposes of this bifurcation  
20 request, what's important is that, as a threshold matter,  
21 this Tribunal would have to hear argument and expert  
22 testimony on the applicable fundamental principles of  
23 Peruvian contract law in order to properly adjudicate the  
24 contract claim here, and that further underscores why  
25 bifurcation is not appropriate.

1           Now, that's just not a principle of Peruvian law  
2 that requires to look at the context of the Contract.  
3 Article--or Clause 12--excuse me, Clause 18 of the Stock  
4 Transfer Agreement itself accords "supplemental validity  
5 to background fact regarding the signing and the  
6 negotiation of those agreements," and specifically it  
7 mentions two documents. It mentions the answers to  
8 consultations of official character circulating during the  
9 bidding process for La Oroya, and then it also mentions  
10 the Bidding Conditions. So, I just want to take a moment  
11 to go through these two documents to show you the  
12 relevance of this evidence to the questions that  
13 Claimant--excuse me, that Respondents want to bifurcate.

14           So, if you look at the consultations and  
15 answers, you may recall the first privatization round for  
16 La Oroya failed because it did not attract Investors.  
17 Nobody wanted to bid on that.

18           And in the second round, Peru undertook steps to  
19 attract bidders including by providing answers to their  
20 questions. And so, if you look at Question 41, which is  
21 on this slide, Peru acknowledged in its official response  
22 that Centromin would remain liability for third-party  
23 claims. Peru asked the question--excuse me, Peru was  
24 asked the question: Would Centromin accept responsibility  
25 for all the contaminated land, water, and air until the

1 end of the period covered by the PAMA? Answer:  
2 Affirmative. So, these answers gave a critical assurance  
3 to the consortium into admitting their bid and in signing  
4 the Stock Transfer Agreement, and these facts provide  
5 crucially important context on the Parties' intent on how  
6 and why they became Parties to the Stock Transfer  
7 Agreement and how they continue to have rights under the  
8 Agreement, and those are precisely Respondents' first and  
9 second objections.

10           And then let's look very quickly at the Bidding  
11 Conditions themselves because they require the  
12 bidding--the winning Consortium to establish a local  
13 subsidiary that would sign the Stock Transfer Agreement.  
14 And this is what Claimants did. They won the bid and then  
15 they established Doe Run Peru for this--the Stock Transfer  
16 Agreement. But Doe Run Peru was not involved in the  
17 negotiation of the Stock Transfer Agreement. Renco and  
18 Doe Run Resources negotiated that Agreement, and this is  
19 very relevant context to decide all of three Respondents'  
20 objections to whether Claimants are Parties and whether  
21 Claimants retain rights under those agreements.

22           And so, I listed on the slide a few more points  
23 that this Tribunal would have to decide or go into in  
24 deciding this objection, and the reason why this is  
25 relevant is because Respondents are asking this Tribunal

1 to go into all of these merits questions as to whether the  
2 Guaranty Agreement is terminated or it's null and void and  
3 whether there is a difference between being Parties or  
4 Intervenors, and all of these background that go to the  
5 heart of the merit of the case is relevant in deciding  
6 those issues because they are so deeply intertwined.

7 So, in the interest of time, I'm not going to  
8 read through all of these additional background facts and  
9 legal issues that this Tribunal would have to go into, but  
10 I just want to underscore that the notion that we heard  
11 just a moment ago that there is, as they said, threshold  
12 contract issues that are different and apart from the  
13 application of the Contract is not true in this case based  
14 on the types of objection that Respondents have put  
15 forward the before this Tribunal.

16 And so, finally, very quickly, I just want to  
17 say that bifurcation would in this case for long rather  
18 than shortened and would increase the time--the length of  
19 these proceedings and it would increase rather than reduce  
20 the costs because these objections are likely to fail,  
21 they're intertwined with the merits, and they lack  
22 substance.

23 And I think with that, I'm going to turn it over  
24 Mr. Kehoe. Otherwise, I think we may be done with our  
25 presentation.

1           PRESIDENT SIMMA: Thank you, Ms. Fernández de la  
2 Cuesta.

3           I have to confess that I did not understand the  
4 last sentence. Are you handing over?

5           MR. KEHOE: I think she's handing it to me,  
6 Mr. President.

7           PRESIDENT SIMMA: All right. Thank you.

8           Mr. Kehoe.

9           MR. KEHOE: We have no further comments, sir.  
10 Thank you.

11           PRESIDENT SIMMA: Thank you very much. This  
12 brings to an end the Opening Statements on The  
13 Contracts/bifurcation issue, and we are now having our  
14 second break, a break of 30 minutes, which means a break  
15 until 6:25, 6:25 Hague/Munich time, and that is, Martin,  
16 please?

17           SECRETARY DOE: 12:25 for those on Eastern time.

18           PRESIDENT SIMMA: Okay. See you again at 12:25  
19 Eastern Standard Time, and another three hours earlier for  
20 Mr. Thomas.

21           MR. HAMILTON: Mr. President, might I make a  
22 procedural inquiry?

23           PRESIDENT SIMMA: Yes. Go ahead.

24           MR. HAMILTON: Thank you.

25           Following up on my comments yesterday and the



1 exchange that included Mr. Kehoe as well, I just wanted to  
2 inquire, does the Tribunal have any questions that it  
3 would like the Parties to consider during this break  
4 before we come back for the rebuttal segment?

5 PRESIDENT SIMMA: Let me just make sure whether  
6 I'm right, and if--Martin, can you take me back to the  
7 breakout room just for a quick moment? We will be back  
8 shortly.

9 MR. HAMILTON: Thank you.

10 SECRETARY DOE: Okay.

11 (Pause in the proceedings.)

12 SECRETARY DOE: Great. I think everybody is  
13 back in the Main Hearing room, and you can resume.

14 You're on mute, Bruno. There we go.

15 (Pause.)

16 SECRETARY DOE: I think we can resume.

17 PRESIDENT SIMMA: We are ready to resume.

18 SECRETARY DOE: Yes.

19 PRESIDENT SIMMA: Okay. So, I go back to  
20 Mr. Hamilton or to both Mr. Jijón and Mr. Hamilton.  
21 Actually, there is going to be a question by Mr. Thomas.

22 Was your idea to hear the question right now and  
23 then answer it, or have the question asked and answered  
24 following the two rebuttals?

25 MR. HAMILTON: We're glad to hear your questions

1 any time, Members of the Tribunal, but we thought it might  
2 be more efficient and effective for both Parties if we  
3 could hear the questions now before we take a break so we  
4 can consider and try to assist the Tribunal when we  
5 return.

6 PRESIDENT SIMMA: Okay. So, I give the floor to  
7 Chris, to Mr. Thomas.

8 ARBITRATOR THOMAS: Thank you, Mr. Chairman.

9 QUESTION FROM THE TRIBUNAL

10 ARBITRATOR THOMAS: My question was provoked by  
11 Slide Number 5 of the presentation made by the Respondent  
12 this morning, which referred to the withdrawal of the  
13 claim in the Treaty Case in terms of Doe Run Peru. And I  
14 have been wondering about Doe Run Peru for quite a while  
15 since I have been reading into this case, and I would like  
16 to ask about its involvement or lack thereof in the Treaty  
17 and the Contract Cases. And I would like you to think  
18 about this temporally, at the time of Renco I and at the  
19 present time.

20 So, it's possible that this relates both to the  
21 Treaty waiver, the material side of the Treaty waiver, and  
22 it's also possible that it pertains to the contract claim  
23 because it is identified in the Contract as the second  
24 Party to the Contract. And, of course, we've heard  
25 submissions made on the question of privity of contracts

1 today.

2 So, it's more a question of fact than law. I  
3 would just like to have greater elaboration from both of  
4 your perspectives on why Doe Run Peru was withdrawn as a  
5 Party to the initial treaty claim and why it's not a Party  
6 to the existing contract claim.

7 And is there any evidence--it may not be on the  
8 record, but is there any evidence of any involvement--I'm  
9 not sure what the term is in Peru, but the Trustee in  
10 Bankruptcy or the liquidator. Is there any involvement  
11 between Renco, on the one hand, and the Trustee in  
12 Bankruptcy in relation to these legal proceedings? Was  
13 there any at the time of Renco I? Is there any in the  
14 more recent Renco II and III proceedings.

15 Is that sufficiently clear, Mr. Kehoe and  
16 Mr. Hamilton?

17 MR. KEHOE: Yes, it is perfectly clear to me.

18 MR. HAMILTON: Understood, Mr. Thomas.

19 ARBITRATOR THOMAS: Thank you.

20 And if it turns out that this is not something  
21 you can easily deal with within the half an hour, I accept  
22 that, I understand that. But I did want to raise this  
23 issue because it's been in my mind.

24 MR. KEHOE: Once again, it's a good question.  
25 Obviously I'm not going to answer it now. I do think

1 we'll be able to give you some information, but to give  
2 you full--you know, every bit of information you need,  
3 then we may need to follow up with you. I have a very  
4 good idea, but I may miss a detail and then regret it.

5 ARBITRATOR THOMAS: Understood. Thank you.

6 MR. KEHOE: Thank you.

7 PRESIDENT SIMMA: Okay. Thank you. That gets  
8 us to the break. And the break we will extend to 6:40  
9 Munich time, 12:40 Eastern Standard Time. Okay, so see  
10 you then.

11 MR. KEHOE: Thank you.

12 (Recess.)

13 PRESIDENT SIMMA: So, we reach the stage of the  
14 short rebuttals on the contract arbitration bifurcation  
15 issue, and I give the floor to Respondent for its  
16 rebuttal.

17 Mr. Hamilton or Mr. Jijón, you have the  
18 floor--whoever.

19 REBUTTAL ARGUMENT ON CONTRACT ARBITRATION BY COUNSEL FOR  
20 RESPONDENT

21 MR. HAMILTON: Thank you very much. I'm going  
22 to invite my colleague to project just a few slides that  
23 are material, you've seen before, just to help guide us.

24 Thank you very much.

25 Next slide.

1           Mr. President and Members of the Tribunal, we  
2 will begin with a brief response to the query of the  
3 Tribunal, and Mr. Thomas in particular, that related to a  
4 reference in Respondents' presentation in the Treaty Case  
5 regarding the Amended Statement of Claim, and as  
6 Mr. Thomas mentioned, depending on your point of view,  
7 could have materiality for the Treaty or the contract  
8 case.

9           Fundamentally what occurred in 2011 was that  
10 Renco initially filed a Statement of Claim in April of  
11 that year that included two Claimants and two Respondents.  
12 It subsequently amended its Statement of Claim in August  
13 of 2011. Ms. Menaker will briefly discuss what occurred.

14           MS. MENAKER: Hi, Members of the Tribunal.

15           I suggest briefly in response to Arbitrator  
16 Thomas's question on the Treaty front, as Mr. Hamilton  
17 noted, Renco initially filed its Treaty claim in Renco I.  
18 The Claimants were both Renco and DRP, and the Respondents  
19 were Peru and Activos Mineros. And Peru consulted or  
20 raised an issue with--with, excuse me, Claimants and noted  
21 that, of course, Activos Mineros cannot be a respondent in  
22 a treaty claim. And in response Renco then ended up  
23 filing--and let me back up to say that with their initial  
24 Notice of Arbitration, Renco filed a waiver on behalf of  
25 itself, on behalf of Renco and also filed a waiver on

1 behalf of DRP because, as you know, under the Treaty as in  
2 other Treaties, U.S. treaties in particular like the  
3 NAFTA, you can file a claim on your own behalf; you can  
4 also file a claim on behalf of an enterprise that you own  
5 and control; and, when you do that, you need to file a  
6 waiver of the enterprise's right to initiate or continue  
7 any proceedings.

8           So, they filed two waivers. Then they filed an  
9 amended claim. They dropped Activos Mineros as a  
10 respondent. They also dropped DRP as a co-claimant, and  
11 they did not file a new waiver for DRP, so they only filed  
12 a waiver for Renco, no waiver for DRP.

13           In our objections, Preliminary Objections on  
14 waiver, we raised numerous arguments. As you know, we  
15 objected to Renco's waiver, including because of the  
16 language, the reservation that they took. We also  
17 objected on the ground that Renco should have included a  
18 waiver for DRP. And the basis was that their claim they  
19 originally filed did not change from their claim that they  
20 filed--the amended claim other than the named Parties.  
21 The substance of the Claim did not change. And we argued  
22 that that meant that the Claim would still be made on  
23 behalf of their Investment DRP and, therefore, they should  
24 have submitted a waiver for DRP.

25           And to the extent that they were acting

1 inconsistently with that waiver, it should or acting  
2 inconsistently by having DRP initiate or continue local  
3 proceedings with respect to the same measure, then the  
4 Claim should be dismissed either because they were acting  
5 in violation of DRP's initial waiver that they purported  
6 to unilaterally withdraw, or because they should be deemed  
7 to have submitted the Claim on behalf of DRP and should  
8 have put in a compliant waiver on DRP's behalf.

9           And, in support of that, we noted that there  
10 were two different proceedings that DRP had, indeed,  
11 initiated and continued, and these were not defensive  
12 proceedings. Nor were they proceedings within the  
13 confines of the bankruptcy proceeding, so specifically  
14 there was a constitutional amparo DRP had filed initially  
15 against the MEM challenging the MEM credit in November of  
16 2010. DRP lost. And then it filed an appeal, and it  
17 lost, and it filed a second appeal, which was the  
18 constitutional amparo which was months after the Amended  
19 Notice of Arbitration was filed.

20           So, that is an Affirmative Action taken by DRP  
21 in the Court to file this amparo and in violation of a  
22 waiver had a waiver been filed. And again, that was not  
23 governed by the Bankruptcy Code. It was governed by the  
24 Peruvian Code of Constitutional Procedure.

25           The second case was a Contentious-Administrative

1 proceeding that was again filed by DRP in January of 2012.  
2 There, in that case also, DRP had lost in the first  
3 instance, and they also lost on appeal. They filed a  
4 cassation appeal, and both that cassation appeal was  
5 pending at the time that Renco won, as was the  
6 constitutional amparo that I just mentioned; both of those  
7 were pending, so that was the crux of our material waiver  
8 objection in that case.

9 So, thank you.

10 MR. HAMILTON: Thank you, Ms. Menaker.

11 And, Members of the Tribunal, it only  
12 underscores the dangerousness of this absurd abuse theory  
13 that Claimant is asking you to buy into and really to  
14 utilize to gut the Treaty requirements in the pending  
15 Treaty Case because there are a whole series of issues  
16 that unfolded in the first case in connection with the  
17 waiver, in connection with the ongoing local litigations  
18 which Renco then went in under the auspices of a different  
19 subsidiary of Renco on those cases. So, there are a real  
20 thicket of issues here.

21 The one thing I would just underscore that we  
22 said this morning, of course, is upon receiving that  
23 Amended Statement of Claim, Peru, in letters of August and  
24 September of 2011, with no filing obligation already  
25 flagged the waiver issue which it then, of course,



1 repeatedly requested to be heard upon.

2           The final thing that we would say as to your  
3 query about DRP, is we draw your attention to the  
4 Framework Agreement between the Parties that is before the  
5 Tribunal, and at Section 3 of that Agreement, it explains  
6 in this joint Document the Parties acknowledge that the  
7 process for the liquidation of DRP referenced in the  
8 Notices, the dispute Notices, is ongoing. It also refers  
9 to the role of the Ministry of Energy and Mines including  
10 continued efforts to function on a consensus-based  
11 approach with the approval of the majority of the  
12 creditors.

13           And so, we would be glad to discuss that, if you  
14 ever reach it, but I refer you to that as one source of a  
15 Joint Statement about the status of DRP.

16           Next, we will briefly address the Contract Case,  
17 is it we could go to the next slide, please.

18           Now, Members of the Tribunal, we showed you this  
19 figure, which was also in our pleadings, showing the  
20 misalignment between the Parties to the Contract and the  
21 Guaranty and the Parties to the Contract arbitration.  
22 That is truly disturbing. It is inconceivable to us how  
23 that issue would not need to be addressed as a threshold  
24 matter. The Parties have been dealing with this issue for  
25 years. As we mentioned before, this issue was extensively

1 briefed in 2014 and 2015. The fact that the Tribunal in  
2 the first case, which included the contract claims, did  
3 not reach this issue is simply because we won on our first  
4 line of defense.

5 And so, these issues are very well-known, very  
6 heavily briefed, and easily divisible from the deep swathe  
7 of issues relating to environmental conduct and all of the  
8 attendant technical and documentary issues. Literally,  
9 millions and millions of documents, a swathe that will be  
10 necessary if the case reaches that point.

11 And, fundamentally, what we heard from Claimants  
12 is now revealed; it's now there. There was not an  
13 emphasis that they are Parties, but rather careful slicing  
14 of words using the term "signatories." Signatories, and  
15 based on this very, very narrow role that these entities  
16 had, and their departure four days after in the case of  
17 Renco, four days after the original date of this Contract,  
18 they are seeking to use that to bring a range of  
19 contractual arguments and extra-contractual arguments.  
20 So, they're not parties, there was no consent to  
21 arbitrate, and they want to magically bring  
22 extra-contractual claims in an arbitration.

23 If the fight that they want is whether  
24 signatories who are not parties can benefit from their  
25 Arbitration Clause, let's go. We know this very well

1 under Peruvian law. It's been addressed in various  
2 matters. Certainly, the Tribunal may be familiar with  
3 contract disputes around the region dealing with this  
4 issue about signatories versus Parties. And it is a  
5 segregable issue. Respondents have not consented to  
6 arbitrate these claims. It must absolutely be dealt with  
7 up front.

8 Mr. Jijón, has a few additional observations.

9 PRESIDENT SIMMA: Thank you, Mr. Hamilton.

10 Mr. Jijón?

11 MR. JIJÓN: Thank you, Mr. President.

12 Very briefly, today, we heard at length Claimant  
13 argue and make an extra-contractual focus trying to say  
14 that Respondents' objections should be rejected on the  
15 basis of certain extra-contractual claims under the Civil  
16 Code. This extra-contractual focus only underscores the  
17 problem with consent.

18 What we did not hear is what is another basis  
19 for hauling Peru and Activos Mineros into this Arbitration  
20 if not for the Contract and Guaranty? Consent is consent,  
21 as I said this morning, it is fundamental. And the only  
22 basis for consent that has been alleged so far, as we  
23 know, is the Contract and the Guaranty. That is correct  
24 whether we're talking about liability under the Civil Code  
25 or under the Contract. And today we heard lots of

1 arguments about the origins of the Contracts.

2           Similarly, these arguments on the formation of  
3 the Contract underscore why this is a serious objection  
4 and why this is an objection that should be heard now  
5 rather than with the liability piece. Whether there is  
6 liability under the Civil Code or under the Contract is  
7 completely different from whether there was consent or  
8 whether the Claimants can submit those liability disputes  
9 to arbitration. We don't agree with any of the argument  
10 put forward today on this issue by Claimants but that is  
11 not the point that the Tribunal has to decide now. The  
12 question before the Tribunal now is simply whether those  
13 issues, those substantial and serious issues, which  
14 Claimants wanted to argue about should be heard in a  
15 preliminary phase or whether they should be joined to the  
16 very separate also complex issues of liability that would  
17 have to be decided if this Tribunal let the case go  
18 forward.

19           Thank you.

20           PRESIDENT SIMMA: Thank you, Mr. Jijón.

21           Mr. Hamilton?

22           MR. HAMILTON: Thank you very much.

23           Can we stay on the prior slide, please.

24           Thank you.

25           So, just to close out on the Contract issue. As

1 I mentioned, Peru does not request bifurcation lightly.  
2 It does not do so routinely. It only does so due to the  
3 serious nature of the fundamental cornerstone issue of  
4 consent that goes to the heart of this Request for  
5 Bifurcation. In that sense, this is a situation that is  
6 readily distinguishable from many cases relating to  
7 bifurcation. A recent example such as Eco Oro versus  
8 Colombia and other recent investment claims in Colombia as  
9 well. This is a different situation because we really  
10 have not only a cornerstone issue related to consent by  
11 signatories not parties, who were not even lingering  
12 signatories.

13 So, we have an easily divisible set of issues.  
14 One goes to threshold contractual issues. The other goes  
15 to a giant swathe of environmental issues, all of the  
16 millions of documents in the Missouri litigations, all of  
17 those technical documents, and all of that other universe  
18 of types of issues and experts that may be involved. As a  
19 matter of fact, if anything, what we heard today about  
20 disputes or arguments about what the Contract says,  
21 clearly have nothing to do with all this other vast swathe  
22 of issues.

23 So, in short, this issue is readily segregable  
24 and needs to be heard promptly. It doesn't need to take a  
25 year to hear this issue. It doesn't need to take two

1 years to hear the issue. We think that a compact briefing  
2 schedule is perfectly appropriate to address this issue.

3 Now, to conclude, in summary, Members of the  
4 Tribunal, you have two sets of issues before you: The  
5 scope of the Treaty Case and the scope of the Contract  
6 Case. In the Treaty Case, the Treaty itself mandates  
7 temporal requirements. They cannot be escaped because one  
8 company wants to. They cannot be escaped because one  
9 company violated the Treaty in a previous case, a previous  
10 case where there was no finding of abuse and no  
11 opportunity to cure. This Tribunal is not authorized to  
12 make such findings at this point. There is consonance  
13 between the two parties to the Treaty, the United States  
14 of America and the Republic of Peru, regarding the  
15 importance and rigidity of these temporal requirements.  
16 Peru did not consent to arbitrate such claims, and the  
17 Treaty mandates dismissal of the Claims in the case.

18 Second, with respect to the Contract Case,  
19 bifurcation is plainly appropriate. Claimants are not  
20 parties to the Contract, Respondents did not consent to  
21 arbitrate with these Claimants, and these issues are  
22 wholly distinct from the application of the Contract and  
23 the swathe of related technical and legal merits issues.  
24 Bifurcation is permissible and certainly is necessary.

25 So, Members of the Tribunal, you actually have a

1 big responsibility right now, a responsibility to apply  
2 the Treaty that is the basis for jurisdiction in the  
3 Treaty Case and thereby limit the scope or dismiss that  
4 case; and, second, to take into account the fundamental  
5 cornerstone issue of consent to arbitrate in the Contract  
6 Case.

7 I want to thank you very much for your patience  
8 and your attention during this Hearing on behalf of Peru  
9 and White & Case. Thank you very much.

10 PRESIDENT SIMMA: Thank you, Mr. Hamilton. That  
11 gets us to the Claimants' rebuttal on the matter, but the  
12 Claimant will get the five minutes' extra break that we  
13 agreed on yesterday.

14 And, of course, it would be open for Claimant to  
15 follow the example of Respondent and answer Arbitrator  
16 Thomas' question in one go-together with a short rebuttal.

17 Okay, so we start again at 7:10 Hague time.  
18 That is 13, 1310, 1:10 p.m. Washington time.

19 MR. KEHOE: Mr. President, can you hear me?  
20 This is Ed Kehoe.

21 PRESIDENT SIMMA: Yes.

22 MR. KEHOE: I would like to note for Martin Doe,  
23 when I tried to start the video, it says you cannot start  
24 your video because the host has stopped it. So, if you  
25 could just fix that within the next five minutes, that

1 would be great.

2 PRESIDENT SIMMA: I'm sure that Martin will do  
3 his best.

4 MR. KEHOE: Okay. I just wanted to move it  
5 along.

6 SECRETARY DOE: You should be right there.

7 MR. KEHOE: Thanks so much. See you in a few  
8 minutes.

9 PRESIDENT SIMMA: Thank you.

10 MR. KEHOE: Thank you.

11 (Pause.)

12 MR. KEHOE: Mr. President, shall I begin?

13 PRESIDENT SIMMA: Yes, please.

14 REBUTTAL ARGUMENT ON CONTRACT ARBITRATION BY COUNSEL FOR  
15 CLAIMANTS

16 MR. KEHOE: We know begin, as you asked, and  
17 begin answering Mr. Thomas's question as best we can right  
18 now, and we would like an opportunity to follow up because  
19 it's an important point that you're right, it transcends  
20 both cases.

21 When Renco refiled its case, originally it filed  
22 it with Doe Run Peru--and Ms. Menaker was right, there  
23 were consultations; we were hoping to have a consolidated  
24 case and dialogue with colleagues at White & Case--they  
25 said they would oppose that, and we said "fine." But, as



1 time went on, Renco became very concerned about losing  
2 control of DRP, and that's actually exactly what happened.  
3 DRP is now in bankruptcy, and the liquidator--MEM is the  
4 largest creditor for all the reasons we just discussed,  
5 and the liquidator has taken complete control over DRP, so  
6 Renco has lost 100 percent control over DRP.

7           So, you know, I think I can leave it at that for  
8 now. There has been a lot of attribution by Peru as to  
9 why Renco did or didn't do something, and even this  
10 morning, you know, talking about the waiver and the like,  
11 but Renco knows why it did or didn't do things. And  
12 having Doe Run Peru in bankruptcy, which ultimately  
13 happened, was not something--it's not a good thing for  
14 Renco to have DRP in a treaty case when Renco doesn't  
15 control it anymore and it's in bankruptcy.

16           With that, I will turn it over to my colleague,  
17 Isabel Fernández de la Cuesta, to rebut--to give a  
18 rebuttal on the Contract Case.

19           PRESIDENT SIMMA: Thank you, Mr. Kehoe.

20           Ms. Fernández de la Cuesta, you have the floor.

21           MS. FERNÁNDEZ de la CUESTA: Thank you,  
22 Mr. Chairman.

23           Just very briefly, I will make a few points.  
24 The first one is that, of course, we claim and take the  
25 position that the Claimants are parties to the Stock

1 Transfer Agreement, so I want to be very clear about that  
2 because Respondent seems to be playing games with the  
3 wording.

4           Second of all, all relevant Parties consented to  
5 arbitration under Clause 12. That Clause is separable  
6 from the remaining--from the rest of the Agreement. And  
7 so, to the extent that Respondents were to be right, that  
8 Claimants are not parties to the Agreement, to the Stock  
9 Transfer Agreement, they would still be parties to the  
10 Arbitration Agreement in Clause 12, which is the basis for  
11 consent.

12           My third point is that the Claimants'  
13 extra-contractual claims are based on that same  
14 separability in that same consent, and those claims are  
15 based on the Civil Code and fall within the broad scope of  
16 the Arbitration Agreement which talks about any claims  
17 relating to the Contract, and these claims relate to the  
18 Contract.

19           And the fourth point, and probably my final  
20 point, is that this whole notion that, in this case, there  
21 are very discrete threshold issues and then a swathe of  
22 environmental matters that can easily be separated is not  
23 true. And it's not true because, under Peruvian law, and  
24 under the Stock Purchase Agreement itself, the Tribunal  
25 must take into consideration extrinsic evidence relating

1 to how the Contract came about, how the negotiations came  
2 about, who the Parties were, and so on and so forth, to  
3 decide these Preliminary Objections, which are merits  
4 objections.

5           And so, I'm not even sure that all of these  
6 throngs of environmental issues would ultimately be part  
7 of this case, but even if they were, they were related to  
8 the merits objections that Claimants--excuse me, that  
9 Respondents have put forward.

10           And so, I would refer the Tribunal to Slides 28,  
11 29, 30, and 31 of our presentation this morning where I  
12 went through Peruvian Law on the issue of the Parties'  
13 intent and the Stock Transfer Agreement and the express  
14 reference in that Agreement to extrinsic documents that  
15 have interpretative value, and that there itself, right  
16 there, shows that these issues cannot be bifurcated  
17 without causing inefficiency and without causing delay and  
18 without causing additional cost.

19           And the last point I would make is that  
20 Mr. Hamilton started his remarks by saying that Renco was  
21 trying to delay this case to avoid the reckoning day, and  
22 I would like the Tribunal to think who is really trying to  
23 avoid the reckoning day by causing this delay and  
24 bifurcation. Because, ultimately, the liability or  
25 environmental claims lies with Activos Mineros and on

1 Peru, and the longer this procedure goes, the longer they  
2 avoid their liabilities under the Stock Transfer  
3 Agreement.

4 And with that, Mr. Chairman, I pass the floor to  
5 Mr. Kehoe.

6 PRESIDENT SIMMA: Thank you very much.

7 That brings to an end the last act in this  
8 drama, the Claimants' rebuttal of contract matters and, if  
9 I have followed it correctly, all the answers to the  
10 question by Mr. Thomas.

11 Chris, may I ask you: Are you fine with the  
12 answers or you need more information or...

13 ARBITRATOR THOMAS: Well, I think I can work on  
14 the basis of the existing record, although I do note that  
15 Mr. Kehoe indicated that he might wish to follow up on the  
16 point.

17 PRESIDENT SIMMA: Okay. Mr. Kehoe, if that is  
18 the case, you probably have to give Mr. Hamilton a chance  
19 comment, or does that go--I think so.

20 Mr. Kehoe, let me ask you.

21 MR. KEHOE: And, first of all, let me apologize  
22 for having my video on during most of Ms. Fernández's  
23 presentation; I didn't realize it.

24 So, Mr. Thomas, I think I just--I think it was  
25 more of a caveat, that obviously I want to be able to

1 elaborate on that point and not to be, which I know the  
2 Tribunal wouldn't do, but not to be kind of boxed in, and  
3 I didn't give you an awful lot of facts. I just explained  
4 to you, you know, the timing of the withdrawal, the reason  
5 for the withdrawal. You asked what's going on with the  
6 liquidator, and so I don't think--if you have more  
7 questions about that, then I would like an opportunity to  
8 give you a more fulsome answer; it feels like you may.  
9 And so, if that's the case, we can make a written  
10 submission, but we're not asking for permission to do that  
11 right now.

12 PRESIDENT SIMMA: Okay. Chris, you probably  
13 have the last word on this matter.

14 ARBITRATOR THOMAS: Why don't we leave it on  
15 this basis. The Tribunal will discuss after the Hearing  
16 how it wishes to proceed in terms of the deliberative  
17 process.

18 And given the fact that you didn't have a lot of  
19 time to respond to this, obviously the Respondent was in a  
20 position to explain its perspective in relation to the  
21 treaty claim, but it may be that we might ask for  
22 something in writing--speaking entirely personally--simply  
23 because if it turns out that there is something of real  
24 relevance here to the disposition of a question that's  
25 before us, it would be better to be doing it on the basis

1 of receiving any further information we think is necessary  
2 to receive. I didn't want to take anybody by surprise by  
3 drawing an inference from something which has been said in  
4 oral argument without necessarily being able to see a  
5 document.

6 But may I suggest we just leave it on that basis  
7 and I can discuss with my colleagues and we can see  
8 whether we have a need to follow up?

9 MR. KEHOE: That's good for the Claimants, yes.

10 PRESIDENT SIMMA: Okay. Good.

11 MR. HAMILTON: Mr. President, if I might very  
12 briefly, first, Peru and Activos Mineros would be glad to  
13 provide clarification if that would assist.

14 Second, just as a factual matter, I think it's  
15 important to note that DRP was removed from the initial  
16 Statement of Claim in Renco I because the Statement of  
17 Claim was not formulated in a manner consistent with the  
18 Treaty. It was a procedural issue that was coordinated  
19 and discussed between the Parties that led to their  
20 decision to submit an Amended Statement of Claim.

21 And, finally--and again, you can look at the  
22 joint agreement of the Parties and the Framework  
23 Agreement--the Republic does not control the bankruptcy  
24 proceeding. It is a creditor-controlled process. The  
25 liquidator is not the State--it is the liquidator

1 appointed by creditors--and the Ministry of Environment  
2 doesn't control and dictate what happens in this  
3 creditor-controlled process.

4 Beyond that, I think for Mr. Kehoe or I to say  
5 more would certainly open up a whole range of issues, and  
6 it would complicate everyone's afternoon, so we will leave  
7 it at that.

8 (Overlapping speakers.)

9 MR. KEHOE: Mr. President, I disagree with that.  
10 I would ask to be able to respond to that. Mr. Hamilton,  
11 in the Contract Case, has referred to the Treaty, and I  
12 haven't objected, and I wouldn't normally, but I should be  
13 allowed to respond to what he just said. It was...

14 PRESIDENT SIMMA: Right. May I suggest that you  
15 let the Tribunal deliberate on this matter.

16 MR. KEHOE: Sure.

17 PRESIDENT SIMMA: I will get back to you if  
18 there is need for further clarification with regard to the  
19 contract claims. We're not in the same, I would say,  
20 "hurry" as we are with the treaty claim, so there would be  
21 the time, so let's see what comes out.

22 MR. KEHOE: Yes.

23 PROCEDURAL DISCUSSION

24 PRESIDENT SIMMA: Okay. That leaves us with a  
25 couple of questions. The first question is the question

1 of Post-Hearing Briefs.

2 Now, with regard to the treaty claim, the  
3 Tribunal has about two-and-a-half weeks' time to come up  
4 with the Award in the 10.20.5 procedure, so the Tribunal  
5 does not need or does not expect you to come up with  
6 Post-Hearing Briefs at least on the treaty claim. We have  
7 the same feeling with regard to the contact claim except  
8 if the Parties really insist on writing these briefs.  
9 But, as I said, it would make no sense with regard to the  
10 Treaty.

11 So, the bottom line, the Tribunal does not need  
12 Post-Hearing Briefs except if you really are eager to  
13 produce them.

14 Respondent? Mr. Hamilton?

15 MR. HAMILTON: On behalf of Peru and Activos  
16 Mineros, we are not anticipating Post-Hearing Briefs at  
17 this time, Mr. President.

18 PRESIDENT SIMMA: Okay. Mr. Kehoe?

19 MR. KEHOE: And we're the same, Mr. President.  
20 We are happy to not have Post-Hearing Briefs.

21 PRESIDENT SIMMA: Good. Thank you.

22 The other point is the question of the  
23 Transcripts, the Transcripts' examination and correction,  
24 and here I think the same is valid as I said before. With  
25 regard to the treaty claim, the Tribunal has so little



1 time, and I think it would really come to the correct  
2 decision in the case without even on the basis of  
3 Transcripts that might not have the ultimate blessing by  
4 the Parties, so my suggestion would be that you please go  
5 about the procedure regarding the Transcripts, but we will  
6 not need them at least for the Decision on the treaty  
7 claim. The Decision would have to be made by the end of  
8 the month.

9 Would that be fine with you, too?

10 Mr. Kehoe, we start with you this time.

11 MR. KEHOE: Yes. That's perfectly fine with us.

12 PRESIDENT SIMMA: Mr. Hamilton?

13 MR. HAMILTON: Yes, Mr. President. Thank you.

14 PRESIDENT SIMMA: And let me ask my colleagues  
15 first.

16 To my colleagues, do you have any organizational  
17 issue that I might have forgotten to raise?

18 Chris?

19 ARBITRATOR THOMAS: Nothing comes to my mind at  
20 this point. Thank you.

21 PRESIDENT SIMMA: Thank you.

22 Horacio?

23 ARBITRATOR GRIGERA NAÓN: Nothing on my mind,  
24 either.

25 PRESIDENT SIMMA: Okay. Fine.

1 Parties, Mr. Hamilton, any matter that I, in my  
2 innocence, might have forgotten to raise?

3 MR. HAMILTON: There are many things on the mind  
4 of the whole world these days, but I don't think we have  
5 anything in addition to raise at this time with the  
6 Tribunal. We very much appreciate your patience and time,  
7 and I extend courtesies to Mr. Kehoe as well.

8 PRESIDENT SIMMA: Mr. Kehoe?

9 MR. KEHOE: Thank you. Thank you,  
10 Mr. President.

11 I actually do have one question for the  
12 Tribunal.

13 PRESIDENT SIMMA: Okay.

14 MR. KEHOE: And for Mr. Hamilton, to whom I  
15 extend my gratitude as well.

16 So, Article 10.20.5, as you note, gives you 17  
17 more days, and if we read it carefully, it's--I mean, we  
18 were reading it, it says, "on a showing of extraordinary  
19 circumstances," we can have the extra 30 days; right?  
20 Because 180 days expired on May 31st, and the 210 days,  
21 which is the extra 30 days we get to bring us to  
22 June 30th, requires a showing of extraordinary  
23 circumstances.

24 So, would it be proper for you to ask the  
25 Parties, which I think we will both agree, that there were

1 extraordinary circumstances here and we make a showing to  
2 you and you approve it and we get the extra 30 days, or is  
3 that not necessary?

4 PRESIDENT SIMMA: That is a question which I  
5 would like to briefly discuss with my colleagues. I hope  
6 it hasn't been our appearance on the video, on the  
7 picture, that we look so fatigued and stressed that you do  
8 not consider us capable of coming up with an award, but I  
9 will make sure how my colleagues feel, okay?

10 MR. KEHOE: No, no, no, no, no. Just so you  
11 understand, all I'm saying is that May 31st has already  
12 gone by--we're already past that--and so, in order to have  
13 the 17 days, we all have to agree extraordinary  
14 circumstances would enable us to get us the extra 30 days.

15 PRESIDENT SIMMA: Okay. Right. Of course, if  
16 that is the situation, yeah.

17 MR. KEHOE: Yes.

18 (Overlapping speakers.)

19 MR. KEHOE: The Claimants agree that there were  
20 extraordinary circumstances that warrant the extra 30  
21 days.

22 PRESIDENT SIMMA: May I ask, Mr. Hamilton?

23 Sorry for my mistake. I really thought that the  
24 end of June was--

25 MR. KEHOE: Yeah.

1           PRESIDENT SIMMA: Mathematics was never my  
2 great--

3           MR. KEHOE: Well, you have a skill set somewhere  
4 else.

5           PRESIDENT SIMMA: Since we are already two weeks  
6 past the time it would be actually wonderful if you could  
7 agree the circumstances exist.

8           Mr. Hamilton?

9           MR. HAMILTON: The Respondents are glad to  
10 cooperate with Claimants and the Tribunal to confirm the  
11 availability of the indicated period of time to reach a  
12 conclusion.

13           PRESIDENT SIMMA: Okay. Thank you very much.

14           Then I think all that remains for me is to thank  
15 you for, let's say, having been available for this having  
16 gone through this exercise in a very amicable, cooperative  
17 way. And I would like to thank all the people that are  
18 involved in this technological exercise--Registry people,  
19 the Interpreters, Court Reporters, Law In Order--I have to  
20 find out what that meant, "Law In Order," but apparently  
21 the law was in order. So, thank you, and we will do our  
22 best. Thank you very much.

23           MR. KEHOE: Thank you very much, all of you.

24           MR. HAMILTON: Thank you. Buenos tardes.

25           (Whereupon, at 1:31 p.m., the Hearing was

1

concluded.)

## 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.

A handwritten signature in black ink, appearing to read "David A. Kasdan", is written over a horizontal line.

DAVID A. KASDAN