

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

PCA Case No. 2019-46

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 In the Matter of Arbitration Between: :
 :
 THE RENCO GROUP, INC., :
 :
 Claimants, :
 :
 and :
 :
 THE REPUBLIC OF PERÚ, :
 :
 Respondent. :
 ----- x Vol. 4

- AND -

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

PCA Case No. 2019-47

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 In the Matter of Arbitration Between: :
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 THE RENCO GROUP, INC, AND :
 DOE RUN RESOURCES CORP., :
 :
 Claimants, :
 :
 and :
 :
 THE REPUBLIC OF PERÚ AND :
 ACTIVOS MINEROS S.A.C., :
 :
 Respondents. :
 ----- x Vol. 4

(Continued)

HEARING ON JURISDICTION AND LIABILITY

Friday, March 8, 2024

The World Bank Group
1225 Connecticut Avenue, N.W.
C Building
Conference Room C1 450
Washington, D.C. 20036

The hearing in the above-entitled matter came on
at 9:30 a.m. before:

JUDGE BRUNO SIMMA, President of the Tribunal

DR. HORACIO GRIGERA NAÓN, Co Arbitrator

MR. J. CHRISTOPHER THOMAS KC, Co Arbitrator

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Registry, Permanent Court of Arbitration:

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P R O C E E D I N G S

PRESIDENT SIMMA: Good morning, everybody.

We are on Day 4 of the Renco Hearing, and we are going to continue the cross-examination of Mr. Varsi. And so I give the floor to Mr. -- oh, the question of applicable law. Why don't we get that out of the way before. Okay.

Mr. Schiffer.

MR. SCHIFFER: We agree that the law of the seat of the arbitration applies the procedural law in the case. So there's no controversy about that. We do need time, however, to look at whether that would apply to declaratory judgment actions.

I believe -- not to speak for Respondent, but they believe English law would apply to determine whether the facts of this case could be determined by declaratory judgment action under English law, and we've -- this is not something that we've looked at, at least certainly not in any reasonable time since the briefing.

And we're a small team, so I'd just like to hopefully add that to the briefing that we will -- again, we believe we should be doing after this.

PRESIDENT SIMMA: Thank you, Mr. Schiffer.

Mr. Pearsall or Ms. Gehring.

MS. GEHRING FLORES: Yes. Thanks, Mr. President.

1 Our position on the law governing the Arbitration
2 Clause has been quite clear in all of our briefing, and
3 certainly you would have to start with the law of the seat
4 and its choice of laws. And where that leads you is one
5 place, with respect to what law governs the Arbitration
6 Agreement.

7 The question with respect to the remedies open to
8 this Tribunal is an entirely different question, and that
9 is not the question that the President asked the Parties,
10 and we would respectfully submit that the time for Counsel
11 to investigate this issue and to research this issue has
12 passed. They did not speak on it in their Rejoinder on
13 Jurisdiction and Admissibility, and they had an opportunity
14 to do so.

15 So, yes, if opposing Counsel wishes to research
16 the question, that is fine, but they had their opportunity
17 to submit their argument on this issue, and they did not.

18 MR. SCHIFFER: Mr. Chairman, I feel like I'm
19 being somewhat hoodwinked here, because --

20 PRESIDENT SIMMA: What does that mean?

21 MR. SCHIFFER: It means -- it's like a gotcha.
22 Like it's in the U.S., it's called a "gotcha."

23 Their briefing only talked about procedural law
24 of English law in connection with the declaratory judgment
25 issue; so if they're now trying to expand it into other

1 arguments and theories, I will say back to them that they
2 haven't done that.

3 PRESIDENT SIMMA: Ms. Gehring.

4 MS. GEHRING FLORES: I merely say we stand on our
5 arguments. We're not expanding them whatsoever. I'm
6 merely noting that the time has passed for opposing Counsel
7 to respond to those arguments. I'm not expanding at all.

8 MR. SCHIFFER: May I ask a--

9 MS. GEHRING FLORES: You can find them in our
10 Briefs.

11 MR. SCHIFFER: May I ask Counsel a direct
12 question, then? Are you seeking to apply English law to
13 anything other than the declaratory judgment action?

14 MS. GEHRING FLORES: I think our arguments are
15 very clear in our Brief.

16 MR. SCHIFFER: Yeah.

17 MS. GEHRING FLORES: That -- Briefs, that English
18 law as the seat of the Arbitral Agreement applies to
19 procedure, which includes remedies available to this
20 Tribunal. And remedies available to this Tribunal are
21 governed by English law.

22 MR. SCHIFFER: Right. But the only remedy you
23 discuss in the Brief is the declaratory judgment action.

24 MS. GEHRING FLORES: That's correct, because it's
25 the only one relevant with respect to your arguments.

1 MR. SCHIFFER: I feel like that they are
2 intending something -- I mean, honestly, I think they are
3 intending something that I don't believe was ever set out
4 in the Briefs. If we're going to have a big battle over
5 this, then we absolutely need time to brief it. I
6 don't -- I mean, actually there has been a lot of these
7 gotchas in this case, which hopefully Tribunal sees we
8 don't play that way, but I don't want to be -- a case of
9 this importance cannot be decided on a gotcha.

10 I mean, it just can't be, especially when it's
11 not clear from their papers what all they're saying,
12 because I think what Ms. Flores is saying is probably a lot
13 broader, because a declaratory judgment action, if you
14 apply English law, to me it's the same as Peruvian law. I
15 mean, it's the same almost everywhere. So the standard is
16 the Standard.

17 It's pretty easy, but I really feel like what she
18 is now intending to do is say, ah, but you don't get the
19 benefit of the Peruvian Arbitration Act to determine what
20 Parties are related to the arbitration, which is an
21 argument they never made in their briefing. But I think
22 that's what she wants to apply to now. And I just don't
23 want to agree to something, and then have them say we can't
24 brief it anymore, and then try to get the Tribunal to apply
25 it more broadly than they ever argued before.

1 I actually feel that's where they are going.

2 PRESIDENT SIMMA: Okay. So may I suggest -- this
3 is getting more interesting than I thought, at least. But
4 we don't have the time to go into that. So let's -- maybe
5 we'll find a moment. Oh, yes. Chris.

6 ARBITRATOR THOMAS: It's a question of
7 nomenclature, but you said the law of the seat, and its
8 choice of laws. Do you mean the English rules on conflict
9 of laws?

10 MS. GEHRING FLORES: Yes.

11 ARBITRATOR THOMAS: Okay. I just wanted to make
12 sure that I understood what might be a difference between
13 English law and American.

14 MS. GEHRING FLORES: Sure. Yes. Yes.

15 ARBITRATOR THOMAS: Okay. Thank you.

16 PRESIDENT SIMMA: So maybe we find another chance
17 for that, to take that up before we leave by the end of
18 next week.

19 MS. GEHRING FLORES: Yes, let's --

20 PRESIDENT SIMMA: We will see what we do with it,
21 but let's not lose further time.

22 MS. GEHRING FLORES: But I just -- I really do
23 want it to be clear, that we absolutely and simply just
24 stand on all of the arguments that we have already
25 presented in the Briefs. These arguments have been

1 presented over years, and Counsel on both sides have had an
2 opportunity to address these arguments.

3 We're not expanding, and I do not think that
4 opposing Counsel, that Renco and DRRC should have yet
5 another opportunity to respond through the backdoor to
6 arguments that have already been made over years.

7 PRESIDENT SIMMA: Okay. Okay. Right. So I
8 think, if I remember correctly, my question started out
9 does -- do the Parties agree, and that question has been
10 answered to my full satisfaction. You do not agree. Let
11 it be that here. Mr. Varsi has been sitting here now for
12 about half an hour. It must be terrible for you with your
13 temper; so why don't we -- okay. Close that for the
14 moment. And the floor goes to Mr. Fogler for the exam.

15 ENRIQUE VARSİ ROSPIGLIOSI, RESPONDENT'S WITNESS, CALLED

16 (Continuing)

17 CROSS-EXAMINATION

18 BY MR. FOGLER:

19 Q. Good morning, Mr. Varsi.

20 A. A pleasure. Mr. Josh. May I call you Mr. Josh?

21 Q. This is Josh.

22 A. Excuse me.

23 Q. Permit me to introduce myself. I am Murray
24 Fogler, I am one of the lawyers for Renco and DRRC in this
25 Arbitration.

1 As a preliminary matter, I'm never certain how to
2 address someone of your stature, whether I'm supposed to
3 address you as Professor Varsi or Dr. Varsi or Mr. Varsi.

4 What do you prefer?

5 A. Enrique. How about Enrique?

6 Q. That's slightly more informal than I'm used to;
7 so I'm going to call you Mr. Varsi, if that suits you.

8 I see in the Reports that you have prepared for
9 us that you, yourself, have, on occasion, served as an
10 arbitrator.

11 Is that true?

12 A. Yes, that is true. I am an arbitrator with the
13 Commerce Chamber in Lima for over 10 years. I have been an
14 arbitrator with the Arbitration Center in the Catholic
15 University of Perú, and also some other chambers of
16 arbitration within the country.

17 Q. You are familiar, then, with the obligations of
18 Parties and Witnesses to make disclosures in arbitrations,
19 are you not?

20 A. Of course. And that's what I did.

21 Q. And you're familiar with the concept of
22 independence of Experts, for example, are you not?

23 A. Certainly.

24 Q. And you made a Statement in your Report,
25 the -- actually the September 2023 Report. Let me read it

1 to you. It's Paragraph 2.1. You say: "I further reaffirm
2 my independence in the preparation of this Supplementary
3 Report, and confirm that there is no relationship with the
4 Parties, their Counsel, or the Arbitral Tribunal to be
5 disclosed herein."

6 I didn't see a similar Statement from your prior
7 Report, but that Statement would apply to all of the
8 Reports that you have prepared in this case; right?

9 A. That is correct.

10 Q. And yet, at the same time that you have served as
11 an Expert for Perú and Activos Mineros in this case, you
12 and your law firm were representing the Government of Perú
13 in a different arbitration; isn't that true?

14 A. Yes. Yes. And if my memory serves me right, it
15 was also as an Expert.

16 Q. Well, actually, you and your law firm were the
17 lawyers for the Government of Perú in that case, were you
18 not?

19 A. I'm not certain. What I know, so far, is that I
20 am an Expert in an arbitration, and I was asked to provide
21 an Opinion in connection with the Ministry of Energy and
22 Mines.

23 Q. I'm speaking of the Geurent Case. Maybe Geurent
24 is the way you would pronounce it. I'm not very fluent in
25 Spanish, but are you familiar with that case?

1 A. I do not -- I'm not a representative there. I'm
2 not Counsel there. It must be a partner from my law firm,
3 but my policy in my law firm is not to practice, rather to
4 act as an arbitrator.

5 Q. You understand, sir, that the Ministry of Energy
6 and Mines for the Government of Perú is a central actor in
7 the facts of this case?

8 A. As far as I know, it is not relevant that the
9 Ministry of Energy and Mines has any role to play in this
10 case, and that my law firm defends, or I am an Expert
11 on -- defends that case or that I am on a -- or as I appear
12 as an Expert on a particular case. I do not know how this
13 may impact my autonomy and independence. I think that at
14 my age and with my background, there is no doubt to cast.

15 Q. Here's the thing about disclosure; we can't
16 determine whether your participation in another matter is
17 relevant or not unless we know about it, unless it is
18 actually disclosed. True?

19 A. As you said, yes, it should be that way.

20 Q. Nevertheless, what is true is that there is no
21 reference in any of your Reports to any other matter in
22 which you or your law firm have represented or participated
23 in any other way in a case for the Government of Perú or
24 the Ministry of Energy and Mines; right?

25 A. No, but there is the information that you have

1 just shared with me that is the disclosure that I did in
2 due course, and that is what should be there.

3 Q. Let's move on. I want to talk to you about some
4 of the -- some pretty basic concepts about contracts in
5 Perú. In Perú -- just as we do in the United States -- you
6 have freedom of contract, that is Parties are free to make
7 any contract they wish so long as it's legal; right?

8 A. That is correct. So the will prevails as well as
9 the Contract. The freedom to enter into a contract.

10 Q. By way of example, if a company wants to sell
11 assets or the stock of a subsidiary to another company, the
12 two Parties, the buyer and seller, can allocate liabilities
13 and assets, however they may agree; right?

14 A. That is the freedom to contract.

15 Q. Here in this case, we are talking about
16 environmental liabilities. That's the basic issues in this
17 Arbitration, and we know we're going to hear quite a bit
18 more later from other folks, but Perú has an established
19 legal principle that the Party that pollutes is responsible
20 for paying for damages that might be caused by the
21 pollution; isn't that right?

22 A. That is the general law on the environment.

23 Q. Nevertheless, two Parties can agree to allocate
24 the liabilities for pollution in a different way, if they
25 desire, can't they?

1 A. As long as they do not go against the law.

2 Q. Okay. Well, that's what the Parties did here.

3 That is, when Centromín and Renco and DRRC were negotiating
4 the Stock Transfer Agreement, they negotiated an allocation
5 of responsibility for environmental claims, didn't they?

6 A. No. They did not go against the law. What they
7 did was to distribute risks, liabilities, and also
8 indemnity as part of a contract relationship, but they were
9 not beyond the law.

10 Q. I wasn't suggesting that what they were doing was
11 improper or illegal. I'm just asking you to confirm that,
12 in the Stock Transfer Agreement, in Articles 5 and 6, they
13 made an Agreement about how to allocate responsibility for
14 environmental matters; right?

15 A. The way you asked me first, you were taking me to
16 offer you an answer meaning that they were breaking the
17 law. That was my understanding.

18 Now, the question you're asking me whether they
19 assigned liabilities under the contract based on Clauses 5
20 and 6 and the answer is, yes, that is clearly stated,
21 responsibilities, liabilities for Centromín and liabilities
22 for the Company.

23 Q. And if there were to be any dispute between
24 Centromín, on the one hand, and DRP on the other hand,
25 about the proper allocation of responsibilities, clearly

1 that dispute would be subject to the arbitration provision
2 in the Contract; right?

3 A. Would you please repeat the question?

4 Q. Certainly. We've discussed very generally -- and
5 I'm talking in general terms -- that in Articles 5 and 6
6 there is a division of responsibilities for environmental
7 matters between Centromín on the one hand, and -- I'm
8 calling it DRP because it acquired Metaloroya.

9 So when I say "DRP," I mean Metaloroya and DRP.
10 In the Article, in Articles 5 and 6, if there were a
11 dispute between Centromín and DRP about allocation of risk
12 for a particular environmental matter, that would clearly
13 be subject to the arbitration provision in the Contract,
14 wouldn't it?

15 A. Indeed, because they are the Parties.

16 Q. So the question that here we're debating is
17 whether Renco and DRC have a right to arbitrate a dispute.
18 And that's what I want to generally talk to you about here
19 this morning. All right?

20 So let's -- what I want to do -- do you have a
21 copy for yourself of the STA, the Contract at issue?

22 Do you have one in front of you?

23 A. No, I do not. I only have my Reports.

24 MR. FOGLER: With the permission of the Tribunal,
25 I would like to hand to the Witness, R-001, a Spanish

1 version of the Contract. And here's a copy for
2 Mr. Rodriguez too.

3 PRESIDENT SIMMA: Okay. Go ahead.

4 BY MR. FOGLER:

5 Q. I'm going to show you certain provisions of the
6 Contract, but I want you to have the entire Contract in
7 front of you in case you wish to consult any other
8 provision while we're discussing this.

9 The first provision that I want to talk to you
10 about we have discussed here before is Article 18,
11 Clause 18, which you will find -- it's at PDF Page 65.
12 It's numbered 64, I believe. And I've put the English
13 version up here, but I want you to obviously feel free to
14 consult the Spanish, which is, by the way, the
15 primary -- the preferential version of the Contract. And
16 you've seen this before; right?

17 A. Yes.

18 Q. And as part of your work, the review of the
19 Contract was important, wasn't it?

20 A. It is key.

21 Q. In this particular clause, we see that the
22 Parties agreed that there would be certain other documents
23 that would be available to consult in the event there were
24 questions about the interpretation of the Contract;
25 correct?

1 A. Yes, indeed.

2 Q. We have the Answers to Consultations in Part (a),
3 and we have the Bidding Conditions in Part (b) of this
4 section; true?

5 A. Indeed.

6 Q. I assume then that, in the course of your work,
7 that you consulted with these answers and bidding
8 conditions in the performance of the work that you did; is
9 that right?

10 A. Yes.

11 Q. Okay. So as we are keeping the ultimate question
12 in mind, I want to talk to you about some of the Bidding
13 Documents that are referenced here in this Clause 18.
14 That's where I'm going. I want you to -- I want to make
15 sure that we're communicating. So if you don't understand
16 any of my questions, please ask me to rephrase it, and I'll
17 be happy to do so.

18 A. Thank you very much.

19 Q. Let's start with the first round of bidding,
20 which is R-167. This was, if I'm not mistaken, in January
21 of 1997.

22 You've seen this document before? It's a
23 multi-page document and we're going to -- I'm not going to
24 talk to you about all of it, you'll be relieved to hear.
25 But I want to go to Page 10, and you will see this is

1 English, but let's start at the heading for this
2 2.2 section. This is about the participants, the people
3 that -- or the entities that could submit a bid for the
4 Metaloroya stock. And you see, in Part (a), the Tender is
5 open to both Peruvian and foreign companies. There are
6 certain other discussions about how to proceed with the
7 process.

8 MR. RODRÍGUEZ: Excuse me, Counsel. This is the
9 English version of the document, and Dr. Varsi does not
10 read English. That's the only request.

11 MR. FOGLER: I think we have -- I don't think we
12 have a Spanish version in what was provided to us, so
13 maybe -- let me just read the part that I want and it can
14 be translated so he can understand it. I apologize. We
15 will have -- for most of the documents, we do have a
16 Spanish version, but, unfortunately, for this one, all we
17 have is the English.

18
19 BY MR. FOGLER

20 Q. So I want to focus you to Part (d) of this. And
21 by the way, the handwriting and notation just came with the
22 exhibit, so that's not part of my question. I just want to
23 focus on what the typed portion is. So let me read this,
24 and hopefully the translation will help you understand. It
25 says: "A subsidiary of the Company that won the bid could

1 subscribe the Contract, only if the Company winning the bid
2 owns at least 67 percent of the subsidiary's shares and
3 takes on its own subsidiary all the Contract obligations."

4 All right. Did you follow?

5 A. Yes.

6 Q. All right. So in the original bid, the
7 procedures were set out, by the way, by a committee
8 established by the Peruvian Government. You're aware of
9 that, aren't you?

10 A. Certainly.

11 Q. And my understanding is that these instructions
12 or qualification procedures were prepared by this Committee
13 to have a transparent process for companies that were
14 interested in participating in the process.

15 Is that your understanding too?

16 A. That is correct.

17 Q. But this particular provision of the bidding
18 conditions, one of the items that we are permitted to
19 consult with in the Contract, it is apparent that, if there
20 is a winning bidder who establishes a subsidiary, they want
21 to impose two conditions on that winning bidder, one being
22 you have to own 67 percent of the subsidiary, and the
23 other, the winning bidder has to agree to all of the
24 obligations of the subsidiary; right?

25 A. Yes.

1 Q. Let's look at the second round of bidding. It's
2 R-187.

3 And here, happily, we do have a Spanish version.
4 This, I believe, is a couple of months later in 1997.
5 Apparently, companies had prequalified, and there had been
6 some prior questions and answers.

7 Do you remember that?

8 A. Yes.

9 Q. And now, they've refined the process and they've
10 come out with more explanatory material for the potential
11 bidders.

12 So let's go to Page 10. And again, we see this
13 same section on participants. I can't read that far, but I
14 know he's going to call this out for me, and now it's going
15 to cover up the Spanish version, so that's -- perhaps he
16 can call out the Spanish as well and we'll both be able to
17 follow as I ask my questions. We're not on the same
18 provision. One is (c) and the other is (d). So let's
19 start with (c). And let's see -- I want the Witness to be
20 able to follow along.

21 There we go. All right. I'm going to read the
22 English, but I want you to follow along in the Spanish
23 version here, and it says, the highlighted portion: "The
24 Consortium members" -- and I'll stop right there because
25 part of the prequalification permitted a consortium of

1 companies to bid together.

2 You're aware of that, are you not?

3 A. Yes.

4 Q. So: "The Consortium members jointly and
5 severally assume compliance with the obligations arising
6 from the Contract. The responsibilities of the members of
7 the Consortium with respect to all obligations arising from
8 their participation in the contest is equally joint and
9 several."

10 Now, here we're talking about -- I mean, Renco
11 and DRRC were a consortium who bid on the Metaloroya
12 shares; right? And if they had directly contracted with
13 Centromín, the idea here is they would both be jointly and
14 severally responsible for all of the obligations; true?

15 A. Crystal clear, yes, as you just mentioned it.

16 Q. And we have a concept in the United States about
17 what joint and several liability is, and, I assume, that
18 it's the same in Perú; that is, the -- if there are two
19 parties that are jointly and severally liable, they are
20 both equally liable. They are -- it gives the option to
21 the aggrieved Party on the other side to sue one or both
22 and hold both of them responsible; right?

23 A. Yes.

24 Q. Let's move down to Part (d). And here, you see,
25 parallel with what we looked at in the first round of

1 bidding, the circumstance if the Consortium or the winning
2 bidder wants to establish a subsidiary to enter into the
3 Contract. And let me read this. It says: "A subsidiary
4 of the Awarded Company of the Buena Pro may sign the
5 Contract, to the extent that the Awarded Company owns at
6 least 67 percent of the Shares of the subsidiary and
7 assumes jointly and severally with the subsidiary the
8 obligations arising from said contract," the same concept
9 that we looked before; that is, it's okay if the winner of
10 the bid sets up a subsidiary, but they want to make sure
11 that that winner is going to be obligated jointly and
12 severally with the subsidiary; right?

13 A. Yes.

14 Q. And so, we see it in this case. In this case,
15 when Renco and DRRC won the bid and set up a subsidiary,
16 Centromín wanted to make sure that Renco and DRRC were
17 obligated to all of the obligations of the subsidiary;
18 right?

19 A. As stated in the documents you showed me.

20 Q. Well, it's stated in the Contract too because
21 there are many obligations that Metaloroya -- now
22 DRP -- have in the Contract; right?

23 A. Would you allow me to interrupt you? To conclude
24 the previous comment, would you please ask me the question
25 before we move on so that I do not lose connection with the

1 previous point? Before we go into the Contract, I would
2 like to complete the issue of the question that you want to
3 ask me about the bids.

4 Q. I'm confused. I did not have another question
5 about the bids. I was under the impression that you and I
6 had agreed on what the language meant from these Bidding
7 Documents.

8 Do we have a dispute?

9 A. No. No. What the text means, what we read, you
10 and I cannot discuss things that are not stated in those
11 texts, but, afterwards, as part of the process, as part of
12 the bidding process, there were two key facts. If you
13 allow me to explain them.

14 First, we have the creation of the subsidiary
15 that is an independent legal personality that is autonomous
16 with its own rights, and it is -- it has its own
17 collective -- it is a legal persona of its own collective
18 right, and we -- it also had the main Shareholder that was
19 also undertaking some of the demands under the bidding.
20 But then, we have the assignment of rights, and the
21 assignment of rights by Renco and DRR also sets a very
22 important fact because this obligation -- the obligations
23 that were established during the bidding process were
24 assigned to DRP. And contrary to this, or against this, we
25 have the signing of the Guaranty, and they are going to

1 be -- that is, Renco and DRR will be liable,
2 vis-à-vis -- DRP's liabilities. So this is the Contract
3 that we have as a result of the bidding.

4 Q. Thank you, Mr. Varsi. I'm not certain that I
5 followed all of that, but my point, I think, is much
6 simpler. In the Contract itself, it is obvious that there
7 are a number of obligations that are imposed on DRP; true?
8 There's an investment commitment of \$120 million over the
9 first five years, for example; right? Correct?

10 A. That is an obligation, yes.

11 Q. There are reporting obligations, where the
12 Contract obligates DRP to make certain reports to
13 Centromín; right?

14 A. That is correct.

15 Q. There are many obligations in the Contract for
16 DRP.

17 A. That is correct.

18 Q. All of those obligations are guaranteed by Renco
19 and DRRC; right? All of them.

20 A. Yes. Certainly.

21 Q. If there were a breach by DRP, Centromín would
22 have the Option, as we were discussing earlier in the
23 context of this joint and several liability issue.
24 Centromín would have the Option of making a claim against
25 DRP only or against Renco and DRRC only, or both of them,

1 all together; true?

2 A. Could be. Could be.

3 Q. We agreed earlier that, in the event that there
4 was a dispute about an obligation between Centromín and
5 DRP, that that dispute would be subject to arbitration;
6 right?

7 A. The arbitral clause applies to the Parties.
8 Centromín, the Company, and DRP, that are the ones that
9 signed the Assignment Contract as stated under the contract
10 clause.

11 Q. Right. I understand your point. I want to make
12 sure that we're all clear about what you are telling us.
13 It is your view, however, that, if there was a dispute
14 arising under the Contract about an obligation of DRP, and
15 Centromín wanted to make a claim against Renco and DRRC,
16 Centromín would have to file a separate lawsuit. That's
17 your opinion?

18 A. No. I don't think I am understanding. Would you
19 please repeat your question.

20 Q. Yes. Let me give you just a hypothetical
21 example. Let's suppose that Centromín believed that DRP
22 had breached its obligations to complete the PAMA.

23 You understand?

24 A. Yes.

25 Q. And Centromín wanted to enforce that obligation,

1 not only against DRP but against DRRC as the guarantor.
2 Okay? Because DRRC has guaranteed that obligation, has it
3 is not?

4 A. Let's see. The Party to comply with the
5 obligation is the Contracting Party. In this case, DRP.
6 And in case that DRP does not comply, the one guaranteeing
7 compliance with those obligations by means of the Guaranty
8 under the additional clause -- that is, this bond is Renco
9 and DRRC that are not Parties to the Contract. They assume
10 responsibility as guarantors due to the noncompliance with
11 an obligation under the Contract, under the Assignment
12 Contract. It is not that, because they are guarantors,
13 they are Parties to the Contract, to the assignment
14 Contract, and I think that that was clear from my
15 presentation yesterday.

16 Q. It was quite clear. That was not my question,
17 though. My question is, if Centromín wants to enforce an
18 obligation that it believes DRP has breached and Centromín
19 wants to bring a claim against both the obligor, that is
20 DRP, and the guarantor, DRRC, is it your position that it
21 must file two separate proceedings?

22 A. I have not said that. So they claim for
23 complying. So who was the one that was in breach? DRP;
24 correct? So Centromín says, "please, you need to comply."
25 So they are saying this is a rare situation, given that

1 noncompliance, they do have the possibility to apply the
2 Guaranty that is a different contract.

3 So there you have the necessary channel to
4 determine the compliance with the obligation by means of
5 DRP, and once it has been complied with, that is when you
6 can demand for the application of the Guaranty for DRRC and
7 Renco by means of that special clause, but you cannot ask
8 them to comply. They need to comply based on the Guaranty
9 and also the bond that is part of the commitment.

10 Q. My question must not have been very clear, so I
11 want to try again.

12 I am focused now on a choice of forum -- that is,
13 where and how Centromín might bring such a claim, and I
14 think we have agreed initially -- let's take it step by
15 step. I think we have agreed that Centromín would have a
16 right to go after either or both DRP and DRRC if there was
17 a default in an obligation by DRP.

18 We agree on that, don't we?

19 A. I do not agree with that. The issue of the
20 Guaranty is quite specific. Let me repeat, and if you do
21 not understand what I say, I can clarify this because I
22 don't want you to keep asking me the same question, given a
23 situation that is very clear in my opinion.

24 Let us imagine the case that DRP breaches and
25 Centromín demands compliance with an obligation directly

1 from Renco or DRR. That would work as long as there is no
2 exclusion clause under the Contract. The exclusion benefit
3 is to go directly against the obligee without constituting
4 arrears. That is one of the paths that we would have, that
5 Centromín would have against DRR and Renco. The normal
6 path is for Centromín, given the breach by DRR, as for
7 compliance, and if this does not happen, then the bond
8 would be applied against Renco and DRR. That is my answer.

9 Q. How would Centromín enforce the Guaranty? Would
10 Centromin have the right to arbitrate a claim against DRRC
11 on the Guaranty?

12 A. So the Guaranty would be enforced by means of a
13 proceeding that is not an arbitration because the arbitral
14 clause was limited to the Parties, and the Guaranty is a
15 clause that is not part of the Contract and that applies
16 for the relationship in between the Parties -- that is to
17 say, Centromín or DRP and, on the other hand, the
18 Guarantors, Renco and DRR.

19 Q. You have made your position quite clear. I just
20 want to make sure that you and I are communicating, and I
21 believe that what you are telling me and -- correct me if
22 I'm wrong -- you are telling me that the way the Parties
23 constructed their agreement, the Guarantors are not jointly
24 and severally liable with DRP.

25 Is that what you're saying?

1 In other words, I thought -- I'm hearing you say
2 that Centromín must exhaust its claims against DRP before
3 it can ever assert a claim on the Guaranty.

4 Is that what you believe?

5 A. Under Peruvian law, the nonfulfillment -- the
6 breach of an obligation requires that you need to present
7 the Claim immediately, and once there is -- for breach, and
8 after that, the Guaranty may be enforced. So in this case,
9 we have Centromín that may demand Renco and DRR to enforce
10 that Guaranty, but the way to enforce the Guaranty would
11 not be by means of the arbitral clause because that
12 Guaranty does not have that arbitral jurisdiction.

13 Q. Let's move on.

14 You have stated in your Report that you believe
15 Renco and DRRC have no obligations under the Contract;
16 true?

17 A. They do not, correct.

18 Q. Even though they have guaranteed each and every
19 obligation that DRP has under the Contract; right?

20 A. Yes.

21 Q. Okay. You have also stated that you believe
22 Renco and DRRC have no rights under the Contract; is that
23 true?

24 A. Yeah. They don't have any rights.

25 Q. Let's look at Clause 17. This is the

1 confidentiality provision of the Contract. You've read
2 this part too, have you not? Right?

3 A. Of course.

4 Q. If there is a dispute about the confidentiality
5 obligations of the Contract, that would be an arbitrable
6 issue, would it not?

7 A. Yes.

8 Q. Let us read the provision: "Following the
9 closing and in the maximum extent allowed by law, Centromín
10 agrees to maintain, and to require its other commercial
11 units to maintain, the confidentiality of all data,
12 financial information, business information, customer
13 lists, process and technology information, and all other
14 information concerning the La Oroya Metallurgical Complex,
15 and of the Consortium and the Investor and the Company."

16 Now, you know how the Contract defines the word
17 "consortium," don't you?

18 A. Yes.

19 Q. The Consortium is Renco and DRRC; true?

20 A. Yes.

21 Q. This is a promise by Centromín directly to Renco
22 and DRRC that it will maintain as confidential any
23 information that it received from Renco and DRRC; true?

24 A. Yes. It is an obligation that only pertains to
25 Centromín as a party to the Contract.

1 Q. If there were a breach of this provision -- and
2 I'm assuming -- this is a hypothetical question. If
3 Centromín disclosed -- in violation of Clause 17 of the
4 Contract, if it disclosed confidential information of Renco
5 and DRRC, Renco and DRRC would have a claim to assert
6 against Centromín, would it not?

7 A. Of course they would have a claim. Of course.

8 Q. That claim would be subject to the arbitration
9 clause, wouldn't it?

10 A. No.

11 Q. You told me just a minute ago that this Clause 17
12 is governed by the arbitration clause?

13 A. Clause 17, it is, but in connection with the
14 Contract Parties, not the bidders, not the ones forwarding
15 to the Contract, not the third parties, not the guarantors.

16 Q. It's time now to examine, a little bit more
17 carefully, your proposition that there are really two
18 Contracts instead of three -- instead of one, excuse me.
19 All right.

20 A. Not three.

21 Q. Just one.

22 A. Two. My position is two.

23 Q. Two.

24 A. I apologize.

25 Q. My mistake. No. No. My mistake.

1 A. Okay.

2 Q. I want to show you one of the slides that you
3 provided to us yesterday as the starting point for our
4 discussion here. It is the seventh slide. I'm putting up
5 the English. Do you have -- do you have a hard copy or a
6 copy of the Spanish? To the extent this is difficult for
7 you, we'll put up the Spanish version here, but, for me, I
8 need to look at it, first, in English.

9 So the heading of your slide here is "where there
10 are a plurality of causes, there is a plurality of
11 contracts." And you had this discussion with us yesterday
12 that, in your view, there's a separate cause, one separate
13 cause for Clauses 1-19, and a separate cause for the
14 additional clause of the guarantee; right?

15 A. Yes. Yes.

16 Q. The cause of the 19 clauses of the base Contract
17 in your view -- you've quoted this from Mr. Payet -- "is to
18 achieve the simple reorganization and transfer of
19 Metaloroya to private companies." Okay. And you were
20 quite animated in talking about how you and Mr. Payet
21 agreed on this point.

22 Let's examine several other provisions of the
23 Contract. Okay. I'm going to start off with the one that
24 you have cited here. Clearly, there is a transfer of
25 shares of the Metaloroya from Centromín to DRP. That is

1 Article 1 of the Contract; right?

2 A. Yes.

3 Q. In fact, let's put the Contract up so that we can
4 follow along. The first clause appears on Page 9. It's
5 numbered 8, but I'm using the PDF version so that Mr. Neely
6 can keep up.

7 So you see here in the first clause, this is the
8 transfer of the Shares. There's a price listed, and it
9 identifies that the transfer is to occur from the Seller,
10 Centromín; to the Buyer, DRP; right?

11 A. Yes.

12 Q. But there are additional -- I'll call them
13 contracts -- in this Contract as well. Let's look
14 at -- ah. The third clause, the third clause begins on
15 Page 11. Now we are talking about the increase of the
16 Company's stock capital. You've read this provision too;
17 right?

18 And in this provision, this is no longer talking
19 about a sale of Shares from Centromín to DRP; right?

20 Now we are talking about the issuance of new
21 shares by Metaloroya to DRP, a different transaction,
22 aren't we?

23 A. The way you mentioned it, it would be another
24 contract.

25 Q. So, now, there are --

1 A. Another contract within this Contract.

2 Q. So, in your view, is this stock issuance subject
3 to the arbitration clause?

4 A. Being a part of the assignment contract is
5 subject to arbitration clause.

6 Q. We're talking about two different Contracts, now,
7 in your view. One Contract is for the sale of the
8 original --

9 MR. RODRÍGUEZ: Excuse me, Counsel.

10 I -- respectfully, I think you are misrepresenting
11 Mr. Varsi's position as to whether there are more than two
12 contracts in this document.

13 THE WITNESS: If you allow me. Two minutes ago
14 you told me that within this document, within this
15 Contract, there was more than one contract, as I would call
16 it, several contracts, and you took me to the stock capital
17 increase and also the decision now. And now I believe that
18 you are following the logic that there is more than one
19 contract within the same contract.

20 If you ask me what is within this assignment
21 contract, there is a sale, and as part of that sale there
22 are several legal transactions, some corporate transactions
23 that allow for the performance of this operation, that is
24 to say, the sale of the Metaloroya.

25 That is my position, and I apologize that we may

1 not be -- that you may be using some terms that go against
2 your own position because that may be related to that. I
3 don't know.

4 BY MR. FOGLER:

5 Q. Let's look at one additional provision of the
6 Contract. It is 8.19 on Page 53. Here we have an option
7 that has nothing whatsoever to do with Metaloroya.
8 Centromín grants to DRP a preferential right to purchase
9 30 percent of the Shares of two different companies, don't
10 we?

11 It is Number 52 in your Spanish version, I
12 believe.

13 A. That is correct, yes.

14 Q. This has nothing whatsoever to do with the
15 assignment of Renco and DRRC's rights to DRP, does it?

16 A. This is a provision that is part of the Contract
17 as to the Parties that entered into it.

18 Q. Is it a separate cause?

19 A. It is a separate cause. It is part of the
20 purpose of the Contract to sell La Oroya. That is, you
21 have a series of acts, of legal acts, that need to take
22 place. Each and every one of them with a specific cause to
23 attain a specific end.

24 Q. I'm recalling the heading of your slide. Your
25 slide said, "If there are a plurality of causes, there's a

1 plurality of contracts." Right?

2 A. That is correct.

3 Q. In your view, as I appreciate what you're saying,
4 Clause 8.19 is a separate autonomous, independent contract
5 from the rest of it?

6 A. This is not a contract. This is a right. This
7 is a prerogative. This is a concession. This is something
8 that is being given to Centromín, and Centromín is giving
9 to the investor. If you want, I can give you the right to
10 purchase those Shares. So we cannot confuse "right" with a
11 legal act and with the Contract. And here we clearly see
12 the terminology.

13 The preferential right to purchase the Shares,
14 this is a corporate right that Centromín is giving the
15 Investor. Let's see if the investor is interested, and if
16 they are interested, well, then there will be an assignment
17 based on that preferential right.

18 Q. You aren't suggesting, are you, Mr. Varsi, that
19 these Parties could not have set a separate deal in a
20 separate document, for Centromín to give this preferential
21 right to DRP?

22 A. I did not suggest that. If you're asking me
23 whether I would suggest that, whether there could be
24 something like that, whether something like that could be
25 done, that is different. But at no point during my

1 presentation am I saying things that -- this, what you just
2 mentioned.

3 Q. Well, my point, simply, is that, as Mr. Payet
4 told us yesterday, it is quite possible for parties to
5 agree to put different agreements in the same document and
6 call it one contract, isn't it?

7 A. Nowadays, contracts are so complex and they are
8 so reliant on others that we can, basically, say that there
9 are no simple sale contracts, as we had them before. So
10 today, sale contracts always have some additional content
11 of legal acts that will allow for their performance.

12 Now, as Professor Payet mentioned, this is a
13 complex contract. I think it is one of the most complex
14 contracts entered into by Perú, and its purpose or its
15 assignment, I think, justified it, that is, that was the
16 sale of Metaloroya.

17 And I apologize if I get too excited about this,
18 but those of us who are Peruvians and have gone by
19 La Oroya, this is a village that has suffered a great deal
20 due to contamination. So I think that the purpose of this
21 Contract is more than legal.

22 It had an asset commercial, but even beyond that,
23 it had a human purpose, humane purpose to allow for those
24 living in La Oroya to have a clean business. To have a
25 company that would allow them to recover the nature that

1 had been so deeply devastated in La Oroya.

2 Q. These Parties knew how to put different
3 agreements together into one document, didn't they?

4 A. Yes. Of course.

5 Q. And here's another example. I'm going to give
6 you a copy of the amendment to the Contract.

7 You've seen that too, haven't you? You knew
8 there was an amendment to the STA?

9 A. Yes. Yes. A modification with the participation
10 of the same parties but no Renco or DRR participating in
11 it; correct?

12 Q. Well, DRRC signed this Contract that I'm putting
13 in front of you. This amendment was dated in December of
14 1999. And you're aware that DRRC signed this amendment,
15 aren't you?

16 Do I need to repeat my question? No, I'm asking
17 who signed the contract?

18 A. If we read the record, the minutes, here it says
19 that there will be a modification to this assignment
20 contract for the increase of the stock capital and transfer
21 of Metaloroya and also the assignment and possession
22 granted by one party -- from Centromín on the one hand and
23 on the other we have the DRP. With the intervention
24 here -- we have an intervention here, but we have two
25 Parties, and -- FOPRI -- we have the FOPRI; that is a State

1 organism.

2 Q. Again, Mr. Varsi, I fear I have failed to make my
3 question clear. It was pretty simple: DRRC signed this
4 Contract. That's true, isn't it?

5 A. We do not see that in the document. Let me see
6 if I can verify this again, whether they signed at the end
7 of the deed as something. I don't know if you have
8 identified that quickly for me not to take up so much time.
9 I would appreciate if you could let me know if you see the
10 signature.

11 We are talking about the signing of the public
12 deed but not this separate document, the minutes that are
13 completely different. So here we have Doe Run Perú with
14 Mr. Buckley, that I understand he was a witness in this
15 proceeding, Dr. Raúl Ferreyro on behalf of DRR, as you
16 mentioned, and Mr. Barcelos on behalf of FOPRI.

17 Q. You have confirmed that Mr. Ferreyro signed it
18 for DRRC; right?

19 A. Yes. But it doesn't mean that he's a party to
20 the Contract, to this amendment contract.

21 Q. Look at the name of this Contract. Let's go to
22 the third page. There's a title to this Contract. It's a
23 long one.

24 It says: "Modification of the Contract to
25 transfer shares, increase capital and subscription of

1 Shares of Metaloroya S.A." That's referring to the STA,
2 isn't it, the exhibit we have been looking at? But there's
3 more, isn't there?

4 A. Yes.

5 Q. It goes on: "As well as transfer of the granting
6 of the beneficitation and rural property that is granted by
7 Centromín and by Doe Run Perú with the action by the
8 Executive Management FOPRI, and Doe Run Resources
9 Corporation."

10 The point here is that this not only modifies the
11 Contract, it adds an Additional Agreement about the
12 transfer of property that is separate from the original
13 Contract, doesn't it? Right?

14 A plurality of causes; true?

15 A. If you allow me.

16 What we see on the screen is the public
17 deed -- is the cover page of the public deed because the
18 Contract, as presented by the Parties for the Notary to
19 sign it as a deed, starts on Page 5. So the causes that
20 you are trying to address in this conversation should be in
21 the document by the Notary, not on that cover page.

22 Q. I was trying to make this shorter, but you are
23 welcome to review this document. It is 20-plus pages, but
24 it has two different agreements in the same document,
25 doesn't it?

1 One is an agreement to amend the prior contract.
2 The second is a new agreement to transfer additional
3 property from Centromín to Doe Run Perú; right?

4 A. Yes. Yes. Let's be more pragmatic. There are
5 some legal acts that took -- that were performed as part of
6 this complex sales contract. So as part of this amendment
7 contract, there had been some legal acts that had been
8 included, and they all had their own abstract and concrete
9 purposes. So they had a predetermined object intended to
10 make this assignment, this sale of Metaloroya more
11 efficient.

12 Q. Is this document one contract or two?

13 A. This is just one contract that has several legal
14 acts.

15 Q. Now we come to the additional clause in the
16 Contract. You're probably thinking, finally, we are going
17 to talk about --

18 A. No. No. No. No. I am so happy. I am very
19 happy to be able to help the Tribunal, to contribute my
20 experience, and also, with the request by Activos Mineros,
21 to appear. I'm really satisfied to be able to be here to
22 cooperate with you.

23 Q. Perhaps, I was secretly expressing the Tribunal's
24 wish that I get to the point.

25 PRESIDENT SIMMA: Just, Mr. Fogler, coffee break

1 is approaching. And I don't want to kind of interrupt this
2 pursuit for happiness at the wrong moment, so, if you
3 indicate what would be a good point, would that be a good
4 point?

5 MR. FOGLER: Any time, yes.

6 PRESIDENT SIMMA: So everybody is happy about it?

7 MR. FOGLER: Yes.

8 PRESIDENT SIMMA: Okay. So let's have the coffee
9 break until 11:05.

10 (Brief recess.)

11 PRESIDENT SIMMA: We continue the examination of
12 Mr. Varsi.

13 You have the floor, Mr. Fogler.

14 MR. FOGLER: Thank you, Mr. President.

15 BY MR. FOGLER:

16 Q. Let's turn to the Additional Clause in the
17 Contract, R-001 at Page 66 and 67.

18 Obviously, this has been a subject of great
19 review and study by you, has it not?

20 A. Yes, sir.

21 Q. It is your view that this Additional Clause is
22 autonomous, separate, independent, stands on its own.

23 Is that true?

24 A. It is a Contract.

25 Q. Not exactly my question.

1 Is it a separate, independent, autonomous
2 Contract from the rest of the STA?

3 A. That's what I answered. It is a separate
4 Contract, and it is independent from the other.

5 Q. All right. Can you show me in this provision who
6 is the beneficiary of the Guaranty?

7 A. The Investor.

8 Q. So DRRC and Renco have guaranteed only to DRP.
9 That's it?

10 A. Yes.

11 Q. So Centromín has --
12 (Overlapping speakers and interpretation.)

13 Q. -- under this agreement?
14 (Interruption.)

15 Q. Centromín has no rights under this Guaranty.
16 Is that your testimony?

17 A. Yeah. We have to look exactly at what the clause
18 says. This is a Guaranty. It is express, and it shows who
19 is the debtor and who is the guarantor.

20 Q. So is the answer to my question, yes; that is,
21 Centromín has no rights under this Guaranty?

22 A. The guarantor and the debtor, well, who is the
23 guarantor? Renco and DRR. And who is the debtor? Well,
24 DRP.

25 Q. So we were discussing many minutes ago what would

1 happen if DRP failed in one of its obligations.

2 Do you remember that discussion?

3 A. Of course.

4 Q. And B.B., we don't have the right provision up
5 here. It's the Additional Clause at the bottom of the page
6 and the top of the next page.

7 A. Umm-hmm.

8 Q. But in that discussion -- and we saw the Bidding
9 Documents at the very beginning of our discussion, where it
10 was made clear by the Committee designated to privatize the
11 business, they wanted to make sure that the winning
12 bidders, if they set up a subsidiary, would be on the hook,
13 would be directly obligated for all of the obligations of
14 the subsidiary.

15 Do you remember us discussing that?

16 A. Yes. Of course, yes.

17 Q. Did they just make a big mistake with this
18 Additional Clause by failing to give Centromín any right to
19 enforce the Guaranty?

20 A. You're putting words in my mouth. I have not
21 said that. If you allow me, sir. If you allow me,
22 Mr. Murray.

23 Given the breach by DRP -- and who would be DRP
24 breaching against? Centromín. Centromín is the one that
25 enforces the guarantee, vis-à-vis, Renco and DRR. So I

1 don't see the problem here. I don't see the discussion. I
2 don't know where you would like to go with this. This is a
3 very simple matter, truth be told.

4 The performance of obligations by DRP in the
5 Contract, well, that is something that is guaranteed by
6 Renco and DRR. If DRP breaches its obligations, and then
7 Centromín will enforce the clause.

8 Q. Show me in this Additional Clause where it is
9 that Centromín has the right to enforce the Guaranty?

10 A. It doesn't have to say it expressly. Let's see.
11 If we look, the Additional Clause that we have here, it
12 says: "The Consortium composed by DRR and Renco guarantees
13 compliance with the obligations by the Investor, DRP."

14 Q. So, Mr. Varsi --

15 A. If you allow me sir, I can -- I haven't finished.

16 Q. My apologies.

17 A. No problem. Okay. So what they are doing here
18 is they are guaranteeing the performance of obligations,
19 obligations by DRP. What are DRP's obligations? In this
20 Contract and against whom? Well, against the other Party
21 in this Contract. I'm talking about DRP; right? And I'm
22 talking about the obligations that DRP has, vis-à-vis,
23 Centromín.

24 Q. You told us that this stands by its -- on its own
25 and we can't tell just from the Additional Clause whether

1 the obligations that are being guaranteed relate to the
2 STA, or maybe they relate to DRP's tax obligations to the
3 Government of Perú, or maybe they relate to their payment
4 obligations to the employees of the Company. You can't
5 tell what obligations are being guaranteed, unless it's
6 specifically part of a single unified Contract, can you,
7 Mr. Varsi?

8 A. That is not the case. I think your
9 interpretation -- and I wouldn't want to qualify it, but I
10 think it's very linear, it is very superficial in nature.
11 If we interpret and understand this clause, and we do it in
12 good faith, well, evidently this is referring to the
13 obligations under the Transfer Contract.

14 The only obligations are the ones that are
15 included in the Transfer Contract. We don't have labor
16 obligations. We don't have tax obligations, Social
17 Security obligations. So we need to interpret these
18 provisions on the basis of the content and the principle of
19 good faith. And, also, we have to, of course, take into
20 account the finality of the Contract, the purpose of the
21 Contract.

22 Q. You are suggesting that you must incorporate the
23 provisions of the STA into the Additional Clause in order
24 for it to make any sense, aren't you?

25 A. I have not said that.

1 Q. Do you believe that the choice of law provision
2 applies to the Additional Clause?

3 A. I haven't understood your question.

4 Q. Well, you know the Contract has a choice of law,
5 Peruvian law applies to the Contract. What law applies to
6 the Additional Clause?

7 A. Sí, sí, sí.

8 Q. What law applies?

9 A. Well, since there is no express indication then,
10 of course, it is Peruvian law.

11 Q. Is it Peruvian law because that's what the
12 Parties chose in the Contract?

13 A. If the Guaranty is an independent Contract, and
14 there is no change in jurisdiction in connection with
15 applicable law, then the law of the place where the
16 Guaranty was entered into has to be the one that governs;
17 right? I wouldn't want to talk about things that I'm not
18 an Expert on.

19 Q. Does the provision that we've looked at, at the
20 very beginning, that permits the Parties to use the Bidding
21 Documents and the questions and answers -- does that help
22 interpret the Additional Clause too?

23 A. You are making reference to...

24 Q. Clause 18.

25 A. Okay. 18, you're saying; right? You are making

1 reference to Clause 18. No, because this is an independent
2 Contract.

3 Q. Well, you understand, sir, that it was not simply
4 some random choice that Renco and DRRC signed the STA. You
5 know that was part of the Bidding Documents, don't you?

6 A. Yes, of course. Of course. They are the ones
7 that participated in the bid.

8 Q. So let's look at the Bidding Documents again.

9 Pull up R-200. There was a specific question and
10 answer about this at Page 31. Here's Question 70. We're
11 going to put the Spanish version too.

12 The question was: "Definition of 'investor.' As
13 per Section 2.2(d) of the Bid Documents" -- we actually
14 read that at the very beginning of this examination -- "the
15 signatory to the Contract may be a subsidiary of the
16 Company that won the bid. Is there a form of Guaranty that
17 the Company that won the bid will be required to sign, or
18 can it simply pledge its Shares in the subsidiary to secure
19 its obligations."

20 That's the question that was asked by one of the
21 bidders, and the answer given by the Committee, the Awardee
22 of the Buena Pro -- which I take to be the bid
23 itself -- the Awardee of the Buena Pro must subscribe the
24 Contract.

25 You saw that in the study that you made, didn't

1 you?

2 A. Yes, it's on the document.

3 Q. And it was reiterated -- let's look at the second
4 round because it came up again in R-201 at Page 5,
5 Question 6.

6 The question here was: "Regarding the answer to
7 Question 70" -- the one we just read -- "of the First Round
8 of Questions, which established that the winner of the
9 'most favorable bid' must sign the Contract. This answer
10 has a contradiction with 2.2(d) of the Bases that
11 establishes that a subsidiary of the most favorable bid
12 could sign the Contract. In any case, does the answer to
13 Question Number 70 modify Item 2.2(d) of the Bases."

14 And we're talking about the same issue that we've
15 been covering from the very beginning of examination this
16 morning. That is, must the winning bidders guarantee, be
17 jointly and severally liable, sign the Contract. These are
18 all related ideas, aren't they, sir?

19 A. Yes, they're all related.

20 Q. So the answer given in the second round is that:
21 "The answer to Question 70 of the first Round does not
22 modify Paragraph 2.2(d) of the Basis. In accordance to
23 such paragraph, the subsidiary will subscribe the Contract
24 in his capacity of El Inversionista. Nevertheless, the
25 prequalified Empresa must subscribe the Contract to assume

1 solidarity El Inversionista's obligation, independently of
2 the Guaranties contemplated by the Contract."

3 So it was very clear throughout the entire
4 bidding process that the Committee and Centromín wanted to
5 make sure that the winning bidders were going to be liable
6 for all of the obligations of the subsidiary that they set
7 up; true?

8 A. And that happened. That indeed happened. They
9 are liable in their capacity as guarantors under the
10 Guaranty in the Additional Clause. So the wish was
11 granted.

12 Q. The Parties certainly could have. They were free
13 under their freedom of contract. Had they desired, they
14 could have put this Guaranty in a completely separate
15 independent document, could they not?

16 A. Yes. Of course. Yes, of course.

17 Q. And we know that because that's exactly what Perú
18 did when it guaranteed the obligations of Centromín.
19 There's an entirely separate Contract; right?

20 You've seen the Guaranty, haven't you?

21 A. I have, yes.

22 Q. And it states expressly who the beneficiary is,
23 what obligations are being required, and that they are
24 going to be subject to -- expressly subject to the
25 Arbitration Clause in the Contract, this Contract, the STA,

1 don't they? Right?

2 A. Yes. In the Perú Guaranty, which has a different
3 document, it is a separate document. It is pretty well
4 structured. Yes.

5 Q. They didn't have to do that with the Additional
6 Clause to the STA because all of the specific terms are
7 already in the Contract including choice of law,
8 arbitration, how to interpret the Contract. All of that is
9 incorporated in the Additional Clause because it's part of
10 the same Contract; right?

11 A. No. No. That's not true. There is no
12 requirement by the Regulations or in the Regulations that
13 the Guaranty needs to be included in a separate document.
14 In this case, the Parties decided that they were going to
15 have an independent Contract, the Guaranty, but in the same
16 document. And then, of course, this was later made into a
17 notarized document, a public deed.

18 Q. Parties are free, not only to include different
19 agreements in the same contract, they can also agree to
20 include different documents in the same contract, can't
21 they?

22 A. Include documents in a contract. I don't
23 understand what you mean. Let's see. The Contract is
24 contained in a document when it is in writing. We have
25 verbal contracts, oral contracts, they're very common now,

1 and, of course, there is no evidence. They're not
2 expressed, or, rather, express.

3 A contract is contained in a document. In this
4 case, a document may contain a number of contracts, and a
5 number of contracts may include a series of acts with legal
6 effects in order to, perhaps, fulfill some purpose, some
7 specific purpose. So I think, perhaps, you mixed some of
8 these terms up.

9 Q. My question was not very clear, and I apologize.

10 In this Contract, we see references to annexes
11 that are not actually part of the Contract.

12 You know that, don't you?

13 You know what I'm referring to?

14 A. Yes. Of course. Of course. Of course.

15 Q. Article 8 has references to many annexes. There
16 is an annex in 8.4 for information on employment contracts
17 and collective agreements of workers, and Annex 5 is a list
18 of surface lands and concessions, and Annex 6 is a list of
19 fixed assets. These are separate documents; right?

20 A. Yes.

21 Q. They are expressly part of this Contract, aren't
22 they? Right?

23 A. Yes.

24 Q. And they are expressly part of this Contract
25 because that's what the Parties agreed to in Article 18.

1 They made sure to be very clear that the annexes are part
2 of the Contract. That's at 18.4; right? Right?

3 A. Yes.

4 Q. They didn't have to do that with the Additional
5 Clause because it was already part of the Contract; isn't
6 that true?

7 A. The Additional Clause is not part of the
8 Contract. It is a consequence of the breach of a contract.
9 And let me reiterate my position, the Assignment Contract
10 is the main contract -- the Transfer Contract is the main
11 contract. The additional contract is a guaranty clause.
12 Guaranty -- and it's additional to what? To the Contract.
13 This guaranty clause is supplementary. It is the
14 consequence of not doing something or of breaching an
15 obligation under the Contract. So if there is no contract,
16 there is no guaranty that is enforced. There's no reason
17 for that guaranty, and that is the relationship
18 between -- the symbiotic relationship between the existence
19 of a guaranty between Renco and DRR vis-à-vis the transfer
20 Contract for Metaloroya as such.

21 Q. I regret having to terminate your contentment
22 with our little question-and-answer session, but I have one
23 more subject, and then I'm going to conclude. In the list
24 of materials that you provided, attached to your Reports, I
25 did not see any of the Pleadings or documents or

1 depositions from the Missouri Litigation, and I take it
2 from that that you were not asked to undertake any review
3 of the proceedings in Missouri; is that correct?

4 A. Indeed. I learned of that on a very basic way
5 when drafting my Reports. I was informed more yesterday in
6 this Hearing when Mr. Payet was examined, but I have
7 minimal information.

8 What is it that I know? I know that there is a
9 proceeding underway, that the Claim was not admitted, that
10 there is not even an identification of who the
11 Plaintiff -- the affected Parties are, who the affected
12 Parties are. I do not know much beyond that. And my role
13 as an expert cannot go beyond what I was asked to do.

14 Q. And so you had not been asked to, nor have you
15 given any opinions about whether the Claims of the Missouri
16 Plaintiffs relate in any way to Article 5 and 6 of the
17 Contract; correct?

18 A. First of all, I followed the instructions given
19 as an expert. And in my Report, there is a reasoning based
20 on the documents that I have reviewed.

21 Q. Okay. And I take it from your answer and the
22 lack of discussion in your Reports about this, you're not
23 aware of any ruling in Missouri that relates to whether the
24 Claims of the Missouri Plaintiffs are barred by any
25 statutes of limitations; is that correct?

1 A. No. At any rate, I have addressed the issue
2 based on some assumptions, hypotheses that may have been
3 reflected, but this is also what Mr. Payet did. Mr. Payet
4 worked on a document, but he may have gone beyond a little
5 bit more in his conclusions and arguments, but I just
6 wanted to refute his position given the Reports that he
7 drafted.

8 Q. I think the answer to my question was you were
9 confirming that you have not reviewed and have no opinion
10 about whether the Missouri Litigation has decided any issue
11 about statute of limitations of these Plaintiffs; is that
12 correct?

13 A. No. Once again, let me reiterate, Mr. Murray, I
14 do have the basic information.

15 Q. All right.

16 A. And I told you the information that I handled. I
17 do not have more, and I don't think there is a reason for
18 me to go beyond that, and not to suggest, the Party that
19 asked me to draft the Report, something that they thought
20 it was not necessary for me to do.

21 Q. I'm not fussing at you, Mr. Varsi. I'm just
22 trying to establish the limits of your Opinions. I think
23 we're clear.

24 MR. FOGLER: And with that, I conclude my
25 examination. Thank you, Mr. President.

1 PRESIDENT SIMMA: Thank you, Mr. Fogler.

2 We get to the stage of the redirect.

3 Do you need any preparation?

4 MR. RODRÍGUEZ: If -- with the Tribunal's
5 permission, if we could have five minutes to discuss.

6 PRESIDENT SIMMA: Certainly.

7 MR. RODRÍGUEZ: Thank you.

8 PRESIDENT SIMMA: So we break for five minutes.

9 (Brief recess.)

10 PRESIDENT SIMMA: We are ready to continue, and
11 it's going to be Mr. Rodriguez, or? Okay.

12 MR. RODRÍGUEZ: Yes, Mr. President.

13 PRESIDENT SIMMA: Mr. Rodriguez, you have the
14 floor. And, of course, you know about 10 times as much as
15 issues like leading questions, et cetera.

16 MR. RODRÍGUEZ: Yes. Yes.

17 PRESIDENT SIMMA: Thank you.

18 REDIRECT EXAMINATION

19 BY MR. RODRÍGUEZ:

20 Q. Mr. Varsi, I'm going to ask you about two
21 subjects. I'm going to ask about two subjects that you
22 discussed with Mr. Fogler. The last subject you discussed
23 was the statute of limitations rulings in Missouri, and I
24 want to ask about that subject first.

25 Did you explain, in your Reports, what statute of

1 limitations would apply to the subrogation claim? And, if
2 so, can you explain that to the Tribunal?

3 A. Yes. Thank you very much. It was striking in
4 Mr. -- in Prof. Payet's position, to read about when the
5 statute of limitations was to be applied because he's
6 referring to subrogation, that is an allegedly existing
7 legal concept, that is subrogation, that is to be applied
8 under Peruvian law.

9 So if we follow that path, and also based on the
10 alleged damage that is being claimed and that is the strict
11 liability under Article 1970, the statute of limitations,
12 according to Article 2001 of the Civil Code, is two years.
13 I'm saying this because it is not proper to allege just a
14 whimsical statute of limitations and, much less, the law
15 that is not to be applied. So this is also supported on
16 the assumption whereby subrogation would be
17 enforced -- that is to say, the new creditor acquires
18 rights, privileges, and positions, as well as limitations,
19 and, as part of those limitations, the statute of
20 limitations is included.

21 That was the understanding I had. And let me be
22 totally frank, it was difficult for me to understand the
23 position of Dr. Payet's.

24 Q. Thank you.

25 We are going to put up on the screen Exhibit R-1.

1 Could you please read to yourself, just review, VIII.

2 A. Yes.

3 Q. We'll put up the English. Would the Tribunal
4 like to review the English version on the screen?

5 You discussed with Mr. Murray various bidding
6 questions and bidding conditions today.

7 Could you explain to the Tribunal how the
8 Consortium's assignment of its rights influences how you
9 should use or interpret those bidding conditions for
10 purposes of interpreting the Contract?

11 A. Yes. When Mr. Murray asked me a series of
12 questions, I precisely mentioned to him that there had been
13 an assignment or transfer that was also memorialized in the
14 Contract where it says: "According to the Bidding Terms
15 and Conditions, the Consortium has transferred its rights
16 or assigned its rights to the Investor, and the assignment
17 has been authorized." So we see that everything that had
18 happened throughout the bidding process was later on
19 assigned by means of this assignment to the Investor.

20 Q. Just one more question. We're going to show you
21 Clause 18.1(a)-(c). When you're done reviewing, please let
22 me know.

23 A. Yes.

24 Q. Could you please explain to the Tribunal how
25 18.1(c) influences how you used the Bidding Documents and

1 questions to interpret the Contract?

2 A. Yes. This Clause 18 is a typical clause because
3 the Bidding Contracts, we could say, have a preliminary
4 stage that some call an "administrative" or "precontract
5 phase," according to others, whereby there are some
6 commitments, obligations that are undertaken to be able to
7 enhance their position as bidders. Whatever is agreed and
8 when it becomes part of the bidding process, could be part
9 of the Contract in -- or they may exert some influence, as
10 long as there is no divergent concepts between the Bidding
11 Terms and conditions and the agreed terms of the bidding.
12 But the Contract prevails because the Contract is the final
13 document agreed by the Parties, if there is any difference
14 or any dispute in between the two documents, and this has
15 to do with global application.

16 This goes beyond Peruvian law, but the Bidding
17 Terms and conditions are part of the Contract, meaning that
18 there is no -- as long as there is no dispute, no lack of
19 clarity. And if that happens, whatever is agreed in the
20 document is applied.

21 MR. RODRÍGUEZ: No further questions.

22 PRESIDENT SIMMA: Thank you, Mr. Rodriguez.

23 That brings us to questions from the Tribunal.

24 Are there any? Yes.

25 Mr. Thomas, go ahead.

1 QUESTIONS FROM THE TRIBUNAL

2 ARBITRATOR THOMAS: I'll start with the last
3 subject which was touched upon by Mr. Rodriguez. It's an
4 issue that I had been pondering while I listened to
5 Mr. Fogler's cross-examination of you.

6 There was considerable time spent on the Bidding
7 Conditions and the questions and answers that were given to
8 the bidders during that process. You'll recall those
9 questions from Mr. Fogler.

10 The question I have for you is this: Do you see
11 any inconsistency between the answers that were given in
12 the bidding round and the ultimate terms of the Contract,
13 in terms of how the Consortium related to the Contract?
14 I'm trying to say this in a neutral fashion.

15 Maybe, to be a little bit more precise so you can
16 answer this question, do you see any -- a consistency
17 between the bidding answers or inconsistency with the
18 Contract?

19 THE WITNESS: I thank you for the question.

20 The truth is that there is some inconsistency and
21 lack of logical relationship in some of the answers offered
22 during the bidding process, and that's the reason why the
23 decision was made to move forward with the assignment so
24 that in the future this would not have an impact on the
25 purpose of the Contract. And for greater certainty, this

1 assignment that was finally recognized as part of the
2 Contract program.

3 ARBITRATOR THOMAS: I'm not sure that I
4 understand, completely, your response.

5 Could you be a little bit more specific?

6 THE WITNESS: Yes. What I mean is, that the
7 answers given the questions during the bidding process were
8 not always following the same path. I recognized that some
9 of the answers were inconsistent with the other ones.

10 So to avoid for this to have an impact in the
11 future on the Contract relationship, a decision was made to
12 have an assignment so that all of the obligations
13 undertaken as part of the bidding process by Renco and DRR
14 were assigned to the investor.

15 ARBITRATOR THOMAS: A second question, a very
16 minor question. Is there any significance to calling the
17 Additional Clause, "the Additional Clause," from a Peruvian
18 law perspective? The title. Just the title.

19 THE WITNESS: That is a question that is the
20 subject of discussion at the university level. Why is it
21 an Additional Clause? Because it is a clause that
22 supplements, that confirms, or that makes the operation
23 final. And as part of an Additional Clause, some acts in
24 these Contracts are entered that allow for the -- for
25 complying with the main purpose.

1 But, to be very honest, I wouldn't think there is
2 much to say about this choice of words because that clause,
3 at any rate, should have been called by its own
4 name -- that is to say, clause, a guarantee clause.

5 That was the Contract in which this was included,
6 but if you allow me, the Additional Clause name, as I
7 mentioned at the beginning, as indicated by its own name,
8 is the one that allows you to ratify compliance with the
9 main obligation.

10 ARBITRATOR THOMAS: Okay. One more question, if
11 I may.

12 I'd like to understand the mechanics of your
13 analysis of the relationship between DRP's performance of
14 the Contract and the guarantee. You had some exchanges
15 with Mr. Fogler fairly early on in the cross-examination,
16 and I didn't get clarity on this specific question.

17 Is it your -- and I don't mean to put words in
18 your mouth. I want you to answer this question, but I'm
19 trying to describe what the issue is.

20 Is it your position that, if Centromín formed the
21 view that DRP was in breach of an obligation under the STA,
22 that it would, first, have to commence an arbitration under
23 the STA vis-à-vis DRP and obtain an award to that effect,
24 and then would have to commence a litigation against Renco
25 and DRRC in order to give effect to the Award that had

1 determined a breach of DRP?

2 THE WITNESS: Those would be the steps to be
3 followed by Centromín, given DRP's breach. DRP's breach
4 would be cured by means of an arbitration proceeding, and
5 for Centromín to be able to secure the compliance with the
6 DRP obligations under the additional guarantee clause, they
7 would need to demand the performance of that guarantee in a
8 judicial court because the additional court is not under
9 the arbitration clause.

10 ARBITRATOR THOMAS: Okay. Thank you very much.

11 PRESIDENT SIMMA: Thank you, Mr. Thomas.

12 Any questions?

13 ARBITRATOR GRIGERA NAÓN: No.

14 PRESIDENT SIMMA: No questions.

15 That brings to an end your examination,
16 Dr. Varsi. Thank you for your contribution, patience, and
17 time that you spent, and you are hereby released. And you,
18 actually, are going to have a free lunch, so thank you.

19 THE WITNESS: I thank you. Thank you all.

20 (Witness steps down.)

21 PRESIDENT SIMMA: So we have 50 minutes left, and
22 I think that is enough time to bring up the next Expert,
23 Mr. Schmerler.

24 DANIEL SCHMERLER, CLAIMANTS' WITNESS, CALLED

25 PRESIDENT SIMMA: Welcome, Mr. Schmerler.

1 Do you have hard copies of your Reports with you?

2 A. I do not.

3 Q. Okay.

4 THE WITNESS: Thank you.

5 BY MR. SCHIFFER:

6 Q. And, as I understand it, you've issued two
7 Reports in this case?

8 A. That is correct.

9 Q. So you'll have them there for reference whenever
10 you need to use them.

11 The first thing I'd like to do is to present you
12 with a slide from our Opening Statement dealing with your
13 subject matter.

14 And Counsel and the Tribunal may recall the
15 slide, but I just want to focus for right now on the
16 relevant international law principles. Okay? I'm going to
17 read it out loud: "The Standard for a denial of justice is
18 that it exists when a Court's Decision is manifestly
19 arbitrary, lacking a legal basis or justification, or in
20 excess of mere judicial error."

21 Do you see that?

22 A. Correct.

23 Q. And have you reached an opinion in this case as
24 to whether there has been a denial of justice?

25 A. I have.

1 Q. What is your opinion?

2 A. I consider that when the case was resolved for
3 the recognition of claims by MEM, in connection with DRP, a
4 denial of justice situation has existed.

5 Q. Okay. And are all the reasons set out in detail
6 in your Reports?

7 A. That's correct.

8 Q. Now, if I were the Tribunal, I would -- first
9 thing I'd want to know is where do the Experts agree, and
10 then where do they disagree? Because there is a lot of
11 words in everyone's Reports. So I'd like to show you a
12 couple of paragraphs from Mr. Hundskopf's Report, his First
13 Report, and I believe it's 116. And I'm going to blow that
14 up in English -- or is that in Spanish?

15 A. English.

16 Q. Thank you. Okay. I'll read it. Paragraph 77
17 says: "With regard to claims arising from compensation,
18 although the judiciary has full power to establish such
19 amounts, this does not affect the fact that within the
20 framework of a credit recognition proceeding, and in
21 accordance with the powers granted by the LGSC, the
22 insolvency Authority may recognize credits arising from
23 compensation, provided that the evaluation of the
24 documentation submitted clearly shows that the law,
25 Contract, or the Declaration of the Parties allows

1 determining the amount of compensation."

2 My question for you is: Do you agree with this
3 proposition, disagree, or partly agree, or tell us if
4 there's any common ground here?

5 A. I agree that -- and I said this in my Report.
6 When the compensation has been determined in a different
7 fora, for example, by the judiciary or by Contract, with a
8 legal damages clause, or, for example, for termination of
9 employment of workers, there may be room for the Chamber of
10 the INDECOPI Tribunal to recognize that, if this is
11 included in the law or in the Contract.

12 Now, a Declaration of the Parties? That I
13 disagree with.

14 Q. The sentence -- or the part of the sentence that
15 says "declaration of the Parties allows determining the
16 amount of compensation," is that the clause you disagree
17 with?

18 A. Yes, that section. That portion, rather.

19 Q. And just very --

20 (Overlapping speakers and interpretation.)

21 Q. And very briefly, please explain to us what you
22 disagreed with about that sentence.

23 A. Yes, of course. As I indicate in my Report, in
24 both my Reports, the Reports that I submitted, all of the
25 case law that has allowed INDECOPI to determine an amount

1 of compensation that existed priorly, they have to do with
2 cases when a Contract has existed and both Parties agreed
3 that there was an amount of compensation. So we have to
4 quantify the amount of the compensation damage existed,
5 liability existed, and one of the Parties had to pay to the
6 other for compensation purposes. So they needed to
7 quantify it. So INDECOPI did that, recognized that.

8 Now, the same thing happens in cases when it is
9 clear that there was the termination of an employee, and
10 because of the Contract termination or legal termination,
11 then that would allow INDECOPI to quantify the amount.
12 That case law has never stated that this had to do with the
13 declaration of the Parties.

14 The Company says, okay, I owe compensation.
15 That's a recognition of -- by the Company. So if you take
16 information by one of the Parties, and you do that, well,
17 that's something that has not happened in the case law of
18 INDECOPI, which is the bankruptcy Authority in Perú.

19 THE INTERPRETER: Mr. Schiffer, this is the
20 Interpreter, we're going really fast.

21 MR. SCHIFFER: Yeah, I have asked him to slow
22 down, and I think from now on, if he starts speeding up,
23 I'm going to take my hand and make a signal; so that will
24 remind him to speak much slower. Yeah. That's -- I feel
25 your pain that way.

1 THE INTERPRETER: Thank you, sir.

2 BY MR. SCHIFFER:

3 Q. So, let's take a look at Paragraph 78, for the
4 sake of completeness, and I'll read that out loud and
5 you'll tell the Tribunal whether you and Mr. Hundskopf have
6 common ground or not on that paragraph: "A different
7 situation arises when the insolvency Authority lacks the
8 necessary evidentiary elements that facilitate
9 demonstrating the amount of the credits that are the
10 subject matter of a request for recognition. In such
11 cases, the Commission can only make a recognition when the
12 Court has determined that in the corresponding judicial
13 proceeding," that being the compensation, I assume.

14 Do you agree or disagree with this proposition?

15 A. I agree with that proposition.

16 Q. Now, I want to show you another provision of
17 Mr. Hundskopf's Report.

18 B.B., if we could go to the next callout.

19 And this is in Paragraph 66 of his First Report.

20 And I'll read it out loud:

21 "In this case, the credit of the MEM under the
22 responsibility of DRP originated from the obligation to
23 implement the PAMA in accordance with Supreme Decree
24 016-93-EM. The failure to comply with said obligation to
25 perform means that DRP is obliged to pay compensation in

1 favor of the MEM for the value of the PAMA implementation,
2 which was valued by the same Company according to the
3 Report submitted on January 27, 2010, by DRP to the MEM."

4 Do you agree with that proposition?

5 A. I do not agree with it.

6 Q. So let's go back to, just briefly, B.B., to the
7 first slide I showed him. The -- I'm sorry, the PowerPoint
8 from the Opening.

9 If we look at the relevant Peruvian Bankruptcy
10 Code principles, I highlighted -- I know there are many,
11 but I highlighted Article 4, and it says -- I won't read
12 the number, but it "requires creditors to prove the
13 existence, origin, legitimacy, and amount of their credit."

14 Do you understand that to be the applicable
15 principle at play here?

16 A. That's correct.

17 Q. Can you explain your understanding of "existence,
18 origin, and legitimacy"?

19 A. Let me explain. These requirements are included
20 in the law. They're also enshrined in Resolutions from
21 INDECOPI. And this is a precedent, and they must be
22 complied with, compulsorily. So there is a resolution of
23 this kind that is cited by the Reports of both Parties.

24 Q. Right. But I'm not interested in the history.
25 Just tell us what you understand, as an Expert in this

1 field.

2 What do you understand the words "existence,
3 origin, and legitimacy," what do they mean?

4 A. Existence entails a legal relationship that is of
5 an asset nature. There is an obligor and obligee. There
6 is a Party that has an obligation, vis-à-vis the other
7 Party, that is property-related.

8 Origin means the source, the source of that legal
9 relationship and the recognition of the credit. The source
10 in Perú, for example, and in many other cases are the law
11 and the agreement by the Parties, a contract. So in one of
12 those sources, one must establish the relationship. Is it
13 a contract? Is it a document? Legitimacy has to do with
14 the beneficiary who is the party that has the right to ask
15 for the credit and also the amount of the quantum; right?

16 Q. Let me ask another question. Under Peruvian
17 bankruptcy law, in order for a credit to be
18 recognized -- and let's assume we're talking about a
19 contract case, not a labor law case, where there are
20 special laws. Okay. We're just talking about contracts
21 right now.

22 Does the contract have to give the person making
23 the claim a specific right to receive compensation?

24 A. If we were talking about a compensation that is
25 included in the Contract, for example, a liquidated damages

1 clause, the consequence is compensation. If an obligation
2 was not performed, and that could, of course, bring about a
3 recognition of the claim.

4 Q. Well, of course.

5 A. Or the credit.

6 Q. But more generally speaking, under Peruvian
7 bankruptcy law, does the origin -- so the origin would be
8 the Contract. Does it have to specifically grant the right
9 to compensation in order to get over the hurdle of
10 Article 4 that we're looking at on the screen?

11 A. That would be something that would bring about
12 recognition. Why? Because -- the insolvency
13 Authority's --

14 Q. Okay. I didn't ask why. We can move on now.
15 Let's go to the PAMA, which is the basis for Perú's Claim
16 for a credit. Okay? And I believe we have that teed up.
17 That's C-88. And we'll go particularly to the Penalties
18 Clause.

19 Have you reviewed this document in preparing your
20 Reports in this case?

21 A. Yes, I have.

22 Q. Okay. Do you understand that this is the "origin
23 and legitimacy" from which Perú says they're owed
24 \$163 million?

25 A. Please repeat the question. I didn't hear the

1 Section of the question.

2 Q. Okay. This PAMA document is the document that
3 Perú says is the origin and legitimacy for their claim?

4 A. Yes.

5 Q. Is there anything in the PAMA that gives Perú the
6 right to receive compensation from, in this case, DRP, in
7 the event DRP defaults on its obligations under the PAMA?

8 A. Not expressly. No. What I see here is that
9 there are some consequences, some penalties, but there is
10 no right for compensation.

11 Q. That's the point. So what are their rights if
12 there's a default?

13 A. The consequences of the breach under PAMA is to
14 impose penalties. It may be, for example, the closing of
15 the establishment or a fine or any other kind of
16 administrative-type decision.

17 Q. Okay. Well, I'm going to represent to you that
18 there is only -- do we have -- I think we have Mr. Isasi's
19 Statement. Paragraph 25, Page 6. Let's blow that up.

20 So according to the Chief Legal Officer of the
21 MEM during the relevant time period, he says that the only
22 possible alternative under the PAMA, "if DRP was in
23 default, was to find DRP and ultimately close the CMLO."

24 Okay.

25 Do you see that? Is that your understanding of

1 what the PAMA allows?

2 A. I agree that that is what it says, on the basis
3 of the document you showed me before.

4 Q. Right. And let's go back to the PAMA, please.
5 Is there anything in here that imposes an obligation on the
6 MEM or any organ of the Peruvian Government to complete a
7 project that DRP fails to complete?

8 A. No.

9 Q. Okay. So the PAMA doesn't give the MEM a
10 specific right to compensation in the event of default.

11 I think we've established that; true?

12 A. That's correct.

13 Q. And I think we've already established that the
14 PAMA doesn't obligate the MEM to pick up where DRP left off
15 if there's a default; true?

16 MR. VACA: Mr. President --

17 MR. SCHIFFER: I'm just summarizing what I
18 believe he's already testified to. We've been through
19 this.

20 MR. VACA: We let a few go, but, at this point,
21 it's probably five or six that I've counted.

22 (Comments off microphone.)

23 MR. VACA: No. We said that there have been a
24 few leading questions and we let them go, but, at this
25 point, I think it's time to stop doing that, asking leading

1 questions.

2 PRESIDENT SIMMA: Right. I apologize because I
3 have a problem with leading questions put at the direct
4 where I see maybe a different limit than in the other case
5 we had a couple of days ago, but that's my fault. So you
6 are right. Okay.

7 BY MR. SCHIFFER:

8 Q. I'll move on.

9 So what is the reason you believe that the
10 INDECOPI Court system exceeded its authority -- and it
11 wasn't just mere judicial error -- in recognizing
12 Perú's -- the MEM's claim under the PAMA?

13 A. I think that it was a majority vote that was
14 taken. And it is a majority vote that contains an
15 incorrect decision that is not in line with the regulations
16 that govern INDECOPI, which is an administrative authority.
17 So that is why a credit was recognized and, from what I
18 have reviewed, that should not have proceeded that way.

19 Q. And why shouldn't it have proceeded that way?

20 A. There are a number of reasons. I'm going to try
21 to summarize them very briefly.

22 Q. Actually, I only want the main one that has to do
23 with the origin and legitimacy of the Claim?

24 MR. VACA: Another leading question,
25 Mr. President.

1 MR. SCHIFFER: No, I'm not leading him.

2 MR. VACA: He's testifying.

3 PRESIDENT SIMMA: I said I hope I'm learning
4 about this topic, but this is a question that I would let
5 pass. Thank you.

6 BY MR. SCHIFFER:

7 Q. Are you still good with my question,
8 Mr. Schmerler?

9 A. I have understood the question. Yes. So the
10 main reason is that a resolution was issued -- should I
11 answer? Shall I answer?

12 Q. Yes. You should. We were just waiting for
13 everyone who needed translation to get it. So if you could
14 start over, please. I'm sorry. One more time.

15 A. The main reason why that credit should not have
16 been recognized is because the Tribunal went ultra vires
17 when it ruled on the recognition of credits. Why? Because
18 it defined the existence of a compensation. And as I said
19 in my Reports, this is a matter that goes beyond the
20 competence of the INDECOPI, the administrative authority,
21 specifically in the case of insolvency, to rule on these
22 matters. There are many other reasons, but that would be
23 the substantial reason.

24 Q. And should the INDECOPI court system have
25 recognized a claim for compensation using and relying on

1 the PAMA?

2 A. No.

3 Q. You have answered question.

4 Is there -- so -- okay. You know, they messed
5 up, they made a mistake. That's not denial of justice. Is
6 there anything that you've seen that actually shows that
7 they absolutely knew that they were in the wrong and did it
8 anyway? Any case law that you found that makes an
9 exclamation point on your point?

10 A. There are cases, yes, that are similar to this.
11 They originate in regulatory or administrative obligations
12 like Doe Run or other mining companies that went into
13 insolvency many years later. Although the MEM wanted these
14 obligations to do to be recognized and to bring about the
15 right to a credit, the two instances of INDECOPI, first the
16 commission and then the appellate body, said that this was
17 not the case because there were obligations to do something
18 that entailed rights, but they did not have property
19 content. And, therefore, they didn't have the right to
20 issue a recognition.

21 There were two cases in two different instances
22 after Doe Run.

23 Q. Let's look at those cases. Let's look at the
24 first case. Do you recognize -- and I believe -- just so
25 we're clear on the exhibit numbers, this is DS-58.

1 Do you recognize this as --

2 A. I can look?

3 Q. Yeah. You can look.

4 A. That is a resolution that was attached as an
5 annex to my First Report.

6 Q. Right.

7 A. The Tribunal, it's the Second Report.

8 Q. Let's look at this, first, the date, as we can
9 all see, is August 9, 2021. And then I'll just go ahead
10 and read the key paragraphs. Number 3: "In a motion filed
11 on March 18, 2019, the Ministry of Energy and Mines
12 requested the allowance of claims against Minera Santa Rosa
13 in the amount of" -- call it 17 million plus
14 interest -- "arising from the debtor's obligation to post
15 environmental guarantees to ensure compliance with the Mine
16 Closure Plan provided in the law." Okay. I mean, I
17 paraphrased that a little bit, but that's what you
18 understand the Claim to be, as we can all read.

19 Let's go down.

20 A. That's correct.

21 Q. Okay. And then let's go down to the next.

22 They -- again, Paragraph 33, the MINEM, which is, I
23 believe, the successor to MEM, they said that the Claim
24 derived from Santa Rosa's obligation to post an
25 environmental bond to cover the estimated cost of closure.

1 So they're actually talking about a bond that the MINEM
2 could have used to finish the Project in that case. Is
3 that your understanding?

4 A. Yes.

5 Q. Okay. So let's look at Paragraph 35. "In this
6 regard, it is necessary to specify that neither The
7 Mine-closure Law nor its regulations establish, as a
8 consequence of the failure to provide environmental
9 guarantees, a claim in favor of the MINEM that can be
10 quantified based on the economic value of the environmental
11 bonds posted. As can be seen in Paragraph 29 of this
12 ruling, the Mine Closure Regulation only empowers the MINEM
13 to exercise the following powers in the event of failure to
14 post an environmental bond."

15 And let's go down to the next page.

16 Covering -- the rights are: Prevent the development of
17 exploration, exploitation, and mining process activities.
18 Second thing they can do is paralyze the activities for a
19 maximum period of two years. And those are the -- again,
20 I'm not going to read all of it, but those are the rights
21 they have under the law, as you understand it, as -- the
22 Opinion, obviously, we can all read.

23 Let's go down to Paragraph 37: "Thus, although
24 Minera Santa Rosa was obliged to post bonds in favor of the
25 MINEM in the amount of \$17 million to secure the compliance

1 with the Measures established in the Closure Plan, the
2 monetary value of such guarantees does not grant MINEM, as
3 the competent authority for the supervision and control of
4 the obligations assumed in the Closure Plan, the right to
5 obtain a benefit from Minera Santa Rosa equivalent to such
6 amount, in the event this obligation is not performed. The
7 value of the obligation to do is different from the value
8 for which the Parties guaranteed said obligation in the
9 event of default."

10 And can you just elaborate on the obvious words
11 that we can read here, why you think this case is important
12 and applies?

13 A. What happens in this case is that there are
14 obligations in connection with the Mining Regulations that
15 apply to a mining company, a mining company that is in
16 insolvency proceedings. And the MEM asked them to
17 recognize a credit. What INDECOPI is examining in the two
18 administrative instances is that -- the fact that certain
19 obligations exist and, if we look at 35, we are going to
20 see an explanation of what those obligations are.
21 Although, obligations to do are established there, these
22 are not property-related obligations that can be
23 transferred to a right to a credit in favor of the MEM.
24 Since the Regulations do not grant a property-related
25 right, then the Ministry cannot become a creditor in the

1 insolvent proceedings. Why is this important?

2 Q. I don't think we need to get why -- I don't think
3 we need to get into why it's important right now, but do
4 you find the facts in law in this case to be substantially
5 the same as the facts in law in our situation? Do
6 you -- it's not leading.

7 MR. PEARSALL: Just a reminder, this is his
8 direct examination.

9 PRESIDENT SIMMA: Even I recognize this as
10 leading; right?

11 MR. SCHIFFER: Okay.

12 BY MR. SCHIFFER:

13 Q. How do you view the facts in this situation
14 versus DRP?

15 A. I see that, in both cases, we are faced with
16 obligations to do that are different. These are
17 administrative obligations. These are obligations to do
18 that have a no-property content, but, as we've seen, the
19 results have been different. In the 2011 case that is
20 being discussed at this Hearing, these cases that we have
21 brought to show how later on INDECOPI has decided on
22 similar situations.

23 Q. Okay. And there is -- is there another case that
24 you also cited in your Report that's identical to this
25 case?

1 A. There is another case of another mining company,
2 the Kavicka (phonetic) mining company that is also of 2019,
3 and it quite similar to this one that was presented here,
4 the Santa Rosa one.

5 Q. And we're not going to take the time to go into
6 that one, but it's DS-59 in your Report.

7 A. Correct.

8 Q. So, with that, I thank you very much for your
9 answers, Mr. Schmerler.

10 MR. SCHIFFER: And I'm finished with our direct.

11 PRESIDENT SIMMA: Thank you, Mr. Schiffer.

12 I think -- would you prefer spending the next
13 15 minutes in starting the exam, or should we have a
14 slightly earlier lunch break and then continue at 1:30
15 instead of 1:45? I'm in your hands.

16 MR. VACA: Thank you, Mr. President. On our
17 side, we'd prefer to take the lunch break. We think that
18 would be better, that way people aren't hungry during the
19 cross-examination, if that's okay.

20 PRESIDENT SIMMA: It's good for the people not to
21 be hungry.

22 MR. VACA: It's good for the people not to be
23 hungry, at least that's my position.

24 PRESIDENT SIMMA: Okay. So Mr. Schmerler.

25 THE WITNESS: Yes.

1 PRESIDENT SIMMA: Mr. Schmerler, you will have to
2 have a lunch without engaging any discussion with anybody
3 about the case.

4 So we meet again at 1:30. Thank you.

5 (Whereupon, at 12:33 p.m., the Hearing was
6 adjourned until 1:30 p.m., the same day.)

7 AFTERNOON SESSION

8 PRESIDENT SIMMA: So I give the floor to Mr. Vaca
9 for the examination of Mr. Schmerler.

10 You have the floor, sir.

11 MR. VACA: Thank you, Mr. President. I'll be
12 conducting this cross-examination in Spanish.

13 CROSS-EXAMINATION

14 BY MR. VACA:

15 Q. I think your mike is on.

16 A. Good afternoon.

17 Q. How are you doing, Mr. Schmerler?

18 My name is Brian Vaca, and, together with my
19 colleagues, I represent the Republic of Perú and Activos
20 Mineros in this Arbitration.

21 Before we start, I would like to ask you to speak
22 slowly and clearly for your answers to be interpreted and
23 transcribed properly for the benefit of everyone.

24 A. Understood.

25 Q. And if you'd like to have a pause at some point,

1 please let me know.

2 A. Certainly.

3 Q. Mr. Schmerler, have you read the Decision in the
4 ELSI Case?

5 A. What case?

6 Q. ELSI. E-L-S-I.

7 A. Would you please be specific about that Decision?

8 Q. My question is whether you recognize ELSI or not.

9 A. I do not know it by that name, no.

10 Q. Have you read the Mondev Case, M-O-N-D-E-V?

11 A. No.

12 Q. Have you read a book that was written by Jan
13 Paulsson?

14 A. No.

15 Q. Very well. In addition to the Standard of
16 denegation of justice shown to you by Claimants' Counsel,
17 you have no other basis to understand what that Standard is
18 under international law?

19 A. I have followed in my analysis the documents
20 given to me in connection with the credit recognition file,
21 and I have prepared the Reports that you have seen.

22 Q. When you're talking about the documents, are you
23 talking about the facts, what happened, what actually
24 happened in Perú?

25 A. Whatever is related to the credit recognition in

1 this, in the specific case.

2 Q. Very well. So you are not -- you wouldn't say
3 that you are competent to opine, as an Expert, on the
4 meaning of the Standard of the denegation of justice under
5 international customary law?

6 A. My expertise is in the area of bankruptcy law in
7 Perú, and based on that, I prepared my Report.

8 Q. I would like to ask you some basic questions to
9 make sure that I have properly understood some of the
10 reasons why you opine that the MEM credit against DRP, Doe
11 Run Perú, should not have been recognized. I would like
12 you to go to your First Report.

13 Can you see it on the screen?

14 A. Yes.

15 Q. If we move on to the second page, in the
16 contents, you include Section IV.3.2. That Section
17 reads: "INDECOPI does not have jurisdiction to determine
18 an indemnity."

19 Have I read it correctly?

20 A. Yes. This is the way you have it on the screen.

21 Q. And if we move on to Paragraph 109, at Page 47.
22 I would like to read that paragraph.

23 You said: "From the assessment of the set of
24 standards mentioned, it is clearly seen that the
25 determination of the damage, as well as the potential

1 indemnity, since these are matters that have to do with
2 civil liability, are acts that are within the exclusive
3 jurisdiction of the judiciary. Following those thoughts,
4 and also as long as the administrative Authorities do not
5 have a jurisdictional role, only the bodies that are part
6 of the judiciary, courts and chambers may issue or may
7 decide indemnities, and that is not allowed for other
8 bodies that are part of the public administration."

9 Have I read this correctly?

10 A. Yes.

11 Q. And I would like, now, to move on to
12 Paragraph 138 at Page 54. In this paragraph, you
13 state: "In addition, as stated in this Report, the
14 administrative Authorities, as in the case of the
15 Commissions and Chambers with the INDECOPI from the
16 bankruptcy area, are not bodies that may establish
17 indemnity since that is limited under the constitution and
18 the laws of Perú exclusively for the judiciary, and also
19 because the LGSC does not grant those powers to the bodies
20 in terms of their role in the petitions for the -- for
21 credit recognition."

22 Have I read this correctly?

23 A. Yes.

24 Q. To sum up what I just read, would it be proper to
25 say that your argument or the position that you express

1 here in these paragraphs is that no administrative
2 Authority in Perú has jurisdiction to determine the
3 existence of an indemnity or compensation as a result of
4 civil liabilities since this is a role for a power that is
5 reserved to the judiciary.

6 Is this a fair summary?

7 A. I would say that it comes close enough.

8 Q. Very well. I understand that Doe Run Perú filed
9 an adjudicatory administrative Claim against the Resolution
10 of 2011, 1743 of 2011?

11 A. Yes, that is part of the case.

12 Q. And I also understand that the jurisdiction to
13 hear this Claim was with the Fourth Temporary Court that
14 specializes in adjudicatory administrative issues with the
15 Superior Court?

16 A. Yes. That is the name of the Court.

17 Q. I'd like to show you that document, that is
18 R-141. This document was presented by Doe Run Perú;
19 correct?

20 A. This is the Statement of Claim; correct?

21 Q. Yes. If we look at Page 28 of this Claim by Doe
22 Run Perú, you will see -- you can see the title of
23 Section 5, where it says "concepts of credit and credit
24 under the provisions of Article 1," and then -- and there
25 it says legal requests common to both autonomous demands,

1 but if we look at Page 50 now, towards the end of the page,
2 you're going to see that there is a subparagraph under 5,
3 that is Section (d). I am going to read the title, and it
4 reads: "The Court cannot fix compensation because that's
5 the sole jurisdiction of the judiciary."

6 Have I read it correctly?

7 A. Yes.

8 Q. And, in general, we could say that this is the
9 same argument that you have presented for the paragraph
10 that we read; correct?

11 A. Well, yes. On its face, yes.

12 Q. I also understand that on October 18, 2012, the
13 Fourth Temporary Court specializing in adjudicatory
14 administrative matters issued a Judgment indicating that
15 the Claim was meritless; is that correct?

16 A. Yes.

17 Q. And then on November 5, Doe Run presented an
18 appeal against that Claim -- against the Judgment by the
19 Court, and this is something else that you recognize;
20 correct?

21 A. Yes. I understand that everyone knows that.

22 Q. And after the fourth court issued a Decision in
23 the First Instance. In the Second Instance, I understand
24 that the eighth judgment -- Eighth Court also issued a
25 decision against Doe Run; correct?

1 A. Yes.

2 Q. And on August 22, 2014, Doe Run presented a
3 cassation request against the Doe Run Judgment; correct?

4 A. Yes.

5 Q. I would like to show you C-191.

6 This document was presented by Right Business
7 S.A. for Doe Run Perú.

8 A. Yes.

9 Q. This document is a cassation request against the
10 Judgment by the Court that was confirmed in the First
11 Instance; correct?

12 A. Yes.

13 Q. And if we look at Page 6 -- and I can tell you
14 that we are at the substantiation of the Claim presented.
15 I would like to call your attention to the text that we
16 have in uppercase at the bottom of the page. Here, Right
17 Business S.A. for Doe Run Perú said: "The Decision whose
18 nullity has been sued in this proceeding is contrary to the
19 Constitution and the laws by establishing that INDECOPI may
20 set compensation, notwithstanding that this is an exclusive
21 power of the judiciary."

22 Have I read it correctly?

23 A. Yes.

24 Q. And here, again, just to confirm, would it be
25 correct to say that this is an argument that you have also

1 presented in your Report, in general?

2 A. Yes.

3 Q. Continuing with these basic questions to make
4 sure that I have understood some of the reasons why you
5 opine that the MEM credit against Doe Run Perú should not
6 have been recognized, I would like to move on to another
7 reason that you present. I will show you, again, your
8 First Report. And now, we are going to look at the
9 content, second page, and I would like to look at Section 4
10 that says, "in existence of a MEM credit vis-à-vis DRP." I
11 don't know if you see that in your contents. And there is
12 a subsection, rather, Section 4. And there, you have a
13 subsection that is 4.3.3(b), and it says that the origin of
14 the alleged MEM credit has not been evidenced; is that
15 correct?

16 A. Yes.

17 Q. And as part of that section, I would like to read
18 to you Paragraph 171, at Page 62. Well, it starts at the
19 end of Page 61, and it moves on to the next page -- 171,
20 rather.

21 It is Paragraph 171 on Page 62 of the PDF.

22 I will read that paragraph from your Report. You
23 said: "As can be seen, both the Resolution of the INDECOPI
24 commission and the singular vote of Member Ferreyros,
25 coinciding pointing out that in the Regulations governing

1 the PAMA, a serious of possible consequences is established
2 in case the mining company (essentially the imposition of
3 administrative sanctions of a fine or cessation of
4 operations). In this case, DRP fails to comply with
5 executing the actions (finance built) adhering to the
6 Project that it extends, but in no case does this entail
7 the possibility that a patrimonial obligation is
8 originated, generated, or managed, that is a debt on the
9 part of DRP in favor of the MEM or some other entity or
10 person."

11 Have I read this correctly?

12 A. Yes.

13 Q. Now, I would like to look at what Doe Run Perú
14 said in the first administrative instance before the
15 INDECOPI commission. And on the screen, I will show you
16 OEH-10. This is a pleading presented by Doe Run Perú to
17 the Bankruptcy Commission with INDECOPI; correct?

18 A. Yes.

19 Q. And on the second page, I will show you one of
20 the items that Doe Run Perú told the Tribunal that they
21 needed to bear in mind. They said -- and I am reading the
22 third item. There is a number 3, the third one: "Doe Run
23 Perú said the effects and consequences of the PAMA breach
24 (a situation that DRP disputes) are specifically regulated,
25 and the Regulation does not provide in any case that, given

1 their breach, there is a need to compensate for the value
2 of the Project in favor of MINEM. So for the latter one to
3 perform the last phase of PAMA, its breach is related to
4 the application of pecuniary sanctions and the existence of
5 a plan by OEFA."

6 A. It doesn't say -- it says "a demand of a
7 cessation plan in charge of OEFA."

8 Q. Okay. So, "the demand for a plan for the
9 cessation of the charge by OEFA." Have I read it
10 correctly?

11 A. Yes.

12 Q. I would like to review what Doe Run presented in
13 the second instance of the administrative proceeding, and I
14 will show you the Exhibit C-172. This document on the
15 screen was presented by Doe Run Perú before the First
16 Chamber of the INDECOPI -- correct? -- for the defense of
17 competition?

18 A. Yes.

19 Q. If we look at the second paragraph on the seventh
20 page, and I can tell you that this section addresses the
21 origin, the existence, the amount, and also the legitimacy
22 of the PAMA credit that MEM invoked. And there, Doe Run
23 Perú argued: "In the present case, there is no rule that
24 authorizes the State in general, or MINEM in particular, to
25 charge or claim monetary amounts that may be necessary to

1 develop the work to comply with the purpose of the
2 obligation imposed on the administered Parties by law, nor
3 of the duties arising from it. Indeed, the State (through
4 its competent institutions) is only authorized to monitor
5 and sanction noncompliance (or incentivize compliance)."

6 Have I read it correctly?

7 A. Yes.

8 Q. That is, once again, Doe Run Perú is stating that
9 PAMA -- or that in PAMA, there is no provision that, in
10 case of breach, there is a need to restore the value of the
11 Project in favor of MINEM; correct?

12 A. Yes.

13 Q. I would like now to look at what Doe Run Perú
14 stated in the Adjudicatory Administrative Court. I am
15 going to show you R-141. This document -- and we just saw
16 it -- is the challenge of the administrative Resolution;
17 correct?

18 A. Yes.

19 Q. And if we go to Page 43 of this Claim, if you
20 look at the title at Subsection (c), it says: "The
21 obligation to comply with the PAMA is not a monetary or
22 quantifiable obligation."

23 Have I read it correctly?

24 A. Yes.

25 Q. And if we move on to Page 46 of this Pleading by

1 Doe Run Perú, I am going to read what the first sentence
2 says. It reads: "This ratifies the position, meaning that
3 the PAMA does not imply an obligation to do that could
4 be -- that could result in an immediate monetary debt in
5 favor of the State represented by the amount of the
6 investment."

7 Have I read it correctly?

8 A. Yes.

9 Q. That is, Mr. Schmerler, Doe Run, again, is
10 presenting an argument that you presented in your First
11 Report; that is, that PAMA -- or the PAMA does not provide
12 that, in case of breach, there is a need to restore the
13 monetary value of the Project in favor of MINEM; correct?

14 A. Yes.

15 Q. And I apologize, we are about to come close to
16 the story time, and I know that I am reading a lot, and we
17 are now moving on to questions to understand your Opinion
18 in connection with the MEM credit against Perú, and we are
19 going back to the first -- Doe Run Perú -- and we are going
20 back to your First Report.

21 At Paragraph 126, Page 51, you represent the
22 following. You say, on the fourth line, you start a new
23 sentence and you say: "Thus, it must be born in mind that
24 the quantification of the amount of an obligation is not
25 equivalent to the termination of its existence. This means

1 that one has to -- one has to make sure beforehand whether
2 there has been a relationship between the obligor and the
3 obligee. This may be based on an agreement or it may be
4 legal in nature. It determines the need to value the
5 amount of money in connection with a potential obligation
6 by the obligor in favor of the counterparty."

7 Did I read this correctly?

8 A. Yes.

9 Q. Now, let's look at the administrative proceedings
10 and what Doe Run Perú submitted there. And let us go to
11 another document, C-172. I'm going to read at 2.3, the end
12 of Page 7. I'm going to wait until this is put on the
13 screen. I'm going to begin reading. I'm going to be
14 reading 2.3 at the end of Page 7. It says
15 here: "Referring to the existence of the PAMA credit,
16 MINEM is confused or it thinks that it seeks to confuse,
17 arguing that the credit exists whenever it" -- and I'm
18 going to the next page -- "results from failure to comply
19 with an obligation quantifiable in money and that DRP
20 itself acknowledged owing, giving proof of such
21 recognition, ergo, the existence, with Letter 01959297,
22 submitted by the appellant to MINEM on 27 January 2010. On
23 this point, it should be first noted that you,
24 Mr. President, have already cautioned the quantification of
25 an obligation as nothing to do with its existence."

1 Have I read DRP's argument correctly?

2 A. Yes.

3 Q. I will now show you C-196. This document is an
4 appeal to the ruling that was handed down in first instance
5 in the Administrative Court submitted by the DRP in
6 liquidation, represented by Right Business, its Liquidator;
7 correct?

8 A. Yes.

9 Q. It says here at Page 4 -- I'm going to read the
10 argument submitted by Doe Run Perú in this lawsuit: "With
11 regard to the PAMA Project under review, it should be noted
12 that, while this Party indicated that the estimated
13 investment to complete the Project is \$163 million" -- and
14 I'm rounding the amount -- "his does not entail, nor does
15 it generate an acknowledgment of a credit in favor of
16 MINEM, as it is only an estimate of the value or the
17 estimate of the works to be implemented in order to meet
18 the objective of the PAMA. Consequently, since the origin
19 is not reliably verifiable, the existence, legitimacy, and
20 the amount of Claims invoked by MINEM, INDECOPI should not
21 have recognized them."

22 Have I read this correctly?

23 A. Yes.

24 Q. Again, Mr. Schmerler, DRP puts the same argument
25 that you have included in your Reports, that the

1 quantification of the amount of an obligation does not
2 really determine the existence of that obligation?

3 A. That's right.

4 Q. Thank you for your patience. We are going to
5 move on.

6 In your presentation, during your direct
7 examination, Claimants' Counsel showed you DS-58, if memory
8 serves, which is one of the resolutions that you appended
9 to your Second Report to support your argument that
10 INDECOPI has not recognized, in the same manner, the
11 requests for credit submitted by MEM, as it did in the
12 MEM's request in connection with Doe Run Perú?

13 A. So I'm looking at Resolution 051 from INDECOPI
14 dated August 2021, and this is company Minera Santa Rosa
15 case and, yes, the question was asked about this earlier.

16 Q. Very well. Let us put that document on the
17 screen, DS-58, and I'm going to read Paragraph 24. At 24
18 here, the Chamber said -- sorry. I'm going to show you the
19 Spanish version. I think that would be more useful.

20 "As mentioned in the background of this ruling,
21 MINEM invoked the allowance of claims against Minera Santa
22 Rosa for the amount of \$16 million as principal and
23 \$300,000 as interest derived from the debtor's obligation
24 to post environmental bonds to ensure compliance with a
25 Closure Plan, in support of which MINEM submitted a copy of

1 the documentation indicated in Paragraph 5 of this ruling."

2 I haven't read the exact amount, of course, but
3 I've read this correctly; right?

4 A. Yes.

5 Q. So in this example, the credits invoked by MEM
6 were, according to MEM, derived from the debtor's
7 obligation to post environmental bonds; right?

8 A. Yes.

9 Q. And the obligation, according to the MEM in this
10 example, is borne of the Mine Closure Law; right?

11 A. Yes, of the Regulations from that industry.

12 Q. Well, yes. It has to do with mine closures;
13 right, sir?

14 A. Yes, mine closures. It is in here.

15 Q. And the Chamber actually looked at the
16 consequences on the applicable regulations; right?

17 A. Yes. And this is further developed in this
18 ruling later on.

19 Q. Let us now look at Paragraph 38. And here the
20 Chamber says, "Subsequently, taking into consideration that
21 the -- that in the Closure Plan, the Parties have not
22 established the elements that are now determining the
23 amount of the claims invoked by MINEM against Minera Santa
24 Rosa due to the failure to post environmental bonds
25 detailed in Table 2 of this ruling. It is not possible to

1 convert the conduct of Minera Santa Rosa into a monetary
2 equivalent for its recognition in bankruptcy proceedings."

3 Have I read this correctly?

4 A. Yes.

5 Q. In this example, it was the General Directorate
6 of Environmental Matters, the one that established the
7 yearly contribution for environmental guarantees; is that
8 right?

9 A. Yes. It is important to look at 35 and 36. I
10 think it is important for us to see that they analyzed
11 there the alleged obligation put forth by the MEM. This is
12 34 and 35.

13 Q. Okay. We agree. Claimants' Counsel, perhaps,
14 will ask you questions about that, if they so wish.

15 A. Yes. It was just a clarification, sir.

16 Q. Yes. Let us look at something else. Let's look
17 at some of the statements that you include in your two
18 reports.

19 If we look at the First Report at Paragraph 118
20 at Page 49, you say: "The work of the Commission will have
21 to do with evidencing the existence -- will confine itself
22 to verifying the existence of the credits invoked in the
23 Application for Recognition because, as explained by the
24 INDECOPI Tribunal, that Resolution 268-97, the Act of
25 Recognition of Credits by the Bankruptcy Authority, does

1 not determine the existence or nonexistence of the debts,
2 but it is declaratory in nature. Through said procedure,
3 the Bankruptcy Authority verifies that these are credits
4 incorporated into the process and verifies that the
5 Applicants are really the holders of the credits that
6 support the request."

7 Did I read that correctly?

8 A. Yes. And this reproduces what the Resolution
9 says, and it is also included in the Expert Reports
10 submitted by Perú.

11 Q. Would it be correct to say that your position is
12 that the bankruptcy authority cannot determine the
13 existence of debts, but it only has a declaratory nature?

14 A. Indeed. If we're talking about a compensation,
15 in particular, what I have said in my Reports is that,
16 INDECOPI -- not only the bankruptcy Tribunal, but also
17 consumer issues, et cetera, INDECOPI does not have
18 jurisdiction in this case because it goes beyond the
19 authority given to it by the law.

20 Q. Okay. Let us see if I understand your position.
21 You are reaffirming what you have stated in this paragraph?

22 A. Yes.

23 Q. Let us now look at your Second Report. I only
24 have one more paragraph that I wanted to show you, and this
25 is Paragraph 26 of your Second Report.

1 At Paragraph 26 you say: "In this regard" -- you
2 have your Report there and you can see the context, but it
3 says here: "In this regard, it is necessary to point out
4 that INDECOPI's functional bodies may indeed interpret the
5 legal rules to recognize claims, but this does not allow
6 them to distort them by granting themselves powers beyond
7 those granted to them by the law. This would imply a
8 violation to the principle of legality."

9 And the last part, in it you say: "Determining
10 or creating a claim exceeds the role of verifying or
11 confirming its existence, which is the specific attribution
12 of the Peruvian Bankruptcy Administrative Authority
13 according to Peruvian legal system."

14 Have I read this correctly?

15 A. Yes.

16 Q. Okay. Let us go back to the document that you
17 submitted during your direct, and we looked at it a moment
18 ago. This is Resolution 0551 of 2021. This is DS-58.

19 You cited this to show that in no other case
20 INDECOPI opined in the same manner that it opined in the
21 2011 resolution. Let us now look at this document, and I
22 would like to show you at Paragraph 20 of the analysis
23 conducted by the Chamber.

24 The INDECOPI Court says: "As stated by the
25 INDECOPI Court in previous rulings, the insolvency

1 authority is competent to determine, within the framework
2 of an insolvency proceeding, the existence, origin, the
3 legitimacy, ownership, and amount of the claims invoked by
4 the creditors of an insolvent debtor so that their
5 recognition does not constitute in any way a contentious
6 matter of private law that can only be elucidated in
7 jurisdictional or arbitral jurisdiction."

8 "Rather, since this a disputed matter within a
9 bankruptcy proceeding, it requires a ruling by the
10 administrative authority. Since it has been given the
11 power to verify, determine, and rule on the existence,
12 origin, legitimacy, ownership, and amount of a claims
13 invoked in a bankruptcy proceeding."

14 Have I read this correctly?

15 A. Yes, word for word.

16 Q. Let us now look at Paragraph 26 of your Second
17 Report that we just read a few minutes ago. And this
18 Paragraph 20, and you and I agree that this comes from a
19 resolution that you cited and that you included in your
20 direct.

21 On the left, you have DS 58 in the paragraph that
22 I just read to you, and this is a Resolution that you
23 included in your Second Report.

24 On the right, we have Paragraph 26 of your Second
25 Report, and I wanted to ask you a very simple question.

1 Do you agree that these two paragraphs say
2 exactly the opposite in connection with the jurisdiction of
3 the administrative authority to determine the credits
4 invoked?

5 A. I don't think they are completely opposed to each
6 other.

7 MR. VACA: No further questions.

8 THE WITNESS: I think it is important to take
9 into account the precedent here, which is Resolution 268.

10 PRESIDENT SIMMA: Was that the interpreter just
11 completing the statement, the last statement?

12 THE INTERPRETER: The interpreter just said what
13 the witness said, and what he said is that it is important
14 to take into account the precedent here, which is
15 Resolution 268.

16 PRESIDENT SIMMA: Okay. Thank you very much. So
17 the floor goes to Mr. Schiffer.

18 REDIRECT EXAMINATION

19 BY MR. SCHIFFER:

20 Q. Mr. Schmerler, do you want to clarify any of the
21 answers that you've given? Because you seemed, at the end,
22 to want to explain, so if you want to explain your last
23 answer, please feel free.

24 A. Basically, what I wanted to say is that I was
25 asked whether there was a contradiction or there wasn't a

1 contradiction between the two paragraphs shown, but I
2 wanted to say -- and this is in my Report, in both Parties'
3 Report, really.

4 I wanted to say that the nature of a credit
5 recognition procedure, which is an element of the process
6 here, has to do with verifying the credits. So this
7 is -- the Resolution 268 is a precedent that must be
8 complied with. DS-37 is the exhibit number, which is the
9 Resolution of Banco de Crédito del Perú against Droguería
10 Lidar, and it is cited in a number of sections in my
11 Report. It explains how credit recognition works and what
12 are the limits of the conduct of the body.

13 That's what I wanted to state.

14 MR. SCHIFFER: We have nothing else.

15 PRESIDENT SIMMA: Thank you very much,
16 Mr. Schiffer. I heard the mike. She said there was no
17 further question or clarification. So that brings me to my
18 colleagues, whether they have questions. There are no
19 questions.

20 That brings an end to your examination,
21 Mr. Schmerler. Congratulations, you're a free man again.

22 THE WITNESS: Thank you very much.

23 (Witness steps down.)

24 PRESIDENT SIMMA: I was going to say that we
25 should just not lose time and have Mr. Hundskopf in the

1 witness stand. Thank you.

2 OSWALDO HUNDSKOPF EXEBIO, RESPONDENT'S
3 WITNESS, CALLED

4 MS. GEHRING FLORES: Mr. President, I just wanted
5 to ask for a brief humanitarian break.

6 PRESIDENT SIMMA: Sure.

7 MS. GEHRING FLORES: All right. Thank you.

8 (Brief recess.)

9 PRESIDENT SIMMA: I think we are all set.

10 I recognize Mr. Hundskopf in the witness stand.

11 OSWALDO HUNDSKOPF EXEBIO, RESPONDENTS' WITNESS, CALLED

12 PRESIDENT SIMMA: Welcome, Mr. Hundskopf.

13 Would you be so kind and read out the Statement
14 that should be in front of you or on the screen?

15 THE WITNESS: Good afternoon, everyone.

16 With all due respect, I solemnly declare upon my
17 honor and conscience, that I shall speak the truth, the
18 whole truth, and nothing but the truth, and that my
19 statement will be in accordance with my sincere belief.
20 Thank you.

21 PRESIDENT SIMMA: Thank you very much.

22 Who is going to direct?

23 MS. GEHRING FLORES: I will, Mr. President.

24 PRESIDENT SIMMA: Okay. Thank you. Ms. Gehring
25 Flores, you have the floor.

1 MS. GEHRING FLORES: Thank you. And for this
2 brief direct, I will be speaking in Spanish.

3 PRESIDENT SIMMA: Okay.

4 DIRECT EXAMINATION

5 BY MS. GEHRING FLORES:

6 Q. Professor Hundskopf, I don't think that you have
7 to be so close to the mike, but you have to be careful with
8 the distance between you and the mike.

9 Mr. President, Members of the Tribunal, I will
10 now introduce Mr. Hundskopf to be tendered for
11 cross-examination. He has been an Expert, recognized
12 Expert, in insolvency law, and he has prepared two Expert
13 Reports that are part of the file of this arbitration.
14 They were submitted on 14 March 2022 and 23 August 2023.

15 Mr. Hundskopf has been practicing law for more
16 than 50 years, and he has been a precursor and an eminent
17 Authority in the development of insolvency law in Perú,
18 from the beginning of the issues of bankruptcy law in the
19 country.

20 Without further ado, this is the end of our
21 direct, and I would like to tender the Witness for
22 cross-examination purposes.

23 MR. SCHIFFER: Good afternoon, Mr. Hundskopf.
24 How are you today?

25 PRESIDENT SIMMA: You have the floor.

1 MR. SCHIFFER: Oh, sorry.

2 PRESIDENT SIMMA: That's fine.

3 MR. SCHIFFER: I jumped the gun. I'm sorry.

4 CROSS-EXAMINATION

5 BY MR. SCHIFFER:

6 Q. Good afternoon, Mr. Hundskopf.

7 A. Very well. Thank you.

8 Q. I noticed in your Report that you cited a number
9 of cases that you claim support the view that the MEM's
10 claim of credit under the PAMA was a legitimate claim;
11 true?

12 A. Yes, indeed.

13 Q. And in my Opening Statement, I tried to give fair
14 warning that I was going to talk to you about those cases.

15 Did -- was that relayed to you?

16 A. No, but, I assume that there is no problem
17 because -- yes.

18 Q. We'll go through the cases, then.

19 First, I want to show you Paragraph 113 of your
20 First Report, and I'm going to show it in English, and I'll
21 read it so that you can then hear it in Spanish.

22 MS. GEHRING FLORES: I apologize.

23 Mr. Hundskopf, do you have your Report in Spanish
24 there, because we have it in English on the screen?

25 THE WITNESS: It's the first one; correct?

1 MS. GEHRING FLORES: Well, yes, but it is the
2 first one, sorry the one -- the one on the screen.

3 (Discussion off the record.)

4 MR. SCHIFFER: Maybe. Hang on. Let me give you
5 the date. It's 14 March 2022.

6 MS. GEHRING FLORES: It's the first one.

7 MR. SCHIFFER: Yeah.

8 THE WITNESS: Umm-hmm.

9 BY MR. SCHIFFER:

10 Q. And the language I've highlighted is your words:
11 "From the review it is noted that neither DRP nor DR Cayman
12 have used this argument in the former's contentious
13 administrative complaint, nor in the appeals or cassation
14 petition. Beyond that, attention must be paid to the fact
15 that there were no cases identical to that of DRP-MEM, but
16 certainly cases in which there has been a pronouncement by
17 the insolvency Chamber in favor of recognizing
18 compensation, even when there is no judicial pronouncement
19 in this regard."

20 Now, let me, first of all, ask you, flat out,
21 have you read the PAMA?

22 A. Yes. Of course I did.

23 Q. Have you seen anywhere in there where it says
24 that the MEM is entitled to compensation, in any amount, in
25 the event of default by DRP?

1 A. Specifically?

2 Q. Yeah, specifically?

3 A. Specifically, I don't think there is any
4 obstacles in doing so. And let me tell you why, because --

5 Q. Please answer my question first and then can you
6 explain.

7 A. Okay.

8 Q. So is there any specific provision in the PAMA
9 that said in the event of default by DRP, the MEM is
10 entitled to damages or compensation?

11 A. There is none. There's no impediment, not only
12 in PAMA but also in the legislation, in the legal framework
13 supporting PAMA --

14 Q. Well, I'm not --

15 A. -- in the legislation in force or in the
16 bankruptcy system in Perú.

17 Q. And isn't it true that all the cases you cite,
18 the origin of the claim was something where either a
19 contract gave the nondefaulting party an express right to
20 compensation, or it was a matter of labor law where the
21 Civil Code gives the employee an express right to
22 compensation? Isn't that true?

23 A. I apologize. The question, are you talking about
24 the Civil Code and the employee? The Civil Code is
25 different from labor legislation.

1 Q. Okay. Then I misspoke. Let me break it down.

2 All the cases that you cite in your Report deal
3 with, on the contractual side, either a Promissory Note or
4 a Contract for the sale of goods where, if there's a
5 default, the nondefaulting Party has the express right to
6 recover damages; correct?

7 A. Correct.

8 Q. And you also cite a number of labor cases where
9 there's, by law, if an employee is terminated, the employee
10 has a statutory right to seek compensation on some formula
11 based on their salary; correct?

12 A. Correct.

13 Q. And that is the standard case law that you cited?

14 A. But if you allow me --

15 Q. Actually, sir, I think if you can just answer my
16 questions, please, and I think you did. Let me move on.

17 You do not cite the Santa Rosa Case that
18 Mr. Schmerler discussed earlier; true?

19 A. Umm-hmm.

20 Q. That's yes?

21 A. 2021.

22 Q. Right. And you do not cite the DS-59, the
23 Compañia Minera Case; true?

24 A. Yes.

25 Q. Were you aware of these cases when you prepared

1 your Report?

2 A. Yes, but, if you allow me, can I explain?

3 Q. Not yet. Just want to have answers to my
4 questions, please. I'm trying to make my questions super
5 simple so we can move along.

6 Had you read those cases at the time of your
7 Report?

8 A. I wouldn't be able to specify because I don't
9 cite them. I don't cite them in my Report.

10 Q. Right. But my question is, did you know about
11 them when you wrote your First Report?

12 A. Not back then because the First Report was in
13 2022, and the second one in August 2023; right? So, yes,
14 my first one is March 2022.

15 Q. Well, your Report, but -- B.B., will you please
16 pull up the Santa Rosa Case that we covered with
17 Mr. Schmerler and look at the date.

18 A. That case is of 2021.

19 Q. Right. So that's before you wrote your Report.
20 Of course.

21 Did you read that case before you completed your
22 Report in this case?

23 A. I heard, very attentively, the explanation by
24 Mr. Schmerler, and I don't have many comments to make about
25 it.

1 Q. No, that's -- I appreciate that. That wasn't my
2 question. My question was, had you read that case before
3 you wrote your Report?

4 A. No.

5 Q. Did you read that case before you wrote your
6 Second Report?

7 A. I don't think so because I would have made a
8 comment directly. I would have compared if -- those
9 Reports to the one in 2011.

10 Q. Okay. So I'll just put it to you. Since we
11 reviewed the Santa Rosa Case, don't you think that case has
12 applicability to the situation?

13 A. Would you allow me to respond?

14 Q. I will. But if you say yes or no first, and then
15 you can respond.

16 A. I believe no, because it is a completely
17 different case from the November 2011 Resolution. One
18 thing is to have a proceeding, to have a credit recognized,
19 and something completely different is to have the
20 proceeding of a company that is going through bankruptcy
21 such as Santa Rosa.

22 We are completely -- they are completely
23 different situations, both Resolutions of 2021 are
24 different, different companies, but with a similar content.
25 They have to do with the termination of the corporate life

1 of those corporations, and in the case -- in the other case
2 is completely, completely different. The 2011 case is
3 completely different. It's a different juncture.

4 Q. Let me ask you a few questions about that.

5 So in the two cases that Mr. Schmerler cited in
6 his First Report, there were mining companies that went out
7 of business and the mines had to be closed; correct?

8 A. Yes. Certainly. Yes. Certainly.

9 Q. And in both cases, under the law, they were to
10 have put up a bond in the amount that it would cost to
11 actually close the mines. Is that true?

12 A. Yes, but I insist, the issue of 2011, that is the
13 Resolution that I deal with in my Reports, has nothing to
14 do with a Company that is in bankruptcy. This a Company
15 that is a running business. That is an ongoing business.
16 It is completely different.

17 Q. So you're -- okay. So what you're saying is
18 because DRP hadn't yet been liquidated, that the cases that
19 we cite to have no applicability, even though facts are
20 almost identical and the Courts' ruling is the total
21 opposite? That's your distinction?

22 A. (No translation.)

23 Q. So what -- what authority do you have --

24 (Interruption.)

25 Q. I think he said, yes.

1 A. I said that both 2021 Resolutions are different
2 legal situations as of the one in 2011.

3 Q. Right. So what Authority, Legal Authority can
4 you point us to that says that when a company is in
5 bankruptcy, liquidation, one set of rules apply versus when
6 a company is in bankruptcy, almost liquidation, they don't?

7 A. In Perú, when the bankruptcy law is applied, we
8 are no longer talking about bankruptcy. Bankruptcy is the
9 final, final stage in the life of a corporation. It is the
10 very final stage. It's no longer a bankruptcy proceeding.
11 That would be an administrative proceeding, but with very
12 specific characteristics. If you give me two minutes, I
13 can explain to you the difference between the previous
14 regime of the Bankruptcy Law and the current one. If you
15 authorize me, I think that it would be very important to
16 clarify, because INDECOPI is the one --

17 Q. And as -- has been stated many times, your lawyer
18 will have a chance, if you feel like you haven't had an
19 opportunity to fully explain yourself, I promise you, you
20 will get that chance, if they ask you. Okay? So please
21 don't -- you know, be patient with me, and let's try to go
22 question and answer. All right?

23 A. I apologize.

24 Q. So you realize that in the two cases that
25 Mr. Schmerler cited, that you did not, both of those

1 involved the MEM seeking a credit in bankruptcy for the
2 amount of the Bond?

3 A. But MEM's attitude is completely different from
4 the one that we see in 2011. That's the reason why we
5 understand their petition or their situation is different.
6 And if you allow me, I hope you take the Article of 2011.

7 Q. Let's compare and contrast the two situations.
8 So in the 2011 bankruptcy against DRP, the MEM said they
9 were entitled to a credit -- I mean -- yeah, a credit in
10 the bankruptcy for compensation in the amount of an
11 estimate that DRP gave to complete the Sulfuric Acid Plant;
12 right?

13 A. Yes.

14 Q. And in the two cases that Mr. Schmerler cites,
15 that you don't cite, the MINEM was seeking a credit in
16 bankruptcy for the amount of the Bonds that the mining
17 Company should have put up to close the mine but didn't;
18 correct?

19 A. Yes. Correct. But if you allow me, I can
20 explain.

21 Q. Sure. Please explain.

22 A. I want to mention the following: The regime that
23 replaced the bankruptcy law that exists in Perú as of 1992
24 that is part of a completely different legal framework, is
25 a stage when there was an attempt to control

1 hyperinflation, and the crisis of an administration -- that
2 is, Mr. Fujimori's administration. So the framework is
3 completely different. It is a Decree Law. What does it
4 mean? That Congress was shut down and, with the authority,
5 Mr. Fujimori passed Decree-Law 25,886, August 1992. This
6 is not a law approved by Congress, so the attitude was
7 completely different. And let me tell you, in a way we
8 needed to -- there was a need to revitalize or make
9 decisions so as to foster the recovery, the economic and
10 financial recovery of the society and of the corporation
11 and for the activities to continue. And I am speaking here
12 with knowledge, but some lawyers were invited by Mr. Carlos
13 Torres, who was a Minister back then, who was also a Dean
14 at the University of Lima. We were asked to attend a
15 meeting to give an opinion on the Decree Law of 1992.

16 Do you know why I tell you this? Because the
17 regime is so specific that this was not mentioned. Before,
18 it was only the judiciary, the one that could go into the
19 termination of a company bankruptcy, but that is not the
20 case. But when INDECOPI was created in 1990 -- 1992, has
21 powers. It has powers that usually are not discussed, not
22 only to issue resolutions, to issue declaratory judgments,
23 but also ones that have to do with the Constitution. And
24 also the financial-economic solution. So the powers of
25 INDECOPI changed completely when the Bankruptcy Law was

1 abrogated and when a completely different regime, the one
2 in force, was created.

3 Q. Okay. B.B., will you put up my Opening Statement
4 slide. No. No. It's the slide that we showed
5 Mr. Schmerler right off the bat. There we go.

6 Will you highlight the second bullet? Yeah, that
7 one.

8 Mr. Hundskopf, do you see the
9 highlighted -- well, I'll read it in Spanish. It
10 says: "Article 4 of Decree-Law Number 26116 requires
11 creditors to prove the existence, origin, legitimacy, and
12 amount of their credit."

13 Are you familiar with that standard?

14 A. Yes.

15 Q. And that standard existed in 2012?

16 A. Exactly. Precisely. Article 4.

17 Q. And existed in 2021?

18 A. Umm-hmm.

19 Q. Yes?

20 A. Yes.

21 Q. And it existed today?

22 A. Yes. But, please, the Decree-Law has been
23 replaced by another one. 26116 has been replaced with
24 another one.

25 Q. But the concept remains the same. It's the same

1 concept.

2 "Yes" or "no"?

3 A. Yes, but you are asking me whether the -- not the
4 Decree. The concept is the same. The attitude of INDECOPI
5 is just evidentiary. They are trying to fight, fight for
6 the consolidation and the continuity of the Companies, but,
7 if that is not possible, they liquidate the Company. But
8 it is an administrative proceeding. It is not a judicial
9 one. And I am speaking because I have experience with
10 INDECOPI.

11 Q. Okay. And I'm not trying to be disrespectful to
12 you, and I'm not trying to say that you don't have
13 experience, but I have limited time, and when you give
14 lengthy explanations, you're eating away at my time, which
15 is valuable. So if we could have simple Q&A, that would be
16 very appreciated. And I only have one other topic to
17 cover.

18 So you talk a lot in your Report about the actual
19 activities of the Creditors Committee in this case?

20 A. It's not a committee. It's a Board.

21 Q. Okay. I'm sorry. The Board.

22 And the Board was made up of creditors?

23 A. Yes.

24 Q. You have to answer out loud for the Court
25 Reporter.

1 A. And the Ministry of Energy and Mines was the main
2 Creditor with 31 percent.

3 Q. Exactly. But the Ministry of Mines was in
4 a -- all the other Creditors, they were simply just
5 creditors. They wanted to get money back from the debtor;
6 right?

7 A. That is correct, but let me explain something, if
8 you allow me.

9 Q. No. I'm not allowing. Okay. I'm sorry. I'm
10 not allowing. So let's continue.

11 The MEM -- the MEM had two hats. They were an
12 alleged creditor, but they were also the governing body for
13 what the mining companies could and could not do; right?

14 A. Yes. Yes.

15 Q. So if the MEM imposed a rule or a law, for
16 example, that said that DRP was not allowed to operate
17 until they met an environmental standard that was
18 impossible to meet, they could thwart any Plan of
19 Reorganization through the regulatory powers; true?

20 A. Clearly, there was a positive interest by the
21 MEM. The MEM was a creditor, and they needed to present
22 themselves and be recognized as such. And it is completely
23 correct because there is a -- public and private creditors
24 are both creditors, and they both participate in the Board.

25 Q. I understand that. But my point was that the MEM

1 had special powers of regulation that none of the other
2 Creditors had; is that true?

3 A. Correct. They had several offices -- several
4 offices, but, once again, they are protecting a company so
5 that it doesn't get dissolved, it later on gets liquidated,
6 but that is a different story. There might be an
7 assignment, but that is a different story. But the
8 Ministry of Energy and Mines presents itself as a creditor
9 because that's what it was, and that's why there was a plan
10 within the financial sector. The request is the same. The
11 petition is the same. The one presented by Doe Run in
12 November 2010.

13 Q. So I think what I just heard was that the MEM,
14 through its Regulatory Authority, could help the debtor
15 come out of bankruptcy, or it could force the debtor to
16 liquidation. It had that power.

17 A. In the letter of November 2010 --
18 (Interruption.)

19 MS. GEHRING FLORES: -- Of what the Witness said.

20 MR. SCHIFFER: I don't -- that's a speaking
21 objection which --

22 (Comments off microphone.)

23 MR. SCHIFFER: It's a speaking objection.

24 MS. GEHRING FLORES: And that might exist in U.S.
25 practice, but --

1 MR. SCHIFFER: Your side raised it.

2 PRESIDENT SIMMA: I think the Transcript needs
3 clarification. So what do you need precisely?

4 MS. GEHRING FLORES: I said that's
5 mischaracterizing. I'm saying that Mr. Schiffer
6 mischaracterized what the Witness had said. So if
7 Mr. Schiffer wants to read back what the Witness said from
8 the Transcript, he can. We have a LiveNote.

9 MR. SCHIFFER: Okay. I understand that
10 Ms. Gehring Flores doesn't like leading questions here, but
11 I'm entitled to do it, and the Witness is free -- he was
12 shaking his head, yes, in answer to my question. And
13 before he could verbalize the yes, Ms. Flores jumped in to
14 give him a speaking objection, which Mr. Pearsall took me
15 to task for the other day. So I would say what's good for
16 the goose is good for the gander.

17 In other words, if she wants to make an argument,
18 then we need to excuse the Witness, and you can make your
19 argument. But I would like to proceed with my questions,
20 because you're burning my time now.

21 MS. GEHRING FLORES: I'm only asking you to use
22 the Transcript to say back to the Witness what the Witness
23 said.

24 MR. SCHIFFER: And I refuse to -- I am refusing
25 to do that. So I'm going to ask my question.

1 MS. GEHRING FLORES: That's it. I guess we could
2 hear from the President of the Tribunal to see what he
3 thinks.

4 PRESIDENT SIMMA: At the moment this occurred, I
5 looked at the text because I had a problem understanding
6 the longer quote that precedes your exchange. But is it
7 worth, let's say, spending more time on this? Can we just
8 go on? I think -- I didn't --

9 MS. GEHRING FLORES: I think we can go on if
10 Mr. Schiffer would quote back to the Witness what the
11 Witness -- the words of the Witness from the Transcript and
12 not mischaracterize what he said.

13 PRESIDENT SIMMA: Yes. Why don't you just -- is
14 that a big problem?

15 MR. SCHIFFER: It actually is not how this works,
16 in my experience. She does not get to tell me how I get to
17 ask my questions. If she wants to clarify with the
18 Witness, she has a chance to do that on redirect. I'm
19 doing cross-examination, which is -- you know, which is
20 always hard because you usually have a witness that doesn't
21 want to give you answers that you're looking for. And I
22 would just like to have my last question read back, and he
23 can -- he can give a verbal answer to the physical answer
24 that he was giving, and I think he even said, "correcto,"
25 but I could be wrong. And then that's probably the last

1 question I've got.

2 PRESIDENT SIMMA: Can you just ask this question?

3 BY MR. SCHIFFER:

4 Q. Question: "So I think what I just heard is that
5 the MEM, through its Regulatory Authority, could help the
6 debtor come out of bankruptcy, or it could force the debtor
7 to liquidation. It had that power."

8 A. I apologize. There was no bankruptcy. There was
9 no bankruptcy in 2011. There was no bankruptcy. The
10 procedural Law on Bankruptcy was abrogated in August. The
11 Bankruptcy Law was a judicial proceeding. The procedural
12 Law on Bankruptcy is a judicial proceeding, and the
13 bankruptcy system right now is completely different. The
14 INDECOPI Regulations may be quasi jurisdictional. Of
15 course, they may be of a constitution and declaratory, and
16 they could be of justice too.

17 Q. So I think it's a matter of terminology. We're
18 not speaking the same language, and that's my fault.

19 What would you call the procedure that DRP was
20 going through back in 2012?

21 A. It was a bankruptcy --

22 Q. Okay.

23 A. -- proceeding. The bankruptcy proceeding has two
24 paths, the reactivation or the dissolution, but not
25 bankruptcy.

1 Q. Okay. So the MEM, we established, has regulatory
2 power; true?

3 A. Yes.

4 Q. And in a bankruptcy proceeding, whether the
5 debtor goes into reorganization or liquidation depends on
6 the Plan of Reorganization, doesn't it?

7 A. It is the Board of Creditors, the one that makes
8 the decision, and the MEM was a recognized creditor. It
9 was legitimate, 31 percent.

10 Q. I understand that. But what the Board would have
11 to approve or disapprove is a Plan of Reorganization
12 submitted by the debtor. Isn't that how it works?

13 A. Yes. That's the way it was. In three stages:
14 First, there was an attempt to reorganize. It did not
15 work. They moved onto liquidation; and then to a third
16 stage, they went back to reactivation; and, finally, they
17 went into liquidation. It is a historical process that
18 is -- has been proven.

19 Q. So I'm going to ask you this hypothetically
20 because I don't think this question is within your area of
21 expertise, but I want to apply it to the bankruptcy law.

22 So assume that the MEM had an environmental
23 standard that it required the debtor to meet, but no one
24 could meet it, and that, as long as the debtor's plan
25 didn't show that it was going to meet the standard, they

1 weren't going to allow the debtor to continue.

2 Now, in that case, there would be really nothing
3 to vote on; right? The plan is dead in the water.

4 Is that -- under that hypothetical --

5 MS. GEHRING FLORES: Excuse me, I think this
6 question was started with, "this goes outside the area your
7 expertise."

8 MR. SCHIFFER: Hypothetically --

9 MS. GEHRING FLORES: Well, is it or is it not?

10 MR. SCHIFFER: Ms. Gehring, you don't -- you are
11 abusing this process. And I am sorry, but this is, you
12 know, beyond the pale.

13 I said -- my question was: I'm asking you to
14 hypothetically assume that the MEM was enforcing a law that
15 made the debtor's Plan of Reorganization dead in the water.
16 Okay.

17 PRESIDENT SIMMA: Mr. Schiffer, sorry for
18 interrupting, but I have -- at least, I have the impression
19 that this question -- I cannot agree with you on that.
20 That an expert on bankruptcy law would not be -- it would
21 not be, let's say, capable of giving an answer to the
22 question.

23 MS. GEHRING FLORES: I'm not saying that he's not
24 capable of answering a hypothetical. I'm just
25 stating -- restating what Mr. Schiffer started his question

1 with, which was: "This is outside your area of expertise
2 but," and so, if he's going to ask a hypothetical that is
3 outside the area of expertise of the Expert, I am
4 Objecting. Even if it is a hypothetical.

5 MR. SCHIFFER: Okay. Can I read my question back
6 verbatim? Because -- and may I ask that this not go
7 against my time because -- I mean, I would be finished by
8 now if it weren't for Ms. Gehring Flores's continued and
9 constant interruptions. I have to find the question.

10 BY MR. SCHIFFER:

11 Q. "So I'm going to ask you this hypothetically
12 because I don't think this question is within your area of
13 expertise, but I want to apply it to the bankruptcy law."
14 Okay. That was the lead-in.

15 So I assume that the MEM had an environmental
16 standard -- excuse me. I'm asking him to assume that the
17 MEM had an environmental standard that required the debtor
18 to meet but no one could meet it, and as long as the
19 debtor's plan didn't meet this impossible requirement, then
20 the plan -- then the MEM wouldn't allow the plan to go
21 forward. Okay. I'm asking to assume that.

22 My question to you is, have you ever seen before
23 in bankruptcy where a governmental body is involved where
24 they have both a regulatory hat and a creditor's hat?

25 A. Oftentimes, in different areas in Perú, in the

1 fisheries section, in the shipping section, in all of the
2 areas, we see that because the State participates in the
3 area of fisheries. There is a Fisheries Ministry that is
4 called production in all of the sectors we see that.

5 But what I'm telling you is that, as of the
6 abrogation of the Procedural Law on Bankruptcy 1992, this
7 is no longer a judicial proceeding. This is an
8 administrative proceeding, but very special, very special
9 with qualities that were unknown before.

10 And what is the intent? We are trying to obtain
11 the necessary funds to pay -- to assume the cost and
12 expenses of the environmental protection in the area that I
13 think was very important.

14 Q. Okay. I'm going to shift gears.

15 Was the MEM obligated -- under the PAMA, was the
16 MEM obligated to complete the Sulfuric Acid Plant?

17 Did it have that affirmative obligation?

18 A. There are stages. There were some studies that
19 were conducted, but, at some point, Doe Run was not paying,
20 and, unfortunately, a decision -- an original decision, an
21 initial decision for projection continuity had to be
22 changed. And they moved on to the liquidation of the
23 Company, and then, clearly because of the liquidation
24 entity, they went back to the reorganization and
25 reactivation.

1 Q. Okay.

2 A. And then on the fourth step.

3 Q. And then my question: If you look at PAMA, which
4 you say you've looked at, is there an obligation on the
5 part of MEM to complete what the mining company doesn't
6 finish? There is?

7 A. In the PAMA, there was a plan, a progressive plan
8 of investment to get to the final stage, and the issue
9 became frustrated because I think the whole thing would
10 have been very successful. I'm sorry I have to answer this
11 way, but I'm telling you the truth.

12 There were prior stages, and in the last stage
13 they stopped contributing, and since they stopped paying,
14 the Creditors Committee had to reorganize; right?

15 Q. My question -- one more time, and then I'll quit
16 after this, I promise, no matter what you say.

17 Did you ever see an obligation by the MEM written
18 out in the PAMA that says that, if DRP defaulted, that the
19 MEM would have to finish what DRP didn't finish?

20 A. Yes. Well, I have not seen that, personally
21 speaking, but I have read the letter of November 2010. And
22 this is mentioned in the First Instance Resolution of
23 INDECOPI and in the appeal stage as well and in many
24 writings, and they talk about a debt that Doe Run had that
25 had to be overcome. And an important part of all this was

1 the protection of the environment.

2 Q. Did you ever see anything, anything in writing,
3 where the MEM said: "We want this credit so we can finish
4 the plant"? Anything? Any letter? Anything?

5 A. I have never been a public servant at a Ministry,
6 but I'm sure that they had requirements of all kinds. I'm
7 sure.

8 Q. I presume. I'm asking what you have seen in this
9 case.

10 Have you seen any document where the MEM
11 explained that: "We want a \$163 million credit so we can
12 finish the Sulfuric Acid Plant"? Have you ever seen those
13 words or words to that effect?

14 A. That amount was not stated by the MEM. It was
15 put by Doe Run in a letter of 2010, letter of 2010, by Doe
16 Run, and the 160-odd million -- well, that was evidenced
17 point by point. 163-odd million, and one of these points
18 was the financing for environmental purposes. Full stop.

19 Q. Mr. Hundskopf, do you understand your role here
20 today? Are you here to be an objective expert, or are you
21 here to be an advocate for the Republic of Perú?

22 I'm just curious what you think your role is.

23 A. With all due respect, sir, what I'm doing is I'm
24 ratifying and reiterating what I have said in my First
25 Report of March 22, my Second Report of March, and if you

1 read those, you are going to see that there is no
2 contradiction in my statements. I ratify what I have said.
3 I insist, with all due respect, sir.

4 Q. Okay. I'm going to try one more time on this
5 question, and let's not quibble with numbers. Have you
6 seen anywhere where the MEM said that: "We want a credit
7 in bankruptcy so that we can complete the Sulfuric Acid
8 Plant"?

9 A. The requirement was Doe Run's requirement. The
10 Committee of Creditors accepted this.

11 Q. Okay. So if, assuming that I'm right and that
12 the MEM had no intention of actually performing the work
13 itself, can you explain why it would want to be a creditor
14 in the bankruptcy?

15 A. It's not that it wanted to be a creditor. It was
16 a creditor. It was a creditor, of course. Why is it a
17 creditor? Because there was a communication supported by
18 lots of material by Doe Run, and they set the 163 million,
19 and this is not a figure that was set by the MEM. I have
20 to say that.

21 MR. SCHIFFER: Those are all the questions that I
22 have, Mr. President.

23 PRESIDENT SIMMA: Thank you, Mr. Schiffer.

24 I give the floor to Perú for the redirect. It's
25 going to be Ms. Flores.

1 MS. GEHRING FLORES: Thank you. Thank you,
2 Mr. President. No questions.

3 PRESIDENT SIMMA: Thank you very much.

4 So question to my colleagues?

5 ARBITRATOR GRIGERA NAÓN: No questions.

6 PRESIDENT SIMMA: On the part of colleagues.

7 Okay. So we are over the -- overtime with regard
8 to the coffee break, but maybe we just have a -- let's have
9 a quick look at what remains to be done, if anything, needs
10 to be done or can be done.

11 Sorry, Mr. Hundskopf, you are excused.

12 THE WITNESS: May I step down, sir? With all due
13 respect, may I step down?

14 PRESIDENT SIMMA: Yes, please.

15 THE WITNESS: Thank you very much. Thank you
16 very much for the opportunity that you have given me to
17 explain and supplement what I have written in my two
18 Reports. Thank you.

19 (Witness steps down.)

20 PRESIDENT SIMMA: Thank you. Okay. Now, you are
21 free. But can we -- so my point is, the next witness is
22 Madam Alegre Chang. I overheard, so she must be --

23 MS. GEHRING FLORES: Ms. Alegre.

24 PRESIDENT SIMMA: Okay. Is she -- would she be
25 available?

1 MS. GEHRING FLORES: She is in transit.

2 PRESIDENT SIMMA: In transit.

3 MS. GEHRING FLORES: From Perú.

4 PRESIDENT SIMMA: Okay.

5 MS. GEHRING FLORES: So we were not contemplating
6 at all that she would come up today, and we apologize for
7 that, but she is -- she is on her way, but she won't arrive
8 until tomorrow.

9 MR. RODRÍGUEZ: So we have no choice, even if we
10 are full of expectations, it is to bring this to an end;
11 right? So instead of coffee break, you can go where you
12 want.

13 And we need to be very disciplined next week, so
14 we have one of the Experts per day plus Ms. Chang. So we
15 will see each other again on Monday at 9:30.

16 MR. PEARSALL: Just before we break,
17 Mr. President, as has become my custom, can we just check
18 the time of the day? Thank you, sir.

19 PRESIDENT SIMMA: Okay.

20 SECRETARY DOE: Unfortunately, I'm going to have
21 to disappoint because, of course, we did have all those
22 objections, and we have a pending request, as to the
23 allocation of time. So I think I'm going to have to get
24 back to the Parties by email after the Tribunal has been
25 able to discuss exactly what to do with that.

1 MR. PEARSALL: Should we handle the -- does
2 Mr. President want argument on whether objections should be
3 included within the allotment of time, or would the
4 Tribunal just like to take that on its own and give us a
5 ruling? Obviously --

6 PRESIDENT SIMMA: Does PO10 say something?

7 SECRETARY DOE: It does. It allocates the
8 objection against whoever loses on an objection.

9 PRESIDENT SIMMA: So who lost the objection?

10 SECRETARY DOE: Well, from my part, I'm not even
11 sure if we have one, two, three, or four objections to deal
12 with. But that's where I'm not sure I'm in a position to
13 say with certainty exactly --

14 MR. PEARSALL: Understood. Well, you have
15 two hours of working time to figure that out for us,
16 Mr. President.

17 PRESIDENT SIMMA: So you're going to get an
18 answer by email?

19 MR. PEARSALL: No rush. No rush. Up to you,
20 sir.

21 PRESIDENT SIMMA: All right. So that was humor,
22 the last.

23 MR. FOGLER: Mr. Doe, I think the objections are
24 immaterial to the total length. Can you give us just a
25 feel for overall? That way we'll have at least a working

1 number to go with.

2 MR. SCHIFFER: I'll make this even easier because
3 I don't want the Tribunal to have to deal with this. It's
4 picky. So I will withdraw my request to have her
5 objections count against my time because it is -- we're
6 going to be fine with time. I'm not worried about us.

7 PRESIDENT SIMMA: I could imagine that would be
8 helpful for both sides to get what you call a "feel," and,
9 you know, Martin, just a feel.

10 SECRETARY DOE: In that case, the total amount of
11 time that the Claimant has used is 7 hours and 18 minutes;
12 and the Respondent has used 11 hours on the dot.

13 MR. PEARSALL: Thank you.

14 PRESIDENT SIMMA: Okay. Have a good weekend.

15 (Whereupon, at 3:14 p.m., the Hearing was
16 adjourned until 9:30 a.m., Monday, March 11, 2024.)

POST-HEARING REVISIONS

CERTIFICATE OF REPORTER

I, Dawn K. Larson, RDR-CRR, Court Reporter, do hereby attest that the foregoing English-speaking proceedings, after agreed-upon revisions submitted by the Parties, were revised and re-submitted to the Parties per their instructions.

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.


Dawn K. Larson