

ALSO PRESENT:

MS. CATHERINE KETTLEWELL
Secretary to the Tribunal

Realtime Stenographer:

MR. DAVID A. KASDAN
Registered Diplomate Reporter (RDR)
Certified Realtime Reporter (CRR)
B&B Reporting/Worldwide Reporting, LLP
529 14th Street, S.E.
Washington, D.C. 20003
United States of America

SRA. MONIQUE FERNÁNDEZ
SR. RODOLFO RINALDI
D.R. Esteno
Colombres 566
Buenos Aires 1218ABE
Argentina

Interpreters:

MR. DANIEL GIGLIO
MS. SILVIA COLLA
MS. MONIQUE FERNÁNDEZ

APPEARANCES:

On behalf of the Claimant:

MR. HERNANDO DÍAZ CANDIA
MR. RAMÓN AZPÚRUA
MS. GABRIELLA HORMAZABAL
MR. SEBASTIÁN ORDOÑEZ
MR. MIKEL del VALLE-CORONA
WDA Legal
848 Brickell Avenue
Suite 1000
Miami, Florida 33131
United States of America

Party Representatives:

MR. [REDACTED]
Founder

MS. [REDACTED]
Finance Manager

APPEARANCES: (Continued)

On behalf of Respondent:

MS. VANESSA RIVAS PLATA SALDARRIAGA
President, Special Commission that
Represents Peru in International
Investment Disputes

MR. JHANS PANIHUARA ARAGÓN
Counsel, Technical Secretariat to the
Special Commission that Represents Peru in
International Investment Disputes

MR. GINO CAMPAÑA ALBÁN (remote)
SUNAT's Representative before the Special
Commission

MR. JUAN FALCONÍ GÁLVEZ (remote)
Ministry of Justice's Representative before
the Special Commission

MR. PATRICIO GRANÉ LABAT

MS. MÉLIDA HODGSON

MR. ÁLVARO NISTAL

MS. KATELYN HORNE

MR. TIMOTHY SMYTH

MS. CRISTINA ARIZMENDI

MR. PETER SABAN

MS. ANDREA MAURI PARICIO

MS. PALOMA GARCÍA GUERRA

MR. AGUSTIN HUBNER

MR. ANDRÉS ÁLVAREZ CALDERÓN

Arnold & Porter, LLP

601 Massachusetts Avenue, N.W.

Washington, D.C. 20001

United States of America

MR. JORGE LAZO (remote)

MR. ROCHAR ALLEMANT (remote)

MR. JOSE JARAMILLO (remote)

Lazo Abogados

Pardo y Aliaga 699, San Isidro Lima

Gobierno Regional de Lima LIMA, 27

Peru

APPEARANCES: (Continued)

On behalf of the United States of America:

MR. DAVID BIGGE
MS. MELINDA E. KURITZKY
Office of the Legal Adviser
United States Department of State
Washington, D.C. 20520
United States of America

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1 MR. DÍAZ-CANDIA: Yes, I plan on speaking
2 for about one hour, and then at that moment we can
3 take that break, if that's okay with the Tribunal.

4 PRESIDENT McREA: That sounds fine.

5 REALTIME STENOGRAPHER: Thank you.

6 PRESIDENT McRAE: Let's start with the
7 Claimant's Closing.

8 Mr. Díaz.

9 MR. DÍAZ-CANDIA: Thank you very much. Can
10 we please start with the projection.

11 CLOSING ARGUMENT BY COUNSEL FOR CLAIMANT

12 MR. DÍAZ-CANDIA: Good morning, Members of
13 the Tribunal, representatives from the state of Perú
14 and law firm of Arnold & Porter, the representatives
15 from the United States, our celebrity Court Reporter
16 in the back, the Translators, the Secretary,
17 representatives of the United States, and all other
18 support staff in this Arbitration.

19 I will speak about jurisdiction and the main
20 facts of the case for approximately one hour, as I
21 mentioned. Then my colleague, Ramón Azpúrua will
22 cover applicable law, and at the end my colleague,

1 Gabriella Hormazabal will finish with damages
2 including causation.

3 At the beginning of this Arbitration, and I
4 made reference that we have felt that we are in a
5 fight of David against Goliath. Now, I want to
6 mention another related idea, which is, in our view,
7 the structural prejudice that we feel in the
8 investment-arbitration system in favor of States. I'm
9 not referring to this Tribunal or any tribunal in
10 particular, but the reality is that it's not easy
11 psychologically for a human being to rule against a
12 sovereign State in favor of a private investor. We
13 have heard the arguments that the Government of Perú
14 has put forward here regarding the environment,
15 mercury, the well-being of children and fetuses, et
16 cetera. We all care about that, and that's why Kaloti
17 Metals followed and respected the laws of Perú.

18 But that background of being a sovereign
19 country with millions of people has in our view
20 created this structural prejudice in favor of States.
21 ICSID would not exist without States, Member States.

22 Approximately in the beginning of the 2000s

1 and probably until 2012, there were a number of
2 decisions that, in our view, were correct on liability
3 but that probably some of them exceeded or were a bit
4 lax on quantum. That prompted a reaction, a political
5 institutional reaction from the States. There was a
6 famous article dated 2012 of dubious scientific value,
7 in our view, but it became--I wouldn't say "viral"
8 because our community is relatively small, but it made
9 the rounds. It was called "Profiting from Injustice."
10 And it says, literally, the subtitle "How law firms,
11 arbitrators, and the system has profited unjustly from
12 the system and the States." A pushback came from
13 several countries, Venezuela denounced the ICSID
14 Convention. Bolivia and Ecuador denounced all its
15 bilateral investment treaties. They put political
16 pressure and, indeed, this had an effect, in our view,
17 of all the correction of the system as a whole. And
18 we ask you to please put aside that potential
19 cognitive bias that we're not saying that you have, we
20 are referring to the system as a whole, and focus only
21 on the rule of law in this case; focus on the facts
22 and the Treaty that is applicable in this case.

1 I'm going to start with jurisdiction. Our
2 main point here, and I'm just going to repeat it from
3 my Opening Statement--is that Perú should not be
4 allowed to present a labyrinthic argument that no
5 treaty breach occurred ever, meaning that it did not
6 occur before April 30, 2018, but if it did occur, it
7 was before that day. Again, I want to confirm and
8 read for the record that an Investor cannot be obliged
9 or deemed to know of a breach before it occurs.

10 At the jurisdictional stage, a tribunal must
11 be guided by the case as put forward by the Claimant
12 in order to avoid breaching the Claimant's due-process
13 rights. To proceed otherwise is to incur the risk of
14 dismissing the case based on arguments not put forward
15 by the Claimant at a great procedural cost for that
16 Party. It is for the Investor to formulate its case
17 of the relevant breaches as it sees fit. It is not
18 the place of the Respondent State to recast those
19 claims in a different manner of its own choosing. The
20 Claimant's claim accordingly must fall to be assessed
21 on the base in which they are pleading. We here have
22 not alleged a number of individualized breaches. We

1 have alleged creeping progressive breaches of
2 Article 10.3, 10.5, and 10.7 of the Treaty. Not
3 particular individual acts. And their legality under
4 Peruvian law is for the Peruvian Legal Expert to
5 analyze. We're asking you to see these breaches in
6 their totality, in their conjunction, as they
7 crystallized after April 30, 2018.

8 In connection with the *ratione materiae*
9 objections that Perú has made in this case, first, I
10 want to make very clear that Perú has made reference
11 to two related but separate or different investments.
12 One is the inventory of gold that was physically
13 invaded and taken by Perú. We pose to you that that
14 in and of itself was an investment.

15 No. 2, the going concern enterprise that
16 operated inside Perú until 2018. They are related at
17 least in causation because the loss of the inventory
18 necessarily meant the loss of the going concern. One
19 served the causation of the second. There are two
20 separate investments. And in connection with the
21 Investments inside Perú, Professor Knieper made a
22 question about commercial contracts not being

1 protected as investments. And we said that we agreed
2 with that general proposition in and of itself, but
3 investments for purposes of the Treaty are normally
4 structured including commercial contracts. In this
5 case, Kaloti entered into a lease of an office that it
6 operated in Perú until 2018. It rented an apartment
7 that it had inside Perú until 2018. It had
8 relationships with the personnel until 2018.

9 But Kaloti is not complaining here that Perú
10 took away the lease Contract or that Perú took away
11 the use of the apartment. Again, we have to relate
12 that to what Mr. Chodorow said yesterday. Those--and
13 Perú has criticized that those were minimum
14 disbursements of the word "tooling" and hence did not
15 demonstrate a commitment. Mr. Chodorow mentioned
16 yesterday that the cost of the Investment, the sunk
17 costs, normally do not represent the Fair Market Value
18 of the ongoing concern of the Investment. This was a
19 going concern that actually produced revenues for
20 Kaloti Metals as a minimum in the real world until
21 2018. That operation, the going concern, is the
22 Investment, not the individual contracts that

1 were--that surrounded or through which the Investment
2 was structured.

3 We ask you to read Article 10.28 of the
4 Treaty in accordance with the Vienna Convention of the
5 Law of Treaties. Give a plain reading, a natural
6 reading of the words of this Article. This Article
7 refers--.Perú has contested multiple times that Kaloti
8 did not acquire title over the gold. Under this, we
9 did, Kaloti did, in fact, and we have proven that in
10 this Arbitration.

11 However, even if there were problems of
12 title allegedly, which, in fact, there were none,
13 under Peruvian law, it is unquestioned that Kaloti had
14 the control of this gold, physical control of this
15 gold at the offices of Kaloti in Hermes. Had it not
16 been for the Measures of Perú, Kaloti would have sent
17 that gold to Miami, and Kaloti would have profited
18 from the export of that gold that was expropriated in
19 2018. Kaloti made a significant contribution to the
20 development of Perú, sent substantial amounts of money
21 to banks in Perú, paid substantial amounts of money to
22 producers or Sellers of gold inside Perú. And this

1 enterprise had a very significant profit between--in
2 Perú or derived from the operation in Perú, and then
3 we can talk about how and where that was taxable,
4 which is a totally different issue; but these were
5 derived from that investment--investments--inside,
6 physically inside, Perú.

7 We want to beware of terms like
8 "investments" or "trading" that some of the Quantum
9 Experts have used in this Arbitration. The term
10 "investment" for purposes of the Treaty does not
11 necessarily equate what financial analysts, The Wall
12 Street Journal or other people call an "investment."

13 For instance, in the case that is on the
14 record about a commercial residence in South Korea
15 that the Tribunal found that that was not an
16 investment. I'm 100 percent sure that if we saw the
17 Financial Statement of the owner of that house, that
18 was reflected as an asset. It was an investment for
19 other purposes. That's undisputable. For purposes of
20 that Treaty, the Tribunal found that it was not
21 acquired for commercial reasons and, hence, it was not
22 an investment.

1 Vice versa, accountants and economic
2 experts. A debt. They would probably not call that an
3 "investment" from the perspective of the debtor, the
4 borrower, that is going to be reflected in the
5 borrower's Financial Statements as a liability. For
6 those financial experts, that is not an investment.
7 An investment for the purpose outside the Treaty, it
8 may be an investment for the lender who put the money
9 there. That, for purposes of a treaty, still if this
10 is called a "liability" for different purposes, is an
11 investment for purposes of most, if not all, bilateral
12 investment treaties. The same with the term
13 "trading." We heard concerns and allegations that
14 Kaloti Metals was only a trader or broker of gold in
15 Perú. A trader can be someone like you find on Wall
16 Street. That it buys or it puts together a Seller and
17 a Buyer and facilitates the transfer of property from
18 that Seller to that Buyer, and then it gets a
19 commission, but it never takes title over the
20 underlying shares.

21 In business and in the commercial world, you
22 can also call a trader someone who takes property,

1 possession, and control over an asset or a commodity,
2 and then resells that asset to another person. This
3 is what happened in this case. Kaloti took physical
4 possession and control of the gold, title we claim
5 under Peruvian law, and then took risk of loss over
6 that Investment, transported it to the United States
7 as its own risk, and then it had the discretion to
8 resell it. It was mostly sold to [REDACTED]
9 Dubai, but it was also sold to other Parties,
10 including within the United States. Kaloti may have
11 been a trader for some senses or some meanings of that
12 word, but it was not a mere broker of gold in the
13 sense that it was not simply putting together a Buyer
14 and a Seller. Kaloti was a Buyer that took
15 possession, title, and risk of loss over this gold.
16 And this inventory was an investment for Kaloti
17 Metals.

18 Let's move to jurisdiction, continue with
19 jurisdiction.

20 And again, this is a point in the Transcript
21 where what I just mentioned is evident. The United
22 States, in its submission, on Monday said that an

1 investment, to qualify as such for purposes of
2 Article 10.28 of the Treaty, it can meet some but not
3 necessarily all of the requirements of that Article.
4 This is not what we're saying. This is what the
5 United States said on Monday. It can fulfill some or
6 all of the characteristics of an "investment." Just
7 read the Transcript on your own.

8 When did Kaloti Metals cease operations? We
9 think it's undisputed that the ongoing concern--the
10 going-concern business continued inside Perú until
11 2018. Mr. Chodorow, the Quantum Expert for
12 Respondent, said that--and this is on the record--that
13 Kaloti Metals purchased gold in Perú after April 30,
14 2018. This is what he said. This is not only what we
15 are saying.

16 Ms. [REDACTED], which is the portion of the
17 Transcript that you see on the left--said that there
18 were people inside Perú with authority to represent
19 the Company, who met with customers who had a role in
20 closing the transaction and purchase in gold--and
21 sourcing gold, who were physically inside Lima until
22 2018. And again, you can refer to the Transcript on

1 that issue.

2 Perú has criticized that, apparently--and I
3 don't know the answer--again, this is a taxation
4 issue--that if Kaloti Metals did not pay Income Taxes
5 inside Perú, it is because it did not have business
6 activities in that country. That is incorrect.
7 Taxpayers must pay Income Taxes when it has more
8 income than deductions, more revenue than expenses.
9 That is basic. It's not for me to explain.

10 But Mr. Chodorow agreed: as a high-level
11 matter, no. Tax laws are complicated. The question
12 was: "When a company has more expenses than revenue
13 in the country in which they work, do they pay taxes,
14 Income Taxes, once again?" And this was his answer:
15 [points to screen].

16 The fact that Kaloti Metals paid or not paid Income
17 Taxes in Perú has nothing to do with the fact that it
18 had actually an operation, a going concern, an
19 investment in Perú from 2012 and until 2018.

20 Again, continuing with the issue of the
21 statute of limitations, we ask you to read
22 Article 10.18 of the Treaty according to the plain

1 meaning of the words, and this provision is drafted
2 differently from other treaties. This provision says
3 that you have to have an actual breach of the Treaty,
4 and then actual damages connected specifically to that
5 breach, in Spanish, "por las reclamaciones
6 entabladas," not any damage or any potential damage.
7 The damage has to be actual, be irreversible, and be
8 connected to breach. This is what the Treaty says.
9 And we're telling you, throughout this Arbitration,
10 that whatever Kaloti Metals suffered as damages were
11 not irreversible until 2018. Mr. Chodorow admitted
12 before you yesterday that if Kaloti Metals had
13 received as minimum \$13 million dollars in 2018,
14 that would have put the Company into a positive-equity
15 position.

16 Mr. Smajlovic, in his written report says
17 that it is very likely that the going concern would
18 have survived after 2018 if it had received the gold
19 and been able to resell it, been able to pay [REDACTED]
20 [REDACTED], and been able to pay all the outgoings, if
21 they had received the gold before November 30, 2018.

22 So, the damages were not irreversible until

1 the Company closed the operations.

2 The same with the lost profits. The value
3 of the gold in 2018 was higher than the value of the
4 gold in 2013 and '14. And a company--no treaty breach
5 for expropriation can be found if the economic effect
6 is not permanent as it was not here until 2018. That
7 is when the damage became actionable in arbitration.
8 That's when the damages were incurred by Kaloti Metals
9 after April 30, 2018.

10 Perú has put two elements on the record to
11 contest that Kaloti Metals knew that a breach had
12 occurred. Again, that's not what Kaloti Metals
13 believed or anything. I will cover what Kaloti Metals
14 believed at that time. It's what actually occurred.
15 The breach has to be actual for the statute of
16 limitations to start running as a prerequisite.

17 This letter does not make reference to
18 Article 10.7 of the Treaty, the expropriation except
19 to say expressly that "an expropriation may culminate
20 in the future," meaning that it did not happen in 2016
21 or had not happened at that time.

22 The amparo that Kaloti presented before a

1 court. We heard first from the two experts, from
2 Mr. Caro and from Mr. Missiego, that that court has no
3 jurisdiction to adjudicate a breach of the Treaty.
4 This is what Mr. Missiego said: "I don't think a
5 constitutional judge would have gone into analyzing
6 the scope of the Treaty."

7 In any case, something can be an
8 expropriation for purposes of the Treaty that is not
9 an expropriation of purposes of Peruvian law, and vice
10 versa. Most civil-law countries, for purposes of an
11 expropriation, require an extinction or a termination
12 of formal title. Not in investment arbitration. In
13 investment arbitration, you can keep the Investment,
14 formal title, even perhaps possibly possession. But,
15 if the economic value is damaged permanently or the
16 owner is deprived of the value, that can be an
17 expropriation for purposes of the Treaty. It is not
18 the--the intention of the Measures is irrelevant,
19 particularly in an indirect or creeping expropriation.
20 The important thing, as all the case law confirms, is
21 the economic effect of the Measure, not the intent for
22 purposes of a treaty. In any case, no expropriation

1 occurred under Peruvian law, to the best of our
2 belief, in that year, because those particular
3 Measures that were challenged in the amparo were
4 lifted.

5 So, the gold was not retained by Perú under
6 those orders challenging the amparo. The amparo also
7 referred only to two shipments, not to the Five
8 Shipments. The amparo was withdrawn. Kaloti Metals
9 did not believe and never said for purposes of the
10 Treaty that an expropriation had occurred before 2018.

11 Again, something irreversible and permanent
12 is required for the purposes of the statute of
13 limitations. We heard here a discussion about the
14 write-off of the gold in 2018. Mr. [REDACTED] said that
15 it was an issue for the accountants to consider. When
16 Ms. Horne was cross-examining him, she made a point
17 that if the gold was not written off, it is because
18 Kaloti did not consider it lost.

19 A Financial Statement is a matter of
20 reporting. Even if something is carried out or
21 whether a technical write-off for accounting purposes
22 is required or not, that doesn't mean whether an

1 expropriation had occurred or not for purposes of the
2 Treaty. Mr. [REDACTED] said here, multiple times--and I
3 believe the other witnesses, too--that the loss, the
4 hope of getting that gold back was lost in 2018.

5 It's a fact that, according to that line of
6 questions, a write-off was not conducted before
7 November 30.

8 There is also another issue of why Shipments
9 No. 3 and Shipment No. 5 were not reflected in a
10 statement. And again, that may be an issue of
11 reporting, of what the accounting principles said, or
12 what a particular accountant was thinking at the time.
13 It has no determination or effect for purposes of the
14 Treaty.

15 Ms. Mélida Hodgson, on Monday, a very well
16 renowned investment arbitration lawyer and now an
17 international arbitrator herself, for purposes of a
18 statute of limitations, and when it's convenient, she
19 said expressly that this gold was lost in 2013 and
20 '14. She said: "This morning Claimant said that the
21 loss of the gold caused insolvency." Well, according
22 to her, "the gold was lost in 2013 and '14, not in

1 2018." So, Perú wants to say, for purposes of the
2 statute of limitations, the gold was lost in 2014.
3 For purposes of the insolvency and protection under
4 10.7, it was not lost because no formal write-off was
5 done in 2018. They cannot have the cake and eat it,
6 too. The reality is that this gold was taken under
7 Temporary Provisional Measures in 2013 and '18, and it
8 was not expropriated for purposes of the Treaty until
9 the Claimant was permanently deprived of value in
10 2018, specifically on November 30, 2018, when the
11 Company closed operations.

12 Perú, multiple times, has insisted that they
13 did not do anything concrete on that date. Omissions,
14 passive actions, abstentions can be used to consummate
15 a breach of a criminal expropriation and a breach of
16 Article 10.5 of the Treaty. Had Perú acted in
17 accordance with the legal obligations and returned
18 this gold to Kaloti, for instance, in August 2018,
19 something that the courts could have done sua sponte,
20 then the gold would not have been lost, and the going
21 concern would have survived.

22 Again, I refer you to the Fearn

1 International Case, when a Plant Manager finally shut
2 down operations and upon confirmation from the United
3 States State Department, that no profit-making
4 enterprise could continue under the circumstances in
5 Somalia, that's when the breach of international law
6 occurred, and the appropriate Valuation Date.

7 When asked about what is appropriate,
8 Mr. Chodorow and Mr. Nuñez, they simply were very
9 evasive. They claimed that the date, apparently, is
10 not November 30, 2018. We asked them multiple times,
11 "what is the date?" They didn't give us any answer.
12 It is not clear. There's not enough information.
13 They were very evasive on this point. And the reality
14 is that they were hired not to make an independent
15 assessment. They were specifically hired only, as
16 their Expert Report shows, to attack the Report of
17 Mr. Smajlovic, not to come with opinions, but simply
18 to say that the opinions and positions of
19 Mr. Smajlovic were wrong. That, in our view, is
20 advocacy, it's not the role of an independent expert.
21 They don't say what is the appropriate Valuation Date,
22 they don't take positions on many things, but they do

1 say that what Mr. Smajlovic did is wrong.

2 For instance, when they go to the point of
3 the news that adversely affected Kaloti Metals. Then
4 they say: "We have enough evidence to conclude that
5 it's likely that press articles relating to [REDACTED]
6 [REDACTED] Dubai, for things that occurred in 2012,
7 that is sufficient, we have sufficient conviction that
8 was an element of the loss of providers and reputation
9 for Kaloti Metals." When they are confronted by us
10 with specific news of articles regarding Kaloti Metals
11 in Perú, then they said "we don't have enough evidence
12 to conclude whether that was a factor or not. We
13 simply concede that it was possible." At least they
14 say "it's possible," but "we don't have sufficient
15 evidence to conclude."

16 Why can you conclude that the articles in
17 London are good but the articles in Perú are not?
18 It's an asymmetry, it's not coherent. That is an
19 advocacy position that they are taking in this
20 Arbitration.

21 You also heard about what press, what media
22 has more readers worldwide. Maybe in the media in

1 London, one of those companies, apparently owned by
2 Mr. Murdoch, has more readers worldwide, but which is
3 most read by Suppliers of gold in Perú? And the
4 answer is: El Comercio. Tell me who reads in Perú,
5 the BBC of London or El Telégrafo--I don't remember
6 the name of that particular article--what is important
7 is what they read in Perú, and El Comercio is one of
8 the mainstream newspapers in Perú. The closing of the
9 Bank's accounts occurred after that publication.
10 Issues that happened in 2012 were known in 2012, even
11 if we were presented here with articles that reported
12 those events in 2014 or 2019. The facts of those
13 cases relating to [REDACTED] occurred before--in
14 2012 or before, and Kaloti Metals bought a very large
15 quantity of gold in Perú in 2013 and significant
16 quantities until 2017, because the Company was active
17 and proactive in mitigating damages and the Company
18 fought and struggled until November 30, 2018.

19 Mr. Chodorow also commented that an
20 insolvency can be obtained when there are more
21 liabilities than assets, and he clearly stated, that
22 in his opinion, in 2018, this company was in a

1 negative-equity position. [REDACTED] said in
2 writing that it would not provide financing to Kaloti
3 Metals. This is when the Company filing for
4 bankruptcy--we never said that was required, we never
5 said we did it, but then they were asking the
6 Witnesses where is the evidence that you did it? We
7 didn't say we did it. Kaloti metals never filed for
8 bankruptcy anywhere. We said that it became de facto
9 bankrupt, and it became insolvent in 2018, and both
10 Quantum Experts confirmed this.

11 The hope for the return of the gold remained
12 in Mr. [REDACTED] mind and in the Company, and in the
13 minds of all of the employees, until 2018. He said it
14 multiple times: "I fought, I lost hope in
15 November 2018, and that's when I had to close the
16 Company."

17 Again, it is undisputed that this company
18 had operations, an office, an apartment, personnel in
19 Perú until 2018. That's a fact, not a matter of
20 opinion. Other witnesses confirmed that they left
21 Kaloti Metals only when the Company had to shut down
22 in 2018, and these are the portions of the Transcript

1 on which I would refer you to.

2 Ms. [REDACTED], again, made clear that the
3 people in Lima that were there until 2018 had a
4 significant role of the Company and had the
5 decision-making powers on behalf of the Company. They
6 could take clients, they could refuse clients. They
7 can initiate or complete closings that were sent to
8 her in Miami for purposes of completion in the system.
9 But this is what she said that that office did until
10 2018.

11 If all of this fails, then if the Tribunal agrees
12 with the United States that Article 10.18 of the
13 Treaty is rigid, then --and that a loss or a treaty
14 breach occurred before April 30, 2018, and damages--,
15 three requirements: An actual breach, actual losses
16 relating to that breach before April 30, 2018,
17 knowledge by Kaloti, and Article 10.18 is rigid. Then
18 you have to take into account the most-favored-nation
19 clause of the Treaty in Article 10.4.

20 This provision is very clear in what it
21 excludes. It only excludes dispute-resolution
22 mechanism, period. It doesn't exclude the application

1 of all the remaining provisions of the Treaty, the
2 substantive provisions of that Treaty. Procedural
3 rights cannot be artificially separated from the
4 substance. Is the United States and Perú saying--are
5 the United States and Perú saying that, after three
6 years, you lose the substantive protections under
7 Article 10.3, 10.5 and 10.7? Are they saying that?
8 And if not, if they don't consent to arbitration under
9 Article 10. 18, where would Kaloti Metals present the
10 Claims for substantive breaches after those three
11 years? If you conclude that entering into a treaty is
12 treatment for purposes of international law,
13 necessarily--and here is a case that refers that the
14 maintenance and the operation and having recourse to
15 international arbitration, is very much related to a
16 particular investor's maintenance and of an
17 investment, like the Suez and Vivendi Case against
18 Argentina confirm--, then you have to conclude that
19 the statute of limitations has to be combined with the
20 most-favored-nation clause in Article 10.4.

21 I'm going to move now to the facts portion
22 of the case.

1 Again, as I said on Monday, the essence of
2 this case relates to Five Shipments of gold. The
3 position of Perú in this Arbitration and the position
4 of the Peruvian authorities is simple: The first four
5 shipments, three of which were paid for and one of
6 which for which the Claimant--sorry, the Seller did
7 not contest the ownership by Kaloti, then Perú wants
8 to keep that gold permanently but under Provisional
9 Measures. That is another important point.

10 This case, in the substantive breaches of
11 the Treaty, cannot be combined with the potential
12 future decisions of Peruvian courts for two reasons:
13 One, the Tribunal has no jurisdiction to adjudicate
14 the alleged breaches of Peruvian law. But even if
15 that breach is confirmed next month by a Peruvian
16 court, that Decision is too little too late. The
17 treaties that rise under the Treaty were already
18 effected by Perú, irreversibly, even if they say
19 tomorrow that all this gold was illegal, which again,
20 is not what Perú is investigating. We heard from
21 Mr. Missiego that gold perfectly sourced can be used
22 for money-laundering purposes, and that what is being

1 investigated in this case is money-laundering not
2 against Kaloti, that would not mean that a crime was
3 committed or the title of this property would be
4 challenged under Peruvian law. The most important
5 thing is that eight year's lapsed and now it's too
6 late. They had to take a determination of whether a
7 crime was committed for purposes of the Civil Code
8 within a certain period of time. This cannot be an
9 open sword of Damocles, and nothing that this Tribunal
10 can decide. We heard from Dr. Caro, a final decision
11 saying that--about a crime occurred and not any
12 crime, a crime related to the obtention of that
13 particular asset. As Professor Knieper said, the
14 problem is when the gold was stolen or found lost.
15 Those are the two examples.

16 If the gold was legitimately sourced, which,
17 again, is not being investigated under Peruvian law,
18 there is no crime; and no Peruvian court under the
19 investigations can declare that there was illegal
20 mining, because what they're investigating is
21 money-laundering. And again, if money-laundering is
22 related or found by Peruvian courts, which hasn't

1 happened, that would not mean that the gold was
2 stolen, illegally sourced or found lost.

3 And also, that provision of the Peruvian
4 Civil Code needs to be combined with the provision of
5 the Peruvian Criminal Code, which I will cover later,
6 that protects good-faith purchasers when they acquire
7 the asset by what they call "onerous means." Onerous
8 doesn't means too expensive. Under Civil Law what it
9 means is non-gratuitous, not a donation, not a free
10 transfer. A transfer for valid--in exchange for valid
11 consideration, then we will see that Article later,
12 the good-faith purchaser is protected even if the
13 asset is of illegal origin, which again, in this case
14 was not, and is not something that Peruvian courts
15 will determine in this case.

16 We have gone multiple times over the
17 going-concern operations that Kaloti Metals had in
18 Lima, an office, a going concern, an apartment,
19 personnel inside the country until 2018. We have made
20 very clear that SUNAT made an intervention.
21 Mr. [REDACTED] explained that it was not out of his own
22 good heart that he decided not to export Shipment

1 No. 5. He testified that people from Talma and people
2 from SUNAT, when he went to meet them in person and
3 met them in person in Lima, told them--this is his
4 testimony--don't send Shipment No. 5 to the airport
5 because then we're going to immobilize it.

6 It's also undisputed on the record that
7 Shipment No. 5 was subject to seizures. We provided
8 evidence that at least during certain periods of time,
9 physical control of this gold was delivered by the
10 Government of Perú to Banco de la Nación and
11 specifically to CONABI. They can dispute that later
12 there was a decision from ██████ in 2022, but again
13 Measures affected this course, and it's not only the
14 Measures of Shipment No. 5, meant that Mr. ██████ had
15 not a free decision to export Shipment No. 5, but he
16 also received that message, and there were also
17 Measures later affecting Shipment No. 5. This is on
18 the record.

19 Again, the position of the government
20 authorities is whenever the Seller is not questioning
21 title, we keep the gold, we Perú keep the gold. When
22 the Seller is claiming before a court that they have

1 title, then the Seller can keep it. Shipment No. 5 is
2 legal, but Shipment No. 4 is ilegal, where is
3 Shipment No. 5 to this day? We don't know.

4 The Expert Witness, the Legal Expert for
5 Perú, and it's not frequently that counsel for
6 Claimant asks the Tribunal to pay very close attention
7 to what the Legal Expert for Respondent says, but here
8 we want you to do exactly that, and go through the
9 records and the Transcript and all the answers
10 provided by Mr. Missiego. He admitted that the
11 Measures were not notified to Kaloti. He also
12 admitted, he said there's no article setting a term
13 for the duration of the Measures as interim or
14 Precautionary Measures. But the Measures are subject
15 to the duration of the Criminal Proceeding. And,
16 under Peruvian law, under the old Code and the new
17 Code, the Criminal Proceeding have a limited duration
18 prescribed by law. Even if some courts don't follow
19 that term, it's still what the law says. There is a
20 limit, and there is a limit derived from the
21 Constitution of Perú, from the statutes of Perú, from
22 customary international law, the term of

1 reasonableness and fairness in the administration of
2 justice and for purposes of this Treaty under
3 Article 10.5 and others Treaties that we have invoked
4 under Article 10.4 as applicable in this case.

5 So, it is not correct that, under Peruvian
6 law or any law, these Measures could last seven or
7 eight years. That is simply not correct. And even if
8 you believe that this gold is illegal, again, which
9 it's not, no Peruvian court said that within a
10 reasonable time. They, for purposes of the Treaty,
11 they lost the opportunity to say that this gold is
12 illegal. They can say whatever they want for Peruvian
13 law purposes. But for purposes of this Treaty because
14 of the delay, Perú lost the opportunity to say that
15 this gold is illegal. And again, illegal mining and
16 illicit mining is not what is being investigated in
17 connection with this gold.

18 The property over the gold. On Monday, Perú
19 beat to the pulp the argument that there were no
20 contracts for the Five Shipments of gold. We heard
21 that multiple times. But, here--and we admit it is
22 true: there is not a piece of paper with the name

1 Contract signed by two Parties relating to each of the
2 Five Shipments. But Mr. Missiego told you that, under
3 Peruvian law, an oral contract is binding and it's
4 valid unless the law expressly requires otherwise, as
5 is the case normally for real estate, for instance.

6 But here, a simple conversation over the
7 phone would be a valid contract over these particular
8 Five Shipments. Not to mention that for Shipment
9 No. 5 there was a decision from a Peruvian court in
10 2022 declaring a contract terminated, so there was a
11 contract. That's the only conclusion that can be made
12 from that case.

13 If [REDACTED] had thought of claim that there was
14 no contract and that Kaloti was possessing that gold
15 without a contract, Shipment No. 5, they could have
16 filed an injunction, maybe an amparo, an interdicto
17 reivindicatorio (in Spanish) perhaps, which deals with
18 the possession. But no, they went for a termination
19 of a contract claim, so there was a contract
20 necessarily.

21 For the other shipments, again, there is no
22 piece of paper saying this is a contract, but there

1 are invoices, there is agreement on price, there's a
2 master umbrella agreement with terms and conditions
3 that applies to the individualized contracts. There
4 was physical delivery of the Five Shipments to
5 Kaloti's offices at Hermes. There were payments for
6 three of the Five Shipments. There is a contract for
7 each of those Five Shipments. And under Peruvian law,
8 and for purposes of the Treaty also, Kaloti Metals was
9 the owner of the Five Shipments of gold.

10 Kaloti qualified as a good-faith purchaser.
11 Kaloti not only qualified as a purchaser but as a
12 good-faith purchaser of the gold under Peruvian law
13 and for purposes of the Treaty. There are no
14 requirements, specific requirements, about the number
15 of documents or the particularity of documents that
16 Kaloti had--Kaloti itself had to have in its position
17 to verify the origin of the gold. Kaloti Metals had a
18 Compliance Manual beyond what Peruvian law required.
19 There is no legal norm in Perú that specifically
20 prescribed the documents themselves that Kaloti had to
21 say.

22 And even if the documents are not here

1 because the retention period expired or for other
2 reasons, doesn't mean that Kaloti did not verify the
3 origin of the gold. You heard the testimony from
4 Mr. [REDACTED] of what he did, you saw what is on the
5 record, that Kaloti verified the origin of the gold.

6 And most importantly, you have to take into
7 account, and we will see the quote later, in 2013-14,
8 there was an ongoing, unfinished plan that was under
9 implementation to formalize informal miners. That
10 meant that at least for some purposes certain
11 documents were not required under Peruvian law, and
12 they were by substituted by a declaración de
13 compromiso, a Declaration of Commitment. That may be
14 a reason why the documents are here. We don't know.
15 The argument that we're making is that there was no
16 specific documents that were required of Kaloti
17 Metals. There were some documents required for export
18 purposes, which is different than verifying the origin
19 of the gold. Kaloti Metals was diligent in verifying
20 the origin of this gold, and it was its own benefit to
21 verify the origin of the gold because it was going to
22 be exported to the United States and it was subject to

1 the laws of the United States on compliance and
2 anti-money-laundering. There is no reason to conclude
3 that Kaloti would have an incentive not to comply with
4 the laws. Ms. [REDACTED] was pressed on Monday about
5 the pressures that she received from Mr. [REDACTED] and
6 the implication was that maybe she became a bit lax
7 and turned a blind eye because she was under pressure
8 to buy a lot of gold. And she testified first, yes,
9 Kaloti always wanted to buy more gold in Perú, but it
10 never relaxed, or it never breached its own Compliance
11 Program. There is no evidence on the record to make
12 that assessment.

13 Again, Kaloti Metals qualified as a good
14 purchaser. You heard from Mr. Caro that a good faith
15 is presumed. Who alleges the bad faith has the burden
16 of proving, like we also heard, who wants to convict a
17 person under Peruvian law. And these particular four
18 Suppliers of the Five Shipments, Peru had the burden
19 of proving beyond a reasonable doubt that a crime was
20 committed. [REDACTED], [REDACTED], [REDACTED] and [REDACTED] do
21 not have the burden to prove their innocence. It is
22 Perú who has the burden to prove their guilt beyond a

1 reasonable doubt. Mr. Missiego speculates of what can
2 become of those proceedings. At the same time, he
3 admits first, that he did not have access to the
4 entire files, but only to a portion of the files that
5 were conveniently delivered to him by the attorneys
6 for Perú. And, second, that the trial phase and the
7 evidence phase of the trial has not commenced.

8 So, those four Sellers still have a chance
9 under Peruvian law, to prove, to make, to take
10 evidence and to produce evidence that is still not on
11 the file. So, nobody can come to a reasonable
12 conclusion that they would likely be convicted without
13 seeing the complete files and without knowing what
14 proof the indicted Parties, which are not Kaloti, can
15 produce in those proceedings.

16 And again, in any case, there was a time for
17 purposes of the Treaty where the illegality had to be
18 declared and considered, and it's too little, too late
19 for Perú to do that for purposes of the Treaty now.

20 Mr. Missiego also admitted. We heard about
21 the RECPO: is good for nothing, is a piece of paper,
22 anyone can get a RECPO. It's a Register of Producers

1 and Sellers of gold. We asked him, can a person
2 reasonably conclude that someone who is registered
3 there is authorized to sell gold? And his answer was:
4 "yes."

5 Read the record. Don't take my word for it.
6 He then tried to backtrack. We took him to the
7 Transcript, and he confirmed the affirmative answer.
8 That RECPO had an effect on the good faith of Kaloti
9 Metals, and Kaloti Metals was entitled to rely on that
10 Registry for purposes of the Treaty and for purposes
11 of Peruvian law, and the Legal Expert said as much.

12 The leaks to the press by Perú which is part
13 of the causation. First, causation here is attained
14 for obvious reasons. Perú took the gold. Perú did
15 not return the gold. There is no other reason why the
16 gold was lost except that Perú has it as a proximate
17 direct cause for that part of the Investment. For the
18 other part of the Investment, which is the going
19 concern as we discussed, the loss of the inventory had
20 the consequences of causing the loss of the enterprise
21 and the going concern, which is a separate investment
22 that is presented separate for valuation purposes by

1 Claimant in this case.

2 There is a second element of causation,
3 which were the leaks of Confidential Information. We
4 already touched upon how an investigation in London or
5 Morocco regarding ██████████ could have more
6 conviction on a Peruvian Seller than an investigation
7 of Perú of this particular company inside that
8 country.

9 But again, we asked him multiple times
10 whether Perú had or not an obligation of
11 confidentiality. He confirmed that the answer is
12 "yes." Perú had an obligation. The Government of
13 Perú had an affirmative obligation. The Officers of
14 SUNAT, the Officers of the Courts, the Ministerio
15 Público. They had to keep this information
16 confidential; and then he said well, this happens all
17 the time in our country. Read the Sunday newspapers.
18 That doesn't mean that they didn't breach the duty of
19 confidentiality. There is no reason to infer that the
20 duty of confidentiality was breached by Kaloti or by
21 the four producers of--Sellers, I'm sorry, of the Five
22 Shipments.

1 We don't have a written document, and we
2 have not contested otherwise, whereas a Peruvian Buyer
3 or a Peruvian Seller said we're closing your account
4 specifically because of this or we're not selling more
5 gold to you specifically because of this. We don't
6 contest otherwise. But we have the Witness Statements
7 of four people which are consistent that were subject
8 to rigorous cross-examination, and they confirmed that
9 to the Tribunal here.

10 And it's logic. It's a logical implication,
11 that no one would want to deliver their gold to a
12 company that is mentioned in the Peruvian press for
13 being a potential money-laundering, something of which
14 Kaloti has, however, not been formally accused. That
15 is the only reasonable conclusion. Why this was
16 published by El Comercio? Some Government Official
17 from Perú has to be the source of this information,
18 and it is a logical conclusion that we ask the
19 Tribunal to take. And the effects, again, are not
20 indispensable to find causation over the loss of the
21 enterprise.

22 By losing the gold, in and of itself, that's

1 enough causation for the loss of the enterprise. The
2 other point may have some effects or not for the
3 valuation purposes, the real world versus the but-for
4 world, et cetera. Mr. Smajlovic testified and other
5 witnesses testified that the important things were not
6 some individual Suppliers, who ceased operations in
7 Perú. The important thing is that if they ceased
8 operation, somebody else took the gold out of the
9 ground. The output of the Peruvian market was there.
10 And Kaloti Metals was not able to tap into that market
11 even though it, after rigorous efforts to recover some
12 providers in 2016 that were lost in 2014, it recovered
13 some of the same around 2016, but it was not able to
14 achieve the 2013 levels ever because of what Perú did
15 to Kaloti, and including because of the leaks of these
16 investigations.

17 Professor Knieper asked a question of [REDACTED]
18 [REDACTED] on Tuesday. Professor Knieper was concerned
19 with how taking Five Shipments out of around--I don't
20 know how many, 5,000 potentially--I don't know the
21 number; I'm not testifying to that--was
22 discrimination. On Monday, I made an analogy that

1 made someone laugh on this side about a pastry shop in
2 Arequipa. I'm going to use a different one now.

3 Rosa Parks. She could have been able to sit
4 at the front of the bus 150 times. She was sent to
5 the back of the bus one time, that is discrimination,
6 and the important thing is not how many times she was
7 discriminated, but the effects that the discrimination
8 had. The important thing is that the effect that this
9 discrimination had for purposes of Article 10.3, not
10 how many shipments of gold were taken from Kaloti.

11 We urge you to see this Netflix documentary
12 that Perú put on the record, we mentioned it, but they
13 were kind enough to put it on the record completely.
14 Please watch it, if you haven't. This documentary
15 evidences that the operations that Perú started in
16 late 2013 and early 2014 were commenced because of
17 pressure from the United States. The United States
18 was concerned that illegal gold laundering Colombian
19 money coming from drugs was then sent to Perú, and
20 then gold sent to the United States to launder
21 Colombian money. This is what this documentary said.

22 What did Perú do in turn? It went in

1 December of 2013 and January of 2014 after companies
2 exporting gold to the United States. They did not go
3 after companies selling gold to Europe or selling gold
4 to other countries. But the concern was the United
5 States: please don't send me gold related to
6 money-laundering in Colombia. They went to the
7 airport and took gold from companies exporting to the
8 United States to initiate investigations.

9 Many serious convictions came from that,
10 including of the Company NTR that is prominently
11 mentioned in that documentary. Other companies like
12 ██████, that you heard from that on Monday and you will
13 hear later; and Kaloti, they took physical possession
14 of the gold. After they didn't find anything wrong
15 with that gold, then they became posing excuses to
16 delay the return of the gold.

17 We didn't ask for them to say, "sorry." You
18 just tell me, I didn't find anything illegal, in a
19 reasonable period of time, here's the gold. That
20 would have been enough, our name would have been
21 cleared in the press, we would have the gold. But
22 they overreached or became overzealous and then didn't

1 know how to legally back down.

2 None--Kaloti Metals was not indicted in the
3 United States or Perú. NTR was. Was convicted and
4 the people from the Company are in jail in the United
5 States, and some of them were also convicted in Perú.
6 They were found to have connections to Colombian
7 illicit money, but not Kaloti Metals. So, this is
8 discrimination: only people sending gold to the
9 United States in December, and January of 2014.

10 Some of the Investors from other countries,
11 like [REDACTED] was given preferential treatment under a
12 different Treaty, and we also ask you to take that
13 into account to adjudicate this investment
14 arbitration. But that sort discrimination or whatever
15 you want to call it, had a devastating effect on the
16 company that financial actors testified to on both
17 sides. The Company could not survive because this
18 individual discrimination.

19 We were also asked to compare at some point
20 why 17 million which is the alleged or the value of
21 the gold, or not alleged more or less the actual value
22 of the gold in January 2013, was enough to ruin a

1 company turning in sales 1.3 billion, with a "B," in
2 2014. The answer is very simple: You're comparing
3 apples-to-oranges. 1.3 billion is Gross Revenue, is
4 the total product of sales. 17 million, in turn, had
5 to be compared with available free cash flow and with
6 Working Capital. The 17 million had to be compared
7 with the profit that Kaloti actually obtained in 2013
8 and all the other years. Not against the Gross
9 Revenue, which is the 1.3 billion. This
10 discrimination, and this expropriation had a
11 devastating effect on Kaloti Metals.

12 To conclude, I want to mention the fact that
13 Mr. Smajlovic said yesterday that he didn't see a
14 written Business Plan of Kaloti Metals. We do not
15 contend that Kaloti Metals had a piece of paper called
16 "Business Plan." It would have been great to have
17 that. Some companies have that in writing,
18 particularly when they're trying to entice investors.
19 Certainly, when they're going public searching for
20 equity investments, where they want to invite members
21 of the public perhaps. In Miami, they say fools,
22 friends, and family, joking in another context. They

1 put in writing some proposals so they can see a
2 PowerPoint, they go to their office, please give me
3 your money, these are my plans. But Kaloti Metals had
4 plans. It discussed the plans with Kaloti Dubai. If
5 Kaloti Dubai put in writing 45 million--I'm sorry,
6 45 tons of Peruvian gold, it's because that amount was
7 discussed at some point. This was in terms of
8 personnel, and this is in terms of office space, a
9 small company.

10 There was not a need to send a memo from
11 Point A to the office next door. That doesn't mean
12 that the Company had--didn't have reasonable plans and
13 reasonable expectations that have been proven by other
14 documents and by the Financial Statements. By the
15 actual operations until 2018, by the fact that they
16 said study further the opening of an actual refinery
17 in Lima, increase this investment. There is evidence
18 of that. Obviously this company was opened for
19 commercial reasons and to make money. There can be no
20 discussion whether those documents are sufficient or
21 not, to make a valuation under the DCF Method, that's
22 for the Quantum Experts and we ask you to refer on

1 that to the valuation, the very reasonable valuation,
2 that Secretariat has put before the Tribunal.

3 And with that, I conclude. I think it's the
4 two-minute break, and then Mr. Azpúrua will continue
5 with applicable law.

6 PRESIDENT McRAE: Thank you very much.
7 We'll take a two-minute break.

8 (Brief recess.)

9 PRESIDENT McRAE: I think we're ready to
10 resume.

11 Mr. Azpúrua.

12 MR. AZPÚRUA: For the record, my name is
13 Ramón Azpúrua, and I will be delivering some comments
14 on legal basis on behalf of Claimant in this Closing
15 Argument.

16 During the first day of this Hearing, a
17 discussion ensued in connection with Article 31.3 of
18 the Vienna Convention, in particular, in connection
19 with subsequent agreements and subsequent practice as
20 sources for treaty interpretation. These were
21 discussed during the Respondent's Opening statement
22 and also during the presentation made by the

1 representative of the United States.

2 Claimant has not had the opportunity to
3 address the question presented by the President of the
4 Tribunal in connection with this matter and will take
5 the opportunity to do so now.

6 As you will recall, during the Opening
7 Statement, the President of the Tribunal inquired
8 whether the unilateral statements of the U.S. in its
9 submissions is to be treated by the Tribunal as an
10 agreement with Perú. Perú, responded affirmatively,
11 stating that the submissions of the United States to,
12 the extent that it coincides to the submissions that
13 Perú has made in its written submissions in this case,
14 should be taken as an agreement. We strongly
15 disagree.

16 The submissions of a party in a contentious
17 proceeding cannot be used to assert the basis for
18 international agreement. A State that is a party to
19 an investment protection arbitration cannot invoke in
20 the course of the Arbitration that its adversarial
21 submissions be considered a legitimate manifestation
22 of its willingness to agree for purposes of

1 interpretation of the relevant treatment. Instead,
2 what is required in reality is the timely invocation
3 of the existence of other formal documents issued by
4 the relevant State previously, in advance, and through
5 its legitimate and authorized public officials
6 expressly manifesting its agreement. Perú did not
7 invoke and has not produced such formal and previous
8 manifestation of willingness in the course of this
9 Arbitration.

10 Additionally, the scope of representation of
11 Perú's counsel is limited to Perú's defense in the
12 particular arbitrations. To their work as advocates
13 in particular adversarial matters. Perú's counsel was
14 not conferred and has not been conferred with broad
15 diplomatic powers. Allowing Parties that are actively
16 taking part on a contentious proceeding to affect the
17 basis of interpretation during the course of the
18 proceeding itself cannot be allowed. As that would
19 severely alter procedural balance and fairness and
20 sever the other Party's right to due process; in this
21 case, Kaloti Metals's right to due process.

22 In connection with the foregoing, I call the

1 attention of the Tribunal to the decisions that were
2 cited by the U.S. in its presentation of the first day
3 of this Hearing. *Mobile v. Canada* and *Canada*
4 *Cattlemen for Fair Trade v. the U.S.* I would
5 encourage the Tribunal to review them in full and
6 consider the character and nature of the documents and
7 submissions that were effectively taken into account
8 in those cases, to consider that an agreement on
9 interpretation existed. None were Party submissions
10 during the course of an ongoing arbitration or
11 adversarial process. Nothing of what has been
12 submitted in this Arbitration comes from an authority
13 with treaty-making powers or a senior representative
14 of Perú or the U.S. like an Ambassador or a
15 representative before an international organization.

16 We would like to take a few minutes to
17 discuss several items that were discovered during
18 these last few days in the Hearing, and we would,
19 first, like to address the issue of denial of justice.

20 The U.S. alleges, in general, that a
21 denial-of-justice should come from a court of last
22 resort. However, the United States also admits that

1 denial of justice can come from omissions; that is,
2 delays in and of themselves which do not necessarily
3 have to come from the highest court (last resort
4 court), precisely because the delay is preventing
5 access to the highest court, and this is exactly what
6 is going on in the case of Kaloti Metals.

7 There is a famous quote from a very
8 non-judicial juridical authority in Italy--I forgot
9 his name--which is "giustizia ritardata, giustizia
10 denegata." Delayed justice is justice denied. At
11 this point, and as my colleague Hernando Díaz has
12 mentioned earlier this morning, it is irrelevant what
13 Perú decides at this stage. What matters is that
14 Peruvian courts have not made a decision in almost
15 eight years. In connection with the issues of
16 domestic Peruvian law, Mr. Missiego, in his statement,
17 has conceded that the Constitution in Perú includes
18 the right to be judged or to undergo trial within a
19 reasonable period of time. He was asked that, and he
20 answered "yes." Eight years is not a reasonable
21 amount of time under Peruvian law or under
22 international law.

1 In connection with this matter, Mr. Missiego
2 had submitted in this proceeding a couple of documents
3 listing approximately 161 cases to show--with the
4 intention of showing, that the duration of eight years
5 is something that is usual in tribunals. However, he
6 was unable to provide any reference to the statistical
7 relevance of that information he has provided. So, in
8 practice, that information is useless.

9 Also, we want to call the attention to the
10 Tribunal in the sense that Perú, in its Second
11 Memorial and in the course of this Hearing, wrongfully
12 cites to a Law-Decree from 2019 and that was not in
13 force during 2013 and '14 as sources of obligations of
14 Kaloti Metals during the relevant period of time.
15 Obviously, when posed with the question, Mr. Joaquín
16 Missiego conceded that those regulations, that law,
17 was not applicable to Kaloti Metals at the time in
18 which the takings took place.

19 As mentioned earlier by Hernando,
20 Mr. Missiego has also conceded that a regularization
21 plan was ongoing in Perú and that it had not been
22 finalized by 2013 and '14. Under that plan, small gold

1 producers were able to file or enter into commitments
2 with the Peruvian Government and that entering into
3 those commitments, that basically suspended the
4 obligations under the general mining legislation.
5 This very likely affected the type of document that
6 Kaloti Metals was able to retrieve and obtain at the
7 time. Mr. [REDACTED] briefly described that process
8 in his declaration.

9 Also, there is no discussion whatsoever
10 that, under Peruvian law, the Seizure Measures were
11 temporary (provisional) Measures as conceded by
12 Mr. Joaquín Missiego expressly, and basically this is
13 because the duration of the Provisional Measures is
14 tied to the length of the process and the length of
15 the process is regulated and limited under the laws
16 and regulations of Perú. And, in this case, in
17 eight years, those limitations were clearly exceeded.

18 I apologize that there is no quote of the
19 source in this slide. The correct cite there is
20 English translation to Mr. Missiego's cross,
21 Pages 1014, beginning in Page 1014, Line 18, through
22 Page 1015, Line 5.

1 Basically, in that particular piece,
2 Mr. Missiego concedes that Peruvian judges had an
3 affirmative burden under Article 94(c) of Perú's Code
4 of Criminal Procedure, but that burden was not met.
5 That obligation was to notify the Provincial
6 Prosecutor of the potential existence of instrument of
7 a crime to begin other judicial processes on Perú.
8 That did not occur, those other processes did not
9 begin, and Kaloti was also, in that regard--violated
10 its due-process rights under Peruvian law.

11 Mr. Missiego admits that Kaloti did not have
12 access to the Criminal Proceeding files; and, most
13 importantly, that Kaloti was never notified of the
14 Measures against its property. Mr. Missiego basically
15 said that when asked, "have you seen any documents
16 showing that these Measures were notified to Kaloti,"
17 he answered expressly "no." Again, Mr. Missiego did
18 not have access to the full files of the criminal
19 investigations. He had access to a limited amount of
20 documents that were previously selected and
21 cherry-picked by Perú.

22 Finally, we want, again, to emphasize the

1 breach of Perú to its obligations of confidentiality
2 under the law on access to public information, and
3 under Perú's Criminal Procedure Code. Again, those
4 provide for affirmative duties on Perú to preserve the
5 confidentiality of those files. Kaloti, all the
6 Parties that were investigated there, did not disclose
7 the existence of that information. They had no
8 incentive whatsoever to do so. That is an absolute
9 negative fact. The disclosures of the investigations
10 are caused by leakage by the public officers and
11 officials that had access and control of those files
12 that contained the information of the criminal
13 investigation.

14 In several occasions, Perú has argued that
15 Kaloti Metals had not invoked, in a timely manner, the
16 most-favored-nation clause contained in Article 10.4
17 of the Treaty. We include here a cite on Claimant's
18 Memorial, Page 97, which clearly indicates otherwise.

19 In its submissions, the United States has
20 conceded that the standard established for purposes of
21 application of Article 10.4 of the Treaty, is a floor
22 below which Treatment of Foreign Investors must not

1 fall. It's a minimum. It does not set a cap or
2 maximum. In this case, not only has Perú breached its
3 obligations under the Agreement, but as noted by
4 Hernando Díaz in the preceding section of his Closing
5 Statement, we invoke application of other provisions
6 containing other treaties subscribed by Perú and
7 which are more favorable to Kaloti, and those are the
8 ones subscribed by Perú with Italy, Australia, and the
9 United Kingdom.

10 In connection with the breaches of the FET
11 commitments of Perú under the Treaty, Kaloti has not
12 alleged several individualized breaches by Perú of
13 Articles 10.3, 10.5, and 10.7. We cannot stress
14 enough that Kaloti Metals has not alleged multiple
15 transgressions or treaty breaches, only progressive
16 violations that crystallized after April 30, 2018.
17 And again, I cite the holding in the Decision of Wena
18 Hotels v. Egypt that basically defines the standard,
19 stating that it can be described as a process of
20 extending over time and comprising a succession or an
21 accumulation of measures which, taken separately,
22 would not breach that standard but, when taken

1 together, do lead to such a result.

2 In our Opening Statements, we broke down the
3 elements of other components of that breach to the FET
4 commitments of Perú under the Agreement. In
5 Mr. Missiego's declarations, it is conceded that it
6 was clear from the facts that were taken and included
7 in the criminal investigations that Kaloti Metals
8 should have been made a part of the investigations.
9 Kaloti should have been called to declare as a
10 suspect, given the severity and gravity of what was
11 being investigated, but in practice and as evidence in
12 his review of the documents contained in those files,
13 Kaloti was not.

14 We also discussed in our Opening Statements
15 the breaches to the FET commitments of Perú in
16 connection with the different treatment of similarly
17 situated investors in judicial proceedings, and we
18 discussed the case of [REDACTED] which is a
19 company based in Curaçao and controlled by an Italian
20 Investor. [REDACTED] was affected in the
21 same way as was affected Kaloti Metals back in 2013
22 and '14 in the sense that some of its gold was seized

1 for purposes of reviewing the documents pertaining to
2 the source of the gold.

3 However, ██████████ received a
4 completely different treatment to that which was
5 received by Kaloti Metals. When ██████████ claimed to
6 SUNAT, to the Tax Authority, SUNAT provided a specific
7 answer to ██████. ██████ was able, based on that formal
8 decision, to appeal before Tax Courts and obtain
9 responses. Those Tax Courts decided in several cases
10 in favor of ██████ and ordered the Peruvian Government
11 to return the gold to ██████.

12 Perú, in turn, appealed again from those
13 decisions, and some afterward in the proceedings that
14 followed, some of the decisions were favorable to
15 ██████, others were not.

16 Also in that case, Perú initiated "extinción
17 de dominio" processes to take possession of the gold,
18 and it decided against ██████. ██████--that Decision
19 alone, opened again the door to ██████ to file legal
20 recourses under Peruvian law. In Kaloti's case, that
21 never happened. No formal answer was ever provided to
22 Kaloti Metals, and Kaloti Metals was unable to

1 exercise its legal recourses under Peruvian law.

2 Another FET commitment that was breached by
3 Perú was by treating domestic Peruvian purchasers of
4 gold differently from foreign purchasers. In this
5 regard, and as noted previously in this Hearing, Perú
6 has complained that Kaloti has not provided
7 comparators for purposes of Article 10.3, and we
8 contend again that Kaloti did. The comparator is all
9 Peruvian national purchasers of mined and scrapped
10 gold in Perú in 2013 and '14 for processing, assaying,
11 and refining.

12 In other words, Peruvian companies that
13 invested and/or operated in Perú in exactly the same
14 business as Kaloti Metals. Perú has been unable to
15 provide a single example, a single comparator of a
16 Peruvian company or entity or investor in exactly the
17 same position as Kaloti Metals as purchaser, not
18 Seller of gold in Perú. And in a portion of their
19 submissions, Perú has tried to argue that the four
20 Sellers of the gold are comparators in this case, and
21 they are not. They were not purchasing gold in Perú
22 to resell and export into the U.S. Perú's actions and

1 omissions constitute an indirect creeping
2 expropriation of Kaloti's assets and of its business
3 enterprise. Perú's actions and omissions resulted in
4 two distinct but related indirect expropriations for
5 which Perú owes Kaloti compensation under
6 Article 10.7(1) of the Treaty. These obviously are,
7 as described by Hernando Díaz earlier this morning,
8 the taking of the gold itself, and the effect that
9 that taking took on the Company which basically sent
10 it in a downward spiral that basically made it
11 unviable on the long term.

12 These two expropriation claims are
13 separately cognizable from Kaloti Metals's lost-profit
14 claim because, under the Treaty, the economic impact
15 independently may not have established that an
16 indirect expropriation had occurred as provided under
17 Annex 10-B of the Agreement. As noted by
18 Hernando Díaz previously, the indirect expropriation
19 was materialized when Kaloti Metals was forced to
20 terminate operations on November 30, 2018. The United
21 States, in its submission, agrees that expropriation
22 may include something less than property rights when

1 referring to the language contained in the Agreement
2 that refers to property interests, which is
3 similarly--similar to saying or equivalent to saying
4 interest in property.

5 Also, Article 10.28 of the Agreement, of the
6 Treaty, when defining "investment," expressly states
7 that "investment" means every asset that an investor
8 owns or controls, and as previously discussed this
9 morning, those assets, the gold was under the control
10 of Kaloti at the time in which they were seized by the
11 Peruvian Government.

12 Finally, we want to stress again the fact
13 that this is not the first time that something similar
14 happened. We have the case of Tza Yap Shum v. Perú,
15 which is very, very similar to what is being discussed
16 here. In that case, SUNAT, the Tax Authority of Perú
17 and the same entity that began the seizures of
18 Kaloti's gold, basically froze assets of the Chinese
19 Investor, and that resulted in the loss of viability
20 of the Company of the Chinese investment in Perú.
21 And, in that case, the Tribunal effectively held that
22 both Peruvian law and international law had been

1 breached. The annulment of that decision was sought
2 and denied. This ruling was upheld.

3 Finally, in connection with the test
4 provided under Annex 10-B(3) (a) of the Treaty, we can
5 conclude that it is evident that Perú's seizure of the
6 gold has indisputable cost and adverse effect on
7 Claimant, which has been entirely deprived of the use
8 and enjoyment of its property during these eight years
9 and this has caused the subsequent demise of its
10 business in Perú. We can conclude that Perú's actions
11 have interfered with Kaloti Metals's distinct
12 reasonable investment-backed expectations. Kaloti
13 Metals had an expectation that it could operate and
14 grow its business in Perú if Kaloti complied, as it
15 did, with Peruvian laws. Perú has not pointed out to
16 any specific legal article or concrete statutory norm
17 allegedly breached by Kaloti Metals.

18 Finally, the actions and omissions by Perú
19 were not regulatory in nature but rather a physical
20 invasion, and the U.S., in its submissions,
21 Paragraph 51, relates to the gravity of that taking.

22 And with this, I give the microphone to my

1 colleague, Gabriella Hormazabal, who will be talking
2 about damages.

3 MS. HORMAZABAL: Good afternoon, my name is
4 Gabriella Hormazabal, and I will be presenting the
5 damages portion of this Closing Statement.

6 Because I am presenting on damages, I want
7 to make a few preliminary notes based on the
8 examination with Brattle yesterday. I believe it's
9 important to stress that Brattle admitted their use of
10 the ex post information that served to minimize
11 damages since the Peruvian gold production in
12 2019--from 2019, was the lowest. Brattle used the
13 lowest actual-world figure to estimate but-for volumes
14 for 30 years where convenient. Also, Mr. Nuñez,
15 Respondent's Expert, admitted that their model
16 requires updating; and, as such, it cannot be used as
17 is.

18 My second point is that Brattle's legal
19 instructions also served to eliminate damages despite
20 not being economically sound or feasible. During 2014
21 through '18, the lost-profits time period, in
22 Brattle's but-for world, Brattle used only proven

1 volumes to derive the but-for value, then it deducted
2 actual-world volumes not only from Perú's volumes but
3 also from the other countries.

4 Brattle's but-for world is based only on
5 Peruvian revenues, whereas the actual world is based
6 on global revenue, which explains why their historical
7 losses were so small. Despite being Brattle's legal
8 instructions, this mismatch in the scenarios is purely
9 wrong, and it serves to artificially lower the
10 damages. I just want to make that note.

11 So, again, in summary, Claimant is seeking
12 three separate main heads of damages, specifically
13 lost profits, indirect expropriation of the gold
14 inventory, and indirect expropriation of KML's
15 enterprise.

16 I'm sorry.

17 (Flips through slides quickly.)

18 MS. HORMAZABAL: Claimant's separation of
19 claims are valid because, first, lost profit falls
20 under the breach of Articles 10.3 and 10.5 of the
21 Treaty, whereas the two expropriation claims based on
22 Perú's breach of Article 10.7 the Treaty. Second, the

1 lost-profit claim was calculated until November 30th,
2 2018, that 2014 through 2018 period. The
3 expropriation claim used DCF method using projections
4 after November 30th, 2018 as if the business had been
5 able to continue moving forward. And for the
6 expropriation of the inventory, the price value of the
7 physical gold seized by Perú was calculated.

8 Here, is Claimant's Quantum Expert. Here
9 are the breakdown of the damages. As you can see,
10 lost profits have been calculated based on incremental
11 cash flow until November 2018, and resulted in damages
12 in the amount of 27 million. Expropriation of the
13 gold inventory, the physical inventory of the gold,
14 was calculated based on the physical properties and
15 gold prices using the different dates. Specifically,
16 Claimant is seeking the highest of 17.6 million plus
17 Pre-Award Interest, or 24.6 million as of
18 November 2018, which will be updated to a date closer
19 to the Award.

20 Finally, the third main head, the
21 expropriation of the enterprise was determined based
22 on Discounted Cash Flow projected from--projected

1 after November 30, 2018, as if the Company had been
2 able to continue and resulted in damages in the amount
3 of 70 million. I just wanted to refresh this.

4 As it has been established after these
5 several days of this Hearing, KML had competitive
6 advantages that but for the Measure would have allowed
7 KML to have continued in business and further
8 succeeded. Those competitive advantages are: The
9 captive demand, Buyer willing to purchase, steady
10 supply chain, access to capital, revolving line of
11 credit, prudent operations and viable margins,
12 industry knowledge, know-how, and logistics.
13 Particularly, yesterday, Mr. Nuñez pointed out that he
14 agreed that a captive demand is a competitive
15 advantage. And I also included here the [REDACTED] letter,
16 which includes the 45 tons demand, and the document
17 from 2015 with the interest charges which suggest that
18 [REDACTED] was incentivizing KML to purchase even greater
19 than 3 tons a month.

20 For the record, I would also like to note
21 that there was a clerical error in the slide that we
22 submitted, and the date changed under the interest

1 charges document. I just want to make that clear.

2 Like Brattle's calculations, several
3 statements in so-called "evidence" of examples that
4 they have put forward in the Report are plainly
5 hearsay or even double hearsay, and are derived from
6 questionable sources that have not been verified,
7 signed, authenticated under oath, or that are not from
8 actual financials of the companies that they refer to.
9 This makes Brattle's assessments in this case highly
10 unreliable. And I won't--in the interest of time, I
11 won't go through them.

12 In the next few slides, I pick up on where I
13 left off in the Opening Statement and will continue to
14 discuss causation. It has been undisputed that
15 causation may be determined by using the factual
16 causation, the but-for test, and legal causation which
17 filters harms too remote, not proximate or not
18 foreseeable.

19 Importantly, again, it's not necessary to
20 prove that Perú's actions were the sole cause of KML's
21 injuries. This is confirmed by commentary to
22 Article 31 of the ILC Draft Articles, which explains

1 that the existence of one contributing cause does not
2 exclude the causality of the other. Again, the
3 standard may be based on whether causation has been
4 proven by a balance of probability or in all
5 probability.

6 Again, the inventory of the gold but for
7 Perú's Measures, KML would have exported all Five
8 Shipments of gold to the United States and had been
9 been able to resell them. Perú has admitted in this
10 Arbitration--has not denied--that it's still
11 maintaining the gold as of today. Therefore, this is
12 self-evident. As has been established in this
13 Hearing, Shipment No. 5 was also adversely affected by
14 Perú's Measures and was ordered to be seized and even
15 sent to Perú's Banco de la Nación. The export was
16 prevented by SUNAT's intervention in January 2014.
17 You can read that in R-0210, and there also has been a
18 seizure at one point.

19 The Measures, the gold Immobilizations, the
20 seizures taken by the Peruvian Government had a direct
21 and proximate severe impact on KML's operations, both
22 in Perú and worldwide. By seizing gold shipments for

1 over eight years, Perú deprived KML of a large amount
2 of liquid assets. This was also discussed by the
3 Quantum Experts yesterday. That KML could not resell,
4 increasing KML's Operating Costs, and thus the average
5 cost per unit of the gold purchased.

6 The variable interests on [REDACTED]
7 loan raised as was also shown yesterday through the
8 document. KML was placed in a negative net working
9 capital position. The seizure of the gold inventory
10 prevented KML from reinvesting the value in its
11 business. KML could have used such amount to service
12 all its debts in or by 2018, as was also confirmed
13 yesterday.

14 Again, I quote Hydro here because I think
15 it's very applicable to this case, but in the interest
16 of time, I will leave it here and I invite you to
17 review it again, and I will move on.

18 Perú's Quantum Experts have incurred in
19 several intrinsic contradictions as was clear
20 yesterday as well. Notwithstanding, it is agreed that
21 as of November 2018, KML's Balance Sheet after
22 adjusting for the value of inventory, reported a

1 negative value of equity. And you can see that in
2 their Second Report.

3 Regarding the Financial Statements, while
4 KML's Financial Statements may have not been audited,
5 Mr. Smajlovic confirmed at the Hearing the Financial
6 Statements being unaudited did not change his
7 analysis. Further, Brattle does not question the
8 reliability of the Financial Statements in neither of
9 its Reports, and when provided the opportunity at the
10 Hearing, there were no adverse comments.

11 Again, there is an unquestionably direct
12 causal link between Perú's seizure of KML's gold
13 inventory and KML's insolvency as a going-concern
14 business enterprise globally. Such insolvency would
15 not have occurred but for the seizure of the gold
16 inventory. The same is true as to KML's lost profits.
17 The insolvency was caused by, and in, Perú, and
18 directly affected KML's entire operation.

19 I'm showing here snippets of the Hearing
20 Transcript from yesterday. I believe the definition
21 of "insolvency" is at the center of this case. As
22 Respondent attacks Claimant's position by stating that

1 Claimant did not go through some formal process of
2 bankruptcy. But, here, it is a key to understand
3 that, but for Perú's Measures--and I want to be
4 clear--their actions and omissions, KML became
5 insolvent. And as you can see here, the definition of
6 insolvency is the ability of a company to meet its
7 long-term debts and financial obligations or even a
8 company means that it is unable to fulfill its
9 financial obligations were confirmed by Respondent's
10 Quantum Experts.

11 Specifically, Brattle has confirmed that, if
12 KML had been--returned the gold in 2018, Claimant
13 would have avoided insolvency. And I'm also inviting
14 you to read the Transcript. I will move along.

15 The other triggering event of KML's
16 insolvency is proven by [REDACTED] letter of November 14,
17 2018. That date is very important. Approximately two
18 weeks prior to KML's cessation of its operations,
19 wherein it says the following: "[REDACTED]
20 [REDACTED] will no longer give advances to Kaloti
21 Metals with immediate effect due to the large
22 outstanding balances, liquidity blockage, and the big

1 reduction in gold supply from your firm. We urge you
2 to take immediate action to settle the outstanding
3 credit amount."

4 The evidence in this case also clearly
5 demonstrates that the actual loss of Suppliers in Perú
6 and other countries was due to the actions and
7 omissions of Perú. There was a campaign against KML.
8 KML's reputation in Perú and other Latin American
9 countries was tarnished by such leaks. There were
10 several news articles and replications of such which
11 were widely publicized, mainly circulated in Perú and
12 the Americas. The effects were progressive. There
13 are Articles from 2013, there are Articles from 2015
14 and so forth, all through early 2020s. And invite you
15 to read those in C-006. There is no need for KML to
16 prove that Perú intentionally or purposely leaked the
17 details of the investigation. Perú has ardently
18 asserted in this Arbitration and again through their
19 Legal Experts and--our Legal Expert, that certain
20 information was confidential, which includes the risk
21 profiles. And again, I have the El Comercio snippet
22 which shows that they found out that SUNAT personnel

1 after receiving information about expropriation, with
2 risk profiles began operations in the warehouses, et
3 cetera, which strongly suggests that such information
4 was received by Perú as risk profiles are
5 investigatory documents that are deemed confidential.

6 Banks, again, the unfair and unreasonably
7 long cloud of suspicion created by Perú against KML
8 caused financial institutions to stop dealing with
9 them. The proof here is through the Notices of
10 closure of bank accounts and I invite you to look at
11 those as well.

12 Not only did some banks inform Ms. [REDACTED]
13 [REDACTED] that the accounts were being closed because of
14 certain red flags related to the investigations, but
15 there was also clear proximity and connection in time
16 between KML's bank account closures and Perú's
17 Measures. And in the interest of time I will proceed.

18 So, due to KML's loss of its gold, loss of
19 its established vendor base, bank accounts closures,
20 insolvency, and its ruined reputation, KML was never
21 able to return to a position in which it was able to
22 purchase similar quantities of gold as it had acquired

1 in 2013.

2 Further, it was unable to acquire new solid
3 customer base. There may have been customers that
4 left for a short period of time, may have come back,
5 but then again they lost some customers. They weren't
6 able to bring in new customers, and some customers may
7 have left and waited for the dust to settle, as you've
8 heard from certain witnesses.

9 These are the Witness Statements that I
10 presented prior, and I invite you to take a look at
11 those as well.

12 Perú's unduly prolonged interim seizures of
13 gold, a drawn-out loss of access to the significant
14 gold quantities, resulted in, and as the Quantum
15 Expert explained yesterday, a greater cost of
16 operating KML's business, greater financing costs,
17 lower profits, cash flows, and the lengthened
18 inability to sell the inventory of those Five
19 Shipments that are still to this day in Perú's
20 possession. After exhausting its options and
21 attempting to mitigate its damages because KML did try
22 to continue and it tried to continue and stayed until

1 2018, KML was forced to shut down its operations due
2 to its inevitable insolvency in November 2018.

3 KML's equity turned negative on that date,
4 November 30, 2018, and again, we use the word "de
5 facto" insolvent after having to deem its gold
6 inventory loss.

7 November 30th, 2018, represents the day that
8 Perú's expropriation of KML's investment became
9 permanent and fully irreversible. For that reason
10 November 30th, 2018 is both a date of the breach of
11 Perú and the appropriate Valuation Date. As you heard
12 from the Expert yesterday, he could not come up with
13 another particular Valuation Date.

14 For issues relating to valuation,
15 specifically in indirect expropriations, including the
16 setting of an appropriate Valuation Date, you can also
17 see the document that has been on the record, CL-0071.

18 It was Perú's actions and omissions that
19 caused KML's financial crisis, an outcome that would
20 not have occurred in the absence of SUNAT's initial
21 actions as combined with subsequent actions and
22 omissions of Perú's prosecutors in criminal courts as

1 discussed in the previous section.

2 Perú has presented alternate causation of
3 damages theories as a defense in this Arbitration,
4 specifically that KML's reputation and ability to
5 purchase more gold was damaged by investigations and
6 claims made outside of Perú and not against KML. They
7 also allege that KML deviated business to [REDACTED]
8 [REDACTED]. It is Perú who has the
9 burden of proving its own alternate causation theory,
10 and after this week, it has not done so, and any
11 documents they've presented are unsupportable.

12 In contrast, the investigations in Perú,
13 which indeed had specifically mentioned KML itself,
14 remain, according to Perú, open and unconcluded as of
15 today. And I will note that this was stated in their
16 Memorials, but I haven't seen them present much on
17 this during--throughout the Hearing.

18 Again, Tza Yap Shum versus Perú is
19 applicable, and here--in that case, SUNAT also
20 exceeded its authority. It's applicable to our case
21 because it wasn't just SUNAT but other governmental
22 authorities, but it does apply. And then the Tribunal

1 considered that the preventative Measures taken by
2 such governmental authority caused the expropriation
3 of the Claimant's investment and found Perú liable for
4 those actions and consequent damages. Importantly,
5 that Award has been confirmed and not annulled.

6 Again, Claimant has established and is
7 seeking the three main heads of damages. The first,
8 the lost profit, which is caused by Articles--Perú's
9 breach of Articles 10.3 and 10.5 of U.S.-Peru TPA,
10 including because of the unduly prolonging of the
11 interim seizures of KML's gold and failure to prevent
12 the disclosure leaks of its confidential
13 investigations.

14 Again, lost profits relates to January 2014
15 through 2018. And for purposes of the U.S.-Peru TPA,
16 this particular loss was incurred and became
17 actionable on November 30th, 2018, as Perú's actions
18 or omissions which only is defined in the aggregate
19 are sufficient to constitute an international wrongful
20 act. KML's total lost-profit claim became financially
21 irreversible in 2018 when KML's economic viability was
22 impaired, and you have seen that as well yesterday.

1 For lost profits, it's important to note
2 that Claimants--you take Claimant's actual cash flows,
3 like the historic values, and you subtract those from
4 the but-for cash flows for the relevant period. That
5 historic period also includes the mitigation efforts
6 throughout 2014 through 2018.

7 In sum, after analyzing KML's historic
8 trend, growth in revenues and available
9 contemporaneous records for its gold demand, the
10 Quantum Expert forecasted the but-for revenues based
11 on estimation of what would have been KML's Market
12 Share of the gold absent Perú's wrongful Measures.
13 And as previously discussed in the beginning of my
14 presentation, Brattle's calculations are illogical.

15 Needless to say, after comparing
16 Secretariat's volumes with the observed historic
17 trend, it's clear that Secretariat chose the more
18 conservative approach.

19 Additionally, KML's Quantum Expert
20 considered actual economic developments such as the
21 annual gold production, gold price, taxes, Working
22 Capital, and other economic developments which

1 occurred during the historic period. This approach
2 allowed Secretariat to forecast without the inherent
3 forecasting errors, and calculate a conservative
4 restitution as close to reality as possible. The
5 Claimant's Quantum Expert found that the Present Value
6 of KML's lost profit is 27 million before Pre-Award
7 Interests are added.

8 The next main head of damage is the claim
9 for the gold inventory that was creepingly
10 expropriated by Perú. This claim is based on the
11 breach of Article 10.7, which was consummated as well
12 on November 30th, 2018. KML's Quantum Expert
13 conducted a deep analysis to value the Five Shipments
14 that were immobilized and subsequently seized.

15 As you will see, these net or pure weights
16 are derived from invoice level details, and I have
17 added here the Quantum Expert's excerpt on this.

18 Again, Brattle, yesterday, is attempting to
19 allege that approximately 0.08 percent of the total
20 value of assigned to KML to the inventory seized by
21 Perú should be deducted because volumes are, according
22 to him, unrefined, but the pure net weight should be

1 considered as refined because you're already removing
2 that part. And nonetheless, KML's expert already
3 reflected and accounted for such consideration.

4 Perú further claims that KML could not carry
5 as inventory of shipment for which KML has not
6 effectively paid. However, the actual deal between
7 the relevant Parties and Peruvian law did not require
8 actual payment of the price in order for the ownership
9 of the gold to be transferred to KML, and this has
10 been expressed by the legal experts a couple of days
11 ago.

12 Again, concerning Shipment No. 5, a court
13 decision invoked by Perú dated 2022, which purports to
14 transfer the ownership of Shipment No. 5 back to
15 [REDACTED], further confirms that, on November 2018, KML
16 was the legal owner of such gold. And within the same
17 document, you can see that there was an existing
18 contract. Perú cannot use in its favor in this
19 arbitration facts that actually occurred after the
20 Expropriation Date.

21 Again, the Arbitral Award will need to
22 effectively erase all of the economic effects of

1 Perú's actions and omissions, including as to KML's
2 gold inventory, which KML carried in its Financial
3 Statements until at least 2018. And in the interest
4 of time, we have already gone through the values,
5 which I have previously discussed.

6 Because the expropriation of the inventory
7 was progressive, creeping and unlawful, KML is
8 entitled to be compensated at whatever results in the
9 highest, the value of the gold inventory at 2018
10 prices plus Pre-Award Interest or the value of the
11 inventory at the then current prices.

12 The third and last main head of damages, the
13 expropriation of KML as a going-business concern and
14 enterprise also became legally cognizable on
15 November 30th, 2018.

16 A DCF valuation analysis includes the
17 forward-looking assumptions and projections. And for
18 conservative reasons, however, Secretariat did not
19 model any additional Gold Reserve developments in
20 Perú, thus limiting the total volumes that KML could
21 have acquired through 2048, which he discussed
22 yesterday.

1 Again, a forecast cannot be 100 percent
2 certain. That is impossible in practice. Prior
3 tribunals have confirmed that a mathematical certainty
4 is not required. Yesterday, Brattle discussed another
5 approach that they preferred, but it did not seem that
6 important because they did not present those in their
7 own Expert Reports.

8 Perú's own Quantum Experts used the DCF
9 Method, relying on KML's calculations with certain
10 modifications.

11 And I'm showing this again because, in the
12 Opening Statement, the numbers were inversed as a
13 clerical error, but here you will see that Brattle is
14 alleging that, in 30 years, KML would only be able to
15 obtain \$3.3 million, whereas for the lost profits,
16 which is less than five years, it would only be able
17 to come to damages in the amount of 10 million, which
18 is illogical.

19 Again, Claimant has challenged and
20 complained in this Arbitration of the actions and
21 omissions by Perú that permanently impacted the value
22 of KML's investment as of November 30th, 2018.

1 Therefore, those actions and omissions by Perú must be
2 excluded in a but-for damages analysis under a
3 full-reparations standard. Perú's damages calculation
4 is based strictly on the future prices starting from
5 2019. And as we discussed today, Brattle also used ex
6 post information for their analysis.

7 Here, KML can actually benefit and hereby
8 request that the application of whatever is most
9 favorable to KML between future prices of gold as
10 projected in November 2018 or actual prices after
11 November 2018.

12 Again, we find that Brattle's approach to
13 the WACC of 8.4 percent is unsupportable, and
14 Secretariat has provided supportable evidence that
15 would find 5.2 percent reasonable.

16 Regarding taxation, as discussed yesterday,
17 if there are no revenues, if there is more expenses
18 than revenues, there is no need for taxation,
19 especially in another country. For KML's purposes in
20 the United States, KML is an LLC, and as such, KML,
21 the Claimant itself, will not be subject to levied
22 tax, and that's why our Quantum Expert has ignored

1 taxation.

2 Again, [REDACTED], as
3 discussed yesterday, [REDACTED] is not an
4 affiliate of or subsidiary or under common control of
5 KML. Mr. [REDACTED] is not the Claimant here. The
6 other two investors, Mr. [REDACTED] and Mr. [REDACTED]
7 are not and have never been members of [REDACTED]
8 [REDACTED], and [REDACTED] has never
9 purchased gold in Perú, therefore, [REDACTED]
10 should not be taken into consideration regarding
11 damages, especially if Perú is seeking damages without
12 taking into consideration revenues from other
13 countries.

14 For the award interest, again, we find that
15 the Risk-Free Rate that was provided as an instruction
16 from Perú's lawyers is unsupportable, and KML's
17 Quantum Expert established that LIBOR + 4% is
18 reasonable.

19 Finally, the compensation owed by Perú
20 includes the Claimant's historical lost profits until
21 2018, the indirect expropriation of Claimant's gold,
22 and the Fair Market Value of Claimant's enterprise as

1 a going concern, absent the wrongful Measures from
2 2018 through 2048. And as explained, as previously
3 explained, compound interest at a normal commercial
4 rate must be added to those damages.

5 And this is just a brief summary of
6 Claimant's request for relief.

7 Thank you very much.

8 PRESIDENT McRAE: Thank you, Ms. Hormazabal.
9 That concludes, I assume, the submissions of Claimant
10 in their concluding submissions?

11 MS. HORMAZABAL: Correct. Thank you.

12 PRESIDENT McRAE: So, we'll take a 15-minute
13 break now and then start with the closing statement of
14 the Respondent.

15 (Recess.)

16 PRESIDENT McRAE: I think we're ready to
17 proceed.

18 Mr. Grané?

19 MR. GRANÉ LABAT: Thank you very much,
20 Mr. President and Members of the Tribunal.

21 CLOSING ARGUMENT BY COUNSEL FOR RESPONDENT

22 MR. GRANÉ LABAT: In preparing our Closing

1 Presentation, we faced an unusual challenge because
2 there are so many fundamental failings in Claimant's
3 case that it's really difficult to summarize or even
4 identify in the time available the various reasons why
5 those claims can and should be dismissed.

6 But recognizing that limitation, I will
7 provide a very high-level overview of some of the many
8 fundamental defects in Claimant's case.

9 First, there is the fact that the claims
10 fall outside of the scope of the Tribunal's
11 jurisdiction, and that is true both for *ratione*
12 *temporis* and *ratione materiae* reasons. This includes
13 in particular Article 10.18.1, or what we have called
14 the Temporal Limitations Provision in this
15 Arbitration, and this serves as an express limitation
16 on the Tribunal's jurisdiction *ratione temporis*.

17 And as the Tribunal knows, this provision
18 bars the submission of claims that are three or more
19 years after Claimant knew or should have known of the
20 alleged breach and the loss, and that deadline in this
21 case, which we have referred to as the Cut-off Date,
22 is 30 April 2018.

1 Here, Claimant knew of the alleged breach
2 and the loss before that Cut-off Date. Indeed, the
3 Measures that Claimant challenges in this Arbitration
4 took place in 2013, 2014, and 2015. And the evidence
5 on the record, including Claimant's own filings, show
6 that, as early as March 2014, and certainly by
7 May 2016, Claimant knew of the alleged breach and
8 loss. It even submitted its First Notice of Intent,
9 which is dated 3 May 2016, alleging a breach of the
10 Treaty and quantifying the alleged loss.

11 The evidence also shows, and the Hearing
12 this week has confirmed, that Claimant's claims fall
13 outside of the jurisdiction *ratione temporis* of this
14 Tribunal, and this is because Claimant does not own a
15 qualifying or covered investment within the meaning of
16 the Treaty and the ICSID Convention.

17 And this is true in respect of the two
18 alleged investments invoked by Claimant as the basis
19 for all of its claims. That is the Five Shipments of
20 the "dirty gold" and Kaloti as a going concern.

21 Starting with the latter, Kaloti as a going
22 concern, it's not a covered investment for the simple

1 reason that it does not meet the "territorial"
2 requirement under the Treaty. Kaloti is not an
3 investment in Perú. Rather, it is, as readily
4 admitted by Claimant in its submissions, a company
5 incorporated and based in Miami, Florida. This may be
6 the first time in an ICSID case that a Claimant has
7 declared itself to be both a foreign investor for the
8 purpose of *ratione personae* and at the same time an
9 investment in the host State for the purpose of
10 *ratione materiae*, but this is simply untenable and
11 contradictory.

12 Now, turning to the Five Shipments of the
13 "dirty gold," the evidence shows and the Hearing
14 confirmed that none qualify as an investment for
15 various reasons. But before I recall some of those
16 reasons, we highlight that Claimant has deliberately
17 sought throughout these Arbitrations to treat these
18 Five Shipments as an indivisible sum or a single
19 investment. But they are not. And this is something
20 that we pointed out in our Opening presentation
21 earlier this week. While there are some common
22 elements to each shipment, such as the fact that all

1 comprise illegally mined gold, each also has its
2 particularities. By way of example, Claimant never
3 made any payment whatsoever for several shipments and
4 made only partial payments for the remaining three
5 shipments. Perú has included, at the conclusion of
6 this PowerPoint presentation, a table that separates
7 these shipments and shows the facts that attach to
8 each of those shipments, and you will see that there
9 are some differences and some common elements.

10 Notwithstanding their differences, a common
11 feature of all Five Shipments is that they are not
12 more than a commercial transaction for the sale of
13 goods. Such transactions do not possess the objective
14 characteristics of an investment and, therefore, are
15 not within the scope of the Treaty or the ICSID
16 Convention.

17 Furthermore, Claimant never acquired
18 ownership over any of the Five Shipments under
19 Peruvian law. Claimant has never produced Purchase
20 Agreements proving its ownership, nor has it even been
21 able to prove, either before the Peruvian courts or
22 this Tribunal, the lawful origin of the gold.

1 In respect of this basic threshold
2 requirement, Claimant has been vague and inconsistent.
3 Throughout the Arbitration, it has pointed to various
4 different instruments as the purported legal basis for
5 its ownership rights. Even Claimant's Legal Expert is
6 unable to cite or even point to a Sales Contract in
7 either of his two Expert Reports for any of the Five
8 Shipments. And also, Shipment 5 was the subject of a
9 civil litigation between Supplier, ██████, and Kaloti
10 before the Peruvian courts. Indeed, the Civil Court
11 that decided that case on appeal rescinded the
12 Transaction between ██████ and Kaloti, which means that
13 Kaloti does not have legal ownership over that gold.

14 Claimant, thus, has no covered investment
15 and the Tribunal lacks jurisdiction *ratione materiae*.

16 But even assuming that the Tribunal did have
17 jurisdiction, it would have no difficulty finding that
18 the Claims must be dismissed for lack of merit.

19 Among other things, the Tribunal would find
20 that Claimant, Kaloti, is a company that casually
21 disregarded its obligation under Peruvian law to
22 conduct due diligence into its Suppliers. It

1 single-mindedly sought to buy as much gold as it
2 possibly could at the behest and urging of its
3 associated or sister company [REDACTED],
4 unconcerned about the unlawful origin of the gold.
5 Kaloti simply paid lip service to its due-diligence
6 and compliance obligations. In fact, Kaloti's
7 employees and former employees who testified this week
8 each expected that someone else would fulfill Kaloti's
9 compliance obligations, and that includes the
10 Compliance Officer himself, Mr. [REDACTED], who
11 stated that compliance was the responsibility of
12 everyone, but it seems that it was the responsibility
13 of no one in Kaloti.

14 Given that Kaloti repeatedly ignored glaring
15 red flags, it cannot now feign surprise that it
16 developed an operation that involved criminals and
17 criminality at every single stage of its transaction
18 chain.

19 When looking at this case, Members of the
20 Tribunal, there can be no doubt that the Five
21 Shipments consisted of illegally-mined gold. Had
22 Claimant carried out a proper due diligence, it would

1 have known this. But Claimant had no interest in
2 doing so. As Ms. [REDACTED], in charge of trading,
3 testified this week, Kaloti was only interested in
4 acquiring as much gold as possible to satiate [REDACTED]
5 [REDACTED] cupidity.

6 Now, that Suppliers' criminality has been
7 exposed. All of the Suppliers' criminality has been
8 exposed, and so Claimant attempts to wash itself clean
9 by claiming that it is a bona fide purchaser. Kaloti
10 is no such thing. And even if it were, the law does
11 not allow even a good-faith purchaser to walk away
12 with the proceeds of a crime. This is provided by
13 Article 948 of the Peruvian Civil Code and was
14 confirmed by Claimant's own Legal Expert in response
15 to Professor Knieper's questions on Thursday. And
16 Perú discussed this provision in Paragraphs 438 and
17 439 of its Rejoinder most recently.

18 But in any event, the overwhelming evidence
19 before the Peruvian courts, most of which could have
20 been detected by Kaloti if it complied with its
21 due-diligence obligations under Article 11 or
22 Legislative Decree 1107 or even its own Compliance

1 Manual, demonstrate that Claimant is certainly not a
2 good-faith purchaser. But importantly, the Tribunal
3 need not decide that issue of whether the gold was, in
4 fact, illegally mined. It is not a criminal court
5 that has to make that determination on the basis of
6 the standard of beyond a reasonable doubt. Instead,
7 this Tribunal need only determine, and has ample
8 evidence before it to do so, that Perú's conduct was
9 justified. In particular, SUNAT had objective reasons
10 and the authority under Peruvian law to inspect and
11 immobilize the shipments. With that issue decided,
12 Claimant's remaining complaint concerns the conduct of
13 the Criminal Proceedings, and here, again, Claimant's
14 claims fail for multiple reasons:

15 First, Perú and the United States agree, and
16 principles of international law confirms, that the
17 conduct of judicial authorities in the context of
18 ongoing proceedings will only violate international
19 law if they amount to a denial of justice. And a
20 denial of justice requires a final decision by the
21 State's judiciary. Otherwise, international tribunals
22 would be sitting as Appellate Bodies, and as this

1 Tribunal knows, jurisprudence had confirmed that that
2 is not the case under international law.

3 International tribunals are not Appellate Courts of
4 domestic courts.

5 And, here, there are no final judicial
6 decisions. All the judicial Measures that Claimant
7 challenges could have been challenged through multiple
8 legal avenues. But Claimant has insisted and has
9 confirmed this week that it simply chose not to do so.

10 And second, to submit a claim for denial of
11 justice, Claimant must have had an interest in the
12 proceedings. But Claimant did not have such interest.
13 Indeed, as this Tribunal heard, Kaloti sent, seemingly
14 at random, various requests and submissions. But none
15 of those submissions was accompanied by a single piece
16 of evidence that would establish, even on a prima
17 facie case, any property right or interest. And none
18 comply with Peruvian law. Again, the claim fails on
19 that basis.

20 Third, and in any event, the threshold for
21 denial of justice is exceedingly high. It requires an
22 egregious or shocking error of a type that no

1 reasonable decision-maker could make. But Claimant
2 here simply cannot satisfy that standard or threshold.
3 And that is because, when one strips away Claimant's
4 rhetoric and misrepresentations, Claimant's Claim
5 boils down to its complaint that it made three
6 interventions or submissions before Criminal Courts in
7 respect of one shipment, and those three submissions
8 were, unsurprisingly, unsuccessful.

9 However, as Perú's Legal Expert has
10 confirmed, Mr. Missiego, those submissions were not
11 consistent with Peruvian law, and that is obvious.
12 One does not need to be a Peruvian law expert to know
13 that. And as Claimant's own Legal Expert conceded, in
14 none of those submissions Kaloti provide any evidence
15 to the Criminal Courts to substantiate Claimant's
16 alleged property rights. In fact, for two of those
17 submissions, Claimant attached its Notice of Intent to
18 submit claims to international arbitration. It seems
19 that Kaloti expected that the Peruvian courts would
20 apparently just suppose or accept that what Claimant
21 was saying or Kaloti was saying was true, that it had
22 owned the gold. Just take it at face value. It

1 appears to be Kaloti's position before the Peruvian
2 courts. And it has become clear that Claimant takes
3 the same approach in this Arbitration. It is asking
4 you to take at face value what they're saying when it
5 comes to establishing its ownership rights under
6 Peruvian law.

7 And, as I have pointed out and was admitted
8 by both Legal Experts in this Arbitration, Claimant
9 had available remedies under Peruvian law to challenge
10 the rejection of those three submissions or
11 interventions, but, as Claimant admits, it simply
12 chose not to pursue those remedies. In short, the
13 denial-of-justice claim is meritless and must be
14 rejected.

15 As I mentioned at the outset, it is a
16 challenge to succinctly summarize all of the fatal
17 defects in Claimant's claims. I have devoted some
18 minutes to this task already, and we have not even
19 started to scratch the surface as to the many flaws of
20 Claimant's case. We have not even reached the issue
21 of causation, which, of course, is fundamental in any
22 arbitration, and certainly in this one. Because, to

1 substantiate its expropriation claim and to recover
2 damages for any of its claims, Claimant must prove,
3 rather than merely assert, that Perú's conduct caused
4 Claimant to suffer the loss that it alleges. But
5 Claimant has not and cannot do so. Claimant has no
6 documentary evidence to support its case on causation
7 and, therefore, relied on the written testimony of its
8 Witnesses. But that testimony crumbled this week.

9 In some instances, the Witnesses suddenly
10 couldn't recall the events and issues from their
11 written testimony. In other instances, the testimony
12 changed altogether. That was particularly the case
13 for Mr. [REDACTED]. To recall, Claimant's damages theory
14 relies upon the premise that Mr. [REDACTED] had chosen to
15 write off the value of the Five Shipments on
16 30 November 2018. However, Mr. [REDACTED] admitted on
17 cross-examination that he never made that Decision.

18 Moreover, and in any event, the record is
19 replete with evidence of supervening causes of
20 Kaloti's alleged loss. These include but are not
21 limited to Kaloti's deep and very public ties to the
22 [REDACTED], which was the subject of

1 negative media attention and scandals reported by
2 leading news agencies with global reach.

3 And there is also the fact that Mr. [REDACTED]
4 himself transferred his address, assets, staff, and
5 Suppliers to a new company, [REDACTED].

6 These are many of the key, but not the only,
7 reasons that Claimant's claims fail. During the
8 remainder of this presentation, we will walk through
9 the key issues set forth in Perú's list of substantive
10 issues and address the law and proven facts supporting
11 Perú's objections and defenses. And to guide the
12 Tribunal through the evidence and arguments in our
13 presentations, we have included in the headings of our
14 slides the corresponding substantive issue as is
15 contained in that list of issues that Perú submitted
16 to the Tribunal in compliance with the Tribunal's
17 request in the PO.

18 And you will see that in the heading of the
19 subsequent slides in our presentation.

20 We will begin with Perú's objection to the
21 jurisdiction *ratione temporis* of this Tribunal, and
22 for that I will yield the floor to my colleague,

1 Ms. Horne.

2 Mr. Nistal will then address the *ratione*
3 *materiae* objection.

4 And, at that point, we should be at the
5 one-hour mark, and we can take the break.

6 I will then address the lack of merit of
7 Claimant's claims.

8 And, finally, my colleague, Mr. Smyth, will
9 conclude by addressing quantum issues.

10 So, with the Tribunal's indulge, I cede the
11 floor to Ms. Horne.

12 MS. HORNE: Good afternoon, Mr. President
13 and Members of the Tribunal. We will now turn to the
14 subject of this Tribunal's jurisdiction. And we will
15 begin with the lack of jurisdiction *ratione temporis*
16 over all but one of Claimant's Claims.

17 Perú's objection is based on Article 10.18.1
18 of the Treaty. The applicable standard appears to be
19 uncontested between the Parties and is shown on your
20 screen.

21 As applied to this case, the question is:
22 Did Claimant acquire, or should it have acquired,

1 knowledge of the alleged breaches and loss before
2 30 April 2018? If so, this Tribunal lacks
3 jurisdiction over the Claims.

4 Now, Claimant has suggested several times
5 that the Tribunal has to simply accept its claims as
6 they have been pleaded, including that Claimant did
7 not know of the alleged breach or loss, but that's not
8 accurate. The Tribunal must examine the evidence of
9 Claimant's knowledge.

10 In this case, there is ample evidence which
11 unequivocally proves that Claimant did acquire
12 knowledge of the alleged breach and loss before the
13 Cut-off Date.

14 First and foremost, it is undisputed that
15 the key Challenged Measures, namely the SUNAT
16 Immobilizations and the Precautionary Seizures, took
17 place years before the Cut-off Date. And not only was
18 Claimant aware of these Measures, but it repeatedly
19 characterized them, including in formal submissions,
20 as breaches of the Treaty. It did so years before the
21 Cut-off Date.

22 For example, in March of 2014, Kaloti filed

1 an Amparo Request before Peruvian courts. In that
2 filing, Kaloti specifically alleged an indirect
3 expropriation constituting a breach of Article 10.7 of
4 the Treaty. Logically, Claimant had to have gained
5 knowledge of the alleged breach before it prepared and
6 filed this submission.

7 On 3 May, which is about 3 May 2018--2016,
8 rather, excuse me--on 3 May 2016, about two years
9 before the Cut-off Date, Claimant submitted a Notice
10 of Intent, which is on the record as Exhibit R-242.
11 In the Notice, Claimant specifically listed the same
12 conduct of which it now complains before this
13 Tribunal. That includes the SUNAT Immobilizations,
14 the Precautionary Seizures, the conduct of the
15 Criminal Proceedings, and the Civil Proceeding in
16 relation to Shipment 5.

17 Claimant then argued in that same Notice of
18 Intent that such conduct "violated in various ways the
19 Perú-United States Trade Promotion Agreement."

20 These contemporaneous documents prepared and
21 filed by Claimant before various Peruvian authorities
22 are dispositive. Claimant knew of the alleged

1 breaches long before the Cut-off Date.

2 Notably, Kaloti also attached the Notice of
3 Intent, shown on your screen, to its subsequent
4 filings before the Criminal Courts, again confirming
5 its own knowledge of the alleged breaches. Those
6 filings are on the record as Exhibits C-14 and C-15.

7 Now, the Notice of Intent dated 3 May 2016
8 likewise demonstrates that Claimant knew of the
9 alleged loss before the Cut-off Date. In Paragraph 68
10 of the Notice of Intent, which is displayed on your
11 screen, Claimant not only alleged that it had suffered
12 loss but, in fact, it specified that the alleged loss
13 consisted of the value of the gold and damage to the
14 Company, and Claimant Kaloti quantified that loss.
15 Based on this evidence, there can be no doubt that
16 Claimant acquired knowledge of the alleged loss before
17 the Cut-off Date.

18 In any event, there is yet more evidence on
19 the record that confirms this conclusion. For
20 example, in his Second Report, Claimant's own damages
21 expert stated that "KML's loss of potential sales
22 revenues started in 2013, and was particularly

1 observable starting in 2014 onward." If the alleged
2 loss was indeed observable, then Claimant certainly
3 knew, or should have known, of it.

4 During his testimony, in response to a
5 tribunal question, Claimant's damages expert again
6 reiterated that the alleged loss began as early as
7 November 2013.

8 Furthermore, Mr. [REDACTED] testimony also
9 shed light on the timing of the alleged loss. In
10 Claimant's pleadings, including at its Memorial
11 Paragraph 163, Claimant argued that it became de facto
12 bankrupt when it wrote off the value of the gold, and
13 its Net Equity dropped below zero. When confronted
14 with its own--with Mr. [REDACTED] own Financial
15 Statements, though, he conceded that the Company's
16 financial situation in 2017 was the same as it was in
17 2018. In other words, both before and after the
18 Cut-off Date, the Net Equity Value of Kaloti would
19 have been negative following a write-off. This again
20 proves that Claimant knew, or at the very least it
21 should have known, of the alleged loss long before the
22 Cut-off Date.

1 In sum, the evidence on the record shows,
2 beyond any doubt, that Claimant knew or should have
3 known of both the alleged breaches and loss before the
4 Cut-off Date. On that basis, all claims should be
5 dismissed for lack of jurisdiction, pursuant to
6 Article 10.18.1.

7 Now, in an attempt to avoid that outcome,
8 and having expressly conceded that none of the
9 individual Measures, of which it complains, constitute
10 breaches of the Treaty, Claimant relies on a Composite
11 Act Theory to support each and every one of its
12 claims.

13 (Tribunal conferring.)

14 MS. HORNE: Not at all. Thank you.

15 So, to summarize here, what's shown on the
16 screen is that Claimant has relied on a Composite Act
17 Theory in an attempt to evade the temporal limitation
18 provision and hopefully to save its claims.
19 Claimant's counsel reiterated this theory during the
20 Hearing, noting that none of Perú's individual actions
21 constituted individualized breaches of the Treaty.
22 This means that if the Tribunal finds that there was

1 no Composite Act, then all of the claims necessarily
2 fold. Given the foundational importance of the
3 Composite Act Theory, one might have expected a
4 thorough explanation of the legal and factual basis
5 for it. But no such explanation ever arrived, even as
6 late as this Hearing. Claimant's Opening Presentation
7 consisted of 198 slides, but only two of those
8 mentioned a composite act, and none of the slides
9 identified the State Measures that purportedly would
10 comprise the non-existent composite act. Claimant's
11 Closing Presentation followed suit, again mentioning
12 the notion of a composite act only twice.

13 Given that Claimant cannot even say with any
14 certainty what the alleged measures comprising the Act
15 were, it has failed to demonstrate the existence of a
16 composite act under international law. And in any
17 event, a Claimant cannot simply list a set of
18 measures, decide to complain about them in the
19 aggregate, and summarily concluded that there must
20 have been a composite act. That would not meet the
21 standard of customary international law. Rather, a
22 composited act is a specific type of State conduct,

1 which is comprised of a series of measures that were
2 "sufficiently numerous and interconnected to amount
3 not merely to isolated incidents or exceptions but to
4 a pattern or system." That definition is contained in
5 the Authoritative Commentary to the ILC Draft Articles
6 on State Responsibility on the record as RL-22.

7 But Claimant has not proved through evidence
8 the existence of any pattern or system here. Instead,
9 Claimant has at various times challenged the conduct
10 of various State entities acting in the ordinary
11 course of their regulatory and adjudicatory functions.
12 Claimant has not submitted or even sought to submit
13 communications between the various agencies that would
14 show or establish a coordinated pattern or scheme.

15 Moreover, any notion that Perú was engaged
16 in such pattern or scheme against Kaloti is
17 contradicted by the evidence. Kaloti operated in Perú
18 for six years. Its own Transaction History, submitted
19 as Exhibits C-30 and C-43, indicate that, during that
20 six-year period, Kaloti transacted more than
21 30 million grams of gold worth more than \$1.1 billion.
22 The limited information that Kaloti chose to put on

1 the record does not tell us exactly how many
2 transactions took place, but the available documents
3 indicate that there must have been at least 532
4 separate transactions. When the four shipments
5 immobilized by SUNAT are compared to those overall
6 figures of Kaloti's transaction history, it's clear
7 that they represent about 1.24 percent of the total
8 transactions in grams, 1.2 percent of the total
9 transaction in terms of U.S. dollars, and 0.75 percent
10 of the total numbers of transactions that Kaloti
11 effected in Perú.

12 So, where is the pattern of conduct? Where
13 is the scheme against Kaloti? The answer, of course,
14 is that there was no such pattern or no scheme. And
15 the consequence of this is that there was no composite
16 act. And there being no composite act, the entire
17 case must be dismissed.

18 Now, still, there is yet another irrefutable
19 reason why Claimant's Composite Act Theory and the
20 entire case must fail. According to Claimant, the
21 alleged composite act crystallized on
22 30 November 2018. Claimant made this argument

1 numerous times in its written submissions, including
2 in its Memorial at Paragraph 8, which is shown on your
3 screen.

4 Claimant also repeated this argument during
5 the Hearing, including on Slide 13 of the Opening
6 Presentation.

7 Claimant's theory is thus that, even though
8 all of the State Measures took place before the
9 Cut-off Date, the alleged breach crystallized
10 thereafter, but before or on 30 November 2018. Under
11 this theory, there must have been State conduct
12 between 30 April and 30 November 2018, which conduct
13 could have crystallized a breach of international law.

14 So, what was the State conduct? The reality
15 is that there are only two events that took place
16 during this period. Claimant mentioned these in
17 passing in the Reply, not at all during the Opening
18 Presentation on Monday, and was again silent this
19 afternoon. There is a reason for Claimant's
20 reluctance to discuss these events: Neither could
21 have crystallized a composite act or a breach of the
22 Treaty by Perú.

1 The first event is a ruling in July 2018
2 that simply closed the pre-trial phase of the [REDACTED]
3 [REDACTED] Criminal Proceeding. There is nothing there
4 for Claimant to complain about.

5 The second is an October 2018 Ruling in
6 favor of Kaloti. Again, there is nothing for Claimant
7 to complain about.

8 So, the question remains: What was the
9 State conduct between 30 April and 30 November that
10 purportedly crystallized the alleged breach? The
11 answer is simple: There was none. Instead, we have
12 only Claimant's assertion that Kaloti chose to end
13 operations sometime in the fall of 2018. Claimant
14 elaborated on this theory not long ago, and conceded
15 before this Tribunal that the so-called "triggering
16 event" was the loss of hope by Mr. [REDACTED].

17 Members of the Tribunal, the alleged and
18 highly subjective loss of hope by an individual
19 Founder of a company is not State conduct that could
20 crystallize a breach of international law. The
21 reality is that there was no such State conduct, and
22 that is fatal to Claimant's claims.

1 It's further important to recall that, even
2 if there were State conduct, Claimant cannot simply
3 circumvent the temporal limitations period by pointing
4 to the latest in time act. The Temporal Limitations
5 Provision codified in Article 10.18.1 is a condition
6 of the State's Party consent to arbitration. Consent
7 being the cornerstone of the investment-arbitration
8 system, this condition cannot be ignored, modified, or
9 otherwise disregarded. Investment tribunals for that
10 reason have roundly rejected attempts similar to that
11 made by Claimant attempting to circumvent Temporal
12 Limitations Provisions or other Temporal Restrictions
13 in Treaties. This includes the Tribunal in Corona
14 versus Dominican Republic, which stated, as shown on
15 your screen that: "An investor cannot evade the
16 temporal limitations period by basing its claim on the
17 most recent transgression in that series. To allow an
18 investor to do so would, as the Tribunal in Grand
19 River recognized, render the temporal limitations
20 provision ineffective."

21 Similarly, in its non-disputing Party
22 Submission in this case, the United States emphasized

1 that "subsequent transgressions by a party arising
2 from a continuing course of conduct do not renew the
3 Limitations Period once an investor knows, or should
4 have known, of the alleged breach and loss or damage."

5 In summary, the submissions and evidence
6 have demonstrated the following:

7 First, Claimant knew of the alleged breaches
8 and loss long before the Cut-off Date.

9 Second, while Claimant seeks to cure this
10 defect by attempting to manufacture a composite act,
11 Claimant has not identified a set of Measures forming
12 part of a pattern or scheme that could comprise such a
13 composite act under customary international law. And
14 fatally for Claimant's case, Claimant has not
15 identified any State conduct after the Cut-off Date
16 that could have crystallized such a breach on
17 30 November 2018.

18 Third, and finally, as a result of the
19 foregoing, this Tribunal lacks jurisdiction *ratione*
20 *temporis* over all but one of Claimant's claims.

21 Unless the Tribunal has any questions for
22 me, I will now yield the floor to my colleague,

1 Mr. Nistal.

2 ARBITRATOR KNIEPER: You have guessed that I
3 have a question and that's why I interrupted
4 impolitely, by asking the President whether I could
5 ask this question, and he denied, temporarily.

6 PRESIDENT McRAE: It was a right--the right
7 of appeal.

8 (Laughter.)

9 ARBITRATOR KNIEPER: No, my question is the
10 following. Let us go back to your Slide No. 10 and
11 then perhaps also to your Paragraph 389 in your
12 Memorial on Jurisdiction, and my question is: Is
13 there not a contradiction in your Memorial and what
14 you say here, because, in the Memorial you say that
15 most of Kaloti's Claims are barred by the limitation,
16 and here you say all claims are time-barred. Is that
17 a contradiction?

18 MS. HORNE: No. To clarify, Professor
19 Knieper--and thank you for the question--we do not
20 take the position that every single one of the claims
21 is time-barred. There is one aspect of the
22 minimum-standard-of-treatment claim that does not

1 apply here, that's the Claimant's Claim which, I'm not
2 sure was addressed this afternoon, but was addressed
3 in Monday's Opening Presentation. That's the claim
4 that Perú breached the minimum standard of treatment
5 and/or other provisions of the Treaty by failing to
6 negotiate with Claimant after the dispute had arisen.
7 That's the only aspect of the claims, though, that we
8 consider are not time-barred under Article 10.18.1.

9 ARBITRATOR KNIEPER: Is that one or two?
10 So, you say the lack of negotiation and--

11 MS. HORNE: Only the lack of negotiation.

12 ARBITRATOR KNIEPER: Only the lack of
13 negotiation?

14 MS. HORNE: That's the sole claim, yes,
15 Professor Knieper.

16 ARBITRATOR KNIEPER: Okay. Thank you.

17 MS. HORNE: And just to clarify, that is the
18 claim, we believe it's framed under the MST
19 obligation.

20 ARBITRATOR KNIEPER: Thank you very much.

21 MS. HORNE: Thank you, Professor Knieper.

22 Mr. President, I may yield the floor now to

1 my colleague, Mr. Nistal.

2 PRESIDENT McRAE: Yes, certainly.

3 Mr. Nistal.

4 MR. NISTAL: Good afternoon, Mr. President
5 and Members of the Tribunal. In this segment of our
6 presentation--I will perhaps wait until we get to the
7 slide, I think it's Slide 34--in this segment of our
8 presentation, we will address a range of questions set
9 out in Section A of Perú's list of substantive issues.
10 Specifically, we will recall the various reasons why
11 the assets underlying Claimant's treaty claims are not
12 covered investments. Claimant's failure to satisfy
13 its burden of proof in relation to this threshold
14 issue means that the Tribunal lacks jurisdiction
15 *ratione materiae* in respect of each and every one of
16 Claimant's claims. Claimant's treaty claims in this
17 Arbitration are based on two sets of alleged
18 "investments": First, Kaloti as a going concern, and
19 second, the Five Shipments of gold and Kaloti's
20 alleged infrastructure or operation in Perú.

21 I will address each of these alleged
22 "investments" in term starting with Kaloti as a going

1 concern.

2 As established in Treaty Articles 1.3 and
3 10.1, as well as in Article 25 of the ICSID
4 Convention, the Tribunal's jurisdiction is limited to
5 disputes arising out of covered investments made by a
6 Claimant in the territory of the Respondent State. As
7 both State Parties have emphasized during this
8 Arbitration, ignoring this "territorial" requirement
9 would radically and impermissibly expand the rights
10 they granted to foreign investors under the Treaty.
11 As you can see, Claimant and its Witnesses have
12 repeatedly confirmed that Kaloti is a limited
13 liability company registered in the State of Florida,
14 Kaloti is not incorporated in Perú, and Kaloti
15 maintained its principal place of business in the
16 United States.

17 In its Reply, Claimant relied on
18 Exhibit C-159 to allege that Kaloti was registered in
19 Perú, as a company, an ongoing business, with the
20 Peruvian Superintendencia Nacional de Registros de
21 Públicos, or "SUNARP." This is not true, as Perú
22 explained in its Rejoinder and again at this Hearing,

1 Exhibit C-159 does not prove that Kaloti itself
2 registered with SUNARP. Rather, it merely shows that
3 Kaloti registered a Power of Attorney in Perú, and did
4 so as a U.S. company, and this is confirmed by both
5 Exhibit C-159 and Exhibit R-240.

6 Claimant's own arguments on jurisdiction
7 confirm that Kaloti is not a covered investment. This
8 is because Kaloti cannot be a U.S. investor for the
9 purpose of jurisdiction *ratione personae* and, at the
10 same time, a Peruvian investment for the purpose of
11 jurisdiction *ratione materiae*. In sum, Kaloti as a
12 going concern does not qualify as a covered investment
13 under the Treaty or the ICSID Convention because it is
14 not located in Perú. It does not satisfy the
15 "territorial" requirement. It is simply not a foreign
16 investment.

17 I will now turn to the second set of alleged
18 "investments" invoked by Claimant. That is, the Five
19 Shipments of gold and Kaloti's so-called
20 "infrastructure" or "operation" in Perú.

21 As correctly pointed out by the United
22 States, to qualify as a covered investment under the

1 Treaty, an asset also must possess the characteristics
2 of an "investment." Treaty Article 10.28 specifies
3 that those characteristics include the commitment of
4 capital or other resources, and an assumption of risk.

5 The asset also must possess the
6 characteristics of an "investment" under Article 25 of
7 the ICSID Convention. Case law has identified these
8 characteristics which are similar to those set forth
9 in the Treaty. They include a contribution having an
10 economic value, the assumption of an investment risk,
11 and a certain minimum duration. Neither the Five
12 Shipments of gold nor Kaloti's alleged infrastructure
13 or operation possess the characteristics that I have
14 mentioned.

15 For example, tribunals in cases like
16 Doutremepuich or Joy Mining, have explained that the
17 contribution requirement must be assessed, taking into
18 account the totality of the circumstances and the
19 elements of the economic goal pursued by the Investor.
20 Thus, as you can see, in Apotex, the Tribunal noted
21 that the Claimant had not made an investment in the
22 United States because its activities in that country

1 amounted to no more than the ordinary conduct of a
2 business for the export and sale of goods. The
3 Tribunal also noted that it had no reason to doubt
4 that Apotex had committed significant capital in the
5 United States towards the purchase of raw materials,
6 but these were no more than purchases from U.S.
7 Suppliers by way of a commercial contract for the sale
8 of goods, which were generally excluded by the
9 applicable Treaty.

10 Likewise, Kaloti's alleged investments in
11 the Five Shipments of gold, at most, would qualify as
12 mere purchases from Peruvian Suppliers by way of
13 commercial contracts for the sale of goods, which are
14 excluded from the scope of the Treaty applicable in
15 this case.

16 In fact, Kaloti's case on jurisdiction
17 *ratione materiae* is even weaker than that of Apotex.
18 This is, among other reasons, because, by its own
19 admission, Claimant has failed to pay the full price
20 of Shipments 1, 2, and 4, and it has made no payment
21 whatsoever for Shipments 3 and 5.

22 The Five Shipments of gold also lack the

1 characteristic assumption of risk. Claimant has
2 stated in no uncertain terms that, I quote, "risk
3 associated with its trading operation was
4 nonexistent." As Claimant also has conceded, Kaloti
5 was merely serving as a middleman for [REDACTED]
6 [REDACTED], and in his Witness Statement, Mr. [REDACTED]
7 explained that the Five Shipments were, I quote,
8 "committed to being resold (and hence financed) by
9 [REDACTED]."

10 Mr. [REDACTED] statements at the Hearing also
11 confirmed that Claimant's alleged investment in the
12 gold does not satisfy the duration requirement. As
13 you can see, he explained that Claimant used to resale
14 the gold it sourced from Perú within 24 to 48 hours.

15 Claimant's so-called "infrastructure" or
16 operation in Perú also lacks the characteristics of an
17 "investment." Kaloti itself has explained that the
18 objective of the infrastructure was, I quote, "to
19 weight and assay gold for subsequent export to the
20 United States."

21 In that same vein, at the Hearing Claimant's
22 own Quantum Expert explained that Kaloti used its Lima

1 facilities essentially to store the gold until it was
2 shipped to the United States.

3 Similarly, in response to a question from
4 the Tribunal, Mr. ██████ confirmed that "Claimant's
5 business operation was limited to purchase and sale of
6 the already mined gold."

7 Therefore, following the reasoning of the
8 Apotex Tribunal, Kaloti's alleged infrastructure or
9 operation in Perú was simply, I quote, "the mechanism
10 by which the export," I add, of the gold, "was
11 conducted." Therefore, that operation cannot be
12 considered an investment under the Treaty or the ICSID
13 Convention.

14 There are several additional circumstances
15 that confirm this conclusion. For instance, in its
16 written pleadings and again in this Hearing, Kaloti
17 falsely argued that it had hired local employees in
18 Perú. But as you can see, the Contracts that it has
19 submitted to support this statement expressly state
20 that Kaloti did not have an employment relationship
21 with the relevant individuals. Through these
22 Contracts, Kaloti merely purchased services regarding

1 the testing of minerals before their export.

2 Before I move on from this slide, I would
3 like to call your attention to the last part of the
4 second quote because today Claimant has raised a new
5 argument that I will have to address later on, and
6 this could--might be relevant for that. I would like
7 in particular to call your attention to the last part
8 which says "to confirm that they comply with the
9 technical specifications required for the export and
10 eventual purchase of the product by the COMPANY." As
11 I will explain later, this is additional evidence that
12 the way in which Kaloti operated is that the actual
13 purchase of the gold took place in Miami. It didn't
14 take place in Perú. I will come back to this point
15 later. This, as you can see, is part of the Service
16 Agreements that Kaloti entered into with its local
17 contractors in Perú.

18 In conclusion, neither Claimant's alleged
19 purchase of the Five Shipments nor its so-called
20 "infrastructure" or operation in Perú possess the
21 characteristics of a covered investment.

22 Pursuant to Treaty Article 10.28, Claimant

1 also must demonstrate that it owns or controls its
2 alleged investments. However, Claimant has failed to
3 demonstrate that Kaloti ever acquired ownership or
4 control over the Five Shipments of gold. As I
5 mentioned earlier, Claimant has admitted that it never
6 paid ██████ for the gold contained in Shipment 5. As a
7 result, ██████ filed a lawsuit against Kaloti before
8 Perú's Civil Courts. In the context of that private
9 dispute between ██████ and Kaloti, the competent Civil
10 Court concluded that Kaloti did not hold any ownership
11 right over the gold in Shipment 5. It is therefore
12 undisputable that Shipment 5 falls outside the scope
13 of the Treaty.

14 Claimant also has failed to prove that it
15 ever acquired ownership over Shipments 1 to 4. As you
16 can see, before this Hearing, Claimant had repeatedly
17 alleged that it acquired ownership over the gold
18 pursuant to a series of Purchase and Sale Agreements.

19 In the next slide, you can see that to
20 Perú's authorities Kaloti even said that these alleged
21 agreements were governed by specific Incoterms, and
22 that according to those Incoterms, Kaloti allegedly

1 had taken legal possession and acquired ownership over
2 the shipments in its Lima facilities. But Kaloti
3 failed to prove these allegations before Perú's
4 authorities and it also has failed to prove them in
5 this Arbitration, including because it has not
6 submitted the relevant Purchase Agreements.

7 Today, Claimant said for the first time in
8 this Arbitration that there is no written Purchase
9 Agreement for Shipments 1 to 4. I quote, Claimant's
10 counsel said on Monday "Perú bit to the argument there
11 were no contracts for the Five Shipments of gold. We
12 heard that multiple times, but here, and we admit it,
13 it is true, there is no piece of paper between the
14 Parties relating to the shipments."

15 It is difficult to defend a claim--defend a
16 case against a Claimant that constantly raises new
17 arguments, particularly when they do it during the
18 Closing Statement. As I said, this is the first time
19 that they have said that the Agreements do not exist,
20 but I will do my best to nonetheless respond to this
21 new iteration of Claimant's case.

22 Claimant's case now on ownership seems to be

1 that it agreed to the purchases only orally, that
2 pursuant to that oral agreement, Kaloti took legal
3 possession of the gold when it was delivered in its
4 Lima facilities, and that the existence of certain
5 invoices necessarily proves that Kaloti acquired
6 ownership over the gold.

7 On the issue of possession--yes, this is the
8 slide. Claimant has failed to prove that Kaloti ever
9 took possession of the gold. As Perú already
10 discussed during the Opening Statement and as it
11 proved in its Rejoinder, the evidence on the record
12 shows that the Suppliers remain in possession of
13 Shipments 1 to 4, until SUNAT's Immobilizations and
14 they were supposed to do so even until its delivery in
15 Miami. And that would be consistent with what we saw
16 earlier today in that Slide 54 when I called your
17 attention.

18 So, the point is not that two Parties can
19 agree orally to a purchase or a sale. We do not deny
20 that. That's true. The point is that Kaloti needs to
21 prove that it acquired ownership over the gold. It
22 needs to present evidence to prove that. It hasn't

1 presented that evidence, and the evidence that is on
2 the record, seems that if there was a purchase, that
3 purchase would have materialized in Miami. And given
4 that the gold never arrived to Miami, Kaloti never
5 acquired ownership over the gold.

6 Now, as I said already in response to a
7 question by Professor Knieper, we don't know the exact
8 terms of the Agreement, but the reality is that it was
9 Claimant's burden of proof to present those terms and
10 to demonstrate that it acquired ownership over the
11 gold. It needed to do that before Perú's authorities,
12 and it needed to do that to succeed in this case, and
13 it has failed to do so.

14 I now turn to the issue of the invoices.
15 The invoices also failed to prove that Kaloti acquired
16 ownership over the gold for multiple reasons. None of
17 the invoices contain any information concerning the
18 conditions under which ownership over the gold would
19 transfer to Kaloti. Crucially, they do not specify
20 whether Kaloti was to acquire such ownership in Perú,
21 or only after delivery of the gold in Miami.

22 Further, and in any event, the vast majority

1 of the invoices are not even signed by Kaloti. You
2 can see one example on the screen. And, therefore,
3 these invoices lack evidentiary weight.

4 In conclusion, Claimant has failed to
5 establish that it ever acquired legal ownership or
6 control over the Five Shipments.

7 The Five Shipments of gold do not qualify as
8 a covered investment for yet another reason. As the
9 United States noted during this Hearing, I quote,
10 "while not stated expressly, the protections in
11 Chapter 10 implicitly only apply to investments made
12 in compliance with the host-State's domestic law."

13 Equally, numerous investment tribunals have
14 confirmed that an investment must comply with both the
15 law of the host-State and international public policy.
16 However, Claimant's alleged investment in the Five
17 Shipments was made in violation of Peruvian law and
18 international public policy.

19 Pursuant to Peruvian law, the Buyer of
20 mineral products must verify the origin of such
21 products. That is clearly established in the General
22 Mining Law and in multiple other regulations that were

1 already in force when Kaloti began operating in Perú.

2 As shown on the screen, Claimant's own Legal
3 Expert admitted under cross-examination that it was
4 fundamental for any gold purchaser to verify the
5 lawful origin of the gold.

6 The next slide sets out part of the minimum
7 documentation that Kaloti was required to obtain, to
8 keep, and to verify pursuant to Article 11 of the
9 Illegal Mining Decree. In this Arbitration, Perú
10 requested that Claimant produce communications between
11 Kaloti and the Suppliers showing that Kaloti had
12 verified the lawful origin of the gold prior to the
13 alleged purchase of each of the Five Shipments.
14 Claimant committed to produce responsive documents,
15 and the Tribunal took note of that commitment.
16 However, Claimant then failed to produce any
17 communication proving that it obtained the
18 documentation required to verify the lawful origin of
19 the Five Shipments.

20 Likewise, at the Hearing, Mr. [REDACTED],
21 Claimant's Compliance Officer, and Claimant's Legal
22 Expert were unable to show that Kaloti obtained, let

1 alone verified, the minimum documentation that Kaloti
2 was legally required to obtain and verify under
3 Article 11 of the Illegal Mining Decree. In fact, as
4 you can see, they confirmed that the exhibits
5 submitted by Claimant in this Arbitration do not
6 contain that minimum documentation.

7 As you can see, Claimant even suggested that
8 it was not legally required to verify the origin of
9 the gold.

10 Today, Claimant raised another new argument.
11 It alleged that Perú's plan for the formalization of
12 artisanal miners somehow released Kaloti from its
13 obligations under Article 11 of Legislative Decree
14 1107. This is the first time in this arbitration that
15 Claimant raises this argument, despite the fact that
16 Perú has regularly invoked Article 11, including in
17 its Memorial and in its Rejoinder. The fact that--the
18 fact that Claimant had made this new argument for the
19 first time in this Closing Statement, by itself,
20 requires that the argument be rejected, among other
21 reasons, because Claimant has deprived Perú of the
22 opportunity to address the issue in detail.

1 In any event, Perú categorically denies that
2 its formalization plan released Claimant from its
3 obligations under Article 11 of Legislative Decree
4 1107, and Claimant has not proven that allegation.
5 Moreover, Mr. [REDACTED] himself argued that the Suppliers
6 were not artisanal miners but were medium-sized
7 miners. And Claimant's Legal Expert confirmed during
8 cross-examination that there is no basis to conclude
9 that the Suppliers have complied with the Peruvian law
10 requirements to benefit from the formalization plan.
11 Perú respectfully refers the Tribunal to the Hearing
12 Transcript of Day 4 in Pages 933 to 940.

13 The cross-examination of Mr. [REDACTED],
14 Claimant's Compliance Officer, and of Claimant's Legal
15 Expert, also confirmed that Kaloti manifestly failed
16 to conduct appropriate due diligence on the Suppliers
17 and on the origin of the gold. For instance, in his
18 Witness Statement, Claimant's Compliance Officer [REDACTED]
19 [REDACTED], had testified that there was nothing suspicious
20 in any of the four Suppliers. However, under
21 cross-examination, he admitted that [REDACTED] own
22 application to open an account with Kaloti raised

1 multiple red flags. You can see one example of the
2 red flags on the screen.

3 Mr. [REDACTED] also admitted that, in breach of
4 its own Compliance Manual, Kaloti nonetheless started
5 trading gold for [REDACTED] before having conducted any
6 due diligence whatsoever on that company. This is
7 also on the screen now. No, sorry, actually it's the
8 next slide, should be 70. Yes, there it is.

9 Moreover, he confirmed that none of the
10 three due-diligence documents that Kaloti obtained in
11 relation to Shipment 2 allowed him to identify the
12 origin of that shipment. Claimant's Legal Expert made
13 similar concessions during cross-examination.

14 As this Hearing has confirmed, the evidence
15 demonstrates that the Five Shipments were the product
16 of illegal mining and part of a money-laundering
17 scheme, which both Peruvian law and international
18 public policy proscribe. Perú identified that
19 evidence in its written pleadings in its Opening
20 Statement, and through the testimony of Professor
21 Missiego. In addition, during its cross-examinations,
22 Perú's counsel presented overwhelming evidence of

1 money-laundering and illegal mining to Claimant's
2 factual witnesses and Legal Expert. And, yet, they
3 were utterly unable to rebut any of that evidence.
4 Moreover, as you can see on the screen, Mr. [REDACTED] and
5 Mr. [REDACTED] admitted that, between 2012 and 2014,
6 Claimant had traded thousands of kilograms of gold
7 worth hundreds of millions of dollars for convicted
8 criminals, including for the notorious [REDACTED]
9 and Alfredo Chamy.

10 Claimant's witnesses allege that they did
11 not know that they were trading for criminal
12 organizations. But Perú has demonstrated that
13 Claimant could have discovered this by conducting
14 basic due diligence on the relevant companies. In
15 sum, as Perú's representative stressed earlier this
16 week, illegal mining and money-laundering caused
17 immense suffering and environmental devastation in
18 Perú and other regions of the world. However, the
19 evidence reveals that Kaloti simply did not care
20 whether the gold had been illegally mined or was the
21 product of money-laundering. Kaloti paid lip service
22 to its due-diligence obligations, and it ignored

1 glaring red flags that would have suggested to any
2 responsible company that the Five Shipments were of
3 unlawful origin. Neither the Treaty nor public
4 international law protects this kind of conduct. For
5 the reasons we have just summarized, and are discussed
6 in far more detail in Perú's written submissions,
7 there can be no serious disagreement that the Tribunal
8 lacks jurisdiction *ratione materiae*.

9 With the Tribunal's indulgence, I will now
10 cede the floor to my colleague, Mr. Grané Labat, who
11 will address Perú's arguments on the merits.

12 Thank you for your attention.

13 ARBITRATOR KNIEPER: May I ask one question
14 before we forget it? Thank you.

15 I believe we can agree now that Contracts
16 can be concluded orally; right? I think that is
17 uncontested between the Parties, and I have no reason
18 not to agree to that. And so, generally speaking,
19 under Peruvian law and--which is in that respect based
20 on German law, you have two elements for the transfer
21 of property, *titulus* and *modus*. *Titulus* is the
22 Contract which can be concluded orally, and *modus* is

1 the transfer of possession.

2 So, the Contract might be there. It has to
3 be established that the Contracts are orally concluded
4 and that might be complicated, but if the Contract had
5 been executed orally, it would be a titulus.

6 MR. NISTAL: Correct.

7 ARBITRATOR KNIEPER: And then, isn't it a
8 transfer of possession when the gold is sent, shipped,
9 to the warehouse which is rented as a place for KML,
10 isn't that the famous modulus?

11 MR. NISTAL: Can we please go back to the
12 slide--sorry, it's the slide with the timeline, so
13 that I can explain Perú's position on this point,
14 which is important here.

15 ARBITRATOR KNIEPER: Yes.

16 MR. NISTAL: So, the process started with
17 extraction then the gold was transported to a
18 processing plant, then the gold was tested, at least
19 that's what Claimant alleges in Hermes' facilities.
20 From there, it was transported to Talma's facilities,
21 and from Talma's facilities, which were in the
22 airport, the gold was supposed to be exported to

1 Miami.

2 Now, Claimant alleges that the third bullet
3 point, let's call it, in Hermes' facilities, they took
4 possession and became the legal owners of the gold.
5 If that were true, from that point to the airport
6 facilities, it would be Claimant that would transport
7 it or an agent contracted by Claimant. And then from
8 the airport facility to Miami, it would still be
9 Claimant exporting the gold or an entity hired by
10 Claimant anyway.

11 But what we see in the evidence that you see
12 on the bottom of the screen is that the Supplier of
13 its shipment transported the gold from Hermes'
14 facilities to Talma, then it submitted the Customs
15 Declarations to SUNAT, and it even completed air
16 waybills where they appeared as exporters for the
17 shipment to Miami.

18 In addition to that, we have only one
19 email--that's the only thing that Claimant has
20 submitted with some semblance of contractual
21 terms--and I think that image should be mentioned
22 somewhere here--no, it's not mentioned here but it was

1 mentioned in my Opening Statement, and it's in Perú's
2 Opening Statement. That email says that the Suppliers
3 were responsible for the export and for ensuring that
4 the gold reached Miami.

5 It would take all of this into
6 consideration, it seems that what happened in Hermes
7 is simply a testing of the gold, but Kaloti did not
8 take possession of the gold. Kaloti simply said,
9 before you export it, we are going to test the purity
10 and we are going to start the process for payment or
11 whatever process they had. But they did not take
12 possession of the gold because otherwise they would
13 have been the ones exporting the gold, completing the
14 Declarations, being responsible for the gold arriving
15 in Miami. That's our position.

16 In any event, we recognize that there is
17 some level of speculation here, but the point is
18 Claimant should prove that it took possession, and it
19 hadn't done it. It should prove that it acquired
20 ownership; and, in order to do that, and to the point
21 that the Tribunal has just mentioned, there should be
22 evidence of the agreement in the Contract, which would

1 include the object, the price, and the conditions
2 governing delivery of the gold.

3 MR. DÍAZ-CANDIA: Professor Knieper, what
4 you raised.

5 ARBITRATOR KNIEPER: Thank you very much.

6 MR. DÍAZ-CANDIA: Professor Knieper, what
7 you raised I would like to point out something? Just
8 about the slide.

9 ARBITRATOR KNIEPER: Perhaps you would defer
10 to the President.

11 PRESIDENT McRAE: I think we have a problem
12 because we're now in the middle of the--and I was
13 about to say to you that any of the questions asked
14 now, when it comes to the Tribunal question time, you
15 may take the opportunity to make your comments on it
16 then, but it just doesn't seem appropriate now in the
17 middle of the Respondent's--

18 MR. DÍAZ-CANDIA: Just a placeholder that is
19 about Slide 59.

20 PRESIDENT McRAE: When we get to the
21 Tribunal's questions, I will certainly invite you to
22 do that.

1 Now is the two-minute break at this time?

2 Let's take the two-minute break. Thank you.

3 (Brief recess.)

4 PRESIDENT McRAE: We will resume.

5 Mr. Grané?

6 MR. GRANÉ LABAT: Thank you, Mr. President.

7 And since we are a few minutes behind
8 schedule, I will try to speed up, but of course, I
9 will be reined back, if necessary, by the Interpreters
10 and the Court Reporters.

11 And before I get into the substance, we
12 should consider a threshold issue of the evidence that
13 is required to substantiate Claimant's claims, and the
14 question is very simple: Where is the evidence? And
15 we've heard different stories from Claimant throughout
16 the Arbitration and even this week, as my colleague,
17 Mr. Nistal, pointed out. During Document Production
18 in response to specific requests by Perú, Claimant
19 alleged that many of the documents were left and lost
20 in Lima, and Perú argued at the time that this
21 allegation was simply not credible.

22 It seems that Perú was right. During the

1 Hearing, we heard from Mr. [REDACTED], where he offered to
2 go to Miami and retrieve his digital records, which
3 neither Perú nor this Tribunal have seen. Ms. [REDACTED]
4 confirmed that she has access to this same set of
5 digital records or another set of digital records.
6 Then, counsel for Claimant seemed to suggest that
7 Mr. [REDACTED] the documents may have been destroyed. But
8 Mr. [REDACTED] rejected this hypothesis that was put to him
9 by Claimant's counsel.

10 And most recently, Mr. Smajlovic testified
11 that he was offered to go through an entire Office of
12 records in Miami during this Arbitration.

13 So, we've heard a variety of different
14 stories about where the documents are. But no matter
15 what the truth may be, documentary evidence to
16 substantiate the Claims is not on the record of this
17 Arbitration.

18 And we will begin with Claimant's Claim
19 under treaty Article 10.5 which prescribes the Minimum
20 Standard of Treatment, but as we go through these
21 claims of these arguments, I ask the Tribunal to bear
22 in mind this fateful flaw and deficiency of Claimant's

1 case. There is no evidence on which the Tribunal can
2 rely and certainly the Tribunal cannot take at face
3 value the allegations made by Claimant and Claimant's
4 counsel.

5 Now, Claimant's MST claim appears to have
6 multiple different components. Certain of these
7 components are frivolous and/or are so lacking in
8 evidentiary support that we will not devote time
9 during our presentation to address those parts of the
10 claim, but we hereby, of course, reiterate our written
11 pleadings and respectfully refer the Tribunal to our
12 written submissions.

13 And let me begin with Claimant's Claim of
14 denial of justice. A threshold issue, which appears
15 at Paragraph 15 of Perú's list of substantive issues,
16 is whether Claimant has demonstrated that it has or
17 had a legitimate interest in the SUNAT Immobilization
18 proceedings or the Criminal Proceedings against the
19 Suppliers. And the simple answer is "no." Kaloti has
20 not proven, either in this Arbitration or before the
21 Peruvian courts, that it has a legitimate interest in
22 the gold. And specifically, as I mentioned at the

1 outset, Kaloti did not submit any evidence whatsoever
2 before the Peruvian Criminal Courts to demonstrate
3 that it owned Shipment 3. And Mr. Nistal also
4 referred to some of the evidence on the record where
5 there is an admission that there is no evidence before
6 those courts, or was before those courts.

7 Now, in respect of Shipment 5, on
8 14 June 2022, a Peruvian Civil Court ruled, in
9 response to Kaloti's appeal, that the sale of that
10 shipment of gold was rescinded. Now, this means that
11 there is a court judgment that confirms that Kaloti
12 has no ownership rights over that shipment. And
13 Claimant has not challenged that Court Decision in
14 this Arbitration. It's not a Challenged Measure.

15 And, finally, there is no evidence on the
16 record in this Arbitration showing that Claimant made
17 an application or appearance before any of the
18 Criminal Courts in respect of the remaining three
19 shipments, 1, 2, and 4, let alone demonstrated before
20 those courts that Kaloti was the good-faith purchaser
21 of the gold in those shipments.

22 Now, these above uncontested facts are

1 dispositive of Claimant's denial-of-justice claims in
2 respect of all Five Shipments. But, in any event,
3 Perú has demonstrated by reference to extensive and
4 well-established case law, that the threshold for
5 denial of justice is exceedingly high. In this
6 respect, there are certain hurdles that a claimant
7 alleging a denial of justice must clear.

8 First, there is an inherent presumption that
9 the Decision of domestic regulators and courts are
10 valid.

11 Second, and relatedly, an incorrect decision
12 by a regulator or court does not constitute a
13 violation of international law per se. Instead, only
14 the most shocking, serious, and egregious failings
15 could rise to the level of a violation of
16 international law.

17 And, third, such egregious failings must
18 reflect a failure of the State's entire judicial
19 system.

20 And, fourth, only Final Acts can serve as a
21 basis for State Responsibility. Final judicial acts,
22 I'm sorry, can serve a basis for State Responsibility

1 under international law. And as noted by the United
2 States in its Non-Disputing Party submission,
3 "non-final judicial acts cannot be the basis for
4 claims under Chapter 10 the Treaty."

5 Claimant has not disputed this high
6 threshold for denial of justice nor the existence of
7 these hurdles. Yet, it has not been able to overcome
8 any of these hurdles, and I will refer to them. But
9 before I address those hurdles, I pause to address a
10 legal argument made by Claimant's counsel in its
11 presentation a few hours ago, concerning the weight to
12 be given to the Submission of the United States in
13 this proceeding in its capacity as a Non-Disputing
14 Party.

15 Now, we addressed this issue on the first
16 day in response to the President's question concerning
17 Article 31(3)(a) of the Vienna Convention, which
18 requires the Interpreter of a treaty to take into
19 account any subsequent agreement between the Parties
20 to the Treaty regarding the interpretation of that
21 Treaty. In breach of Procedural Order, in Slide 35,
22 Claimant cited and referred to a legal authority that

1 is not on the record of this Arbitration. And if
2 Claimant is allowed to refer to this new authority,
3 and to avoid prejudice to Perú, we wish to introduce
4 into the record the International Law Commission's
5 draft conclusions on subsequent agreements and
6 subsequent practice in relation to the Interpretation
7 of Treaties with commentaries, which is from 2018.
8 Those draft conclusions of the ILC explained that, in
9 establishing such an agreement, the question is one of
10 substance rather than one of form. In particular, a
11 subsequent agreement need not be a formal document
12 jointly drafted or cosigned by the Treaty Parties.
13 Rather, an agreement may consist of separate acts or
14 statements by each Party so long as those acts are an
15 attempt by the Treaty Parties to clarify the meaning
16 of the Treaty at issue, and secondly to reflect--that
17 reflects a common understanding, i.e. that the Parties
18 are aware of and share a particular interpretation of
19 one or more provisions of that Treaty.

20 And specifically, we refer the Tribunal to
21 the ILC Draft Conclusions 4 and 10 and Comments 1, 7,
22 10, and 11 to those conclusions.

1 And we also refer the Tribunal to the Award
2 in Carrizosa v. Colombia which is on the record of
3 this Arbitration as RL-145.

4 In Paragraph 203 of that Award, the
5 Tribunal, which was chaired by Professor Gabrielle
6 Kaufmann-Kohler, the Tribunal noted, "The ILC, in its
7 work on subsequent agreements and subsequent practice,
8 expressed the view that statements in the course of a
9 legal dispute can constitute a subsequent practice
10 insofar as they help establish the Contracting State's
11 agreements as to the interpretation of the Treaty."

12 I am being corrected. I am told that the
13 correct Legal Authority No. is 142, not 145. I
14 apologize. Carrizosa v. Colombia, 142 on the record
15 of this Arbitration.

16 Now, these Legal Authorities directly
17 contradict the legal arguments made by Claimant's
18 counsel today, and confirm the answer that we gave in
19 response to the President's question on Monday.

20 Now, going back to the hurdles under MST
21 that Claimant cannot clear, we can begin with SUNAT,
22 and we do not need to devote much time to this issue,

1 because Claimant conceded at the outset of this
2 Hearing that the initial Immobilization of the gold by
3 SUNAT did not breach the Treaty. This is in Day 1,
4 Page 65, Lines 7 to 12.

5 So, let's turn now to Claimant's complaints
6 about the Criminal Proceedings.

7 Claimant's Claims concerning the conduct of
8 prosecutorial authorities and Criminal Courts in the
9 context of Criminal Proceedings are based on the
10 issuance of the Precautionary Seizures, the rejection
11 of certain requests submitted by Kaloti, and the
12 length of the Criminal Proceedings.

13 Now, during this Hearing, Claimant has not
14 come even close to demonstrating that these Peruvian
15 authorities have denied justice to Kaloti. In
16 contrast, and even though it does not bear the burden
17 of proof, Perú has demonstrated that the Peruvian
18 authorities acted reasonably, proportionally, and in
19 accordance with their respective competencies.

20 First, Claimant has not been able to
21 demonstrate that the Peruvian Criminal Courts issued
22 the Precautionary Seizures over four of the Five

1 Shipments in violation of Kaloti's rights under
2 Peruvian law. And this is the list of issues 16.b.

3 Claimant's Legal Expert has argued in the
4 course of this Arbitration that, and I quote, "there
5 was no indicia of an offense but rather administrative
6 indicia" in relation to the Suppliers, and that, and I
7 quote again, "there is nothing linked to illegal
8 mining or money-laundering." This remarkable
9 assertion is found in Day 4, Page 799.

10 This is demonstrably false. It has been
11 demonstrated during this Hearing the Criminal Courts
12 issued and maintained the Precautionary Seizures based
13 upon objective and compelling evidence of
14 money-laundering related to illegal mining. On
15 cross-examination, Claimant's Legal Expert was
16 confronted with a small fraction of the evidence
17 before the Criminal Courts which he did not appear to
18 have reviewed when preparing his Expert Reports, and
19 his conclusions therein were debunked by that evidence
20 that we showed on the screen and in the course of his
21 cross-examination.

22 And it is fantastical to suggest, as

1 Claimant has done throughout this week and again
2 today, that those Criminal Proceedings relate to
3 money-laundering but not illegal mining. The evidence
4 on the record and discussed this week refutes that
5 argument. Illegal mining is very much at the center
6 of the prosecution of the Suppliers for the crimes
7 that they have committed in relation to
8 money-laundering.

9 And, here I pause to observe that Claimant's
10 Legal Expert, Mr. Caro Coría, lacks credibility and
11 impartiality. Even he is aware of that, going so far
12 as to conceal from this Tribunal the fact that he is
13 currently acting as counsel for an investor against
14 Perú in a separate and ongoing investment arbitration
15 under the auspices of ICSID. And on the stand he even
16 tried to deny the fact, which led us to request leave
17 to introduce evidence that would impeach his
18 credibility on that point. Now, Mr. Coría attempted
19 to weave his way through cross-examination, evading
20 questions, coming up with new theories not included in
21 either of his Reports or adopted by Claimant in this
22 Arbitration, making unsubstantiated and contradictory

1 arguments. For example, when confronted with judicial
2 decisions that disprove his conclusory observations in
3 his Reports, he questioned the authenticity or source
4 of these judicial Decisions, despite being on the
5 record of this Arbitration for a very long time, and
6 never challenged by Claimant. But when he was
7 confronted with the fact that this new argument
8 applied equally to the judicial decisions that had
9 been introduced by Claimant, he backtracked.

10 And, not surprisingly, during this Closing
11 Presentation, Claimant glossed over this issue.

12 As shown on the screen, for example, the
13 evidence underlying the Criminal Court's Decisions to
14 initiate the [REDACTED] Criminal Proceeding and maintain
15 the Precautionary Seizure over Shipment 1 include an
16 on-site Inspection Report of the "Mi Buena Suerte"
17 mine, from where [REDACTED] had allegedly extracted
18 Shipment 1, that confirmed that there were no recent
19 tailings or residues, the new equipment found in the
20 area had not been installed, and the gold-processing
21 plant was inoperative. During the Hearing, Mr. Caro
22 Coría confirmed that the Criminal Court decided to

1 maintain the seizure over Shipment 1 based on these
2 and other evidence.

3 Similarly, Mr. Caro Coría also confirmed
4 that the evidence underlying the Criminal Court's
5 Decision to initiate the [REDACTED] Criminal Proceeding,
6 and maintain its seizure over Shipment 2, included,
7 among others, the evidence that we now see on your
8 screen. For example, he confirmed that the evidence
9 analyzed by court included statements from [REDACTED]
10 alleged Suppliers confirming that they did not know
11 any of [REDACTED] representatives or employees, had
12 never been involved in the extraction of gold, and did
13 not recognize as theirs the fingerprints and
14 signatures that had been included in a sworn statement
15 that was submitted by [REDACTED] to SUNAT as purported
16 attestation of the lawful origin of this Shipment 2.

17 Now, the time limitations of Mr. Caro
18 Coría's cross-examination did not allow us to go
19 through the evidence underlying the Criminal Court's
20 Decisions to maintain the Precautionary Seizures in
21 respect of Shipments 3 and 4, but the conclusions
22 would have been the same. In the slide on the screen,

1 you can find examples of that evidence analyzed and
2 invoked by the courts in the Criminal Proceedings
3 against ██████████, and also ████████.

4 Perú also demonstrated that, contrary to
5 Claimant's arguments, once the judicial Criminal
6 Proceedings have commenced, Precautionary Seizures can
7 remain in place until the end of the Criminal
8 Proceedings.

9 Now, Claimant and Claimant's Expert, their
10 thesis alleging that the Precautionary Seizures should
11 remain on place only for a pre-established limited
12 period of time would frustrate the objectives of asset
13 seizures of this nature, and they simply have no basis
14 in Peruvian law. Because one of the main objectives
15 of Precautionary Seizures is to avoid the dissipation
16 of potential proceeds of a criminal act and ensure
17 that any confiscation ordered or issued at the
18 conclusion of the Criminal Proceeding can be enforced,
19 and it simply could not be enforced if those assets
20 are dissipated before the conclusion of those Criminal
21 Proceedings.

22 This was not only explained by Missiego in

1 his Expert Reports and during the Hearing, but it is
2 also consistent with other Peruvian laws. For
3 example, Article 9 of the Money Laundering Decree
4 provides that, and I quote, "in all cases, the Judge
5 shall resolve the seizures or the confiscation of the
6 money, property, effects or profits involved, in
7 accordance with the provisions of Article 102 of the
8 Criminal Code." And Article 102 of the Criminal Code,
9 in turn, expressly provides that, "the Judge shall
10 order the confiscation of the instruments with which
11 the crime was committed, even if they belong to third
12 parties."

13 This provision is consistent with the
14 exceptions provided in Article 948 of the Peruvian
15 Civil Code, again which was the subject of one
16 question asked by the Tribunal, in particular by
17 Professor Knieper. As in other jurisdictions,
18 Peruvian law protects the rights of good-faith
19 purchasers but introduces an express exception,
20 including for good-faith purchasers, for goods that
21 are acquired in violation of Peruvian criminal law.

22 In this case--and we have said this

1 repeatedly--if the Criminal Courts were to find
2 against the Suppliers and determine that the gold was,
3 indeed, obtained through unlawful means or used for
4 criminal purposes, the Criminal Courts would order
5 that those assets be permanently confiscated, even if
6 they belong to third parties. This also confirms that
7 the Precautionary Seizures were, and by definition
8 continue to be, temporary under Peruvian law for as
9 long as the Criminal Proceedings last.

10 Second, Claimant has failed to establish
11 that the Criminal Proceedings have been conducted in
12 violation of Kaloti's rights under Peruvian law. This
13 is a List of Issue--or Substantive Issue 16.c.

14 Claimant's Legal Expert recognizes that
15 Peruvian law enables the exercise of the affected
16 Parties' right to challenge this and safe guards the
17 right of a third party in good faith to act as would
18 be appropriate, and he cites to Article 4 of the law,
19 and this is in Caro Coria's First Report Page 20.

20 And as Perú and Professor Missiego have
21 explained, Peruvian law did provide Kaloti, as a third
22 party to Criminal Proceedings, with at least three

1 available remedies. Kaloti could have submitted a
2 re-valuation request, an appeal, and an Amparo
3 Request.

4 During this Hearing, both Claimant and its
5 Legal Expert have confirmed that Kaloti failed to make
6 use of any of these remedies in respect of the
7 Precautionary Seizures. And I know that we keep
8 repeating this point, but it is an important point
9 because, as we have said, it is dispositive of the
10 denial-of-justice claim.

11 Mr. Caro Coría also confirmed during
12 cross-examination that in his two Expert Reports, he
13 analyzed only three written submissions filed by
14 Kaloti before the Criminal Court, all in the [REDACTED]
15 [REDACTED] Criminal Proceeding in connection with
16 Shipment 3, and these submissions are Exhibits C-13,
17 C-14, and C-15. Mr. Caro Coría also stated that he
18 asked for all written submissions filed before the
19 courts, and Kaloti provided, or Claimant provided only
20 those three documents.

21 These three submissions or interventions
22 that Kaloti did submit in connection with Shipment 3

1 before the Criminal Courts, were not only
2 fundamentally flawed as a procedural matter, but also
3 unmeritorious as a substantive matter. For example,
4 during cross-examination, Mr. Caro Coría confirmed
5 that none of those requests included any evidence
6 proving Claimant's alleged property rights over
7 Shipment 3.

8 And I go back to what I said in the
9 introduction, Kaloti was telling the Criminal Court to
10 "take my word for it. Take my assertion at face
11 value. I am the owner of that gold," but did not even
12 attempt to substantiate that claim.

13 Additionally, the submissions under Exhibits
14 C-14 and C- 15 invoked the Treaty--the Treaty in this
15 Arbitration--which evidently does nothing to assist
16 the Criminal Judge in ascertaining whether Kaloti is
17 the rightful owner of the gold and, therefore, has an
18 interest and standing to participate in those
19 proceedings.

20 Now, these are merely a few examples of the
21 various flaws of Claimant's requests, which are
22 further described in Perú's Rejoinder, and I refer the

1 Tribunal to Paragraphs 230 to 239 of that written
2 submission.

3 Now, predictably, the Criminal Court in the
4 [REDACTED] Criminal Proceeding concluded that Kaloti
5 had, and I quote, "had failed to prove being the owner
6 of the seized gold bars."

7 (Phone rings.)

8 (Pause.)

9 MR. GRANÉ LABAT: And Mr. Caro confirmed
10 that Kaloti neither filed an additional submission
11 proving its alleged property rights over Shipment 3
12 nor that it challenged that Criminal Court's Decision
13 that said, "you have not proven that you're the owner
14 of the gold."

15 Third, Claimant has failed to demonstrate
16 that the Criminal Proceedings have been unreasonably
17 extended as a result of actions attributable to the
18 State. In fact, given that Kaloti is not a party to
19 the Criminal Proceedings, the only interest that
20 Kaloti could have had with respect to these
21 proceedings would be the Precautionary Seizures of the
22 gold. However, Kaloti's interest in those seizures is

1 entirely contingent on Claimant proving that it
2 qualifies as a good-faith purchaser of the gold,
3 which, as I have described, it has manifestly failed
4 to do because it has not adduced any evidence
5 whatsoever in the context of those proceedings, either
6 respective of the ownership of the gold and certainly
7 not in respect of the assertion that it is a
8 good-faith purchaser.

9 Moreover, as has been demonstrated, Kaloti
10 had procedural avenues at its disposal to attempt to
11 assert its alleged property rights in the Criminal
12 Proceedings. And again, something that we keep
13 repeating, Claimant has admitted that it voluntarily
14 failed to make use of any of those remedies, alleging
15 that it is "at my discretion to use them; I am not
16 obligated," it's completely beside the point, for the
17 purposes of deciding the substantive issues under
18 international law that are before this Tribunal.

19 And this is fatal for Claimant's Claims
20 regarding the duration of the Criminal Proceedings
21 because Claimant's obvious failure to demonstrate with
22 evidence that it was the lawful owner of the gold, as

1 well as the complete absence of evidence in this
2 Arbitration showing that Claimant even attempted to
3 make appearance before Criminal Courts in respect of
4 the other three Shipments, 1, 2, and 4, means that
5 Claimant cannot complain about the duration of a
6 proceeding in respect of which it has not even
7 established an interest, let alone standing.

8 In any event, if Kaloti believed that the
9 duration of the Criminal Proceedings breached any of
10 its fundamental due-process rights, it could have
11 pursued multiple remedies under Peruvian law,
12 including the Amparo Proceeding of which we have heard
13 so much this week and in the written submissions.

14 But Kaloti has failed to use any of those
15 domestic avenues to address the issues, including the
16 amparo, that it now raises before this Tribunal. Nor
17 has it shown that pursuing those local remedies would
18 be futile. As affirmed by investment jurisprudence,
19 Claimant cannot allege a denial of justice in respect
20 of judicial decisions that are not final but subject
21 to appeal or other local remedies. So, Claimant's
22 Claim on denial of justice necessarily fails.

1 Perú has also demonstrated that the other
2 components of the MST Claim fails, but given that
3 these issues under the MST head of claim were not
4 really the subject of discussion during this Hearing
5 or even addressed in any meaningful way by Claimant in
6 its Closing Argument, I will not devote time to this.
7 This includes the alleged obligation under MST to
8 conduct negotiations in good-faith, which, again, Perú
9 has demonstrated that there is no such obligation and
10 that, in any event, if such obligation existed as part
11 of the MST standard, Perú has, indeed, held good-faith
12 negotiations with Claimant after the Notice of Intent
13 and the RfA were filed.

14 I will likewise not refer to the
15 national-treatment claim given that Claimant did not
16 really devote, again, much time to that claim today,
17 but again Perú refers the Tribunal to its written
18 submissions on this issue.

19 So, let me skip forward, and let me turn now
20 to Claimant's Claims under Article 10.7 of the Treaty.

21 And in respect of this claim as the Tribunal
22 knows, Claimant is making two claims of indirect

1 expropriation: First, creeping expropriation of the
2 Five Shipments of gold, and second the creeping
3 expropriation of Kaloti as a going concern. And I
4 will refer to these as "Claim 1" and "Claim 2"
5 respectively. And Perú, of course, has demonstrated
6 that both claims are meritless and should be dismissed
7 because neither of these claims satisfies the
8 requirement, the requisite elements of an indirect
9 expropriation under the Treaty or customary
10 international law, but let's see some of those
11 defects.

12 The first element is the existence of a
13 covered investment capable of expropriation, which is
14 required by Article 10.7(1) and Annex 10-B of the
15 Treaty. In its Non-disputing Party Submission, the
16 United States confirmed that "the first step in any
17 expropriation analysis must be an examination of
18 whether there is an investment capable of being
19 expropriated."

20 During this Hearing, we have referred at
21 length to the Five Shipments of gold as well as to
22 Kaloti as a going concern, and demonstrated that

1 neither constitutes a qualifying or covered
2 investment.

3 For example, we have demonstrated that
4 Peruvian Civil Court concluded on appeal that Claimant
5 has no ownership rights over Shipment 5. This is
6 something that we have already pointed out but it is
7 demonstrated by Exhibit R-212. And since we have
8 thoroughly addressed this issue in respect of the
9 other shipments, we will not restate the reasons here
10 and the evidence on the record.

11 Put simply, both expropriation claims fail
12 at this first hurdle.

13 If I can pause to just take account of the
14 time, I would like to slow down, but let me check if
15 that is possible. It seems I will be able to slow
16 down a little bit for the benefit of everyone.

17 In any event, Claimant cannot satisfy any of
18 the other requisite elements of expropriation; and, in
19 particular, as my colleague Ms. Horn explained,
20 Claimant has not demonstrated the existence of a
21 composite act. And again, as we have explained, this
22 is fatal to Claimant's creeping expropriation claim.

1 Since it is entirely predicated on the existence of a
2 composited act, if there is no composite act, there
3 can be no breach.

4 The next requirement is that of a distinct,
5 reasonable and investment-backed expectation, also a
6 concept that is contained under Annex 10-B of the
7 Treaty. We addressed this in the Opening statement.
8 I don't believe that I need to spend much time on this
9 given that Claimant is not really arguing or devoting
10 time to demonstrate that any expectation that it had
11 was reasonable or investment-backed.

12 To recall, Claimant argued that Mr. [REDACTED]
13 relied on a study of the market in Perú which backs
14 his expectations about the business plan that he had
15 for the country. Which Business Plan? There is no
16 business plan. Is in any event, we have demonstrated
17 that that study does not constitute a representation
18 or a commitment by the State and as such, cannot
19 qualify as an expectation or the basis of an
20 expectation as that concept is understood under
21 international law.

22 Now, this purported analysis of Peruvian

1 market, which is on the record as Exhibit AK-2, again
2 does not and cannot represent an assurance of a
3 commitment by Perú.

4 In any event, far from giving rise to an
5 expectation that Mr. [REDACTED] could simply transact with
6 suspect Suppliers and export illegally mined gold,
7 this Report confirms that Perú would and should take
8 action to combat illegal mining. Now, to be clear,
9 this has not been discussed in this Arbitration, but
10 we will emphasize this nevertheless, there is no
11 allegation here that the regulatory regime in Perú
12 changed in respect of illegal mining and
13 money-laundering after the Investment had been made.
14 And so, at the time that the Investment was made,
15 Kaloti was fully aware of the instruments at the
16 disposal of the law enforcement authorities to seize
17 gold that was suspected of being illegally mined, so
18 there cannot be any alleged that there is a
19 frustration of expectations on the basis of a change
20 in the regulatory regime.

21 The next question is whether Perú caused the
22 permanent and total or near total deprivation of the

1 value of Claimant's alleged investment, and this
2 pertains to the very well-known economic impact test,
3 which is not only a factor under Annex 10-B of the
4 Treaty, but it is widely recognized by arbitral
5 jurisprudence, which is not only well-known to the
6 Tribunal but also contained in the record of this
7 Arbitration. And the simple answer to that question,
8 when you apply the effects test in this case, is that
9 there hasn't been a permanent or total or near total
10 loss of the value of the Investment.

11 Now, let's look at this. Now, with respect
12 to the Five Shipments of gold, Claimant's Legal Expert
13 expressly stated that the Measures relating to the
14 Five Shipments are, and I quote, "strictly temporary
15 (not permanent or definitive) under Peruvian law."
16 And that expert also expressly recognized that the
17 Immobilization Measures are, due to their own
18 precautionary nature, provisional." and this is in
19 Mr. Caro Coría's First Expert Report Paragraph 2.1 in
20 Page 21.

21 And as we pointed out at the start of this
22 week, by Claimant's own admission, the value of that

1 seized gold has since increased in value rather than
2 decreasing and certainly in stark contrast to the
3 showing of a destruction of the value that Claimant
4 would need to meet in order to demonstrate that there
5 has been an indirect expropriation.

6 Now, with respect to Claim 2, Claimant has
7 likewise failed to demonstrate that Perú caused the
8 permanent and total or near total destruction in the
9 value of the alleged investment. In Claimant's case
10 on causation on this point appears to consist of three
11 arguments that are shown on your screen.

12 Now, the trouble is that, as with the other
13 arguments made by Claimant in this Arbitration, there
14 is no supporting evidence. To the contrary, the
15 evident actually disproves Claimant's arguments.

16 I will address some of these points, then my
17 colleague Mr. Smyth will address the fourth point
18 during in his presentation.

19 Now, let's start with the alleged
20 reputational harm through the media. You've heard
21 much about this issue from Claimant this week. There
22 is simply no evidence that Perú caused harm to Kaloti

1 through the media. Instead, Claimant relies
2 exclusively on an article published in El Comercio
3 which has a single reference to Kaloti, and on that
4 sole basis, Claimant constructs a theory that's based
5 on sheer speculation and which in no way can be
6 attributed to the Peruvian authorities. And you've
7 heard much about this. They speculate that the only
8 possible source of the leak could have been the
9 Peruvian authorities. It is sheer speculation, it is
10 not substantiated, and they have not been able to
11 indicate that other sources could just as well have
12 shared information with El Comercio.

13 But this is illustrative of Claimant's case
14 and lack of evidence on causation and many other core
15 issues, actually, in this Arbitration.

16 Oblivious to the fact of its double
17 standard, Claimant yesterday questioned the contents
18 of a news article cited by Brattle because it was not
19 signed, quote-unquote. I have to admit that this is
20 the first time I have heard this argument, but such is
21 the level of desperation reached by Claimant during
22 this Hearing. They didn't question whether the

1 Articles on which they rely had been signed, but seek
2 to criticize and Article cited by Brattle and tried to
3 indicate to the Tribunal that that Article should not
4 be taken into account because it is not signed by the
5 author.

6 But, of course, all of this is designed or
7 intended to distract the attention of the Tribunal.
8 And for the Tribunal to overlook the obvious and the
9 obviously painful fact that Claimant has no one else
10 to blame for its bad reputation but itself, and its
11 associated company, [REDACTED], and more broadly
12 the [REDACTED]. The evidence shows that the illicit
13 activities of [REDACTED] and the [REDACTED]
14 worldwide caused negative media attention, and no
15 doubt caused reputational damage. And you can see
16 examples of such coverage, media coverage, on your
17 screen.

18 Claimant's next argument is that Perú caused
19 a decline in sales and/or in Supplier relationships.
20 And again, there is simply no evidence to substantiate
21 that claim. Claimant's witnesses were also unable to
22 point to a single email from Suppliers communicating

1 their decision to cease supplying gold to Kaloti.
2 When questioned about this, Mr. ██████ testified that
3 it was due to "cultural norms" in the gold industry,
4 meaning that Suppliers do not put decisions to
5 terminate Suppliers in writing--I'm sorry, to
6 terminate supplies in writing. In fact, Mr. ██████
7 testified that part of the reason Suppliers behave in
8 this way was to keep their options open so that they
9 could, and I quote, "jump back on" when it suited
10 them. But, if true, this characterization further
11 undermines the notion that Perú's Measures had led to
12 Kaloti's Suppliers to permanently cease doing business
13 with it. Equally, Kaloti kept no internal records or
14 indeed any written communications regarding these
15 alleged terminations. Now, this is a \$100 million
16 business. We've heard that they've transacted in
17 excess of a billion dollars. And we're expected to
18 believe that the manner in which they transact
19 business is running to the office next door and saying
20 that one of their major Suppliers has suddenly decided
21 to cancel their relationship with Kaloti. It is
22 simply not credible. It is certainly not the way that

1 a serious business conducts transactions.

2 When Mr. [REDACTED] was asked about this, when
3 he was questioned about the manner in which they were
4 conducting business, his response was that he, and I
5 quote, "likely doodled." Again, demonstrating
6 Claimant's casual approach to record-keeping and
7 business practice.

8 In fact, the evidence actually contradicts
9 Claimant's theory of causation. For instance,
10 Mr. [REDACTED] himself expressly confirmed that Kaloti
11 "actually invested in, processed and sold very
12 significant quantities of Peruvian gold between 2012
13 and 2018." That's years after the alleged Measures or
14 the Challenged Measures, I should say.

15 And Kaloti's Transaction History confirms
16 that it continued trading significant quantities of
17 gold following the Challenged Measures, thereby
18 contradicting their direct claim or assertion that the
19 Article in the El Comercio suddenly destroyed the
20 business.

21 For instance, Kaloti transacted 130 million
22 of gold from Perú in 2014, 134 million in 2016,

1 127 million in 2017. And business was so good that
2 Claimant's witness, Ms. [REDACTED], testified that Kaloti
3 was publicly advertising positions for traders in
4 March of 2018. This, again, directly refutes
5 Claimant's Claim about its decline after and as a
6 result of the Challenged Measures.

7 While Kaloti's Transaction History reveals
8 that the majority of its Suppliers transacted gold for
9 a short period of time, that trend is reflective of
10 market conditions and was not specific to Kaloti. And
11 you have seen evidence, and there is evidence on the
12 record, and we have included some on the slide, that
13 refer to these fly-by-night exporters, or
14 "colandrinás." And Mr. Smajlovic stated that he had
15 not seen any evidence to support the notion that the
16 Measures affected Kaloti's ability to purchase in
17 Perú.

18 I'm coming to the end, and for the benefit
19 of Mr. Smyth's presentation on damages, I will skip
20 over some of these slides, and if you bear with me,
21 let me check whether there is anything that I wish to
22 not leave to the side.

1 (Pause.)

2 MR. GRANÉ LABAT: We've heard much about the
3 banking relationship with JPMorgan, and the reality is
4 that Mr. ██████ conceded that that relationship ended
5 before the Challenged Measures. In other words, it
6 could not possibly have been the cause of
7 Perú's--Measures could not have been the cause of the
8 termination of that relationship.

9 And in any event, the suggestion that it was
10 Kaloti who decided to close that bank account, which
11 again is not substantiated by anything on the record
12 of this Arbitration, but rather Mr. ██████ statement
13 on cross-examination at the Hearing is also
14 contradicted by the document that is on the record in
15 which, as shown on the screen, the bank determined
16 that Kaloti's accounts did not "meet our guidelines
17 for acceptable risk."

18 In any event, also as the evidence on the
19 record shows, Kaloti has had at all times access to
20 banks and has banking relationships with various banks
21 at any given time in the period following--well,
22 before and after the Measures were adopted.

1 So, apologizing for having rushed through
2 this last part of my presentation, with the Tribunal's
3 permission, I cede the floor to my colleague,
4 Mr. Smyth.

5 MR. SMYTH: Good afternoon, Mr. President
6 and Members of the Tribunal. You will recall that on
7 the Opening day of this Hearing, we explained to the
8 Tribunal that Claimant's Damages Claims are spurious
9 and must be dismissed.

10 The testimony that we have heard during the
11 Hearing has put that conclusion beyond doubt and we've
12 drawn out some of the most relevant excerpts of the
13 testimony on the slides that follow.

14 In short, each and every one of the
15 propositions that Perú put forward has been confirmed
16 in many cases by Claimant's own witnesses and experts
17 and also by the evidence that is on the record.

18 Claimants has failed to establish causation and its
19 damages model is speculative and unsupported. And I
20 would respectfully point out at this point in the
21 presentation that much of the Claimant's presentation
22 that we heard earlier was, in fact, verbatim the same

1 as the presentation that we heard during Claimant's
2 Opening Argument, and we submit it should be dismissed
3 for the same reasons as discussed previously by Perú.

4 Starting, first of all, with causation.
5 Issue 41 on Perú's list of substantive issues poses
6 the following question: Has Claimant established a
7 proximate causal link between actions or omissions
8 attributable to Perú and Claimant's alleged losses?
9 The answer is "no."

10 There is a logical fallacy at the core of
11 Claimant's causation theory. And to illustrate this I
12 would ask the Tribunal for their indulgence with me
13 using some Latin. Post hoc ergo propter hoc, after
14 it, therefore because of it. In this case, Kaloti has
15 deliberately confused correlation with causation to
16 mask the lack of evidence for its claims. In late
17 2013, following a brief three-month spell of success,
18 Kaloti's fledgling business started declining. That
19 decline continued, and Claimant ultimately gave up on
20 its business. Rather than acknowledging the real
21 causes of the failure of its enterprise, chief among
22 which was the fact that it had done business with

1 criminals, it cast around for someone to blame. It
2 lighted on the fact that, at around the same time as
3 its business started to falter, four shipments of gold
4 that it intended to export had been immobilized and
5 then seized by the Peruvian authorities for legitimate
6 concerns regarding potential money-laundering and
7 illegal mining. Claimant then concocted post hoc a
8 treaty claim against Perú, and that's why we are here
9 today.

10 However, Claimant's Claim offends a cardinal
11 principle of International Investment Law, namely that
12 Investment Treaties are not insurance policies against
13 bad business judgments. As we explained in the
14 Opening Presentation, Claimant advances various
15 causation theories. And my colleague Mr. Grané Labat
16 discussed several of these just now. I will address
17 the final and belated theory that claim has advanced,
18 namely that the seizures of the Five Shipments made it
19 insolvent. And this theory, like Claimant's others,
20 fails. This is yet another example of Claimant
21 evolving its story in response to Perú's exposure of
22 the many flaws in Claimant's arguments. Claimant's

1 insolvency theory, as put forward in its Memorial,
2 relied exclusively on the allegation that its
3 management decided to write down its inventory on
4 30 November 2018, and you can see that at the Memorial
5 Paragraph 163. However, under cross-examination,
6 Mr. [REDACTED] was forced to admit the truth, that no
7 write-off of the inventory ever took place. And
8 Brattle has confirmed this as well in response to
9 Claimant's counsel, at the same time adding that they
10 have not seen a single document confirming Kaloti's
11 insolvency.

12 Claimant referred a number of times in its
13 presentation earlier to a line of cross-examination
14 regarding what would happen if Kaloti's equity
15 position--to Kaloti's equity position, rather, if the
16 gold was returned. And the suggestion appeared to be
17 that if the gold was returned, \$17 million would be
18 added to Kaloti's Net Equity. That argument is
19 illogical on a few levels.

20 First of all, the Claimant at the time was
21 taking Brattle to a hypothetical situation where the
22 gold had been written off, and of course we know

1 that's not the case. Then assumes that if the gold
2 was returned, you would simply add \$17 million to the
3 asset side of Kaloti's Balance Sheet, i.e., the value
4 of all five of the shipments, but that you would not
5 at the same time assume any liability for the gold
6 that Kaloti hadn't paid for. So, in effect, and in
7 layman's terms, Kaloti would be allowed to--would be
8 able to sell that gold without having paid for it;
9 and, in our submission, that makes no economic or
10 logical sense.

11 Claimant has relied in its pleadings and in
12 the Hearing on a letter from [REDACTED] to
13 Kaloti dated 14th of November 2018, urging Kaloti to
14 settle its outstanding loan balance to [REDACTED]
15 [REDACTED]. However, Kaloti has pointed to no evidence
16 that [REDACTED] ever took steps to enforce the
17 loan, or that Kaloti sought financing from other
18 sources. And, in fact, Kaloti, by the time it
19 received this letter, had already ceased trading in
20 Perú in July 2018, and we see this from Exhibit C-43.

21 Moreover, and crucially, Kaloti has never
22 filed for bankruptcy, and this was expressly conceded

1 by Mr. [REDACTED] himself in his testimony during the
2 Hearing. And, indeed, as Mr. [REDACTED] also testified,
3 Kaloti remains in good standing in Florida today.

4 For all these reasons, Kaloti's insolvency
5 theory lacks any credible basis. And, in fact, this
6 theory really just raises far more questions than
7 answers. We have excerpted on the slides a few
8 examples of these question, but in the interest of
9 time, I will leave the Tribunal to read them when it's
10 convenient for them.

11 The testimony at the Hearing also
12 underscored the fact that any losses suffered by
13 Kaloti were far more likely caused by supervening
14 causes than any actions by Perú. Kaloti has sought to
15 casually dismiss the relevance of these supervening
16 causes out of hand, but without conducting any
17 analysis. And when Claimant's damages expert,
18 Mr. Smajlovic, was asked if he carried out an
19 independent investigation into whether adverse
20 publicity in relation to the [REDACTED] led to the
21 loss of Supplier and banking relationships, his answer
22 was: "I have not, no."

1 The knock-on effect of the widespread
2 allegations of criminal activity of [REDACTED]
3 is obvious. While Claimant has repeatedly asserted
4 that Kaloti is a "separate and distinct corporate
5 entity"--that is taken from Claimant's Opening
6 Presentation--with an arm's length relationship to
7 [REDACTED], the evidence shows otherwise, and
8 the testimony of the Claimant's witnesses during this
9 Hearing confirms that. Mr. [REDACTED] was unable to deny
10 the close relationship between Kaloti and his cousin's
11 company, [REDACTED], and acknowledged that
12 [REDACTED] itself considered Kaloti to be its
13 associate branch in Miami.

14 Mr. [REDACTED] also conceded that Kaloti used a
15 letter from [REDACTED] to advertise itself to
16 Suppliers and drum up business.

17 There is further evidence from Mr. [REDACTED]
18 on the slide, but I will skip forward to another slide
19 to talk about the effect of the scandals.

20 To recall, from 2011 onwards, very serious
21 allegations were reported against the [REDACTED],
22 including involvement with gold smuggling,

1 money-laundering, and conflict gold. And as we've
2 also explained, large U.S. banks such as JPMorgan
3 issued Suspicious Activity Reports to financial crimes
4 regulators in relation to concerns about potential
5 money-laundering through Kaloti's accounts.

6 Mr. [REDACTED] also conceded that the
7 terminations of Supplier relationships coincided with
8 high profile reports of such activity, which was
9 widely published in the international press, and would
10 likely be more widely read than any articles
11 originating in Perú in relation to the seizures.

12 A factor that Kaloti has conspicuously
13 failed to address in this arbitration is the impact
14 that its Decision to contract with criminal
15 enterprises had on its business. As Perú has
16 demonstrated, 65 percent of Kaloti's volumes in 2013
17 were sourced from companies connected to the notorious
18 criminal Alfredo Chamy, a proportion that Kaloti's
19 damages expert himself described as impactful. And
20 the evidence shows that the companies that were
21 supplying this gold, were either dissolved or ceased
22 operating in 2014. Kaloti would also have been

1 effected by the volatility in the Peruvian gold market
2 and the frequent changeover of Suppliers that is an
3 inherent aspect of operating in this market. In this
4 regard, Mr. Smajlovic confirmed that "this line of
5 business requires changes in Suppliers," thus further
6 derailing Claimant's argument.

7 As Perú has explained throughout this
8 arbitration, one of the key causes for the demise of
9 Kaloti's business was Mr. [REDACTED] own decision to set
10 up a competing enterprise. Mr. [REDACTED] admitted under
11 cross-examination that the operations of [REDACTED]
12 [REDACTED] are similar to Kaloti, that he transferred
13 certain assets and equipment from Kaloti to [REDACTED]
14 [REDACTED], that [REDACTED] had the same business
15 address as Kaloti, that several of Kaloti's employees
16 were transferred to [REDACTED], and, importantly,
17 that [REDACTED] inherited several Suppliers from
18 Kaloti. Mr. [REDACTED] is, therefore, completely
19 contradicted his own witness testimony. And, in fact,
20 the evidence shows that [REDACTED] inherited
21 approximately 30 percent of its Suppliers from Kaloti.
22 And this statement was further corroborated by

1 Ms. [REDACTED], who touted her success in transferring
2 certain clients of Kaloti to [REDACTED].

3 We can move now to quantification.

4 Issue 43 in Perú's list of issues posed the
5 question: "Has Claimant demonstrated the
6 quantification of its claims equates to the actual
7 loss that it has suffered?" The answer, as
8 demonstrated by the evidence on the record and the
9 testimony at this Hearing, is again emphatically "no."

10 In the interest of time, I will just
11 highlight a few examples.

12 Mr. Smajlovic's Valuation Model is based
13 heavily on his projected gold volumes. However,
14 Mr. Smajlovic's testimony realized that there was
15 no--revealed that there was no evidence to back up
16 those projected volumes. For example, when questioned
17 whether he relied on Kaloti's Business Plan to model
18 Kaloti's future performance, Mr. Smajlovic admitted
19 that there is not a plan, just the draft Business Plan
20 with nothing in it.

21 And he went on to say that there is really
22 not much to it other than the template that Kaloti had

1 in order to forecast volumes, but they had not seen
2 any numbers because Kaloti had never got to the point
3 of inserting them.

4 Mr. Smajlovic further admitted that there
5 are no documents to indicate what Kaloti's strategy
6 was for maintaining Market Share, which would have
7 been crucial in a competitive market with limited
8 barriers to Entry.

9 I understand I'm short of time, but I will
10 just spend a couple of minutes discussing the letter
11 that Claimant relies on heavily from [REDACTED]
12 that indicated a willingness to purchase
13 45,000 kilograms of gold.

14 Mr. Smajlovic admitted that the letter is
15 not a contract, and even if one were to accept that
16 the letter contained some sort of commitment,
17 Mr. Smajlovic acknowledged it was just for two to
18 three years. Finally, he admitted that it provides no
19 guarantee that Kaloti would be successful in sourcing
20 volumes, which Mr. Smajlovic lists as one of Kaloti's
21 biggest risks.

22 Mr. Smajlovic's projected gold volumes from

1 outside Perú are also speculative. And at this point
2 I would like to correct Claimant's assertion during
3 its Opening--its Closing presentation, rather, that
4 Brattle disregarded gold volumes from outside of Perú.
5 That is not correct. What Brattle has done is to
6 exclude damages for purchases outside of Perú, but it
7 has done so by assuming that the actual and but-for
8 volumes from outside of Perú would be equal to the
9 2018 actual volumes. So, the volumes are essentially
10 net out in the actual and but-for scenario, so it is
11 incorrect that Brattle has excluded all volumes, or
12 assumed that there would be no volumes from outside
13 Perú.

14 And Mr. Smajlovic's evidence on volumes
15 outside of Perú was even more speculative than the
16 evidence in relation to volumes sourced from inside
17 Perú. In fact, he admitted that he had not studied
18 any of the markets from which such gold would
19 allegedly be sourced, and he did not even identify
20 which countries those volumes would be sourced from.

21 I'm pretty sure I'm short of time, and I do
22 have a very short set of submissions on the gold

1 shipments, but if the Tribunal would rather, I can
2 leave it there, but if the Tribunal is willing to
3 allow an indulgence for a couple more minutes, I can
4 cover the gold shipments. We're in your hands.

5 PRESIDENT McRAE: You mean you're out of
6 time? Is that what you're saying?

7 MR. SMYTH: I would check with my team, but
8 I think I may be.

9 Yes, I believe I'm out of time.

10 PRESIDENT McRAE: What's your view on this,
11 Mr. Díaz-Candia?

12 MR. DÍAZ-CANDIA: How long?

13 MR. SMYTH: I think one minute. Would that
14 be reasonable?

15 PRESIDENT McRAE: Go ahead.

16 MR. SMYTH: Okay. I will try to be quick.

17 So, again, the claim for damages for the
18 Five Shipments is unsupported. Kaloti has failed to
19 establish that Kaloti was a bona fide purchaser or the
20 legal owner of the gold, and Mr. Smajlovic admitted
21 during cross-examination, that if those facts are
22 true, then damages would be zero.

1 Mr. Smajlovic also acknowledged that Kaloti
2 has not made payment for Shipment 3 or Shipment 5, and
3 that there is no liability included in the 2018
4 Balance Sheet, which is at Exhibit AS-66, and that
5 therefore at the submission that Kaloti has made and
6 that Mr. Smajlovic himself made in his First Report,
7 that Kaloti would be liable to pay for those shipments
8 out of a damages award is false. It's been
9 contradicted by Mr. Smajlovic's evidence during
10 cross-examination.

11 And, finally, in relation to Shipment 5, the
12 claim for damages in relation to this shipment has
13 been further undermined by the fact that Mr. [REDACTED]
14 has admitted that the only Measure that remains in
15 place against that shipment was a Civil Attachment,
16 which arose as a result of a private dispute between
17 Kaloti and [REDACTED], has been resolved by the Peruvian
18 court in a final judgment in favor of [REDACTED].

19 So, for all these reasons, Claimant's claims
20 with respect to the Five Shipments have no merit and
21 must be dismissed.

22 Mr. President and Members of the Tribunal,

1 this concludes Perú's Closing Statement, and we once
2 again express our sincere thanks for your service in
3 this arbitration.

4 PRESIDENT McRAE: Thank you very much.

5 According to the Schedule, we should now
6 take a 15-minute break and then have Tribunal
7 questions and procedural issues.

8 MR. DÍAZ-CANDIA: Before that, with your
9 permission, Mr. President?

10 PRESIDENT McRAE: Yes.

11 MR. DÍAZ-CANDIA: Just a couple of points.
12 The quote-unquote "impeachment" of Dr. Caro was
13 introduced today. We need an opportunity to respond
14 to that. I can do it now or later.

15 And also I wanted to finish my point,
16 Respondent was given an opportunity to expand on the
17 issue of legal contracts in Slide 59, and I would
18 like--appreciate the opportunity to comment on that,
19 even if briefly, for purposes of balance.

20 PRESIDENT McRAE: I understand your request.
21 I think that the period after the break was meant to
22 be Tribunal questions and procedural issues, so that

1 issue I would have come to after we're done with
2 Tribunal questions. And in the course of that, you
3 would be given the an opportunity to respond to
4 questions that have already been put.

5 MR. DÍAZ-CANDIA: Thank you.

6 PRESIDENT McRAE: My question now is whether
7 we want to break for 15 minutes before we move to
8 Tribunal questions or whether we want to move to
9 that--the Court Reporter definitely wants a break. I
10 apologize for having taken him out of this equation.

11 MR. DÍAZ-CANDIA: He's the only one in this
12 room above you.

13 (Laughter.)

14 PRESIDENT McRAE: Well, you're flattering
15 me.

16 So, 10-minute break?

17 REALTIME STENOGRAPHER: Yeah, that's fine.

18 PRESIDENT McRAE: Why don't we take a
19 10-minute break, and then return. Thank you.

20 (Recess.)

21 PROCEDURAL DISCUSSION

22 PRESIDENT McRAE: I think we can now resume.

1 Well, as a tribute to the clarity of the
2 Parties' submissions, we actually have no further
3 questions, but we would like to give the opportunity
4 to the Claimant to make a response to the questions,
5 any response they have to make to the questions that
6 were raised earlier by Professor Knieper.

7 MR. DÍAZ-CANDIA: Thank you, very briefly.

8 I just wanted to highlight that Slide 59 of
9 Respondent's PowerPoint presentation of today made
10 reference to a facility of Kaloti Metals at Hermes.
11 He didn't say the facility of Hermes. It expressly
12 mentioned a facility of the name Kaloti Metals where
13 the delivery was made in response to the question by
14 Professor Knieper. It says "Hermes-Kaloti Lima
15 facility." It was not that it was delivered by
16 Hermes.

17 And, in connection with that, to expand in
18 the creation or the formation of that Contract, oral
19 or otherwise, once Kaloti Metals received the gold in
20 that facility, it had no obligation to send that
21 facility to the airport. After he received title from
22 the Seller, Kaloti could decide to return the

1 shipment, to sell it locally, et cetera. He was not a
2 trader, and a contract was perfected for the delivery
3 of each individual shipment.

4 That's all that I wanted to mention in
5 connection with that question. Thank you.

6 PRESIDENT McRAE: Thank you.

7 If this was a normal question exchange, I
8 would ask if there's any further comment on that
9 particular issue, if there's any further comment.

10 MR. NISTAL: Thank you, Mr. President.

11 Claimant has made a point about whether it
12 was their facility or whether it was Hermes' facility.
13 That doesn't change in any way the argument that we
14 have made. The point is that we do not admit that
15 there was delivery of the gold there. The facilities
16 were rented by Kaloti according to Kaloti, but our
17 point is that what happened in that facility is
18 exclusively the testing of the gold.

19 And, in fact, there are other documents on
20 the record that suggest that the Incoterms agreed
21 between the Parties were not ex-work but rather FOB,
22 means that the Suppliers were responsible for

1 delivering the gold after export, or at least on
2 board. So, the point made by Claimant that doesn't
3 change in any way our argument.

4 MR. DÍAZ-CANDIA: We're not going to answer.
5 I think our position is sufficiently clear on the
6 record.

7 PRESIDENT McRAE: I think the difference of
8 the Parties on delivery is clear to the Tribunal.

9 All right. Then, that means that we should
10 move to any further procedural issues, and I know
11 Mr. Díaz-Candia has an issue to raise.

12 MR. DÍAZ-CANDIA: Yes, just to respond to
13 what Respondent characterized as an impeachment of
14 Dr. Caro. I just want to make clear for the record
15 that Dr. Caro did not deny being present at a hearing.
16 As a matter of fact, he was confronted or questioned
17 why he made his presence at the Hearing public in his
18 social media, so is he hiding it or he breached
19 confidentiality because he put it on social media. It
20 cannot be both.

21 Secondly, what he said here is that he did
22 not sign the pleadings, he did not make interventions

1 at that hearing. He doesn't control how people are
2 characterized in a template from the Centre, but we do
3 want to note that, next to his name, there is a "P"
4 which indicates that he was a Passive Participant, not
5 making arguments or deliveries at the Hearing. What
6 they're basically saying is apparently we know that
7 here there are lawyers for Perú who are attending the
8 meeting virtually, we understand. I believe it's a
9 law firm in Lima called Lazo, and the other one would
10 be that because they watched this Hearing and I assume
11 they provided some guidance to Arnold & Porter, which
12 we're not questioning and we're not interested in
13 their particular role, but that they then would be
14 conflicted of acting as independent expert in a
15 subsequent arbitration.

16 So, we maintain, you saw the credentials of
17 Dr. Caro, you saw the quality of his testimony and in
18 his cross-examination, and we stand that he is an
19 independent expert with full credibility. That's the
20 only point.

21 Thank you.

22 PRESIDENT McRAE: Thank you.

1 I've heard your statement. And do you want
2 to say anything further in the light of that,
3 Mr. Grané?

4 MR. GRANÉ LABAT: Perhaps extremely briefly,
5 Mr. President.

6 Of course, the Tribunal can go back and read
7 the Transcript, and they will see when they read the
8 Transcript Page 819 that the question was posed to
9 Mr. Caro Coría, we referred--we identified the case,
10 Enegás v. Perú, and the question was: "You
11 participated as counsel for the Party; correct?"
12 Referring to Claimant.

13 And the answer was "no." Full stop. "I was
14 not litigating at the ICSID level. I was an auxiliary
15 lawyer." On the basis of that, we sought leave from
16 the Tribunal to introduce the List of Participants,
17 which identified Mr. Caro Coría as counsel. Now,
18 whether you label that as auxiliary or main or lead
19 counsel is entirely besides the point. The point is
20 that he did not wish to recognize that he was listed
21 as counsel in that hearing.

22 And lastly, the point that we have made,

1 which is he did not disclose that fact in any of his
2 Expert Reports, and we believe that he should have
3 made that information available for the Tribunal to
4 assess what impact that had on his independence and
5 impartiality to act as an independent Legal Expert.
6 That is the submission that we have made.

7 Thank you.

8 PRESIDENT McRAE: I understand--

9 MR. DÍAZ-CANDIA: I'm glad that Mr. Grané
10 has referred to the Transcript. Professor Knieper in
11 particular seems to be a very picky reader, and I mean
12 this as a complement. So, in everything that we say
13 that we have said during this Hearing or in written
14 submissions and the cross-examinations, a very basic
15 thing that we ask, don't take how Perú has
16 recharacterized us. Go to the source and read what we
17 said at the Hearing or submissions, and read the
18 Transcripts of the cross-examination. That's all we
19 ask.

20 Thank you.

21 PRESIDENT McREA: Thank you.

22 Then, are there any other issues you wish to

1 raise?

2 I think as I said at the beginning, the
3 Parties were so thorough in putting together the
4 procedure for this Hearing that I think everything
5 else is covered already in the Procedural Order.

6 The only question that is not, I believe,
7 covered is what period of time will you have to
8 correct the Transcript? Is that something the Parties
9 could agree upon?

10 MR. DÍAZ-CANDIA: I think it's in PO4; no?
11 We think it was 21 days.

12 MR. GRANÉ LABAT: We are checking. Pardon.

13 MR. DÍAZ-CANDIA: And just to add on the
14 point while they're checking, Mr. President, both
15 Parties have agreed that there should be no
16 Post-Hearing Briefs.

17 PRESIDENT McRAE: Yes.

18 MR. DÍAZ-CANDIA: And you have indicated
19 that you don't have questions today. But shall the
20 Tribunal come up with questions during their
21 deliberations or review of the record, both Parties, I
22 believe, have agreed to gladly respond to that in

1 writing.

2 PRESIDENT McRAE: Right, right. Thank you.

3 MR. GRANÉ LABAT: I can confirm,

4 Mr. Díaz-Candia is correct: PO contemplates--PO4 in
5 Section 43, which is--reproduces PO1, Transcript
6 corrections 21 days from when the sound recordings and
7 Transcripts are made available.

8 PRESIDENT McRAE: Okay. Well, that
9 clarifies that, that helps.

10 And the corrections of the Transcript will
11 include the deletion from the Transcript the Parties
12 agreed upon.

13 MR. DÍAZ-CANDIA: Correct.

14 PRESIDENT McRAE: Well, then, there is
15 nothing else. Members of the Tribunal? So, just
16 remains me to thank the Parties for--doesn't quite
17 remain--

18 MR. GRANÉ LABAT: There is one more issue,
19 which is the cost submission, Mr. President. The cost
20 submissions have to be decided. It said PO1, Section
21 22(2) that the Tribunal will issue directions on the
22 Parties' Statement of Costs at the end of the Hearing,

1 and we're happy to share at this time our thoughts on
2 the cost submission or if the Tribunal deems it more
3 efficient, we can confirm with our colleagues and
4 submit in writing a joint proposal hopefully.

5 MR. DÍAZ-CANDIA: You want to go ahead
6 briefly now to see if we can agree?

7 MR. GRANÉ LABAT: Okay. Our view on cost
8 submissions is that it should be quite brief, the
9 submission, indicating simply what are the respective
10 costs which, of course, would include ICSID fees,
11 legal fees, expert fees, any additional expenses
12 incurred by the Party without the Supporting
13 Documentation, but simply a breakdown. And of course,
14 it is up to the Tribunal to request Supporting
15 Documentation should that be deemed necessary. We do
16 not believe that it is necessary to have a lengthy
17 submission on principles. It is a very experienced
18 Tribunal and fully aware about the authority and the
19 discretion that the Tribunal has to allocate costs, so
20 we don't think that that would be necessary. So, our
21 view is that it should be a very simple submission.

22 In terms of timing, our preference is always

1 we are reaching the end of July. For accounting
2 purposes, our preference would be to have several
3 weeks after the close of the Hearing to be able to,
4 through our Accounting Department and our client also,
5 to gather all the necessary information to make that
6 submission. In any case, I don't see any particular
7 rush to submit costs.

8 So, we would also be happy to defer this
9 until late August. So, that would be our proposal.

10 MR. DÍAZ-CANDIA: I think we can agree with
11 that proposal. We don't need a submission either with
12 Supporting Documentation and certainly not with
13 arguments, just a summary in late August, and we agree
14 with the proposal.

15 PRESIDENT McRAE: Well, a slight issue
16 before that. I mean, ICSID Arbitration Rule 28.2
17 which is incorporated here says that promptly after
18 the closure--

19 (Pause.)

20 PRESIDENT McRAE: ICSID Arbitration Rule
21 28.2 talks about promptly after the closure of the
22 proceeding, the Parties will produce their Statement

1 of Costs.

2 I don't think the close of the proceeding
3 happens until we say the close of the proceedings have
4 been closed. So, I personally--I haven't discussed
5 this with my co-Arbitrators but I would not be in a
6 hurry to close the proceedings, for example, in case
7 we do decide we have questions.

8 So, I understand you want a period of time
9 before we do this. You said several weeks after
10 your--end of July, and so I don't anticipate that we
11 will be rushing in to close of proceedings, so we will
12 wait that period of time until we think--and then the
13 cost, the Statement of Costs can be issued after that.

14 MR. DÍAZ-CANDIA: We're okay with that
15 proposition also. I mean, we can say in no event
16 before August 31, but only after the proceeding is
17 formally closed by the Tribunal, whatever.

18 MR. GRANÉ LABAT: Here, I confess,
19 Mr. President, that my understanding may be slightly
20 different in the sense that the closing of the
21 proceedings would then trigger the time that the
22 Tribunal would have to issue the Award. And, as you

1 know, Mr. President, the practice is that the closing
2 of the proceeding doesn't happen until many months
3 after, whereas the cost submissions usually are
4 submitted a few weeks after the end of the Hearing.
5 We are happy to proceed that way, to submit our cost
6 submissions, as I said, at the end of August,
7 irrespective of when the Tribunal decides to close the
8 proceedings formally.

9 PRESIDENT McRAE: Okay. What I didn't say
10 was that it's not just Arbitration Rule 28.2, it's
11 actually included in Paragraph 51 of the Procedural
12 Order No. 4, so we can change that. The Parties agree
13 that sometime after August 15th, at an agreed time
14 between the two of you, you'll both submit the
15 statements of costs. And because you're absolutely
16 right, there is no way we will issue this until we're
17 ready to--close to issuing an award.

18 And frequently, in other cases I've been in,
19 actually the costs have not been requested so quickly.
20 You wait until the close of proceedings and then you
21 ask for it so it can be included in the Award. So,
22 the practice varies, I think, according to different

1 tribunals.

2 So, understood that you will agree on a
3 date, it will be sometime after August, end of August,
4 for the--

5 MR. DÍAZ-CANDIA: Yes, Mr. President.

6 MR. GRANÉ LABAT: We agree. Thank you.

7 PRESIDENT McRAE: Okay. And it doesn't have
8 to be the three weeks--equivalent of the three weeks
9 for the Transcripts.

10 Okay. Then just before I embark again on
11 the finality, are there any other matters that have
12 come to mind?

13 MR. DÍAZ-CANDIA: No, thank you, Mr.
14 President. Thank you to the Tribunal.

15 PRESIDENT McRAE: Anyhow, I just simply
16 wanted to thank the Parties for the way they have
17 conducted these proceedings, for the submissions they
18 have made, the arguments they have made, the helpful
19 clarity of it all, and the way in which they have
20 conducted themselves in the Arbitration. The spirit
21 of cooperation that I think we have seen when issues
22 are difficult, when they do raise concerns and

1 passions even, yet we had a very cooperative hearing.

2 And so I would like to also thank ICSID for
3 arranging, Cathy standing in for Anneliese and
4 arranging the facilities. Thank, of course, the Court
5 Reporters for their indulgence and insisting us by
6 insisting on a few more breaks, which actually is
7 always to be thanked for.

8 And the Interpreters as well. I have never
9 had to interpret anything in my life, but I have been
10 the beneficiary of interpretation. I fully understand
11 the complications that we as people who are speaking
12 pose for them.

13 So, I don't think there is anyone else I
14 should refer to? Of course, apart from my colleagues
15 as co-Arbitrators, but that goes without saying.

16 Otherwise, we can bring the--we're not
17 closing the proceedings. We are simply bringing this
18 Hearing to a close. Thank you very much.

19 MR. GRANÉ LABAT: And, for the record,
20 Mr. President, we also wish on behalf of the Republic
21 of Perú to extend our thanks to the Members of the
22 Tribunal, to you, Mr. President, for a flawless

1 conduct of the proceedings, and also the questions
2 from the Tribunal. It's always a pleasure to see the
3 Tribunal as engaged and knowledgeable of the file. To
4 our esteemed colleagues on the other side of the room,
5 we also extend our appreciation and, of course,
6 Ms. Kettlewell, as well as Daniel, Sylvia, Monique in
7 the interpretation both; and David and Regina. So,
8 thank you very much.

9 MR. DÍAZ-CANDIA: And yeah, I'm just going
10 to make Mr. Grané's words mine also in reciprocity.
11 And so, thank you very much, including to the
12 representation of Perú. And, of course the Tribunal
13 and Cathy and everyone else. Thank you.

14 PRESIDENT McRAE: Thank you. So, we now can
15 bring the Hearing to a close.

16 (Whereupon, at 6:05 p.m., the Hearing was
17 concluded.)

1 adjourned until 1:00 p.m. the following day.)

POST-HEARING REVISIONS
CERTIFICATE OF REPORTER

I, David A. Kasdan, RDR-CRR, Court Reporter, do hereby attest that the foregoing English-speaking proceedings, after agreed-upon revisions submitted to me 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.

A handwritten signature in black ink, appearing to read "David A. Kasdan". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

DAVID A. KASDAN