

INTERNATIONAL CENTRE FOR SETTLEMENT OF
INVESTMENT DISPUTES

ICSID Case No ARB/19/28

between

LATAM HYDRO LLC and CH MAMACOCHA SRL

Claimants

- and -

REPUBLIC OF PERU

Respondent

The Tribunal

Professor Albert Jan van den Berg, President

Professor Dr Guido Santiago Tawil - Arbitrator

Professor Raúl E Vinuesa - Arbitrator

VIDEOHEARING ON JURISDICTION AND MERITS

Tuesday, 8 March 2022

LIST OF PARTICIPANTS

The Tribunal:

The President:

PROFESSOR ALBERT JAN VAN DEN BERG

Co-arbitrators:

PROFESSOR DR GUIDO SANTIAGO TAWIL

PROFESSOR RAÚL E VINUESA

MS EMILY HAY, Assistant to the Tribunal

ICSID Secretariat:

MS ANA CONOVER, Secretary of the Tribunal

MR FEDERICO SALON-KAJGANICH, Paralegal

LIST OF PARTICIPANTS

On behalf of the Claimant:

Counsel:

BakerHostetler LLP:

MR KENNETH B REISENFELD
MR MARK A CYMROT
MR GONZALO S ZEBALLOS
MR MARCO MOLINA
MS ANALIA GONZALEZ
MR CARLOS RAMOS-MROSOVSKY
MR JAMES J EAST JR
MS NAHILA CORTES
MR DIEGO ZUNIGA

Party representatives:

MR MICHAEL JACOBSON, Latam Hydro LLC
MR JEFFREY M LEPON, Latam Hydro LLC
MR ANDRES BARTRINA, Latam Hydro LLC
MRS LICY BENZAQUEN, CH Mamacocha SRL

Witness:

MR STEFAN SILLEN, Latam Hydro LLC

Experts:

MR EDUARDO BENAVIDES, Berninzon & Benavides
MS MARÍA TERESA QUIÑONES ALAYZA, QA Legal
MR PABLO FERREYROS, QA Legal
MS MYLENE JAYME, QA Legal
MR ANDREA CARDANI, Berkeley Research Group
MR SANTIAGO DELLEPIANE, Berkeley Research Group
MR JULIAN HONOWITZ, Berkeley Research Group
MR PETER SOMI, Berkeley Research Group
MR JOSE PICOS, Berkeley Research Group
MR MATIAS GALARZA, Berkeley Research Group

EPE Operator:

MR TOM BEYER, TrialGraphix

LIST OF PARTICIPANTS

On behalf of Respondent:

Counsel, Arnold & Porter:

MR PAOLO DI ROSA
MR PATRICIO GRANÉ LABAT
MS AMY ENDICOTT
MR ALVARO NISTAL
MS CLAUDIA TAVERAS ALAM
MS CRISTINA ARIZMENDI
MS NATALIA GIRALDO CARRILLO
MS JULIA CALDERÓN CARCEDO
MR ANDRES ALVAREZ CALDERÓN
MS GABRIELA GUILLÉN
MS EMILY BETANCOURT

Counsel, Garrigues:

MR HUGO FORNO FLÓREZ
MS MELISSA NÚÑEZ SANTTI
MR KEVIN VILLANUEVA

Counsel, TLZ Global Ltd:

MR TOMAS LEONARD

Party representatives:

Comisión Especial:

MS VANESSA RIVAS PLATA SALDARRIAGA, Presidenta

Secretaria Técnica de la Comisión Especial:

MR ENRIQUE JESÚS CABRERA GÓMEZ, Abogado
MS MÓNICA GUERRERO ACEVEDO, Abogada
MR MIJAIL CIENFUEGOS FALCÓN, Abogado
MS ERIKA TUESTA VELA, Abogada

Ministerio de Energia y Minas:

MR GIANCARLO COELLO GADEA, Abogado, Dirección
General de Electricidad

LIST OF PARTICIPANTS

Respondent, continued:

Ministerio de Relaciones Exteriores:

MR MIGUEL ALEMÁN URTEAGA, Director de Negociaciones
Económicas Internacionales
MS GIOVANNA GÓMEZ VALDIVIA, Subdirectora de
Organismos Económicos y Financieros Internacionales
MS EVELYN VARGAS SOTO, Especialista Legal, Dirección
de Negociaciones Económicas Internacionales

Experts:

MR CARLOS MONTEZA, MOAR Abogados
MR CLAUDIO LAVA CAVASSA, Lava Cavassa Abogados
MR DAVID VIDAL PANDURO, Lava Cavassa Abogados

Secretariat International
(previously Versant Partners):

MR MATTHEW SHOPP
MR KIRAN SEQUEIRA
MR PAUL BAEZ
MR SYDNEY STEIN
MS ABIGAIL ALPERT

Witnesses:

MR FRANCISCO ÍSMODES MEZZANO
MR RICARDO AMPUERO LLERENA

LIST OF PARTICIPANTS

Non-Disputing Party:

US Department of State, Office of the Legal Adviser:

MS NICOLE THORNTON
MS LISA GROSH
MR JOHN DALEY
MS MARGARET SEDGEWICK

Office of the US Trade Representative:

MS CATHERINE GIBSON
MR PATRICK CHILDRESS

Court Reporters:

MR DANTE RINALDI (Spanish language)
MS LAURIE CARLISLE (English language)
MS DIANA BURDEN (English language)

Interpreters:

MR JESÚS GETAN BORNN
MS ANNA SOPHIA CHAPMAN
MS PILAR FERNANDEZ

Technician:

MR ANDREW SKIM, FTI Consulting

I N D E X

MR MICHAEL JACOBSON242

 Examination by Claimants246

 by Mr Molina246

 Cross-examination by Respondent252

 by Mr Di Rosa252

 Re-examination by Claimants310

 by Mr Molina310

 Questions by the Arbitral Tribunal344

 Further examination by Claimants357

 by Mr Molina357

 Further cross-examination by Respondent359

 by Mr Di Rosa359

MR GORAN STEFAN SILLEN360

 Examination by Claimants364

 by Mr Molina364

 Cross-examination by Respondent374

 by Ms Taveras374

 Re-examination by Claimants411

 by Mr Molina411

 Questions by the Arbitral Tribunal414

1 (9.00 am EST. Tuesday, 8 March 2022)

2 **PRESIDENT:** I open the hearing for Day 2.
3 As confirmed prior to going on record, there are no
4 procedural matters so we can move on to the
5 examination of Mr Jacobson.

6 **MR REISENFELD:** Yes. Mr President, on
7 behalf of the Claimants, I'd like to turn the -- I'd
8 like to turn to Mr Molina to present our first
9 witness.

10 MR MICHAEL JACOBSON

11 **PRESIDENT:** Thank you. Mr Molina? I will
12 first do the introduction, and then you can move on
13 to the direct.

14 All right. Mr Jacobson, can you see and
15 hear me, the compound question?

16 **MR JACOBSON:** Yes, Mr President, I can
17 both see and hear you.

18 **PRESIDENT:** Can you please state your full
19 name for the record?

20 **MR JACOBSON:** My name is Michael Jacobson.

21 **PRESIDENT:** Mr Jacobson, you appear as a
22 witness for the Claimants. If any question is
23 unclear to you, either because of language or any
24 other reason, please do seek a clarification,
25 because if you don't do so the Tribunal assumes you

1 understood the question and that your answer
2 responds to the question.

3 **MR JACOBSON:** I understand.

4 **PRESIDENT:** Mr Jacobson, you will
5 appreciate that testifying, be it before a court or
6 an arbitral tribunal, is a very serious matter. In
7 that connection the Tribunal expects you to give the
8 declaration, the text of which will now be shown on
9 the screen.

10 **MR JACOBSON:** Yes. Would you like me to
11 read it?

12 **PRESIDENT:** Yes, please.

13 **MR JACOBSON:** I solemnly declare upon my
14 honour and conscience that I shall speak the truth,
15 the whole truth, and nothing but the truth.

16 **PRESIDENT:** Thank you, Mr Jacobson. Now,
17 since this is a virtual hearing, I have to ask you a
18 couple of additional confirmations.

19 Could you confirm that you're alone in the
20 room?

21 **MR JACOBSON:** Yes. Would you like me to
22 pan the camera?

23 **PRESIDENT:** You are already two questions
24 ahead of me. Could you please scan the room?

25 **MR JACOBSON:** Yes.

1 **PRESIDENT:** If at any time anybody enters
2 the room, please alert the Tribunal of this fact and
3 refrain from testifying further until that person
4 has left the room.

5 **MR JACOBSON:** Yes.

6 **PRESIDENT:** Would you confirm the location
7 from which you are now testifying?

8 **MR JACOBSON:** I'm sorry?

9 **PRESIDENT:** Could you please confirm the
10 location from where you're testifying?

11 **MR JACOBSON:** I'm testifying from a room
12 in the Baker Hostetler office in Washington DC.

13 **PRESIDENT:** Thank you. All right. Do you
14 have any portable device, telephone?

15 **MR JACOBSON:** No. I have taken all those
16 into a different room.

17 **PRESIDENT:** Thank you. Then could you
18 please go to your witness statements? You have two
19 witness statements. I assume you have a hard copy
20 in front of you?

21 **MR JACOBSON:** Yes, I do.

22 **PRESIDENT:** Could you go to your witness
23 statement of 14 September 2020?

24 **MR JACOBSON:** Yes.

25 **PRESIDENT:** Could you go to the last page?

1 **MR JACOBSON:** Yes.

2 **PRESIDENT:** The page that is page --

3 **MR JACOBSON:** The page with the signature.

4 **PRESIDENT:** 32. Could you please confirm
5 that the signature appearing above your name is your
6 signature?

7 **MR JACOBSON:** Yes, it is.

8 **PRESIDENT:** Could you then go to the
9 second witness statement of 20 July 2021?

10 **MR JACOBSON:** Yes.

11 **PRESIDENT:** And you go to page 32?

12 **MR JACOBSON:** Yes.

13 **PRESIDENT:** And confirm for the record
14 that the signature appearing above your name is your
15 signature?

16 **MR JACOBSON:** Yes.

17 **PRESIDENT:** Is there any correction,
18 modification or amendment you wish to make to either
19 witness statement?

20 **MR JACOBSON:** No. I stand by my witness
21 statements.

22 **PRESIDENT:** Thank you, Mr Jacobson. Now
23 Mr Molina will ask you a number of questions in
24 direct examination. Mr Molina, please proceed.

25 **MR MOLINA:** Thank you, Mr President.

1 Examination by Claimants

2 by Mr Molina

3 **MR MOLINA:** Good morning, Mr Jacobson.

4 Can you briefly tell us a little bit about your
5 professional background?

6 **MR JACOBSON:** Sure. I'm a lawyer. I was
7 about 17 years in private practice helping my
8 clients to raise money and do merger and acquisition
9 transactions. After that I joined a at that time
10 small e-commerce company called eBay as their
11 general counsel. I was at eBay for 17 years as
12 well. By the time I left the group that I was head
13 of had 400 legal and government relation
14 professionals. At the time eBay split into its
15 e-commerce and payments paths, as I said, I left and
16 I have been semi-retired since, although I am still
17 of counsel at the law firm of Cooley LLP.

18 **MR MOLINA:** What made you become an
19 investor in renewable energy projects?

20 **MR JACOBSON:** I have a firm belief that
21 the problems with global warming are going to be the
22 most significant problems for the entire world for
23 the next for the next 50 or 100 years. I thought
24 that this was a good way to try to ameliorate those
25 problems.

1 **MR MOLINA:** And can you tell us a little
2 bit about your investment in social initiatives in
3 Peru during and even after the project?

4 **MR JACOBSON:** Sure. One of the ancillary
5 benefits of the project site that we chose is that
6 it enabled our team to provide, you know,
7 significant benefits to a relatively impoverished
8 area in southern Peru, so we did a long list of
9 projects, including drinking water, sewage,
10 agricultural improvements for, first, Ayo and then a
11 little bit further up the valley in Andagua.

12 And that is a very direct and easy-to-see,
13 positive contribution to that area.

14 **MR MOLINA:** What were the
15 government-backed incentives that induced you to
16 invest in the Mamacocha Project?

17 **MR JACOBSON:** When we were trying to
18 decide where we would potentially build a project,
19 we looked at a variety of things. Peru was
20 extremely attractive because it had a stable
21 investor-friendly government and had had one for a
22 while by the late 2010s. It had entered into the
23 TPA with the United States, we knew that there was
24 an investor-friendly back-up there, and the RER Law
25 was very investor friendly and made it feasible to

1 invest in small hydro projects because, with the
2 guaranteed returns, one could raise financing.

3 **MR MOLINA:** What is your reaction to
4 Peru's position in this case that you assumed all
5 risks related to achieving commercial operation,
6 including the risk of government interference?

7 **MR JACOBSON:** Incredulity. It is simply
8 inconsistent with the laws, as I understood them at
9 the time, and it was certainly not noticed in that
10 way at any point while we were looking at the Third
11 Auction.

12 **MR MOLINA:** Would you have invested if you
13 had any reason to believe that you had assumed such
14 risks?

15 **MR JACOBSON:** No one -- no one will invest
16 in a project if the counterparty can, with impunity,
17 breach and you have no recourse. That makes no
18 sense.

19 **MR MOLINA:** So what was your understanding
20 of the restrictions in the contract about
21 achieving -- about extending the commercial
22 operation and termination dates?

23 **MR JACOBSON:** Well, my understanding,
24 given that those changes were made in response to
25 earlier concessionaires who had made force majeure

1 claims that may or may not have been strong and as a
2 result delayed their projects was that those dates
3 might be immutable in the event of force majeure but
4 certainly not in the event of counterparty action.

5 **MR MOLINA:** When your project faced
6 permitting delays in the early years, why did you
7 keep investing?

8 **MR JACOBSON:** I kept investing because
9 both those delays appeared to be within the scan of
10 what we anticipated and because I knew that, if they
11 became excessive, we had recourse to the central
12 government and could get recompense.

13 **MR MOLINA:** And when you received addenda
14 1 and 2, how did that affect the project?

15 **MR JACOBSON:** Well, receiving those
16 addenda were consistent with our expectation and
17 certainly when we received addenda 2 that
18 kickstarted the project. We had been talking with
19 both DEG and Innergex for a while at that point, but
20 they were waiting on an extension that would allow
21 us to construct the project before bearing down and
22 finalising all the documents as soon as we got that
23 amendment number 2. That's exactly what would start
24 happening.

25 **MR MOLINA:** How did the RGA lawsuit affect

1 those negotiations with Innergex and the bank?

2 **MR JACOBSON:** Well, after a period of
3 confusion, because remember, the RGA lawsuit was not
4 initially accepted by the court, so while we knew a
5 lawsuit had been brought, we did not know exactly
6 what it said or what was being sought. But after a
7 period of, you know, four or five weeks of confusion
8 until the lawsuit was available for us to see and
9 for DEG and Innergex to see, it completely killed
10 the negotiations because it made the project
11 untenable until fixed.

12 **MR MOLINA:** Then you sought a
13 suspension -- let me ask, why did you seek a
14 suspension instead of just going to arbitration at
15 that moment?

16 **MR JACOBSON:** Because I really wanted to
17 build a project. All of the underlying positives
18 associated with the project were still there, we
19 just had to overcome political opposition, and
20 the -- you know, I did have the choice of calling it
21 quits and seeking recompense legally, but I was
22 hopeful that we would be able to overcome the local
23 opposition with the help of the central authorities
24 and with the Special Commission, which I had heard
25 had been successful in other projects in resolving

1 these kinds of situations.

2 **MR MOLINA:** And what is your reaction to
3 Peru's position in this case that the suspension was
4 never intended to result in an extension to the
5 contract dates?

6 **MR JACOBSON:** It doesn't make any sense to
7 me. I do not understand why, putting aside the time
8 and large amounts of money that I was spending
9 during the suspension period, why Peru would spend
10 probably hundreds of hours of time pursuing a
11 solution if at the end of that period the project
12 would be impossible to complete and we would just be
13 in a litigation situation. It made no sense.

14 **MR MOLINA:** As the suspension period
15 dragged on to 2018, why did you keep investing in
16 the project?

17 **MR JACOBSON:** Because we thought and were
18 encouraged to think that we would get to a positive
19 solution eventually through our communications with
20 both MINEM and the Special Commission.

21 **MR MOLINA:** And what was your reaction
22 when MINEM denied the Third Extension Request?

23 **MR JACOBSON:** I was crushed. First of
24 all, it was a complete 180-degree reversal from
25 where we thought things had been just a couple weeks

1 before. It was clear that it was -- it put the
2 final stake into the body of the project. The
3 project was ended. I was very sad because I thought
4 it was going to be a good thing for the region, for
5 Peru as a whole, and for the world, and I was, quite
6 frankly, a bit angry because this kind of abrupt
7 about-face in a couple of weeks is not something
8 that is normal.

9 **MR MOLINA:** I have no further questions.
10 Thank you.

11 **PRESIDENT:** Thank you, Mr Molina.

12 Mr Grané, who is conducting the
13 cross-examination? Mr Di Rosa?

14 **MR DI ROSA:** Yes, Mr President. It will
15 be me.

16 **PRESIDENT:** Mr Di Rosa, please proceed.

17 **MR DI ROSA:** Thank you very much.

18 Cross-examination by Respondent
19 by Mr Di Rosa

20 **MR DI ROSA:** Good morning, Mr Jacobson.

21 **MR JACOBSON:** Good morning, Mr Di Rosa.

22 **MR DI ROSA:** I will be conducting your
23 cross-examination this morning, and the only request
24 that I would make is that you wait until I complete
25 my questions before you answer, just to facilitate

1 the task of the interpreters and the court
2 reporters. I will be showing you documents on the
3 screen for everyone's convenience but I do
4 understand you have the capability to pull up
5 documents as necessary.

6 Is that a correct assumption?

7 **MR JACOBSON:** I have not set up my
8 computer to do that, but I can.

9 **MR DI ROSA:** Let's see how it goes. We'll
10 show you things on the screen, and if you have a
11 question or you need to see more context, you will
12 let us know, or perhaps our opposing counsel could
13 show you the document on redirect as necessary.
14 Would that work?

15 **MR JACOBSON:** Yes.

16 **MR DI ROSA:** So you were the founder and
17 member of Latam Hydro LLC, correct?

18 **MR JACOBSON:** Yes.

19 **MR DI ROSA:** And you founded that company
20 in 2014, correct?

21 **MR JACOBSON:** Yes. I believe that's the
22 case. That's the company that became Mamacochoa.

23 **MR DI ROSA:** You also formed a company
24 called Greinvest Management Limited, correct?

25 **MR JACOBSON:** That's correct.

1 **MR DI ROSA:** And you were the sole owner
2 of that company, correct?

3 **MR JACOBSON:** For a period. I'm going to
4 actually refer to my first witness statement which
5 has the corporate structure because, as you know,
6 the structure was a little complex.

7 **MR DI ROSA:** You said this in paragraph 3
8 of your first witness statement. It says you're the
9 sole owner of Greinvest. Do you see that?

10 **MR JACOBSON:** Oh, yes. Yes, I was.

11 **MR DI ROSA:** And that company was founded
12 in 2008. Is that consistent with your recollection?

13 **MR JACOBSON:** Yes.

14 **MR DI ROSA:** At all relevant times, for
15 purposes of this arbitration, you owned and
16 controlled CH Mamacocha, which I shall refer to as
17 CHM, either directly or indirectly through Greinvest
18 or Latam Hydro. Is that right?

19 **MR JACOBSON:** That's right, although after
20 2014, my co-investor, Gary Bengier, was a 50
21 per cent partner, so we have to agree on matters
22 going forward.

23 **MR DI ROSA:** Before the renewable energy
24 investment in Peru that is the subject of this
25 arbitration, you had never before invested in Peru,

1 is that correct?

2 **PRESIDENT:** Mr Di Rosa, I hate to
3 interrupt, but here I have to ask a question about
4 numbers. Mr Jacobson, can you please go to page 29
5 of your witness statement? Actually 28. You said
6 as of 2016, you just testified it was 50-50 with
7 Mr Bengier and you, right?

8 **MR JACOBSON:** Yes, that happened in 2014,
9 I believe.

10 **PRESIDENT:** And then the top of page 29,
11 which reflects the situation from May '14
12 to December 2016, it says 72/28. See that?

13 **MR JACOBSON:** You're entirely correct.
14 When we initially set up -- when Gary initially made
15 his investment, we had agreed on a different
16 allocation. As time went on we adjusted that to the
17 50-50.

18 **PRESIDENT:** So the adjustment is 2016,
19 because if you go to page 29 at the bottom and page
20 30, you see 50-50?

21 **MR JACOBSON:** Yes, correct.

22 **PRESIDENT:** And the next one you see also
23 to June '17. Do you see that?

24 **MR JACOBSON:** Yes, that's correct.

25 **PRESIDENT:** But if you go then to

1 paragraph 58 of your witness statement -- sorry,
2 Mr Di Rosa, this is simply to get the numbers right.

3 **MR DI ROSA:** No problem, Mr President.

4 **PRESIDENT:** You see there in June 2017
5 Mr Bengier, if I pronounce it correctly, he walked
6 away, to put it colloquially?

7 **MR JACOBSON:** He told me he was no longer
8 going to put in the 50 per cent, so we had to adjust
9 the terms of the agreement. We did not change the
10 underlying ownership. Essentially I get the money
11 that I have spent since that date back first.

12 **PRESIDENT:** Thank you. Thank you,
13 Mr Di Rosa. Please continue with your cross.

14 **MR DI ROSA:** Thank you, Mr President.

15 I'll re-read the question that I had posed
16 to you before, which was before the renewable energy
17 investment in Peru that is the subject of this
18 arbitration, you had never before invested in Peru.
19 Is that correct?

20 **MR JACOBSON:** That is correct.

21 **MR DI ROSA:** Before you invested in Peru,
22 had you invested anywhere else in Latin America?

23 **MR JACOBSON:** No.

24 **MR DI ROSA:** Do you speak Spanish,
25 Mr Jacobson?

1 **MR JACOBSON:** No.

2 **MR DI ROSA:** Before your investment in
3 Peru had you ever invested in a project that
4 required obtaining government concessions?

5 **MR JACOBSON:** I'm sorry, could you repeat
6 the question?

7 **MR DI ROSA:** Sure. Before your investment
8 in Peru, had you ever invested in a project that
9 required obtaining government concessions?

10 **MR JACOBSON:** Yes. The Eastern European
11 renewable energy projects required government
12 permits and government concessions.

13 **MR DI ROSA:** You are not yourself an
14 expert in renewable energy, though, is that correct?

15 **MR JACOBSON:** That's correct.

16 **MR DI ROSA:** In fact, in your first
17 witness statement in paragraph 3 you say, "At all
18 times my role was limited to owning and financing
19 these companies and their projects. I relied on
20 experts from the renewable energy sector to oversee
21 the development, construction, and operation of the
22 projects".

23 Do you recall saying that?

24 **MR JACOBSON:** Yes. I'm an investor,
25 I oversee my investments, but the statement is

1 correct.

2 **MR DI ROSA:** So to make the investment in
3 Peru you relied heavily on advisers and consultants,
4 correct?

5 **MR JACOBSON:** Advisers, consultants and
6 employees, that's correct.

7 **MR DI ROSA:** And that included Peruvian
8 lawyers, correct?

9 **MR JACOBSON:** That's correct.

10 **MR DI ROSA:** And it also included
11 technical consultants in Peru in the energy sector.
12 Is that right?

13 **MR JACOBSON:** That's correct.

14 **MR DI ROSA:** When you first started
15 focusing on the possible project in Peru, you were
16 aware there had already been two RER auctions. Is
17 that right?

18 **MR JACOBSON:** Yes.

19 **MR DI ROSA:** The RER auction that you
20 ended up participating in was the Third Auction,
21 correct?

22 **MR JACOBSON:** That's correct.

23 **MR DI ROSA:** And at the time that you were
24 considering bidding in the Third Auction, you were
25 aware that there had been certain problems with the

1 first two auctions, correct?

2 **MR JACOBSON:** Yes. I understood that some
3 concessionaires in the first two auctions had not
4 been diligent in pushing their projects forward and
5 had made weak claims of force majeure, which gave
6 them the ability to delay their projects.

7 **MR DI ROSA:** If I could ask my colleague
8 to pull up your first witness statement,
9 paragraph 17, please.

10 You see the part that starts with, "We
11 knew" in the second sentence?

12 **MR JACOBSON:** Yes.

13 **MR DI ROSA:** All right. So in this
14 sentence -- let me just read it -- it says, "We knew
15 the projects from the first two public auctions had
16 experienced delays attributable to the
17 concessionaires, some of which had no prior
18 experience or were intending strictly to flip the
19 project after winning the auction".

20 Do you see that?

21 **MR JACOBSON:** Yes.

22 **MR DI ROSA:** So in this paragraph you are
23 identifying two different problems, one of which you
24 just mentioned before I asked this question -- or
25 before we read this statement -- and that was the

1 problem of the delays attributable to the
2 concessionaires, correct? And the other problem
3 that you mentioned here was that some winning
4 bidders were what you called "flipping" their
5 projects.

6 By that, are you referring to the fact
7 that some winning bidders were just turning around
8 and selling their project to third parties, leaving
9 it to those third parties to construct the power
10 plants?

11 **MR JACOBSON:** My understanding was some
12 winning bidders were not proceeding diligently
13 toward construction but instead were hoping, once
14 they had received the RER -- the RER Contract, to
15 simply sell their rights under that contract,
16 whether -- in some cases well before construction.

17 **MR DI ROSA:** Let's pull up paragraph 15 of
18 Mr Jacobson's first witness statement.

19 Here you say at the beginning of the
20 paragraph, "From the outset, our plan was first to
21 develop the Mamacocha Project and then sell a
22 majority stake to a company that would oversee the
23 Project's construction and operation phases. My
24 team would then pivot to developing the upstream
25 projects".

1 Do you see that?

2 **MR JACOBSON:** Yes.

3 **MR DI ROSA:** All right. Can we pull up,
4 please, exhibit R-0175.

5 This is an e-mail from you to various
6 Innergex representatives, right? And we're going to
7 highlight for you a part here that says -- do you
8 see this sentence there in the middle -- "The
9 easiest way to do this would be for us to sell the
10 entire project to you".

11 **MR MOLINA:** Mr President, I'm so sorry to
12 interrupt. Is it possible for the witness to have a
13 chance to read the document that has just been put
14 on the screen before he answers the question?

15 **MR DI ROSA:** Sure.

16 **PRESIDENT:** Yes. Let me ask, Mr Jacobson,
17 when a document is shown to you and you're not sure
18 or you need to refresh your memory, please ask
19 Mr Di Rosa to -- some time to review the document.

20 **MR DI ROSA:** Sure. We can scroll back and
21 forth, if you wish, Mr Jacobson.

22 **MR JACOBSON:** Why don't you just scroll up
23 to the beginning? OK. This is -- I believe the
24 date at the very top is incorrect. As the e-mail
25 header shows it's January 22, 2018. Yes, go on.

1 Scroll down.

2 **MR DI ROSA:** Let's scroll all the way down
3 to the part we are asking Mr Jacobson about.

4 Thanks.

5 **PRESIDENT:** Mr Di Rosa, wait a moment.
6 Mr Jacobson, have you had the opportunity to review?

7 **MR JACOBSON:** Yes, I think I'm
8 comfortable.

9 **PRESIDENT:** OK.

10 **MR DI ROSA:** That's what I understood as
11 well. If it's not the case, Mr Jacobson, just feel
12 free to interrupt and say you want to review more or
13 you want to review a different part of the document.

14 I guess my question is isn't it the case
15 that it was your intention essentially to flip the
16 project to be able to focus on the upstream
17 projects?

18 **MR JACOBSON:** No, it was our intention to
19 partner with a larger, more capital rich firm, to
20 develop the project, and that would also enable us
21 to give our personnel the time to do the development
22 work on the upstream projects.

23 **MR DI ROSA:** Yes, but --

24 **MR JACOBSON:** Obviously by 2018, as this
25 letter indicates, circumstances changed. We had had

1 the RGA lawsuit and the long delays in trying to
2 resolve the situation. As I indicated, I was
3 hopeful that things would move forward, and I was
4 reconnecting with Innergex. Unfortunately, as you
5 know, the Innergex response was very negative.

6 **MR DI ROSA:** Right. But you were in fact
7 trying at that point to sell the entire project. Is
8 that right?

9 **MR JACOBSON:** By 2018 the project, which
10 was in distress -- there's no question we had
11 changed our strategy and, as indicated in the lines
12 immediately above those that you have highlighted,
13 we had changed our strategy and were seeking to sell
14 the entire project.

15 **MR DI ROSA:** Thank you.

16 The design of your project was done by you
17 and your team of consultants and advisers, correct?

18 **MR JACOBSON:** Well, it was done -- it was
19 done by the team. The team obviously hired very
20 expert engineering firms and others to help with
21 design.

22 **MR DI ROSA:** Right. And there was no
23 government agency or entity involved in any way in
24 the design of your project, was there?

25 **MR JACOBSON:** That is correct.

1 **MR DI ROSA:** And the location of your
2 project also was selected by you and your team, as
3 you put it, is that correct?

4 **MR JACOBSON:** That's correct.

5 **MR DI ROSA:** And no government agency or
6 entity was involved in any way in the selection of
7 your project, is that correct?

8 **MR JACOBSON:** Selection of the project
9 site, that is correct.

10 **MR DI ROSA:** Once you decided to submit a
11 bid in the third auction, your team prepared the
12 relevant papers for the bid describing the location
13 and the technical characteristics of your proposed
14 project, right?

15 **MR JACOBSON:** Yes, I believe that is the
16 case. They prepared all of the documentation
17 necessary to make a successful bid.

18 **MR DI ROSA:** And there was no government
19 agency or entity involved in any way in the
20 preparation of your bid or of your bid papers,
21 correct?

22 **MR JACOBSON:** That's my understanding,
23 yes.

24 **MR DI ROSA:** You were aware at the time
25 that you were preparing your bid for the Third

1 Auction that the auction was for the fixed 20-year
2 tariff, rather than for a government concession to
3 generate energy, is that right?

4 **MR JACOBSON:** That's correct.

5 I understood they were -- it had been explained to
6 me they were two different things that we needed as
7 part of the permitting process, the development
8 process, to first get the environmental and other
9 permissions that would then be rolled up into the
10 concession, the request for a concession.

11 **MR DI ROSA:** So the concession to generate
12 energy was a separate and different concession that
13 you had to obtain called the final concession or
14 concesión definitiva?

15 Is that your recollection?

16 **MR JACOBSON:** That is my understanding,
17 yes.

18 **MR DI ROSA:** The final concession enables
19 a power generator to produce electricity even
20 without an RER contract, is that correct?

21 **MR JACOBSON:** That is correct.

22 **MR DI ROSA:** And this is true regardless
23 of whether the final concession was obtained before
24 or after the RER Contract was signed, correct?

25 **MR JACOBSON:** That is correct, and it's

1 true if the electricity producer is large and not
2 subject to the RER regime, or small.

3 **MR DI ROSA:** You selected as the location
4 of your project the Mamacocho Lagoon in the region
5 of Arequipa, correct?

6 **MR JACOBSON:** Yes.

7 **MR DI ROSA:** Were you aware at the time
8 that you selected the Mamacocho Lagoon as the
9 location for your project that it was one of the
10 world's largest spring lagunas, if not the largest
11 spring lagoon?

12 **MR JACOBSON:** I was aware it had unusual
13 hydrology, that the waters from the valley above had
14 gone into permeable soil, so there was in fact no
15 river that sourced the lagoon, but at the lagoon and
16 indeed along the Mamacocho river starting almost
17 immediately below the lagoon there were very
18 substantial springs where the water essentially came
19 back above the surface and went -- eventually went
20 down to the Colca River.

21 **MR DI ROSA:** Are you aware that a few
22 years ago the plenary of the Andean community
23 formally declared the Mamacocho Lagoon a natural
24 wonder in recognition of its biodiversity and its
25 overall ecological and environmental importance?

1 Have you heard that?

2 **MR JACOBSON:** I don't believe I had heard
3 that, and I'm not sure, when you say a couple, a few
4 years, ago whether you're referring to --

5 **MR DI ROSA:** 2019 specifically.

6 **MR JACOBSON:** Yes. You know, at that
7 point I'm afraid the project had stopped and I may
8 have missed the activity.

9 **MR MOLINA:** I'm sorry to interrupt. Is
10 there a foundation for the question? And if there
11 was, I'm sorry if you explained it already,
12 Mr Di Rosa, but I just didn't hear what the
13 foundation was for that fact that you just read.

14 **MR DI ROSA:** I don't have to establish a
15 foundation as such. I have to ask him questions
16 related to his witness statement. He said in his
17 witness statement that he's concerned about the
18 environment, about global warming, et cetera, and so
19 these questions are related to that.

20 **PRESIDENT:** Wait a moment. Mr Molina, one
21 second. Mr Di Rosa, the reference to a natural
22 wonder is somewhere in the record, if my memory
23 serves me right.

24 **MR DI ROSA:** Yes. It's in exhibit R-0095,
25 Mr President.

1 **PRESIDENT:** Thank you for helping me. The
2 declaration by the Andean community?

3 **MR DI ROSA:** Yes.

4 **PRESIDENT:** With that foundation, you can
5 proceed.

6 **MR DI ROSA:** Thank you, Mr President.

7 Let's pull up clause 3.3 of the Concession
8 Contract. This is, for the record, C-0002 at page
9 39. In the English version, and we're going to use
10 the English version. This is a translation that was
11 provided by the Claimants. We don't accept the
12 accuracy of all of it necessarily but we will use it
13 for present purposes.

14 **MR JACOBSON:** Yes, and when you say the
15 concession contracts, why don't you go back up to
16 the heading? I have two questions.

17 First, this is the -- what I believe you
18 refer to as the RER Contract, the contract between
19 the governments and CHM with respect to the --

20 **MR DI ROSA:** Correct.

21 **MR JACOBSON:** And this is our contract as
22 opposed to anybody else's?

23 **MR DI ROSA:** Yes, this is your specific
24 contract, correct.

25 **MR JACOBSON:** Thank you.

1 **MR DI ROSA:** So the first sentence there
2 in 3.3, if you can see it, it says: "The
3 Concessionaire Company shall design, provide the
4 financing and supply the goods and services required
5 to build, operate and maintain the power generation
6 plant specified in annex 1".

7 Do you see that?

8 **MR JACOBSON:** Yes.

9 **MR DI ROSA:** Would you agree that by
10 signing the RER Contract you fully assumed the
11 financial risk of the project?

12 **MR JACOBSON:** We fully assumed the
13 financial risk of the project. We did not assume
14 the risk that our counterparty would blow up the
15 project.

16 **MR DI ROSA:** Those are different issues.
17 We obviously dispute that last part, but I'm asking
18 you about the financing specifically now,
19 Mr Jacobson.

20 So you do agree that you assumed fully the
21 financial risk of the project. Is that correct?

22 **MR JACOBSON:** I reiterate my comment.

23 **MR DI ROSA:** Let's look at RER Contract
24 section 6.4 on page 42 of exhibit C-0002. At 6.4.1
25 here the contract refers to different ways to

1 finance the project, correct?

2 **MR JACOBSON:** Yes. And this is entirely
3 consistent with overall RER Law, which was intended
4 to make these small hydro projects financeable so
5 that one could get non-recourse financing.

6 **MR DI ROSA:** Let me just look at the
7 transcript here for a second. "So that one could
8 get non-recourse financing". Do you see that
9 anywhere -- is that anywhere in the contract?

10 **MR JACOBSON:** No, but exactly this kind of
11 pledging, mortgaging, and the like is what one does
12 when one is engaged in working with a bank that is
13 going to provide non-recourse financing because the
14 bank wants to know that, should something go wrong
15 and it have to seize -- that it has assets to back
16 up the money or to back up the money that it has
17 loaned to you on a non-recourse basis.

18 **MR DI ROSA:** We'll come back to that,
19 Mr Jacobson. Let me focus your attention on 6.4.2
20 now, the clause immediately below the one we just
21 saw. This one says, "The provisions in the
22 foregoing paragraph shall not release the
23 Concessionaire Company from its obligation to comply
24 with all of the provisions set forth herein, in the
25 Final Concession Contract and in the Applicable

1 Laws". Correct?

2 **MR JACOBSON:** That is correct.

3 **MR DI ROSA:** So essentially the form of
4 financing that you selected would not in any way
5 alter your other obligations under the contract. Is
6 that your interpretation as well?

7 **MR JACOBSON:** I think that is a fair
8 inference from the provision.

9 **MR DI ROSA:** In paragraph 18 of your
10 second witness statement you admitted: "The RER
11 Contract did not constrain our choice in which
12 financial approach we might decide to take".

13 **MR JACOBSON:** That is correct, but the RER
14 Contract, in accordance with our expert, Mr Whalen,
15 was very specifically designed to make non-recourse
16 financing from both commercial and development banks
17 easy and possible.

18 **MR DI ROSA:** Neither the bidding rules nor
19 RER Contract nor any other government directive
20 required that you use project finance as the
21 financing mechanism for the project, is that a
22 correct statement?

23 **MR JACOBSON:** That is correct, but those
24 other -- other forms of financing had historically
25 not resulted in small hydro projects, and that was

1 why the RER Law back in 2008 was -- was created and
2 extended to small hydro projects, if you go back and
3 look at that.

4 **MR DI ROSA:** The RER regime required you
5 to submit a works schedule with the main milestones
6 of the project, is that right?

7 **MR JACOBSON:** That is correct.

8 **MR DI ROSA:** And that works schedule had
9 to be approved by the Peruvian authorities and
10 specifically the OSINERGMIN, do you recall that?

11 **MR JACOBSON:** That is correct.

12 **MR DI ROSA:** One of those milestones in
13 the works schedule was the financial closing date,
14 correct?

15 **MR JACOBSON:** That is correct.

16 **MR DI ROSA:** So your contractual
17 obligation was not either to use project finance or
18 not use project finance; it was rather simply to
19 reach financial closing by the date established in
20 your work schedule, isn't that right?

21 **MR JACOBSON:** That is correct.

22 **MR DI ROSA:** That means that if it was
23 impossible for you to meet the conditions imposed by
24 your lenders, your contractual obligation was to
25 find a different way to reach financial closing by

1 the contractual deadline, is that correct?

10:12

2 **MR JACOBSON:** That's correct.

3 **MR DI ROSA:** But you picked project
4 finance for the reasons you explained and you stuck
5 with it to the bitter end, and let me pull up
6 paragraph 8 of your second witness statement,
7 Mr Jacobson. Here it says, "Except in very rare
8 exceptions, the construction of renewable energy
9 projects is financed primarily through non-recourse
10 project financing loans. Financing these projects
11 through other mechanisms is simply not as profitable
12 and subjects the project developer to greater
13 penalties in the event the project underperforms".

14 Do you see that?

15 **MR JACOBSON:** Yes.

16 **MR DI ROSA:** This sentence here,
17 "Financing these projects through other mechanisms
18 is simply not as profitable" implies that you did in
19 fact have alternative mechanisms, they just weren't
20 as profitable, is that right?

21 **MR JACOBSON:** As I said earlier, these
22 projects were simply not being built. It was not a
23 matter that they were less profitable, it was a
24 matter that they were not profitable at all and
25 therefore no one would build them.

1 **MR DI ROSA:** In your first witness
2 statement you stated: "From 2012 to 2013 my team
3 conducted extensive legal due diligence on the RER
4 promotion".

5 **MR JACOBSON:** Yes.

6 **MR DI ROSA:** You indicated that you took
7 legal counsel from Santiváñez Abogados which is a
8 law firm in Peru, correct?

9 **MR JACOBSON:** A very well respected firm.
10 It had particular expertise in the energy sector,
11 yes.

12 **MR DI ROSA:** Was there any other Peruvian
13 law firm or lawyer advising you at the time, that
14 you can recall?

15 **MR JACOBSON:** I don't recall any other
16 lawyers.

17 **MR DI ROSA:** In part to address the
18 problems in the first two auctions that we just
19 discussed a while ago, in 2013 the government
20 promulgated a Supreme Decree that amended the RER
21 regulations. Is that a fair statement?

22 **MR JACOBSON:** That's my understanding.

23 **MR DI ROSA:** And that Supreme Decree was
24 one of the issues on which the Santiváñez law firm
25 had advised you in 2013, correct?

1 **MR JACOBSON:** Yes.

2 **MR DI ROSA:** Let me direct your attention,
3 then, to your first witness statement, paragraph 17,
4 Mr Jacobson, the third sentence specifically, and if
5 we could pull that up, please.

6 **MR JACOBSON:** The first sentence --

7 **MR DI ROSA:** Can we highlight the third
8 sentence where it starts with "I learned that"?

9 So here you say, "I learned that many of
10 these concessionaires extended their milestone
11 deadlines using vague 'force majeure' arguments.
12 For that reason, we were not surprised when Peru
13 enacted Supreme Decree No 24" and then it goes on to
14 say the date in July 2013 -- "months before the
15 third auction -- making it more difficult for
16 concessionaires in the third auction to extend the
17 commercial operation deadline and concession term".
18 Then you go on to say "for delays attributable
19 solely to the concessionaire or for 'force majeure'
20 delays beyond the control of both parties".

21 Do you see that?

22 **MR JACOBSON:** Yes.

23 **MR DI ROSA:** Now, as we just discussed,
24 the third auction that you mentioned here is the one
25 that you participated in, correct?

1 **MR JACOBSON:** Yes.

2 **MR DI ROSA:** The bidding rules for that
3 auction were published by the government in advance
4 of the auction, right?

5 **MR JACOBSON:** Yes.

6 **MR DI ROSA:** And all bidders were required
7 to abide by the bidding rules, correct?

8 **MR JACOBSON:** Yes.

9 **MR DI ROSA:** The bidding rules included as
10 an attachment the text of the RER Contract that
11 would be signed, right?

12 **MR JACOBSON:** I believe that's the case,
13 yes.

14 **MR DI ROSA:** Prior to your decision to
15 submit a bid in the third auction, your advisers in
16 Peru informed you about the bidding rules, correct?

17 **MR JACOBSON:** Yes.

18 **MR DI ROSA:** And they also informed you
19 about the RER Contract text that was appended to the
20 bidding rules, do you recall that?

21 **MR JACOBSON:** Yes.

22 **MR DI ROSA:** Did you personally review the
23 RER Contract and the bidding rules?

24 **MR JACOBSON:** No, not at that time.

25 **MR DI ROSA:** Let's take a look at the

1 document exhibit R-0153 from the record. This is an
2 e-mail sent by a person named Licy Benzaquén. Do
3 you see that?

4 **MR JACOBSON:** Licy Benzaquén, yes. You
5 have her witness statements.

6 **MR DI ROSA:** Yes.

7 And Ms Benzaquén was one of the lawyers of
8 the Peruvian law firm you had engaged, Santiváñez
9 Abogados, correct?

10 **MR JACOBSON:** Yes.

11 **MR DI ROSA:** The e-mail was addressed to
12 Stefan Sillen and Andrés Bartrina.

13 **MR JACOBSON:** Correct.

14 **MR DI ROSA:** At that time Mr Sillen was
15 president and CEO of Greinvest and then subsequently
16 Hydroeléctrica Laguna Azul, is that right?

17 **MR JACOBSON:** Yes.

18 **MR DI ROSA:** And Hydroeléctrica Laguna
19 Azul was the predecessor entity of CHM, correct?

20 **MR JACOBSON:** Yes.

21 **MR DI ROSA:** So the name of the company
22 was changed from Hydroeléctrica Laguna Azul to
23 CH Mamacochoa in 2017, right?

24 **MR JACOBSON:** That sounds right.

25 **MR DI ROSA:** And Mr Bartrina, for his part

1 at that time, was the project manager and technical
2 consultant at Greinvest and subsequently at
3 Hydroeléctrica Laguna Azul, correct?

4 **MR JACOBSON:** Yes, I believe so.

5 **MR DI ROSA:** To simplify for our present
6 purposes we'll refer to both Laguna Azul and CHM as
7 CHM, if you don't object?

8 **MR JACOBSON:** Yes.

9 **MR DI ROSA:** This e-mail from Ms Benzaquén
10 is dated August 19, 2013. That was before you
11 submitted your bid in the Third Auction, correct?

12 **MR JACOBSON:** That's correct.

13 **MR DI ROSA:** You submitted your bid in the
14 auction later in 2013, right?

15 **MR JACOBSON:** That's correct.

16 **MR DI ROSA:** And this e-mail was a report
17 from your lawyers to your country team on the
18 bidding rules for the Third Auction, is that
19 correct?

20 **MR JACOBSON:** I believe it was a
21 translation and summary. We had subsequent
22 discussions about -- about the rules, but yes.

23 **MR DI ROSA:** At that time the bidding
24 rules had just been released to the public, right?

25 **MR JACOBSON:** As far as I know.

1 **MR DI ROSA:** Let's go to page 3 of this
2 document, in the top of the page specifically. Do
3 you see the heading there says "Highlights --
4 Conditions of the Third Auction RER". Do you see
5 that?

6 **MR JACOBSON:** Yes.

7 **MR DI ROSA:** At the bottom of the same
8 page under the sub heading "Qualification
9 Envelope -- Envelope No 2", it provides a list of
10 the documents that the bidders were required to
11 submit with their bid, do you see that?

12 **MR JACOBSON:** Yes.

13 **MR DI ROSA:** And the list continues on to
14 the next page, page 4, and do you see the entry in
15 the third bullet point or tick from the top starting
16 with the words "Express recognition"?

17 **MR JACOBSON:** Yes.

18 **MR DI ROSA:** And that entry says:
19 "Express recognition of unchangeable character of
20 the termination date of the contract, even when
21 there are events of force majeure".

22 **MR JACOBSON:** Yes.

23 **MR DI ROSA:** This e-mail wasn't addressed
24 to you, but did you see this e-mail at the time?
25 Was it forwarded to you?

1 **MR JACOBSON:** I don't recall, but it was
2 discussed and we did understand that in the events
3 of force majeure, which was, you know, not the fault
4 of either party, that there would be issues in
5 getting an extension of the termination date, but
6 said absolutely nothing about our counterparty
7 taking actions -- you know, that situation was just
8 not covered.

9 **MR DI ROSA:** Let's go now to page 6 of the
10 same document. Do you see a paragraph --
11 specifically let's go to paragraph 3.1 starting with
12 the words "The most important".

13 Do you see that? It says: "The most
14 important characteristics of the contractual regime
15 applicable to RER projects", et cetera, and it says
16 "are as follows".

17 The first item that it mentions is the
18 reference COS date which shall be no later
19 than December 31, 2016. And there's a part in
20 3.1(b) that starts with "If it is the case". Do you
21 see that part? Let's highlight it if we can.

22 There it says, "If it is the case that the
23 real date of commercial operation has not been
24 achieved, then the contract shall be automatically
25 terminated and the guarantee for faithful completion

1 shall be required".

2 You were aware of this requirement at the
3 time, right?

4 **MR JACOBSON:** I had a general awareness,
5 but obviously it was going to be dependent on the
6 reasons why the real date of commercial operation
7 had not been achieved, and, in fact, in our
8 contracts the COS date was extended.

9 **MR DI ROSA:** The next paragraph expressly
10 refers to the contract term. Still in the same
11 section 3.1 it says, "The contract term date will
12 not be changed for any reason, even by force
13 majeure, and is scheduled for December 31, 2036".

14 **MR JACOBSON:** That's correct, and again it
15 spelled out force majeure --

16 **MR DI ROSA:** I haven't asked my question
17 yet, Mr Jacobson.

18 **MR JACOBSON:** I'm sorry.

19 **MR DI ROSA:** So your counsel had alerted
20 you before you made the bid in the Third Auction to
21 all of these provisions in the bidding terms and the
22 RER Contract, that's right, isn't it?

23 **MR JACOBSON:** Yes.

24 **MR DI ROSA:** In connection with your bid,
25 your team submitted to the government two sworn

1 statements. Those declarations, both of which were
2 signed in October 2013, are at exhibits R-0138 and
3 R-0139 in the record.

4 Are you familiar with the sworn statements
5 that I'm referring to? We will put one of them on
6 the screen in a moment.

7 **MR JACOBSON:** I have -- I did not see them
8 at the time. I have seen them since then. They are
9 of course in Spanish, which I do not read, but feel
10 free to put them on the screen and ask questions.

11 **MR DI ROSA:** We'll see how it goes.
12 Neither of these sworn statements has an English
13 translation so let's just focus on the one at
14 exhibit R-0138, which consists of a single sentence,
15 and maybe we can rely on the help of our
16 interpreter.

17 So this statement was signed on behalf of
18 CHM by Mr Carlos Diez Canseco, correct?

19 **MR JACOBSON:** Yes.

20 **MR DI ROSA:** Who was Mr Diez Canseco?

21 **MR JACOBSON:** Mr Diez Canseco was one of
22 our employees. He was in charge of, among other
23 things, relationships with the government and
24 relationships with the communities.

25 **MR DI ROSA:** Let's review the statement on

1 the screen. It's a single -- the whole declaration
2 consists of a single sentence that appears on the
3 screen now. I will read in it Spanish and hopefully
4 our interpreter can assist us. I'm not sure how
5 this works. Maybe an easier way would be for me to
6 translate and your counsel can object if it's not
7 quite right. Let's do that, just in the interest of
8 time and to avoid the hassle.

9 So it says here: We declare under oath
10 that we recognise the non-modifiable character of
11 the date of termination of the contract, even when
12 there are events of force majeure.

13 So here CHM was formally acknowledging
14 under oath that the termination date could not be
15 modified even in the face of force majeure events,
16 correct?

17 **MR JACOBSON:** Yes, but again, that says
18 nothing about acts of our counterparty.

19 **MR DI ROSA:** I understand your position.

20 You mentioned in your second witness
21 statement the Amparo proceeding. That was a
22 judicial proceeding in Peru that was started by a
23 private citizen, correct?

24 **PRESIDENT:** Mr Di Rosa, I think you have
25 now moved to the next subject?

1 **MR DI ROSA:** Yes.

2 **PRESIDENT:** Is it a good moment to break
3 for 15 minutes?

4 **MR DI ROSA:** Absolutely, Mr President.

5 **PRESIDENT:** Mr Jacobson, you are under
6 testimony. I hope you know what it means. It means
7 you are not allowed to communicate with anyone about
8 this case during your testimony, but you are free to
9 go for a natural break, if I may call it that way.

10 **MR JACOBSON:** I understand. I will stop
11 my ears and my mouth.

12 **PRESIDENT:** Feel free to take a coffee.

13 Then 15 minutes' break until 16.45 CET.

14 (Recess taken from 10.28 EST to 10.46 EST)

15 **PRESIDENT:** I see everybody is back.

16 Mr di Rosa, please continue the cross-examination.

17 **MR DI ROSA:** Thank you, Mr President.

18 Mr Jacobson, I'm just going to restart the segment
19 that we were talking about when we went on break.

20 I was mentioning to you that you discussed
21 in your second witness statement, specifically in
22 paragraph 28, the issue of the Amparo proceeding,
23 and my question that I had posed initially was that
24 was a judicial proceeding in Peru that started by --
25 that was started by a private citizen, is that your

1 understanding?

2 **MR JACOBSON:** That's correct.

3 **MR DI ROSA:** And that proceeding concerned
4 the challenge to CHM's environmental permits, is
5 that right?

6 **MR JACOBSON:** That is correct. In the
7 constitutional court.

8 **MR DI ROSA:** Right. That's the Amparo
9 proceeding.

10 In your pleadings you totally -- your
11 counsel totally dismissed the importance of the
12 Amparo proceeding. For example the Reply at
13 paragraph 104 referred to it as "background noise"
14 and as a "nuisance lawsuit".

15 Do you recall that?

16 **MR JACOBSON:** Yes.

17 **MR DI ROSA:** And we noted that it was in
18 the opening statement yesterday as well.

19 Let's pull up exhibit C-0247. This is a
20 legal opinion that was sent by the Peruvian law firm
21 CMS Grau to your potential lender DEG, correct? Do
22 you see that?

23 **MR JACOBSON:** Yes. Estudio Grau was the
24 law firm hired by DEG.

25 **MR DI ROSA:** And the memo is

1 dated December 21, 2018. Do you see that?

2 **MR JACOBSON:** Yes.

3 **MR DI ROSA:** This legal memorandum was
4 commissioned from the CMS Grau firm by DEG itself,
5 correct?

6 **MR JACOBSON:** Yes, that would make sense.

7 **MR DI ROSA:** The purpose of the memo as
8 indicated in the subject line was to provide DEG
9 with an analysis of the various pending legal
10 proceedings relating to your project, correct?

11 **MR JACOBSON:** Yes. It was essentially
12 update due diligence from the work that Estudio Grau
13 had done in 2016 and 2017.

14 **MR DI ROSA:** In the first paragraph the
15 CMS Grau lawyers defined the pending proceedings as
16 the proceedings of power plant, and that may have
17 been a translation issue at the time if the original
18 was done in Spanish, but it's clear from that
19 context that the defined term there refers to the
20 proceedings themselves rather than to a particular
21 plant.

22 Now, at the end of the second paragraph in
23 this section, which is captioned "I. Background and
24 queries", the memo says that one of its goals is to
25 "determine the consequences and severity of the

1 impact of a negative decision on the implementation
2 of the project".

3 Do you see that part?

4 **MR JACOBSON:** Yes.

5 **MR DI ROSA:** So let's turn now to page 4
6 of this document and specifically at point 3.2 at
7 the top: "The CMS Grau law firm provided overall
8 considerations and recommendations on the various
9 proceedings, including the Amparo proceeding", and
10 the part at the beginning of point 3.2 states,
11 "Although the current proceedings power plant" --
12 meaning the proceedings -- "constitute a remote
13 contingency because of the way they are strategised,
14 the consequences could be very serious in case of
15 obtaining an unfavourable resolution or in case the
16 supervisory authority later determines that the
17 environmental management instrument that supports
18 the project does not correspond and has been issued
19 without having in consideration the real impacts of
20 the project".

21 **MR MOLINA:** I'm sorry to interrupt. I do
22 not believe that Mr Di Rosa has established that
23 Mr Jacobson is aware or familiar with this document,
24 and at the very minimum Mr Jacobson should have an
25 opportunity to read the full document before

1 answering a question about it.

2 **PRESIDENT:** Mr Jacobson, do you wish to
3 have an opportunity to familiarise yourself fully
4 with the document?

5 **MR JACOBSON:** I don't believe that I've
6 seen this particular document before. I would be
7 happy to read through it quickly and answer Mr Di
8 Rosa's questions.

9 **PRESIDENT:** Mr Di Rosa, if you would like
10 to maintain your questions Mr Jacobson --

11 **MR DI ROSA:** I'm happy to have him review.
12 Do you want to pull it up, Mr Jacobson, or do you
13 want to have us scroll through it?

14 **MR JACOBSON:** Why don't you just scroll
15 through it?

16 **PROFESSOR TAWIL:** Sorry, Mr Di Rosa,
17 I assume the document has been presented by Claimant
18 because it's C something. Do you know -- can
19 Claimant or yourself indicate why this is a draft
20 and not the final report?

21 **MR DI ROSA:** We don't know,
22 Professor Tawil. This was produced in the document
23 production, as I understand it. We didn't receive
24 from them a final version. Perhaps Claimants'
25 counsel can clarify why this is only in draft.

1 **MR MOLINA:** Yes. Thank you for the
2 question, Professor Tawil.

3 Our understanding is that this is a draft
4 that was shared by Estudio Grau to Claimants
5 in December 2018, and the reason why it's a draft
6 and not a final is because the project was
7 terminated by Peru on December 31, 2018, therefore
8 mooted the need for CMS Grau to complete its legal
9 diligence on the project.

10 **PROFESSOR TAWIL:** Formally this document
11 was never issued? I mean it's just a draft, right?

12 **MR MOLINA:** It's a draft that again was
13 shared by CMS Grau to Claimants. That's as much as
14 we know.

15 **PRESIDENT:** Right. Mr Jacobson, please
16 proceed with reviewing the document. Can you scroll
17 through?

18 **MR DI ROSA:** Yes. We'll do that. Just
19 let us know, Mr Jacobson, when you're done with a
20 particular segment, and we'll scroll another
21 segment.

22 **MR REISENFELD:** Mr President and
23 Mr Di Rosa, would it be easier if Mr Jacobson had
24 the ability to review the entire document? He said
25 that he has his computer, he could open up the

1 entire document and look at in his time.

2 **MR DI ROSA:** That would be better for
3 everyone.

4 **MR JACOBSON:** That would be easier but
5 I have not -- I am not in front of my computer, I'm
6 in front of the Baker Hostetler computer, and I'm
7 not sure quite how to do that.

8 **MR DI ROSA:** Is there someone,
9 Mr Reisenfeld, that could go in and help him, if
10 he's in your offices, just pull it up?

11 **MR MOLINA:** Yes, we're having somebody go
12 and make sure that he has access to the document.

13 **MR DI ROSA:** All right. Thank you.

14 **MR JACOBSON:** I have someone who's come
15 into the room and dropped off a paper copy of the
16 document. I will now read through it. Thank you.

17 **MR DI ROSA:** Yes, please do, Mr Jacobson,
18 and let us know when you're finished.

19 **MR JACOBSON:** [Pause for reading] I am
20 ready.

21 **MR DI ROSA:** Thank you, Mr Jacobson. So
22 let's go back to 3.2 and this statement here. I'll
23 just read the relevant part again.

24 "Although the current proceedings
25 constitute a remote contingency because of the way

1 they are strategised, the consequences could be very
2 serious in case of obtaining an unfavourable
3 resolution or in case the supervisory authority
4 later determines that the environmental management
5 instrument that supports the project does not
6 correspond and has been issued without having in
7 consideration the real impacts of the project".

8 So here the Peruvian lawyers were
9 expressing their view that there could in fact be
10 very serious consequences if any of these
11 proceedings, including the Amparo proceeding, were
12 to be successful or if your environmental permits
13 were found to have been improperly granted.

14 Isn't that a correct interpretation of
15 this?

16 **MR JACOBSON:** The lawyers made two
17 findings, one that the contingency was remote, in
18 other words quite unlikely, and in the analysis
19 section they then described the reasons why it was
20 unlikely, including that the -- that this should be
21 brought as a contentious administrative proceeding
22 rather than as an Amparo, and that there was no
23 evidence adduced to the Amparo.

24 But it did say, I agree with you, that in
25 the event of that remote contingency, the

1 consequences could be serious.

2 **MR DI ROSA:** Right. But the remote
3 contingency did, in fact, become realised, did it
4 not? The Amparo request was accepted and these very
5 serious consequences did come to pass, isn't that
6 right?

7 **MR JACOBSON:** Long after the project had
8 ended, yes.

9 **MR DI ROSA:** Let's -- and in the part
10 immediately below the one we just read in 3.2 it
11 lists some of the possible consequences of these
12 proceedings being successful, and those include
13 reclassification of the project and revocation of
14 the final concession.

15 Do you see that?

16 **MR JACOBSON:** Yes, those are serious
17 consequences for an exceptionally unlikely
18 occurrence.

19 **MR DI ROSA:** Let's focus for a moment on
20 the document that appears at exhibit R-0177 in the
21 record, which we will pull up on the screen now.

22 This document is dated March 15, 2017, and
23 it's a preliminary issues list for legal due
24 diligence prepared by DEG for CHM. The document
25 reflects certain questions from DEG to CHM and CHM's

1 responses to those questions. Let's turn to page 3
2 of this document and specifically to point 7.

3 **MR MOLINA:** Again, would it be possible
4 for Mr Jacobson to have a chance to read the
5 document so that he may be able to answer questions?

6 **MR DI ROSA:** Yes.

7 **MR JACOBSON:** I don't believe I have that,
8 but I'm sure someone -- I'm sure someone will bring
9 it to me.

10 **MR DI ROSA:** That would be helpful,
11 Mr Molina, if they could do that again. Just print
12 it and bring it to him.

13 **MR MOLINA:** Yes. We're taking care of it.
14 Thank you, Mr Di Rosa.

15 **MR DI ROSA:** Thank you.

16 **MR JACOBSON:** Thank you. Again, someone
17 else has come in and brought me a document. [Pause
18 for reading]

19 Yes, you may continue, Mr Di Rosa.

20 **MR DI ROSA:** We're at point 7 in the
21 section of the document that discusses the Amparo
22 proceeding, and do you see there the part that's
23 captioned "Comment DEG"?

24 **MR JACOBSON:** Yes.

25 **MR DI ROSA:** Would you mind reading in its

1 entirety point (a) of DEG's comment by reading it
2 out loud?

3 **MR JACOBSON:** Sure. "We understand from
4 Estudio Grau that Santiváñez Abogados SA are taking
5 the position that the Amparo will be admitted only
6 to the extent that the Appeals Court considers that
7 there is urgency on the claim. In Estudio Grau's
8 view, however, the Amparo could be admitted under
9 other grounds as well, including if the Appeals
10 Court concludes that there is a risk of permanent
11 damages, which Estudio Grau consider well possible.
12 Please comment".

13 **MR DI ROSA:** All right. Then in point (b)
14 below that DEG asked you for an estimate of
15 percentage chances of success of the Amparo request,
16 and CHM responded that it was unable to provide a
17 percentage. Do you see that?

18 **MR JACOBSON:** Yes. I've never been able
19 to get a litigator to give me a percentage, and I've
20 talked with many, many about many cases.

21 **MR DI ROSA:** Rightly so.

22 All right. And so this is a document
23 dated March 15, 2017 in which DEG is saying to you
24 Estudio Grau thinks the Amparo may well be admitted
25 and it considers that well possible, correct?

1 That's what they're saying?

2 **MR JACOBSON:** Although the document that
3 you showed me just a couple of minutes ago from
4 perhaps a year later showed that Estudio Grau still
5 at that time considered the possibility of an
6 adverse result to be remote.

7 **MR DI ROSA:** Perhaps, but what I'm
8 focusing on here is the concern that DEG was
9 expressing to you about the potential impact of the
10 Amparo proceeding. It seems clear from this that
11 DEG did not share the Claimants' view that the
12 Amparo proceeding was merely "background noise", as
13 Claimants called it in the Memorial. Isn't that a
14 fair inference?

15 **MR JACOBSON:** Whatever DEG thought, it
16 certainly wasn't interrupting their work towards
17 getting us to signing documents and eventually to
18 financial close.

19 **MR DI ROSA:** Let me ask you a couple of
20 questions about the ruling that was issued in the
21 Amparo proceeding, and I'll call that the Amparo
22 ruling. For the record the Spanish original of that
23 document is at exhibit R-0070 and the English
24 translation is at C-0035. We don't need to put it
25 on the screen, at least for now.

1 Mr Jacobson, I know you're not a Peruvian
2 licensed lawyer but, based on reports from your
3 Peruvian lawyers, was it your understanding then or
4 is it now that the Amparo ruling annulled the
5 Claimants' environmental permits?

6 **MR JACOBSON:** Well, after the appeal was
7 denied, yes, the environmental permits were annulled
8 but, as you know, one of the considerations of the
9 court was in considering what I would call the
10 balancing of the equities. I'm sure that's not what
11 it's called in Peru. They looked at the project,
12 which was suspended and there was -- you know, it
13 was dead, and balanced the potential damage there
14 against the damage of issuing the ruling.

15 So the ruling was impacted by the fact
16 that the project had already been killed by the
17 measures.

18 **MR DI ROSA:** So I do see that you say yes,
19 the environmental permits were annulled as a result
20 of this. In that ruling, the Amparo ruling also
21 invalidated Claimants' final concession, isn't that
22 true?

23 **MR JACOBSON:** My understanding is that
24 because the final concession was dependent on the
25 environmental rulings, it could not stand if the

1 initial environmental permits could not stand.

2 **MR DI ROSA:** Right. And are you aware
3 that in this arbitration the Claimants are not
4 challenging either the validity or propriety of the
5 Amparo ruling, or of any of the judicial proceedings
6 related to it?

7 **MR JACOBSON:** None of those measures --
8 none of those matters are a part of the measures,
9 that is correct.

10 **MR DI ROSA:** This Amparo request, as far
11 as you can recall, was in fact filed before the RGA
12 lawsuit, is that not true?

13 **MR JACOBSON:** I understand it was
14 originally filed in 2016, yes.

15 **MR DI ROSA:** The various documents that
16 we've been talking about from CMS Grau and DEG, had
17 your lawyers ever shown those to you? Were you
18 familiar with the more recent one we talked about,
19 the one where DEG was asking you questions about the
20 Amparo proceeding? Had you seen that document
21 before?

22 **MR JACOBSON:** I certainly didn't see it at
23 the time and -- you know, because we were in the
24 midst of the quick changeover of the Peruvian
25 position, and I do not believe I reviewed it as part

1 of my review for this cross-examination.

11:11

2 **MR DI ROSA:** Right. But you were the
3 project owner, so it's perhaps surprising that they
4 didn't provide you these documents at the time.
5 Let's turn to a different subject, Mr Jacobson.

6 As we discussed, the place you selected
7 for the project in Peru was the Mamacocha Lagoon.
8 Initially the relevant environmental authorities
9 concluded that your project would, in fact, have a
10 significant environmental impact and that's why they
11 classified it as a Category III project. Is that
12 consistent with your recollection?

13 **MR JACOBSON:** No, because we asked, and
14 the explanation we were given at the time was that
15 the project had been classified as a Category III
16 project because the -- because ARMA, the regional
17 environmental authority, only had the authority to
18 rule on permits up to -- for hydropower projects up
19 to 20-megawatts, and because this was a 20-megawatt
20 project and therefore the largest possible project
21 it could rule on, it assumed that that would make it
22 a Category III.

23 We obviously disagreed with that analysis
24 and asked for reconsideration. The ARMA then
25 actually sent a technician up to look at the

1 project. After that the ARMA agreed that
2 reconsideration was appropriate but, again, it did
3 not issue a permit of any sort at that point. It
4 went through a thorough legal and technical analysis
5 that consumed about six months at that point before
6 coming back to us in September 2014 and confirming
7 that it had accepted the DIA.

8 **MR DI ROSA:** A Category III project is one
9 that has a significant environmental impact,
10 correct? I mean, that's what that means.

11 **MR JACOBSON:** That's right. It typically
12 goes to projects that involve dams, that cover
13 forests or require people to move, or mining
14 concessions that emit toxic chemicals and the like,
15 as I believe the witness statement of Mr Chavez has
16 said, that small run-of-the-river projects rarely,
17 if ever, receive a Category III designation.

18 **MR DI ROSA:** The Category III designation
19 occurred in October of 2013, while Mr Sillen says in
20 paragraph 71 of his first witness statement that it
21 was 14 October 2013. Does that sound about right to
22 you?

23 **MR JACOBSON:** Yes, that sounds about
24 right. 2014 or 2013.

25 **MR DI ROSA:** In terms of documents, C-0185

1 on page 1 also says it's October 2013 but there's a
2 discrepancy in the specific date.

3 **MR JACOBSON:** I believe it was
4 October 2013 because we received word of the
5 reconsideration just before we signed the
6 concession, and we signed the concession, as you
7 saw, in February 2014.

8 **MR DI ROSA:** So October 13th and
9 October 2013 is when the Category III classification
10 was assigned to your project?

11 **MR JACOBSON:** Yes, and as I said, we
12 received word that the reconsideration -- that the
13 Category III designation was going to be
14 reconsidered in February of 2014, and then we
15 received the final approval of the DIA in September
16 of 2014.

17 **MR DI ROSA:** The real COS deadline in your
18 RER Contract was 31 December 2018. Is that
19 consistent with your --

20 **MR JACOBSON:** Well, it was amended, as you
21 know, by addendum number 2 to become March --

22 **MR DI ROSA:** I'm talking about the
23 original one. The one that you had in October 2013,
24 at that point your real COS deadline was 31
25 October 2018, is that right?

1 **MR MOLINA:** If you could please let
2 Mr Jacobson finish the answer. I think he was
3 interrupted. Please.

4 **MR JACOBSON:** No. In 2013 the contract
5 had not yet been amended, and so the real COS date
6 was the December 31, 2018.

7 **MR DI ROSA:** Right. So that meant that at
8 the time of the Category III classification you
9 still had more than five years before the real COS
10 deadline, right? Between 2013 and 2018 there were
11 five years.

12 **MR JACOBSON:** Yes.

13 **MR DI ROSA:** But as you just mentioned
14 your team appealed the Category III classification
15 and managed to get the authorities to change the
16 classification of the project from Category III to
17 Category I, correct?

18 **MR JACOBSON:** That is correct. When we
19 discovered that the reason for receiving such an
20 unusual designation had nothing to do with a
21 technical analysis of the environmental issues
22 associated with the project we thought it was
23 absolutely appropriate to request a reconsideration
24 which, as you know, was successful once those
25 technical evaluations were made.

1 **MR DI ROSA:** Well, temporarily successful,
2 right, until the Amparo ruling, but in any event you
3 filed that appeal because you believed your project
4 in the Mamacocho Lagoon was going to have only a
5 slight environmental impact. I think your counsel
6 used the term "minimal environmental impact". Is
7 that right?

8 **MR JACOBSON:** That is the nature of small
9 run-of-the-river projects. They tend to have
10 relatively little environmental impact, and that's
11 particularly the case in the dry volcanic area that
12 our project was located in.

13 **MR DI ROSA:** So it was because your
14 perception was that the impact on the environment
15 would be minimal, that's why you thought you only
16 needed to submit to the government authorities a
17 declaration of environmental impact, or DIA,
18 correct? That was the --

19 **MR JACOBSON:** Yes. As was consistent with
20 almost every small run-of-the-river project granted
21 permits in Peru we had expected to receive a
22 Category I designation. We were astonished to get
23 the Category III. And when we found out the
24 reasoning, we thought it was absolutely appropriate
25 to correct the mistake that the ARMA had made,

1 because this was a relatively new process for them.

2 **MR DI ROSA:** So a Category I designation
3 means that one needs to present a DIA, which is the
4 type of assessment that was required for projects
5 with only a slight or minimal environmental impact,
6 is that right?

7 **MR JACOBSON:** That's correct.

8 **MR DI ROSA:** In the end, that was in fact
9 the type of assessment that you filed a DIA, is that
10 correct?

11 **MR JACOBSON:** Yes, we filed -- well, yes,
12 once the ARMA had done its technical assessment and
13 indicated that we should file a DIA, we filed one.
14 They did the appropriate analyses and ultimately
15 issued the permit.

16 **MR DI ROSA:** So your environmental permits
17 were approved on the basis of that DIA, correct?

18 **MR JACOBSON:** Well, our -- yes, that was
19 our environmental permit.

20 **MR DI ROSA:** Right. And --

21 **MR MOLINA:** I'm sorry to interrupt.
22 I believe that was a mischaracterisation. I believe
23 Mr Jacobson testified -- we can go back to the
24 record -- that it was approved based on analyses and
25 technical assessments made by ARMA, not on the

1 basis --

2 **PRESIDENT:** Sorry.

3 **MR DI ROSA:** You can't testify for
4 Mr Jacobson, Mr Molina.

5 **PRESIDENT:** Could you please repeat the
6 question and Mr Jacobson can repeat the answer.

7 **MR DI ROSA:** And your environmental
8 permits were approved on the basis of the DIA that
9 you submitted, correct?

10 **MR JACOBSON:** Our environmental permits
11 were approved on the basis of the analyses that ARMA
12 performed after we submitted the information related
13 to the DIA.

14 **MR DI ROSA:** By having your project
15 reclassified from Category III to Category I, you
16 avoided having to file a detailed environmental
17 impact assessment, or EIA, is that correct?

18 **MR JACOBSON:** Yes, that is correct.

19 **MR DI ROSA:** And EIAs were required for
20 projects with significant environmental impact,
21 correct?

22 **MR JACOBSON:** Yes. As you know, there are
23 two varieties of EIA, Category II and Category III,
24 with different levels of obligations associated with
25 each.

1 **MR DI ROSA:** And obtaining approvals of
2 EIAs could take approximately a year, whereas DIAs
3 took only about 30 business days to obtain, correct?
4 Claimants said this at Memorial, paragraph 42.

5 **MR JACOBSON:** That is what was supposed to
6 happen. Our DIA, as I said, was issued
7 in September 2014, which was obviously seven months
8 after the reconsideration process was approved, so
9 clearly it can take longer than 30 business days.
10 It's supposed to take 30 business days.

11 **MR DI ROSA:** In its Amparo ruling the
12 Arequipa Constitutional Court concluded that you
13 should have had filed an EIA rather than a DIA, is
14 that correct? Is that consistent with your
15 understanding at least?

16 **MR JACOBSON:** Well, I have attempted to
17 read the Amparo -- both Amparo rulings several
18 times, and they're not -- they're a little bit
19 impenetrable.

20 As best I can understand, the court ruled
21 that the position or the reconsideration by the
22 authorities was not buttressed with enough
23 information to justify the switch from Category III
24 to Category I, and therefore more information was
25 required. I -- I will confess that these were very

1 difficult opinions to read, whether because of
2 translation or because the background laws were
3 opaque.

4 **MR DI ROSA:** Did your Peruvian lawyers not
5 advise you on what the Amparo ruling concluded?

6 **MR JACOBSON:** The Amparo ruling occurred
7 long after the -- both Amparo rulings occurred long
8 after the projects had been terminated and destroyed
9 by the actions of Peru. They were of interest, but
10 I have attempted to give you my best understanding
11 of what they said. I would refer you to our
12 Peruvian experts to get a far better understanding.

13 **MR DI ROSA:** No, it's just that you
14 mentioned the Amparo proceeding in your own witness
15 statement, so it seemed to me that these were fair
16 questions. But I understand.

17 You stated in your first witness statement
18 at paragraph 3, "I started financing renewable
19 energy projects more than a decade ago because of my
20 strong personal interest in energy sustainability
21 and reducing the catastrophic effects of global
22 warming".

23 Do you remember that?

24 **MR JACOBSON:** Yes.

25 **MR DI ROSA:** And today you said, "I have a

1 firm belief that the problems with global warming
2 are going to be the most significant problems for
3 the entire world for the next 50 or 100 years.
4 I thought that was a good way to try to ameliorate
5 that".

6 Based on that, is it fair to conclude that
7 one of your principal motivations for investing in
8 Peru was to protect the environment?

9 **MR JACOBSON:** Absolutely.

10 **MR DI ROSA:** Given your answer to that,
11 and since Peru is a big country, one option for you
12 would have been simply to pick a place for your
13 project that was less environmentally sensitive than
14 the Mamacocha Lagoon, isn't that true?

15 **MR JACOBSON:** The nature of our project,
16 the fact that it is a small scale run-of-the-river
17 project in an area where even the usual negative
18 consequences of a run-of-the-river project, which is
19 that it dries out the river in between where you
20 take the water out and where you take the water
21 back, would not apply because of the massive amounts
22 of springs, meant that I was perfectly comfortable
23 building this project with all the protections we
24 anticipated in accordance with the equator or
25 Ecuador Principles.

1 So theoretically, yes, we could have
2 chosen a different project but I believed and
3 believe that choosing this project location and
4 being environmentally conscious and appropriate are
5 completely compatible.

6 **MR DI ROSA:** The disagreements and
7 controversy and legal proceedings in Peru over the
8 type of environmental permits that you obtained and
9 the reclassification from Category III to
10 Category I, et cetera, are a big part of the dispute
11 that is the subject of this arbitration.

12 **MR JACOBSON:** Yes.

13 **MR DI ROSA:** In light of that, and given
14 your stated concern for the environment, let me ask
15 you this question then.

16 At the time that the Peruvian authorities
17 initially classified your project as a Category III
18 project and therefore you needed an EIA and you
19 still had five years before the real COS, couldn't
20 you have just erred on the side of caution, in other
21 words on the side of maximum protection of the
22 environment, by simply going ahead and preparing an
23 EIA, rather than fighting to have the project
24 reclassified as a Category I project?

25 **MR JACOBSON:** If the reasoning of ARMA at

1 the time had not been so clearly wrong, that might
2 have been something we considered because we knew
3 that ultimately, eventually, we would have to do all
4 of the same things that were required by an EIS and,
5 in fact, in 2017 and 2018, with respect to the
6 environmental surveys and the like, we did all of
7 that.

8 But it was so clearly wrong-headed and so
9 clearly out of step with what all the -- every other
10 similar project was -- how every other similar
11 project was being treated in Peru, that we thought
12 it was absolutely appropriate to ask for
13 reconsideration.

14 **MR DI ROSA:** Thank you, Mr Jacobson.

15 Mr President, I have no further questions.

16 **PRESIDENT:** Thank you, Mr Di Rosa. I
17 think I have now on the schedule five minutes for
18 redirect. Is that correct, Mr Molina?

19 **MR MOLINA:** I think we have,
20 Mr President -- I think we have reserved 60 minutes
21 for redirect, if I am not mistaken.

22 **PRESIDENT:** Sorry, no. I got confused
23 between 5 minutes and 60 minutes. You need
24 five minutes for preparing for your 60 minutes
25 redirect?

1 **MR MOLINA:** Yes. Could we take a short
2 recess for five, ten minutes, and we can resume with
3 redirect, please.

4 **PRESIDENT:** Mr Jacobson, you are still
5 under testimony.

6 **MR JACOBSON:** Yes, thank you.

7 **PRESIDENT:** Feel free to move for personal
8 reasons. Five minutes recess.

9 (Recess taken from 11.31 EST to 11.37 EST)

10 **PRESIDENT:** Mr Molina, please proceed with
11 the redirect.

12 **MR MOLINA:** Thank you, Mr President.

13 Re-examination by Claimants

14 by Mr Molina

15 **MR MOLINA:** Thank you. Mr Jacobson, do
16 you remember in your cross Mr Di Rosa appeared to be
17 critical of your lawyer's characterisation of the
18 Amparo decision as a "nuisance suit"? Do you
19 remember when he was talking to you about that?

20 **MR JACOBSON:** Yes.

21 **MR MOLINA:** Do you know what MINEM's view
22 of this suit was during the process?

23 **MR JACOBSON:** In the -- yes. They
24 believed it was illegal that, as the appropriate
25 environmental agency, their determination of

1 environmental -- of an environmental matter could be
2 overturned only by another analysis, another
3 technical analysis, which the court simply did not
4 do and was not in position to do.

5 **MR MOLINA:** If I can have my colleague put
6 up on the screen C-0295 and if you could go to
7 the -- and I'm looking for the English version of
8 this document, the English translation. If you can
9 Ctrl/Find "completely illegal" I think it should get
10 there. I believe it starts on page 7 of the pdf,
11 again in the English translation.

12 **MR DI ROSA:** Mr President, I hate to
13 interrupt, but I did not ask Mr Jacobson about
14 MINEM's views and, if Claimants are going to use
15 this as a way to recycle their arguments in their
16 pleadings, then we think that would be
17 inappropriate.

18 **PRESIDENT:** Overruled. It's because it
19 relates to your characterisation of nuisance that
20 he's referencing.

21 Please proceed, Mr Molina.

22 **MR MOLINA:** Thank you. I still do not
23 believe you have it up, Mr Tom Bayer -- yes, that's
24 the page. If you could look at the top, that
25 paragraph, and the sentence that says with "The

1 aforementioned reports".

2 **MR JACOBSON:** "The aforementioned reports
3 were issued by the competent environmental
4 authority; consequently it is completely illegal for
5 the lower court to annul a final electricity
6 generation concession granted on the basis of an
7 environmental management instrument, environmental
8 impact statement approved by the law without there
9 being any technical report issued by a competent
10 environmental authority rebutting the favourable
11 technical opinion contained in technical report" --
12 and so forth.

13 **MR MOLINA:** Was MINEM a party to this
14 proceeding?

15 **MR JACOBSON:** Absolutely, as -- clearly.

16 **MR MOLINA:** And were they -- is it your
17 understanding that they appealed the lower court's
18 decision?

19 **MR JACOBSON:** Yes --

20 **MR MOLINA:** And if we could go -- I'm
21 sorry. Continue.

22 **MR JACOBSON:** Yes, because while it's a
23 civil law state so presidential authority is not --
24 doesn't have the same effect, I'm sure, given that
25 MINEM itself rules on the environmental situation of

1 all large hydro projects, I'm sure this situation
2 was very disturbing to them.

3 **MR MOLINA:** If you could now pull up
4 exhibit C-0305, which I believe Mr Di Rosa showed
5 you, or at least mentioned during the
6 cross-examination.

7 **MR JACOBSON:** Yes.

8 **MR MOLINA:** Do you recognise what this
9 document is?

10 **MR JACOBSON:** I believe it is the English
11 translation of the lower court Amparo decision.

12 **MR MOLINA:** And, Mr Bayer, if you could go
13 to page 13 of this English translation, please, to
14 paragraph 1.2.5 -- I'm sorry, first, could you
15 scroll up? If you could go to the page above first,
16 just to put the context.

17 Do you see at the top of the page there's
18 a header called "Allegations of Respondent Ministry
19 of Energy and Mines"?

20 **MR JACOBSON:** Yes.

21 **MR MOLINA:** Now that -- do you understand
22 that this is a summary of the pleadings that the
23 Ministry of Energy and Mines submitted in this
24 proceeding?

25 **MR JACOBSON:** Yes, I believe so.

1 **MR MOLINA:** If you could go back to
2 paragraph 1.2.5 and zoom in, Mr Jacobson, could you
3 read this paragraph for us, or just the first
4 sentence?

5 **MR JACOBSON:** "Claimant's claims are based
6 only on his own allegations and are not supported by
7 any specific technical report on the potential
8 impact of the project, according to the evidence
9 offered by Claimant in his complaint, and has
10 therefore failed to concretely and specifically
11 assess the potential environmental impacts of the
12 challenged project, which is backed by concrete and
13 specific favourable technical documents under
14 reports" -- "the reports. For these reasons,
15 Respondent requests the complained" -- "complaint" I
16 believe it should be -- "be dismissed".

17 **MR MOLINA:** Are you aware of any other
18 parties to these proceedings other than MINEM?

19 **MR JACOBSON:** I'm sure ARMA was a party
20 and I believe the regional government itself was a
21 party.

22 **MR MOLINA:** Do you have any awareness of
23 what their positions were vis-á-vis the allegations
24 in the Amparo proceeding?

25 **MR JACOBSON:** I believe they both opposed

1 the Amparo proceeding on different grounds.

2 **MR MOLINA:** And when the court of first
3 instance issued this ruling, do you have any
4 awareness of what the other parties' response was to
5 that ruling?

6 **MR JACOBSON:** They continued to oppose it,
7 to plead against it on the appeal, as being
8 incorrect.

9 **MR MOLINA:** You just mentioned ARMA.
10 What's your understanding of ARMA's role vis-á-vis
11 the Mamacocha Project?

12 **MR JACOBSON:** Well, ARMA was the regional
13 authority which had been delegated the task of
14 evaluating the environmental situation of the
15 project and ultimately issuing permits that would
16 then, as part of the concession process, be reviewed
17 by MINEM and its own environmental experts.

18 **MR MOLINA:** Has ARMA always had the
19 authority to review RER projects in its region?

20 **MR JACOBSON:** No. It was given that
21 authority as part of a process of decentralisation
22 so that until I think it was 2012, those small hydro
23 projects would have been reviewed essentially by
24 MINEM, but after some particular point that
25 authority was moved to the different regions, and in

1 the Arequipa region that would be ARMA.

2 **MR MOLINA:** And you remember you were
3 being asked earlier about ARMA's initial
4 classification of the Mamacocha Project as a
5 Category III project? Do you remember that?

6 **MR JACOBSON:** Yes.

7 **MR MOLINA:** And you mentioned that it was
8 your understanding at the time that the ARMA reached
9 that rule -- or made that conclusion without a
10 technical analysis. Is that a fair characterisation
11 of your testimony?

12 **MR JACOBSON:** Yes. My understanding was
13 they had not -- that because of a misguided belief
14 in what was required, they had not actually gone up
15 to the site and done the requisite technical
16 environmental reviews.

17 **MR MOLINA:** Just so we're clear, after the
18 initial classification, what is your understanding
19 of what ARMA officials did to complete the technical
20 analysis of the Mamacocha Project?

21 **MR JACOBSON:** They went to the site and
22 did an assessment.

23 **MR MOLINA:** Do you have any other
24 understanding of anything else that was done by
25 ARMA?

1 **MR JACOBSON:** Well, they -- it was sort of **11:48**
2 a two-part process. First they had to decide if
3 there were grounds for reconsideration, which did
4 involve going through and doing the technical
5 analysis of whether -- of what sort of category the
6 project should be put in, and once they had made a
7 determination as to what sort of category the
8 project had to be put in, then there was a further
9 process of analysing in this case the additional
10 information that we provided as part of the DIA
11 process before issuing the permit.

12 **MR MOLINA:** Mr Jacobson, you were asked
13 earlier about your interest in the environment and
14 in particular in ameliorating the effects of climate
15 change. Do you remember that?

16 **MR JACOBSON:** Yes.

17 **MR MOLINA:** Did you commission any
18 environmental studies for the Mamacocha Project?

19 **MR JACOBSON:** Yes. We commissioned quite
20 a number of studies, starting with the environmental
21 part of the -- of pre-feasibility and feasibility
22 studies, and then some specific studies directed
23 towards the otter population which had been
24 identified as a protected species that was nearby.

25 And ultimately in 2017 and 2018, in order

1 to meet the DEG's requirements under the Ecuador
2 Principles, a quite fulsome analysis of the site,
3 both in the dry and wet seasons.

4 **MR MOLINA:** Could you expand a little bit
5 of your understanding of the Ecuador or equator
6 principles?

7 **MR JACOBSON:** The equator principles are a
8 set of internationally agreed principles designed to
9 ensure that developments -- particularly
10 developments sponsored by development banks -- is
11 appropriate and takes into account both social and
12 environmental factors in the areas where the project
13 is to be.

14 It is quite -- it is quite extensive in
15 terms of its requirements, both in terms of an
16 initial assessment, as I said, in various different
17 seasons where there are seasonal differences, and
18 then in the monitoring that has to go on throughout
19 the construction and operation of a project that is
20 subject to those principles.

21 **MR MOLINA:** What range of -- how much
22 money do you believe you spent in your attempts to
23 comply with the Ecuador principles while the project
24 was still in existence?

25 **MR JACOBSON:** Hundreds of thousands of

1 dollars. I don't know the exact amount.

2 **MR MOLINA:** Was it required under Peruvian
3 law to comply with those principles?

4 **MR JACOBSON:** No.

5 **MR MOLINA:** So why did you comply with
6 those principles?

7 **MR JACOBSON:** Because we thought that --
8 because we thought it was the appropriate thing to
9 do, and certainly one of the things that happens
10 when you choose to use a development bank as opposed
11 to a commercial bank is that you are -- you know you
12 are going to be required to do extra work on both
13 the environmental and the social side because
14 development banks exist to develop appropriate
15 projects in their view in the countries where they
16 are active.

17 **MR MOLINA:** But you could have gone to
18 another bank that wasn't a development bank?

19 **MR JACOBSON:** Yes. I don't believe
20 commercial banks have the same -- at least some
21 commercial banks do not require the same degree of
22 work.

23 **MR MOLINA:** So you chose to be subjected
24 to those principles?

25 **MR JACOBSON:** Yes.

1 **MR MOLINA:** When you -- you mentioned
2 earlier the otter. What was your understanding of
3 the allegations from the regional government about
4 the otter, just so we understand the context?

5 **MR JACOBSON:** I believe that they were
6 alleging that the project would destroy the otters,
7 destroy their habitat, would kill the otters
8 directly or indirectly, and obviously nothing could
9 be further from the truth.

10 **MR MOLINA:** Did you ignore those
11 allegations?

12 **MR JACOBSON:** No. We commissioned a
13 series of studies by both local and international
14 otter experts to study the habitat in the immediate
15 region and to -- we had a couple of symposiums in
16 Arequipa and in Lima, and ultimately we asked the
17 researchers who had done the work to opine as to
18 whether the project would harm the otters, and they
19 concluded that with the mitigation factors that we
20 were putting in place, there would be no harm to the
21 otter population.

22 **MR MOLINA:** During your cross-examination
23 you mentioned the witness statement of Jorge Chavez,
24 is that correct?

25 **MR JACOBSON:** Yes.

1 **MR MOLINA:** Who is Jorge Chavez?

2 **MR JACOBSON:** Jorge Chavez was the
3 principal of one of the -- Envirosys, I believe, one
4 of the environmental specialty companies that we had
5 hired, and his role was to do the work required by
6 DEG -- the environmental work required by DEG under
7 the Ecuador principles.

8 **MR MOLINA:** If we could put up Mr Chavez's
9 witness statement, please?

10 **MR DI ROSA:** Mr President, again I hate to
11 interrupt but we're getting quite a bit afield of
12 the questions that I asked Mr Jacobson, and the
13 rules are that the redirect is supposed to be
14 circumscribed to the questions that were asked on
15 cross-examination.

16 **PRESIDENT:** Wait a moment. Mr Molina, you
17 are not yet there but you are really searching for
18 the limits. You're approaching limits so be
19 careful.

20 **MR MOLINA:** Thank you, Mr President. He
21 mentioned in an answer Mr Chavez and I want to make
22 sure for the record that there's a full record of
23 exactly what he was referring to, so if you can pull
24 up Mr Chavez's witness statement, we'll be quick.
25 Can we just go to paragraph 7?

1 Mr Jacobson, are you familiar with this
2 document?

3 MR JACOBSON: Yes.

4 MR MOLINA: Do you mind reading the second
5 line of this -- or just this entire paragraph?

6 MR JACOBSON: "I understand Respondent is
7 alleging in this arbitration that it was reasonable
8 for ARMA to have classified the Mamacocho Project as
9 a Category III project. Based on my experience
10 advising projects located in Peru and my real-time
11 assessment of the Mamacocho Project, I believe that
12 Respondent's contention is wrong".

13 MR MOLINA: Thank you.

14 Going back to the permit reclassification
15 in July 2013 -- sorry, in October 2013 --

16 PRESIDENT: Sorry, Mr Molina, what was the
17 question actually? That the witness can read?

18 MR MOLINA: Thank you, Mr President. No,
19 the question was is that your understanding, was
20 that his conclusion, his overarching conclusion in
21 his witness statement?

22 PRESIDENT: Please answer the question,
23 Mr Jacobson.

24 MR JACOBSON: Yes.

25 MR MOLINA: Thank you.

1 Back to the reclassification for the
2 environmental permits, Mr Di Rosa asked you if you
3 had managed -- and I'm quoting here -- "managed to
4 get the authorities to reconsider".

5 Did you -- did you put any pressure -- did
6 you or your team put any pressure on ARMA to
7 reconsider?

8 **MR JACOBSON:** No. We obviously presented
9 our reasoning as to why the initial reclassification
10 was wrong, including I believe new evidence, and
11 then it was entirely up to ARMA to make a
12 determination as to whether that initial
13 classification was correct, which they could have
14 done, or whether the project should be reclassified
15 into a different category.

16 **MR MOLINA:** And lastly on these issues,
17 going back to the Amparo, you mentioned in cross in
18 one of your answers about the balancing of the
19 equities. Can you just expand on what you were
20 trying to explain?

21 **MR JACOBSON:** Yes. In the Amparo decision
22 there is a section where the judge has to look to
23 the damage to the private party, which is us, and
24 compare that to the potential damage to the
25 environment, which was the purpose of the Amparo.

1 Because the project was at that point, as
2 the judge noted, in suspension and had not been
3 constructed and was not being constructed, the court
4 was able to quite quickly conclude that there was no
5 countervailing reason not to knock out the
6 environmental permits.

7 **MR MOLINA:** If we could put up C-0305 and
8 go to section 3.7, please, it should be the second
9 to last page -- no. C-0305. There you go. Keep
10 going down. I think there's more than one section
11 3.7 because it repeats.

12 **PROFESSOR TAWIL:** I think it's -- sorry,
13 Mr Molina. I think it's 3.5.

14 **MR MOLINA:** It's the section that's titled
15 "Analysis of the principle of predicting
16 consequences". Maybe that's the easiest way to
17 search for it. Again, I do believe it's the second
18 to last page of this document. There it is.

19 Is this the section of the Amparo decision
20 that you're referring to, Mr Jacobson?

21 **MR JACOBSON:** Yes.

22 **MR MOLINA:** And, just so I understand,
23 it's your understanding that -- so let me ask you.
24 If the project had been completed and had achieved
25 commercial operation, what is your understanding of

1 the likelihood that this decision would have come
2 down as it did?

3 **MR JACOBSON:** I think the court would have
4 had much more to think about, given that there is a
5 constitutional right to -- that we have to not have
6 the State violate our rights. And obviously in this
7 case they looked at the OSINERGMIN website to
8 determine that the project was -- had not been
9 completed and there were no other consequences to
10 consider. I think that if the project had been
11 completed or even was about to be completed, the
12 court would have had to do a balancing between the
13 damages to the project in the area and the economy
14 and all of the other things that that ruling in
15 favour of the -- in favour of the plaintiff would
16 cause. That simply wasn't done in this case, and
17 I certainly can't predict how the court would come
18 out. I suspect that they would have come out
19 differently.

20 **MR MOLINA:** All right. If we could go now
21 to paragraph 17 of your first witness statement,
22 please, I believe you were asked several questions
23 about this paragraph in your cross-examination, is
24 that correct?

25 **MR JACOBSON:** Yes.

1 **MR MOLINA:** In particular you were asked
2 about the second sentence in this paragraph, is that
3 right?

4 **MR JACOBSON:** Yes.

5 **MR MOLINA:** Just to be clear, were you
6 trying to flip the Mamacocha Project to Innergex?

7 **MR JACOBSON:** No. I mean, hydro
8 project -- hydropower projects have one wonderful
9 feature, which is they last for ever, and this was a
10 project that I was hoping that we could develop and
11 have an interest in and that interest is something
12 that could be passed on to my son and so forth and
13 so on because, you know, operating hydro projects
14 are not only wonderful economically, but they indeed
15 do last -- I can't say for ever, but I can say, you
16 know, for more than a century.

17 **MR MOLINA:** And again in this paragraph
18 you're referring to other concessionaires from the
19 first two RER auctions, is that right?

20 **MR JACOBSON:** Yes.

21 **MR MOLINA:** And was it your understanding
22 at the time that these concessionaires that you're
23 referring to in this paragraph were -- had spent
24 millions of dollars developing the projects that
25 they were awarded?

1 **MR JACOBSON:** My understanding was that
2 the projects that were -- that sort of triggered the
3 concern by OSINERGMIN were ones where the developers
4 had not been spending money to develop the project
5 and were, in fact, looking for others to take on the
6 projects and develop them from scratch.

7 **MR MOLINA:** How much money did you spend
8 developing the Mamacocho Project?

9 **MR JACOBSON:** That depends on the dates
10 that you ask, but I think it was somewhere around
11 \$20 million by the time the project ended in the end
12 of 2018.

13 **MR MOLINA:** And was it your understanding
14 that these other concessionaires were maintaining an
15 interest in the projects that they were trying to
16 flip?

17 **MR JACOBSON:** No. Flipping the project
18 means selling it.

19 **MR MOLINA:** And were you planning to
20 maintain an interest in the project if you were able
21 to complete your deals with Innergex?

22 **MR JACOBSON:** Obviously in 2017 our
23 expectation was that we would remain a partner going
24 forward.

25 **MR MOLINA:** If you could go to R-0175,

1 please, this is the e-mail to Innergex that you were
2 shown during your cross-examination, is that right?

3 **MR JACOBSON:** Yes.

4 **MR MOLINA:** Just to confirm, you mentioned
5 something about the date. Could you expand, just to
6 be clear, what the date of this document is?

7 **MR JACOBSON:** It's January 22, 2018, so
8 about -- after the RGA lawsuit had been filed and
9 while it was in the process of being dismissed.

10 **MR MOLINA:** If you could go, in the bottom
11 of that first page, in the paragraph that starts
12 there, I'll give you a second to -- yes, if you
13 could zoom it up and you can just read, my question
14 is -- I'm sorry. If you could go to the -- sorry,
15 it's the first paragraph.

16 So you mention here resolving the issues
17 with the regional government of Arequipa. Could you
18 just explain at the time, in January 2018, what the
19 status was of the project with its dealings with the
20 Regional Government of Arequipa?

21 **MR JACOBSON:** Yes. At the end of December
22 the regional government had announced that it would
23 withdraw the lawsuit, although in fact the process
24 of withdrawal took a while and I don't believe it
25 was completed until March.

1 **MR MOLINA:** OK. If you'd go to page 2,
2 and I believe it is -- it's the second paragraph,
3 the one that starts with "We do not need to make one
4 important change", if you could take a moment to
5 look at that?

6 **MR JACOBSON:** Yes.

7 **MR MOLINA:** If you could read the
8 sentence, just so we have it in the record, the one
9 that starts with "The combination", please?

10 **MR JACOBSON:** "The combination of the
11 reduction in the valuation of the development work
12 that we agreed upon in September and the cost of the
13 roughly one year delay in the project (including the
14 extraordinary costs related to dealing with the
15 litigation surrounding the project) have turned that
16 taxable gain into a substantial loss. Accordingly,
17 it is important for us to structure the transaction
18 in a way that would recognise this loss for tax
19 purposes".

20 **MR MOLINA:** During your cross-examination
21 when you answered one of Mr Di Rosa's questions by
22 saying that this was a distressed asset sale, is
23 this what you were referring to?

24 **MR JACOBSON:** It's part of what I was
25 referring to. The reality was that notwithstanding

1 that at this point the RGA had announced that it
2 would withdraw its lawsuit, the valuation of the
3 project had been badly affected and indeed Innergex
4 responded to my letter here with a lowball offer of
5 \$2 million.

6 But it was also -- I mean this project had
7 been running for a long time and was -- both
8 Mr Bengier and I were sort of coming to the
9 conclusion that we needed to get out while we could
10 get out and so we were -- we were eager sellers.

11 **MR MOLINA:** In your cross-examination you
12 were asked about the RER Contract, and I believe you
13 had it pulled up on the screen. Do you remember
14 that?

15 **MR JACOBSON:** Yes.

16 **MR MOLINA:** If we could pull it up, but in
17 the meantime could you just explain why -- what was
18 the point, from your perspective, of obtaining an
19 RER Contract?

20 **MR JACOBSON:** Well, an RER Contract did
21 a -- you know, as intended by the RER Law, a number
22 of very positive things. First, it gave us a
23 guaranteed revenue stream for 20 years. It gave us
24 a preferential connection to the grid, and it gave
25 us the help of the Ministry.

1 **MR MOLINA:** You were shown -- you were
2 asked questions about financial closing. Do you
3 remember that?

4 **MR JACOBSON:** Yes.

5 **MR MOLINA:** Are you familiar with the
6 definition of financial closing in this contract?

7 **MR JACOBSON:** Yes, I have seen it.

8 **MR MOLINA:** Could we go to clause 1.4.9?
9 Is this a definition that you're familiar with?

10 **MR JACOBSON:** Yes.

11 **MR MOLINA:** What's your understanding or
12 what's your interpretation of this definition?

13 **MR JACOBSON:** Financial closing is the
14 date when we've not only signed agreements with -- I
15 think the presumption is a bank, but the conditions
16 precedent under that contract with respect to making
17 disbursements have been met.

18 **MR MOLINA:** You say the presumption is a
19 bank. Why do you say that?

20 **MR JACOBSON:** Because as Mr Whalen, our
21 expert, testifies the whole of the RER Law was
22 designed to make these small hydro projects bankable
23 such that people could get non recourse financing.
24 That was certainly our intention. It was the
25 intention, as far as I know, of all of the other

1 bidders in the auction and well understood that
2 banks have requirements before they give credit
3 approval, and they have further requirements before
4 they sign and then they have further requirements
5 before they actually disburse money, which is
6 usually after the equity holders have fully paid out
7 the amount that's been agreed.

8 **MR MOLINA:** And you were shown clause 6.4.
9 Maybe we can go to that clause in this contract.

10 Do you remember being shown this clause
11 earlier today?

12 **MR JACOBSON:** Yes.

13 **MR MOLINA:** In particular with 6.4.1 was
14 your understanding that the ability to mortgage or
15 pledge the future revenues, that that's something
16 that was available to you at the time of the
17 signing?

18 **MR JACOBSON:** Yes.

19 **MR MOLINA:** Why was that your impression?

20 **MR JACOBSON:** Because it says that that's
21 what the concessionaire company may do.

22 **MR MOLINA:** Did you think you first had to
23 achieve commercial operation to be able to close on
24 a mortgage or a pledge of future securities?

25 **MR JACOBSON:** Absolutely not.

1 **MR MOLINA:** Why not?

2 **MR JACOBSON:** Because the contract is
3 effectively a property right.

4 **MR MOLINA:** What do you mean by that?

5 **MR JACOBSON:** I mean the contract is
6 something that under Peruvian law can be used as an
7 asset to secure a mortgage or do -- or as security
8 for, you know, any of these other asset-based ways
9 of securing financing.

10 **MR MOLINA:** Mr Jacobson, you've testified,
11 and you said it today on cross, that you used to
12 work at eBay, is that right?

13 **MR JACOBSON:** That's correct.

14 **MR MOLINA:** So you have experience with
15 closing deals, is that fair to say?

16 **MR JACOBSON:** Yes. I've negotiated dozens
17 and supervised probably hundreds.

18 **MR MOLINA:** And you have experience with
19 banks and lending institutions?

20 **MR JACOBSON:** Some, but I have to say the
21 virtue of working for a profitable company is you
22 don't have to borrow money nearly as much.

23 **MR MOLINA:** If the concessionaire had
24 assumed all risks related to the project at the time
25 of signing, would you have been able to mortgage the

1 contract?

2 **MR JACOBSON:** No, I doubt that any bank
3 would accept the risk of counterparty misconduct.

4 **MR MOLINA:** And why wouldn't they accept
5 that, from your perspective?

6 **MR JACOBSON:** Because the only asset they
7 have is -- you know, the definition of non-recourse
8 financing is the only asset they have is the assets
9 that have been pledged to them, and if those assets
10 become valueless, then all of the money that they
11 will have loaned is gone. There's nothing they can
12 do.

13 **MR MOLINA:** Did you believe this contract
14 had value when you received it?

15 **MR JACOBSON:** Absolutely.

16 **MR MOLINA:** Did you invest in reliance of
17 that belief?

18 **MR JACOBSON:** Absolutely.

19 **MR MOLINA:** You -- let me see. Give me
20 one second.

21 You were asked today about document
22 R-0153, I believe is the document that you were
23 shown, if you could go to that document.

24 Do you remember being shown this document
25 earlier today?

1 **MR JACOBSON:** Yes.

2 **MR MOLINA:** Can you just describe what
3 this document -- sorry. This is an e-mail from Licy
4 Benzaquén, who you said was your lawyer, correct?

5 **MR JACOBSON:** Yes.

6 **MR MOLINA:** This e-mail is attaching a
7 document, is that right?

8 **MR JACOBSON:** That's correct.

9 **MR MOLINA:** And you looked at it earlier
10 today?

11 **MR JACOBSON:** Yes.

12 **MR MOLINA:** What is this document that's
13 being attached to this e-mail?

14 **MR JACOBSON:** I would characterise it as
15 an English summary of the bid -- I don't know, bid
16 requirements maybe I'd call it.

17 **MR MOLINA:** These are the bid requirements
18 for the third public auction?

19 **MR JACOBSON:** The third auction, yes.

20 **MR MOLINA:** Was your understanding that
21 this was a legal opinion?

22 **MR JACOBSON:** No. I think it was an
23 English language summary of what was in those bid
24 requirements.

25 **MR MOLINA:** If you could go into the

1 attachment, please, and in particular if you go to
2 the section where -- I think it's the next page.
3 One more. Sorry, keep going. I do believe it's
4 that one. Yes.

5 So you see here on section 3? You
6 remember you were asked questions about this
7 section?

8 **MR JACOBSON:** Yes.

9 **MR MOLINA:** You mentioned when you were
10 being asked the question about subsection (b) of
11 this paragraph that you did not believe that the
12 commercial operation deadline was immovable. Can
13 you just expand as to why, what the basis for that
14 belief was?

15 **MR JACOBSON:** Yes, I'll -- as I said, we
16 applied for an amendment to the contract in
17 I believe it was 2016, which was duly approved by
18 MINEM and ultimately signed by the -- I believe it
19 was the vice minister of electricity -- which had
20 the effect of changing our commercial operation date
21 from -- and the real date of commercial operation
22 to March 14, 2020.

23 **MR MOLINA:** When you signed -- when your
24 company signed the RER Contract
25 in February -- February 18, 2014, did you believe at

1 that time that the commercial operation date was
2 movable?

3 **MR JACOBSON:** We believed it would be
4 movable if the reason for the moving had to do with
5 the actions of Peru, which was our counterparty.

6 **MR MOLINA:** And what was the basis for
7 that belief?

8 **MR JACOBSON:** There were a number. There
9 were particular points in the contract, including
10 the fact that it was subject to applicable laws,
11 including the Civil Code and the constitution.
12 There was the fact that the purpose of the RER Law
13 was to encourage the development of RER projects,
14 including mini hydro projects, and the requirements
15 under the civil law that -- so there were
16 requirements under the civil law that, you know,
17 parties could not take advantage of their own bad
18 deeds in order to get benefits, and under the
19 administrative law that regulations and contracts
20 under a particular set of administrative laws had to
21 be -- had to comport with the purpose of those laws.

22 So we very much believed that, should it
23 become necessary, we would be able to move the COS
24 and, for that matter, the term date of the contract
25 if the reason for that movement had to do with

1 actions by the State.

2 **MR MOLINA:** You mentioned a few minutes
3 ago that you've reviewed hundreds of contracts, is
4 that fair to say?

5 **MR JACOBSON:** Yes.

6 **MR MOLINA:** Have you ever seen a contract
7 that allocates all risks to one of the
8 counterparties?

9 **MR JACOBSON:** I've never seen a contract
10 that would allow one party to breach and not give
11 the other party recourse.

12 **MR MOLINA:** Why do you think you have not
13 seen that?

14 **MR JACOBSON:** Because no one would enter
15 into any such contract.

16 **MR MOLINA:** Why wouldn't anyone enter into
17 that contract?

18 **MR JACOBSON:** Because it's not a real
19 contract. It's effectively an option. The other
20 party would have the ability to, if it liked the
21 contract, to hold you to its terms and if it
22 suddenly didn't like the contract, to cause it to
23 fail.

24 **MR MOLINA:** Had you known at the time that
25 this was Peru's interpretation of the contract,

1 would you have signed the contract?

12:22

2 **MR JACOBSON:** I wouldn't have entered into
3 the option.

4 **MR MOLINA:** You were shown another
5 document related to the third auction. I believe it
6 was R-0138, if we can pull that up.

7 You remember being asked about this
8 document?

9 **MR JACOBSON:** Yes.

10 **MR MOLINA:** And do you remember that it
11 was a sworn declaration about the immovable nature
12 of the termination date, even in the event of force
13 majeure? Do you remember that?

14 **MR JACOBSON:** Yes.

15 **MR MOLINA:** Were you ever shown -- or was
16 the risk that you are assuming all risks related to
17 the contract, was that ever expressly -- was that
18 ever expressly disclosed to you or to your team
19 during the Third Auction?

20 **MR JACOBSON:** No. All the references were
21 to -- all the specific references were to force
22 majeure, which I understood to be causes that were
23 unrelated or not under the control of either party.

24 **MR MOLINA:** Would a delay by a permitting
25 authority, from your perspective, be a force majeure

1 event?

2 **MR JACOBSON:** No, because that was under
3 the control of Peru.

4 **MR MOLINA:** Would an action by the
5 Regional Government of Arequipa against a project be
6 a force majeure from your perspective?

7 **MR JACOBSON:** No, for the same reason.

8 **MR MOLINA:** What about the actions of
9 MINEM?

10 **MR JACOBSON:** No, for the same reason.

11 **MR MOLINA:** You were being also shown some
12 documents from DEG. Can we go to R-0177? Do you
13 remember being asked questions about this document?

14 **MR JACOBSON:** Yes.

15 **MR MOLINA:** And this is sort of a question
16 and answer document between your companies and DEG,
17 is that right?

18 **MR JACOBSON:** Yes.

19 **MR MOLINA:** And do you remember there was
20 a comment here about the Amparo?

21 **MR JACOBSON:** Yes, I believe question 7.

22 **MR MOLINA:** If we can just put that on the
23 screen, this is the one?

24 **MR JACOBSON:** Yes.

25 **MR MOLINA:** Do you see -- well, let me ask

1 you. You said earlier you were involved in the
2 negotiations with DEG. True?

3 **MR JACOBSON:** Yes, although Mr Sillen was
4 much more directly involved.

5 **MR MOLINA:** Were you aware of any -- was
6 it your understanding that DEG was unwilling to move
7 forward with this project because of the Amparo
8 decision?

9 **MR JACOBSON:** Absolutely not. They were
10 eager to move forward.

11 **MR MOLINA:** I apologise. I said Amparo
12 decision. I meant the Amparo proceeding.

13 **MR JACOBSON:** That's correct, the Amparo
14 proceeding, which was ongoing at that point, and as
15 I noted even a year later it was still considered --
16 more than a year later it was still considered a
17 remote contingency.

18 **MR MOLINA:** Do you see that in red font
19 under subparagraph (b) -- have you had a chance to
20 read that response to one of the questions?

21 **MR JACOBSON:** Yes.

22 **MR MOLINA:** Is it your understanding that
23 your company prepared a legal report for DEG's
24 review about the Amparo?

25 **MR JACOBSON:** I believe our lawyers

1 prepared a report for review by DEG's lawyers.

2 **MR MOLINA:** So you told DEG about the
3 Amparo?

4 **MR JACOBSON:** Yes.

5 **MR MOLINA:** Did you tell Innergex?

6 **MR JACOBSON:** Yes.

7 **MR MOLINA:** And did -- was Innergex
8 concerned about closing on the agreements with
9 Mamacocha because of the Amparo?

10 **MR JACOBSON:** No.

11 **MR MOLINA:** If we could go to the C-0247,
12 which is I think the other diligence document
13 regarding the Amparo, if you could go to -- do you
14 remember being asked questions about this document,
15 Mr Jacobson?

16 **MR JACOBSON:** Yes.

17 **MR MOLINA:** If you could go to page 3 of
18 this document under Romanette 2, I'll give you a
19 chance to read this document -- read this part of
20 the document. [Pause for reading]

21 What's your understanding of what CMS Grau
22 is communicating through this document?

23 **MR JACOBSON:** I think this is a more
24 detailed explanation of why they viewed the
25 probability that this would actually become a

1 problem as remote, in their words, and so they give
2 the three reasons why, in their opinion, the
3 proceedings should ultimately be dismissed.

4 **MR MOLINA:** From your understanding, why
5 is CMS Grau even looking at the Amparo proceeding in
6 the summer 2018?

7 **MR JACOBSON:** Because, as I said, this was
8 updated due diligence because of our expectation
9 that through the mechanism of the Supreme Decree, we
10 would be in position to continue working on the
11 project.

12 **MR MOLINA:** Could you explain what Supreme
13 Decree you're referring to?

14 **MR JACOBSON:** I'm sorry. The Supreme
15 Decree that was issued in November of 2018 that
16 would have the effect of giving projects like ours,
17 which had been slowed down by governmental measures,
18 the full 20-year term and a full restitution of the
19 COS date if it -- when it was enacted.

20 **MR DI ROSA:** Mr Chairman, sorry to
21 interrupt, but I didn't ask Mr Jacobson about the
22 draft Supreme Decree, which is I think what they're
23 talking about, and I was very patient with the
24 discussion of the otters and whatever else was being
25 thrown at Mr Jacobson, but I think that they, you

1 know, have exceeded the limits of the redirect.

2 **PRESIDENT:** Sustained. Please move to the
3 next subject.

4 **MR MOLINA:** Mr Jacobson, you were asked
5 about not challenging -- you were asked about the
6 fact that you had -- your companies are not
7 challenging the Amparo decisions under this
8 arbitration, do you remember that?

9 **MR JACOBSON:** Yes.

10 **MR MOLINA:** Why are your companies not
11 challenging the Amparo decision?

12 **MR JACOBSON:** Because those decisions all
13 occurred long after our project had been destroyed.

14 **MR MOLINA:** Can I just take one second?
15 [Pause] I don't have any further questions. Thank
16 you.

17 **PRESIDENT:** Thank you. I look to my
18 colleagues. First, Mr Tawil, you have questions?

19 **PROFESSOR TAWIL:** Thanks, Mr Chairman.
20 Yes, I have a question.

21 Questions by the Arbitral Tribunal

22 **PROFESSOR TAWIL:** Good morning, or good
23 afternoon, Mr Jacobson.

24 **MR JACOBSON:** Good morning, Professor
25 Tawil.

1 **PROFESSOR TAWIL:** I'm interested in
2 knowing a little bit more what happened
3 in December 2018. I mean why was sort of what
4 Claimant alleges as a change of position by the
5 government? Could you give us your recollection
6 about what happened in 2018, in December in
7 particular?

8 **MR JACOBSON:** As you know, there was a
9 proposed Supreme Decree. The government received
10 commentary from two natural gas producers and
11 OSINERGMIN, negative commentary from those, and
12 ultimately decided to do three things: Not move
13 forward with the Supreme Decree, not give us the
14 extensions we were expecting related to the
15 suspension period and the others asked for in our
16 Third Extension Request, and to file the Lima
17 Arbitration.

18 **PROFESSOR TAWIL:** And do you attribute the
19 change of position to any particular cause? I mean,
20 the influence of the gas producers? I would like to
21 know what was your feeling. What was your
22 understanding of why the government changed the
23 position?

24 **MR JACOBSON:** We were certainly very
25 surprised because it was a very abrupt change

1 without there having been any change in government
2 and, you know, the best we could figure out was that
3 it was the influence of the natural gas lobby and
4 the concerns, the financial concerns, that
5 OSINERGMIN had expressed that suddenly resulted in
6 this remarkable change.

7 **PROFESSOR TAWIL:** I assume -- I'm not an
8 expert on the Peruvian electricity system but
9 I assume that the hidroeléctrica plant you were
10 constructing was a small one and that would not have
11 affected the price of the energy. Am I correct on
12 that?

13 **MR JACOBSON:** Yes. It would have had at
14 best a negligible effect because it's a tiny drop in
15 a large ocean.

16 **PROFESSOR TAWIL:** Thanks, I have no
17 further questions, Albert Jan.

18 **PRESIDENT:** Thank you. Professor Vinuesa,
19 any questions?

20 **PROFESSOR VINUESA:** No, I don't have any
21 questions. Thank you very much.

22 **PRESIDENT:** I have a question. Could you
23 again be shown document R-0138? Yes.

24 So, Mr Jacobson, you have been asked
25 already questions before about this document, both

1 in cross and redirect. This is the statement by
2 Mr Canseco, is that correct?

3 **MR JACOBSON:** Yes.

4 **PRESIDENT:** And he was the general manager
5 of CHM in Peru?

6 **MR JACOBSON:** Yes.

7 **PRESIDENT:** And he declares under oath
8 that he recognised on behalf of the company -- and
9 the company is?

10 **MR JACOBSON:** HLA at the time.

11 **PRESIDENT:** -- that the date of the
12 termination date is not movable, do you see that?

13 **MR JACOBSON:** Yes, if -- for any reason
14 including force majeure.

15 **PRESIDENT:** So do you recall what the
16 termination date was under the contract?

17 **MR JACOBSON:** December 31, 2036,
18 I believe.

19 **PRESIDENT:** Now, if you then go to the
20 amendments of the Contract, amendment 1 and 2
21 concerned the commencement of the commercial
22 operations date, is that correct?

23 **MR JACOBSON:** They -- yes. Both of those
24 move the COS date.

25 **PRESIDENT:** Yes, COS date. Ultimately

1 they move to 2020. I think 31 December 2020, is
2 that correct? Or 31 March 2020?

3 **MR JACOBSON:** Yes. 14 March 2020.

4 **PRESIDENT:** 14 March. Two weeks.

5 That left, then, for the revenue stream 17
6 years, is that correct?

7 **MR JACOBSON:** As of what date? I'm sorry.

8 **PRESIDENT:** So if you have the termination
9 date of 2036 and you have the commercial operations
10 date, start date, in March 2020, you have some 16 to
11 17 years left?

12 **MR JACOBSON:** Yes, I think just under 17
13 years. However, our understanding of the
14 suspension --

15 **PRESIDENT:** I'll come to that. Sorry,
16 I don't want to cut you off. Please finish your
17 answer.

18 **MR JACOBSON:** Our understanding of the
19 suspension was the suspension -- a suspension
20 operates to, you know, sort of like injury time in
21 soccer, it stops the clock and then puts the time
22 back on the clock at the end, and that was our
23 expectation as to what would happen with respect to
24 not just the COS but also the PPA.

25 **PRESIDENT:** So the works execution

1 schedule --

2 **MR JACOBSON:** Yes.

3 **PRESIDENT:** Let's separate these two. So
4 the dates in the works execution schedule were
5 suspended, which included the financial closing
6 date, is that correct? The amendments 3 to 6.

7 **MR JACOBSON:** Yes. At least as
8 I understood it, "the clock had been stopped and we
9 would be put back into the same position we had been
10 in when the clock was stopped".

11 **PRESIDENT:** Then as my colleague,
12 Professor Tawil, referred to, when the Supreme
13 Decree was being discussed in 2018, the Supreme
14 Decree was intended, if I understand correctly, for
15 moving the date -- termination date under the
16 various contracts, is that correct?

17 **MR JACOBSON:** I think it did both. I
18 think it gave the possibility of moving the COS
19 date, and where the government's -- where the reason
20 for the delays was due to the government it also
21 gave the opportunity upon submission of appropriate
22 documentation, to move the termination date.

23 **PRESIDENT:** So if that date were not
24 moved, then you had an issue in getting financing
25 for your project, isn't it? By "that date" I mean,

1 sorry, the termination date.

2 **MR JACOBSON:** Yes, if neither -- if the
3 date was not moved, either because of a Supreme
4 Decree or because of an agreement with MINEM or
5 because of the suspension, if nothing moved that
6 date, then we would have had an issue -- we would
7 have had fewer years for our loan and would have had
8 to put up more equity, and I don't know what the
9 outcome would have been.

10 **PRESIDENT:** Mr Jacobson, what you see now
11 still on the screen, that exhibit R-138, the
12 declaration under oath, that tracks another decree
13 of 2013, doesn't it?

14 **MR JACOBSON:** Yes, but in both cases the
15 focus was on force majeure, and it seems to me that
16 if Peru wanted to make it clear that also included
17 was actions by the State, they would have said
18 something.

19 **PRESIDENT:** Would you distinguish between
20 actions by the State and actions from local
21 authorities?

22 **MR JACOBSON:** As I understand it, the
23 State is the State, and that includes the local
24 authorities to whom obviously a lot of governmental
25 functions are delegated.

1 **PRESIDENT:** The contract provides a
2 provision that says that the State would assist you
3 in permitting, doesn't it?

4 **MR JACOBSON:** Yes.

5 **PRESIDENT:** Would that not indicate that
6 there is two maybe divisions -- the one that is
7 assisting, the other one is doing the permitting?

8 **MR JACOBSON:** Yes, and I understand
9 there's a dispute about what "assist" means.
10 Presumably it means more than best efforts because
11 the other portion of that clause which has to do
12 with third parties says "best efforts", but there
13 is -- they're -- you know, I sort of come back --
14 and again, I am not a Peruvian lawyer, but my
15 understanding is that it is a unitary as opposed to
16 a Federal state and that when the State speaks as
17 the State, it is speaking not only on behalf of the
18 central authorities but also the regional
19 authorities.

20 **PRESIDENT:** We have yet to enter into a
21 discussion about attribution.

22 **MR JACOBSON:** Yes, and I suspect there
23 will be much discussion about that between the
24 Peruvian legal experts upcoming.

25 **PRESIDENT:** So have you, in your

1 professional life, advised or been engaged in
2 tendering? Tendering on projects?

3 **MR JACOBSON:** It's not been a significant
4 part of what I do professionally.

5 **PRESIDENT:** Have you ever been involved in
6 a tender before this tender on the Third Auction?

7 **MR JACOBSON:** No, I don't believe so.

8 **PRESIDENT:** My question would have been --
9 maybe you wish to answer, maybe not -- is that in
10 this tender process, usually tenderers try to
11 minimise their exposure by making qualifications,
12 and if that's not allowed to make qualifications
13 what you do is you seek clarifications of the
14 documents. Have you thought about that at the time
15 you made the tender, or your company?

16 **MR JACOBSON:** We didn't ask for a
17 clarification that the State couldn't breach the
18 contract with impunity, and neither did any of the
19 other 25 bidders, and I assume it's because none of
20 us thought that that was even within the realm of
21 the possible.

22 **PRESIDENT:** But when you have a
23 termination date which is declared as one of the
24 tender documents to be immovable, would you not seek
25 a clarification, wait a moment, but there may be

1 circumstances that things should be movable --
2 outside force majeure? Did that not occur to you?

3 **MR JACOBSON:** Well, as I said, our
4 reasoning at the time, which -- and I can't speak
5 for the other 25 -- or other 24 bidders, but our
6 reasoning at the time was that Peru had very clearly
7 highlighted the fact that the tender could not be
8 moved for force majeure reasons, which is unusual
9 but not unheard of, and obviously it would not be
10 moved for actions of the bidder.

11 But we just didn't believe that without
12 any notice, that that meant it couldn't -- it
13 wouldn't be moved because of actions of the State.

14 **PRESIDENT:** But for other reasons. Could
15 it be moved for other reasons on the basis of a
16 contract amendment, in your view of the contract at
17 that point in time? Because what you have is you
18 have a decree and you have a statement which says
19 the termination date is immovable for any reason,
20 and your understanding is yes, that may all be true,
21 except for cases that are attributable to the
22 counterparty, in this case the State.

23 **MR JACOBSON:** Correct.

24 **PRESIDENT:** Is that the way I understand
25 your testimony?

1 **MR JACOBSON:** Yes, that's correct.

2 **PRESIDENT:** One small point. In paragraph
3 76 of your first witness statement -- maybe it can
4 be shown on the screen.

5 **MR JACOBSON:** Yes, I've got it.

6 **PRESIDENT:** You've got it? So you state
7 there that in December 2018 -- okay, it will be
8 shown on the screen. 76. It's the first sentence.

9 You see on the screen it says, "In
10 late December 2018, I learned that MINEM had
11 unexpectedly decided to abandon its proposed Supreme
12 Decree based on public comments from OSINERGMIN that
13 encouraged MINEM to let the projects fail so that it
14 could benefit from the approximately \$55 million in
15 performance bonds deposited under the relevant
16 contracts".

17 To your knowledge, had the bonds indeed
18 been called for 55 million by Peru?

19 **MR JACOBSON:** I know that some of them
20 have been because that was the subject of some of
21 the Lima arbitrations that have already occurred.
22 In several of those arbitrations the Tribunals
23 determined that the bonds could not be called, and
24 those obviously were not.

25 So I'm quite certain that MINEM has called

1 those bonds that, you know, have been through an
2 arbitral process and where the arbitrator said that
3 it could, and I don't know for sure but I see no
4 reason why they wouldn't have been calling other
5 bonds if there was no dispute.

6 **PRESIDENT:** Thank you. Do you know how
7 many cases that happened by any chance?

8 **MR JACOBSON:** I believe it was at least
9 two of the four that were cited by Peru, and I mean
10 obviously some of the projects have been completed
11 so there would be no cause for calling those bonds.
12 I do not know how many of the others have been
13 called.

14 **PRESIDENT:** The bond you issued was
15 5 million, wasn't it?

16 **MR JACOBSON:** That's correct. There was
17 the tiny \$71,000 bond for the transmission line as
18 well.

19 **PRESIDENT:** And still outstanding, that
20 bond?

21 **MR JACOBSON:** Oh, yes. I pay -- I pay
22 fees to the banks every six months.

23 **PRESIDENT:** A hundred thousand you said
24 per year?

25 **MR JACOBSON:** A hundred thousand per year,

1 yes.

2 **PRESIDENT:** Talking about money, can we
3 show paragraph 42? It's the last question,
4 Mr Jacobson. Simply to get figures, how much money
5 was spent by you and your co-venturer, Mr Bengier.

6 **MR JACOBSON:** Bengier.

7 **PRESIDENT:** You testified earlier today it
8 was 20 million. Is that correct?

9 **MR JACOBSON:** No, I believe the --
10 I testified that the total amount that had been
11 spent through December 2018 was approximately
12 20 million, yes.

13 **PRESIDENT:** If I would characterise it as
14 sunk costs, is that 20 million?

15 **MR JACOBSON:** At that point --

16 **PRESIDENT:** At that point.

17 **MR JACOBSON:** Yes.

18 **PRESIDENT:** And so how much did you spend
19 thereafter?

20 **MR JACOBSON:** Well, after that point most
21 of the expenses have been those involved with the
22 Lima Arbitration and this litigation. I think the
23 Lima Arbitration was \$800,000 or \$900,000 total, and
24 unfortunately this litigation has been much more
25 expensive.

1 **PRESIDENT:** Thank you. Thank you,
2 Mr Jacobson.

3 Now I turn to counsel. Mr Molina, do you
4 have any follow-up questions following the
5 Tribunal's questions?

6 **MR MOLINA:** Yes, I do. Thank you,
7 Mr President. Quickly.

8 Further examination by Claimants
9 by Mr Molina

10 **MR MOLINA:** You were asked a question
11 about -- from the President about clause 4.3 of the
12 contract, about the assist obligation?

13 **MR JACOBSON:** Yes.

14 **MR MOLINA:** It would be great if we could
15 put it on the screen just so you have a chance to
16 just look at it again, because I believe it was an
17 important question.

18 While it's getting pulled up on the
19 screen, I believe the question was essentially if
20 the State was assuming this obligation with respect
21 to the permitting authorities, work -- in assisting
22 you obtaining permits with respect to those that had
23 been delayed, could you just take a look and just
24 refamiliarise yourself with this clause? Let me
25 know when you're ready.

1 **MR JACOBSON:** I am ready.

2 **MR MOLINA:** Whose obligation is it to
3 assist you in the permitting?

4 **MR JACOBSON:** The Ministry.

5 **MR MOLINA:** And who is the Ministry?

6 **MR JACOBSON:** I believe that's MINEM.

7 **MR MOLINA:** So it's not -- well, let me
8 just move on to another question.

9 You were also asked about clause -- or if
10 you go back to R-0138, you were being asked about
11 the force majeure and the immovable nature of the
12 termination date?

13 **MR JACOBSON:** Yes.

14 **MR MOLINA:** Let's assume that the
15 termination date could not be moved and the -- and
16 there was interference from your counterparty. Do
17 you believe that this document or anything else in
18 the contract absolves Peru from having to pay you
19 damages?

20 **MR JACOBSON:** No. I mean, clearly that's
21 the other alternative. If a counterparty breaches
22 and it cannot be resolved by additional time, then
23 presumably it has to be resolved by money damages.

24 **MR MOLINA:** Lastly, there's been a lot of
25 discussion, and Mr President also raised it, about

1 what's written on a contract or what's written on
2 some of these documents. Is there -- from your
3 perspective, are there ever terms that are implied
4 and not written expressly into a contract?

5 **MR JACOBSON:** Of course. Contracts always
6 are buried in the context of the relevant laws and
7 people's understandings of the context in which
8 they're written.

9 **MR MOLINA:** And could you give me one
10 example of a principle that would not be expressly
11 written but would be implied?

12 **MR JACOBSON:** Good faith.

13 **MR MOLINA:** Thank you.

14 No more questions.

15 **PRESIDENT:** Thank you. Mr Di Rosa?

16 **MR DI ROSA:** Yes, thank you, Mr Chairman.

17 I just have one question for Mr Jacobson.

18 Further cross-examination by Respondent
19 by Mr Di Rosa

20 **MR DI ROSA:** The Chairman asked you during
21 the process for the -- you know, the basis for
22 the -- consolidated basis of the bidding rules there
23 was a comment period, right. Did CHM submit any
24 questions or comments to the authority?

25 **MR JACOBSON:** My understanding is we did.

1 **MR DI ROSA:** And none of those had to do
2 with the scope of the termination clause?

3 **MR JACOBSON:** Yes, that's correct.

4 **MR DI ROSA:** Thank you. No more
5 questions, Mr Chairman.

6 **PRESIDENT:** Thank you. I look to my
7 colleagues. Any follow-up? No? Nothing?

8 All right. Mr Jacobson, thank you for
9 testifying. You're now excused as a witness.

10 **MR JACOBSON:** Thank you very much.

11 **PRESIDENT:** Recess for 45 minutes until
12 19.40 CET.

13 (Recess taken 12.54 EST to 13.40 EST)

14 **PRESIDENT:** Mr Reisenfeld or Mr Molina,
15 will you call your next witness?

16 **MR REISENFELD:** Yes --

17 **THE INTERPRETER:** Sorry. There was a
18 mistake with the channel.

19 **PRESIDENT:** I invite Mr Molina to call the
20 next witness.

21 **MR MOLINA:** Thank you, Mr President,
22 members of the Tribunal. Our next witness is
23 Mr Stefan Sillen.

24 MR GORAN STEFAN SILLEN

25 **PRESIDENT:** Good afternoon, Mr Sillen.

1 You appear as a witness for the Claimants. Could
2 you please state your full name for the record?

3 **MR SILLEN:** My name is Goran Stefan
4 Sillen.

5 **PRESIDENT:** Mr Sillen, If any question is
6 unclear to you, either because of language or any
7 other reason, please do seek a clarification,
8 because if you don't do so the Tribunal assumes that
9 you have understood the question and that your
10 answer responds to the question.

11 **MR SILLEN:** Understood. Thank you.

12 **PRESIDENT:** And, Mr Sillen, you will
13 appreciate that testifying, be it before a court or
14 an arbitral tribunal, is a very serious matter. In
15 that connection the Tribunal expects you to give the
16 declaration, the text of which will now be shown on
17 the screen.

18 **MR SILLEN:** I solemnly declare upon my
19 honour and conscience that I shall speak the truth,
20 the whole truth and nothing but the truth.

21 **PRESIDENT:** Thank you, there is an
22 additional confirmation I would like to have from
23 you because we are in a virtual hearing setting, an
24 in-person hearing, so could you please confirm that
25 you are alone in the room?

1 **MR SILLEN:** I'm alone in the room.

2 **PRESIDENT:** And could you please confirm
3 you have not attended a recording or read the
4 transcripts of the prior examination?

5 **MR SILLEN:** I have not.

6 **PRESIDENT:** Can I please ask you to scan
7 the room to show whether anybody else is in the
8 room?

9 **MR SILLEN:** Yes.

10 **PRESIDENT:** Thank you, Mr Sillen. Have
11 you switched off your iPhone or any other device
12 with which you can communicate?

13 **MR SILLEN:** I have.

14 **PRESIDENT:** If at any time someone enters
15 the room, please alert the Tribunal, and refrain
16 from testifying further until that person has left
17 the room.

18 **MR SILLEN:** Will do.

19 **PRESIDENT:** Then, finally, can you confirm
20 for the record from which location you are
21 testifying?

22 **MR SILLEN:** I'm testifying from Baker
23 Hostetler's office in Washington DC. I'm in a
24 separate room, and I have been isolated from the
25 team throughout all yesterday, since Sunday evening.

1 **PRESIDENT:** Thank you.

2 What do you have on your desk? Do you
3 have copies of your witness statements?

4 **MR SILLEN:** Yes.

5 **PRESIDENT:** Do you have access to the
6 electronic records of the case?

7 **MR SILLEN:** No. As far as I understand,
8 this room doesn't have access to the electronic
9 records.

10 **PRESIDENT:** Could you please take your
11 first witness statement of 14 September 2020 and go
12 to page 56?

13 **MR SILLEN:** Yes.

14 **PRESIDENT:** Can you confirm for the record
15 that the signature appearing above your name is your
16 signature?

17 **MR SILLEN:** That is my signature.

18 **PRESIDENT:** Could you please go to your
19 second witness statement of 20 July, 2021, to page
20 44?

21 **MR SILLEN:** Yes.

22 **PRESIDENT:** Can you confirm, please, for
23 the record that the signature appearing above your
24 name is your signature?

25 **MR SILLEN:** It is my signature.

1 **PRESIDENT:** Thank you. Is there any
2 correction, amendment or modification you would like
3 to make to either witness statement?

4 **MR SILLEN:** I have a small correction to
5 my first witness statement. It's in paragraph 162
6 on page 52. In the first sentence the year should
7 be 2018 rather than 2020.

8 **PRESIDENT:** On December 20, 2018?

9 **MR SILLEN:** That's correct.

10 **PRESIDENT:** Thank you. Anything further?

11 **MR SILLEN:** No. Apart from that, I stand
12 by my witness statements.

13 **PRESIDENT:** Thank you. Mr Molina, please
14 proceed with the direct.

15 **MR MOLINA:** Thank you, Mr President.

16 Examination by Claimants
17 by Mr Molina

18 **MR MOLINA:** Good afternoon, Mr Sillen.
19 Can you briefly tell us about your professional
20 background?

21 **MR SILLEN:** So I have a Master in Business
22 Administration, Strategy, Finance. I have worked my
23 whole career with corporate development, due
24 diligence and mergers and acquisitions.

25 I started working with energy for

1 Vattenfall in mid 2000 and increasingly have focused
2 on renewable energy. I also worked for KPMG in the
3 same position with due diligence, and since 2014
4 I led Latam Hydro and the team in Peru.

5 **MR MOLINA:** Can you briefly tell us about
6 the team that you put together for this project?

7 **MR SILLEN:** So I wanted to have an expert
8 team, a mix of both local, global experts. I hired
9 Mr Bartrina as the project manager. Mr Bartrina has
10 a background from Iberdrola Renewables and was
11 responsible for project development in Eastern
12 Europe. He also spent many, many years working in
13 Latin America.

14 I supplemented a team -- we supplemented a
15 team, you know, as the project progressed with
16 relevant expertise, whether it was social,
17 technical, environmental. We worked with the
18 best -- in our opinion best experts, both on
19 technical issues, on legal issues. We had
20 Santiváñez, we had Pöyry, we had Norconsult. We had
21 several environmental and social experts around the
22 team.

23 **MR MOLINA:** You testified that you oversaw
24 the development of the financial strategy. Can you
25 please provide a brief synopsis of what that

1 strategy was?

2 **MR SILLEN:** So the RER promotion and the
3 contract was specifically designed for attracting
4 foreign investment, and it provided, you know, a
5 20-year guaranteed revenue stream and it had other
6 protections as well. It was well suited for project
7 finance, and that was the strategy that we pursued.

8 We also sought a complementary equity
9 partner to us that could complement us so that the
10 team could use its abilities to develop a portfolio
11 in Peru.

12 We settled for DEG, who shares the same
13 vision with respect to social and environmental
14 impacts. We chose Innergex because they had a long
15 track record in developing, constructing, and
16 operating hydro assets. So it was a good team.

17 **MR MOLINA:** Why did you start -- sorry.
18 Why did you start permitting more than a year before
19 you obtained the RER Contract?

20 **MR SILLEN:** We wanted to be diligent. We
21 knew that time was of the essence. We wanted to be
22 well progressed for when we participated in the
23 third tender. We wanted to make sure that we had
24 the most important permits, including the
25 concession, and to be able to close the project as

1 quickly as possible after that, preferably in 2014.

13:51

2 **MR MOLINA:** And could you please explain
3 what happened with the environmental permits early
4 in the project?

5 **MR SILLEN:** Yes. So ARMA wrongfully
6 classified the project as Category III. A
7 Category III is, you know, designated for projects
8 with a very substantial environmental impact.
9 You're building a dam, you're displacing people,
10 you're cutting down forests and the like. Our
11 project didn't have any of those characteristics so
12 we knew it was wrong.

13 We understood from MINEM that it was
14 authorised to approve projects up to 20-megawatts.
15 Our project was 20-megawatts. They took it as a
16 sign, you know, that they should essentially give us
17 the highest category, without having done any proper
18 technical environmental assessment.

19 So when we received that classification we
20 filed a petition for reclassification. That was
21 in November 2013, and ARMA made a reassessment.
22 They actually did a technical assessment of the
23 project, they went to the site, they saw that they
24 had made a mistake, so they simply corrected it and
25 classified it as a Category I.

1 **MR MOLINA:** What was your understanding of **13:52**
2 the restrictions on extensions that were imposed
3 shortly before the Third Auction?

4 **MR SILLEN:** We understood that the
5 Ministry of Energy and Mines, they wanted to
6 avoid -- they had some bad experience from previous
7 tenders where concessionaires had raised, you know,
8 a flag of force majeure, even if there were delays
9 caused by the concessionaire's negligence, and they
10 wanted to correct that. They wanted to make sure if
11 the delays were solely attributed to the
12 concessionaire or acts of God, you know, that that
13 would be -- that that wouldn't be a reason to
14 extend.

15 We never interpreted that -- that also
16 including interference or negligence or permitting
17 delays, you know, from the counterparty of the
18 contract. That wasn't anything we reasonably
19 envisaged at the time.

20 **MR MOLINA:** How did the extensions under
21 addenda 1 and 2 -- what was your understanding of
22 those extensions?

23 **MR SILLEN:** That it reaffirmed what we
24 understood, you know, that if the delays -- in this
25 case, you know, were essentially the fault or caused

1 by the government or the authorities, then that we
2 could modify the works execution schedule.

13:54

3 **MR MOLINA:** And how did the extensions
4 under addendum 2 impact the financial negotiations?

5 **MR SILLEN:** Well, we -- you know, the
6 negotiations had stalled for about six months
7 waiting for the extension, so when we received the
8 extension under addendum 2, that energised it and we
9 moved forward in a quick pace. We agreed in
10 principle on terms with Innergex in February. We
11 worked together with Innergex DT to make sure we
12 could close on the financing by May 2017 and to
13 start construction in June/July, that timeframe.

14 **MR MOLINA:** And how did the RGA lawsuit
15 impact those negotiations?

16 **MR SILLEN:** Well, it completely derailed
17 them. Both Innergex and DEG said that they couldn't
18 close on the financing because the RGA lawsuit
19 essentially threatened the environmental permit, and
20 the environmental permit is, you know, a
21 foundational permit for the concession, so by
22 extension it also threatened the concession. So it
23 was -- it didn't move forward. Simple as that.

24 **MR MOLINA:** There were other challenges to
25 the environmental permits at the time of the RGA

1 lawsuit, is that right?

2 **MR SILLEN:** Yes. We had some dealings
3 with AAA authorities that, you know, didn't want to
4 approve -- or deny to approve our permits for the
5 civil works. We had -- following, ten or 15 days
6 after the RGA lawsuit, we had a criminal
7 investigation being opened. We didn't know much
8 about it at the time so we -- so, yes, there were
9 several things happening at the same time.

10 **MR MOLINA:** And what was your impression
11 of the contract suspension?

12 **MR SILLEN:** That it would stop the clock
13 on the project. You know, we certainly couldn't
14 move to financial closing. It was very clear, you
15 know, to all of the parties involved, the Ministry
16 of Energy and Mines, the Special Commission, that
17 without essentially suspending all obligations,
18 including stopping the clock, that it was simply
19 impossible for us to do that.

20 So that was created, you know, for all the
21 parties to be able to negotiate in good faith and
22 see if we could find a solution.

23 **MR MOLINA:** And what's your reaction to
24 Peru's position in this arbitration that the
25 suspensions were never intended to result in

1 extensions to the work schedule?

2 **MR SILLEN:** Well, that's odd, to say the
3 least. I would say it's incredulous because we, as
4 a company, would never have entered into any
5 negotiations unless that was being quite clear
6 between the parties. You know, why would we spend
7 several months, even years, negotiating with a
8 counterparty? We wouldn't be able to build a
9 project on time. It wasn't -- that wasn't the
10 intention.

11 **MR MOLINA:** What was your expectation when
12 you and your team filed a Third Extension Request
13 in February 2018?

14 **MR SILLEN:** That the Ministry of Energy
15 and Mines, like they had done in Addenda 1 and No 2,
16 that they would sign a resolution where they would
17 extend both the COD date and the term date of the
18 contract. That was the expectation.

19 **MR MOLINA:** And why did you have an
20 expectation at that time that the termination date
21 could be extended by MINEM?

22 **MR SILLEN:** Because we had already raised
23 the issue with both the Special Commission and the
24 Ministry of Energy and Mines. We understood, you
25 know, that the Ministry of Energy and Mines agreed

1 in principle that they were allowed to do it and
2 that was a legal mechanism to do it.

3 **MR MOLINA:** And what was your
4 understanding of why they didn't do it? Later, when
5 they denied the Third Extension Request.

6 **MR SILLEN:** Well, I'm still struggling to
7 understand, but I'm understanding a little bit that
8 they essentially walked back on everything that they
9 had done, you know, including the extensions under
10 Addenda 1 and 2 and the suspensions.

11 **MR MOLINA:** No further questions.

12 **PRESIDENT:** Thank you Mr Molina.

13 Ms Taveras, are you doing the cross?

14 **MS TAVERAS:** Yes, Mr President. Thank
15 you.

16 **PRESIDENT:** Please proceed.

17 **MS TAVERAS:** Mr President, before
18 I proceed with the questions I have a question on
19 procedure for you.

20 Today we're supposed to run 60 minutes
21 with the cross, and then the next 60 minutes
22 tomorrow. I have organised my outline with that
23 distribution in mind. I just want to make sure that
24 we will be following the 60 minutes/60 minutes.

25 **PRESIDENT:** Yes, because the blank in this

1 category is the cushion, I understand, with the time
2 over. So please proceed with your 60 minutes, more
3 or less -- I'm in your hands -- seek a natural
4 moment to break, and then you can continue tomorrow.

5 **MS TAVERAS:** Fantastic. Thank you.

6 **MR REISENFELD:** Mr President, if we could
7 intervene, we were under the understanding that the
8 schedule was to be used in full each day and that a
9 party would not be able to have a witness held over
10 unless it was absolutely required. And also, with
11 respect to this schedule, the one which is in the
12 Excel spreadsheet, that was strictly meant to be a
13 suggestion, it was not meant to be binding on either
14 of the parties. That was not our understanding,
15 that a witness would not be able to complete their
16 testimony on a day, should there be enough time in
17 that day to do so.

18 So we would suggest that Ms Taveras
19 complete her cross-examination and not hold over
20 this witness.

21 **PRESIDENT:** But the cross-examination is
22 slated for 120 minutes, isn't it?

23 **MS TAVERAS:** Yes.

24 **PRESIDENT:** And if you are suggesting you
25 need to go for two hours now, it's getting late for

1 me in any case, as well as late for some others, so
2 I think if you do 60 minutes more or less, because
3 I give Ms Taveras of course latitude to choose a
4 natural moment in the cross when she wants to
5 finish, then tomorrow again we will go on with the
6 next 60 minutes.

7 The cushion -- my understanding was that
8 the cushion for today was that if we have delays of
9 today, then we can make it up. But we had a short
10 delay, I think we are ten minutes behind schedule or
11 15 minutes, so we comfortably end around 9 -- I am
12 all the time on CET time notation, I'm sorry -- and
13 9.30 would be then if you go slightly longer, well,
14 it's fine, but that's in the hands of Ms Taveras,
15 because then we are right on schedule for tomorrow.
16 This is not downtime for half a day or so. That was
17 the concern of the Tribunal.

18 **MR REISENFELD:** Thank you, Mr President.

19 **PRESIDENT:** Ms Taveras, please proceed.

20 **MS TAVERAS:** Thank you, Mr President.

21 Cross-examination by Respondent
22 by Ms Taveras

23 **MS TAVERAS:** Good afternoon, Mr Sillen.
24 My name is Claudia Taveras. I'm part of the team
25 that represents Peru in this case.

1 Today I will be asking you a series of
2 questions regarding the matters you addressed in
3 your two witness statements. As you may know, your
4 testimony is being transcribed and it's also being
5 translated into Spanish simultaneously. For the
6 sake of the court -- pardon, were you able to hear
7 me properly?

8 **MR SILLEN:** I could hear you, but it was a
9 little bit mumbled.

10 **MS TAVERAS:** Thank you. I apologise for
11 that.

12 For the sake of the court reporters and
13 interpreters, I ask that you wait until I have
14 finished asking a question before providing your
15 answer. For planning purposes, before I turn to my
16 questions, I would like you to confirm if you speak
17 Spanish?

18 **MR SILLEN:** I do not speak Spanish.

19 **MS TAVERAS:** I see. Thank you for
20 clarifying. Let's begin with your professional
21 history. You have covered this topic in your
22 witness statement, correct?

23 **MR SILLEN:** That's correct.

24 **MS TAVERAS:** And you've also provided a
25 copy of your CV?

1 **MR SILLEN:** That's correct.

2 **MS TAVERAS:** Let me make sure I have this
3 right. You hold a Bachelor's degree and a Master's
4 degree, right?

5 **MR SILLEN:** Yes.

6 **MS TAVERAS:** Both degrees are from the
7 University of Lund?

8 **MR SILLEN:** Lund, that's correct.

9 **MS TAVERAS:** Where is the University of
10 Lund?

11 **MR SILLEN:** It's in Sweden.

12 **MS TAVERAS:** Your first degree was your
13 Bachelor's degree, right?

14 **MR SILLEN:** That's correct.

15 **MS TAVERAS:** And it was in Literature,
16 Media and Sociology?

17 **MR SILLEN:** That's correct.

18 **MS TAVERAS:** And your second degree, which
19 was your Master's degree, was a degree in Business
20 Administration, correct?

21 **MR SILLEN:** Correct.

22 **MS TAVERAS:** Do you have any formal
23 training in law?

24 **MR SILLEN:** No.

25 **MS TAVERAS:** You are not an attorney,

1 correct?

2 **MR SILLEN:** No.

3 **MS TAVERAS:** After you earned your
4 Master's degree you went out into the workforce,
5 correct?

6 **MR SILLEN:** Correct.

7 **MS TAVERAS:** And between 1996 and 2005 you
8 held several roles in BSI & Partners and the Tetra
9 Pak group in Sweden, correct?

10 **MR SILLEN:** Correct.

11 **MS TAVERAS:** And your work involved
12 clients in the finance and technology sectors,
13 right?

14 **MR SILLEN:** When it comes to BSI &
15 Partners, correct.

16 **MS TAVERAS:** And in Tetra Pak what were
17 you doing? What sector did that involve?

18 **MR SILLEN:** That was a project management
19 assignment where the Tetra Pak Group was looking at
20 new technical services, so we were essentially
21 establishing a whole new business for Tetra Pak.

22 **MS TAVERAS:** In November 2005 you joined
23 Vattenfall power consultants in Sweden, correct?

24 **MR SILLEN:** Correct.

25 **MS TAVERAS:** And it was thereafter that

1 your career pivoted towards the renewable energy
2 sector, correct?

3 **MR SILLEN:** That's correct.

4 **MS TAVERAS:** At first you focused on the
5 Nordic markets, correct?

6 **MR SILLEN:** Yes.

7 **MS TAVERAS:** And then you turned to the
8 European markets?

9 **MR SILLEN:** Yes.

10 **MS TAVERAS:** In September 2010 you joined
11 Greinvest Management, right?

12 **MR SILLEN:** 10 ... that is correct, I
13 joined Greinvest management.

14 **MS TAVERAS:** At the time Greinvest
15 Management was a company owned by Michael Jacobson,
16 correct?

17 **MR SILLEN:** Yes.

18 **MS TAVERAS:** And until the creation of
19 Latam Hydro in 2014, it was through the Greinvest
20 group companies that Mr Jacobson developed and
21 financed the Mamacocha Project, correct?

22 **MR SILLEN:** Yes, so they were a little bit
23 different entities but within, you know, the same
24 I would say group. Once we had decided to move the
25 development to Peru, it was conducted through a

1 separate company, not to be mixed, you know, with
2 the European companies. That's correct.

3 **MS TAVERAS:** But part of the same
4 Greinvest group of companies owned by Mr Jacobson?

5 **MR SILLEN:** It was owned by Mr Jacobson,
6 but still separate entities.

7 **MS TAVERAS:** In paragraph 10 of your
8 witness statement you stated -- you have it in front
9 of you, you said, right?

10 **MR SILLEN:** Yes. Is that the first one or
11 the second one?

12 **MS TAVERAS:** First witness statement.

13 **MR SILLEN:** Which page?

14 **MS TAVERAS:** Paragraph 10, and I will tell
15 you the page right now. It's on page 3.

16 **MR SILLEN:** I have in it front of me.

17 **MS TAVERAS:** There it states that in or
18 around November 2011 your team at Greinvest began
19 scouting for possible locations in certain Latin
20 American countries, and then those countries include
21 Peru, and the purpose of that search was to invest,
22 develop and operate hydroelectric projects. Is that
23 correct?

24 **MR SILLEN:** Yes.

25 **MS TAVERAS:** Pardon, I will mute myself

1 for one second. I'm hearing an echo.

2 Apologies for that. So we were discussing
3 paragraph 10 of your first witness statement wherein
4 you stated that in or around November 2011 your team
5 at Greinvest began scouting for possible locations
6 in certain Latin American countries, including Peru,
7 to invest, develop, and operate hydroelectric
8 projects.

9 That's what you state in your first
10 witness statement, correct?

11 **MR SILLEN:** That is correct, yes.

12 **MS TAVERAS:** And in that same paragraph,
13 after describing the members of your team, you say
14 that together, you had more than 150 years of
15 experience developing energy projects, including
16 decades of experience with hydroelectric projects in
17 Peru and around the world, correct?

18 **MR SILLEN:** That is correct, yes.

19 **MS TAVERAS:** But at the time you
20 specifically had only six years of experience with
21 renewables?

22 **MR SILLEN:** That's correct, but I also had
23 a team.

24 **MS TAVERAS:** And you specifically had no
25 experience with hydroelectric projects in Peru,

1 correct?

2 **MR SILLEN:** That is correct.

3 **MS TAVERAS:** You were chief financial
4 officer and chief executive officer of Greinvest
5 Management from 2010 to 2012, correct?

6 **MR SILLEN:** Yes.

7 **MS TAVERAS:** You also served as president
8 and chief executive officer of Latam Hydro until
9 2019?

10 **MR SILLEN:** February 2019, correct.

11 **MS TAVERAS:** In paragraph 2 of your first
12 witness statement you state that as of February 2019
13 you have a consultancy role within Latam Hydro that
14 remains in place until today. Are you currently a
15 paid consultant for Latam Hydro?

16 **MR SILLEN:** I have been paid for helping
17 to prepare my witness statements. Apart from that,
18 I don't do anything for Latam Hydro.

19 **MS TAVERAS:** I just want to understand,
20 what exactly is the scope of the consultancy role?

21 **MR SILLEN:** It is to assist with preparing
22 my witness statements and other documents as a
23 preparation for these hearings.

24 **MS TAVERAS:** When you say other documents,
25 what do you mean? The briefs, for example?

1 **MR SILLEN:** I have read the briefs, yes. **14:11**

2 **MS TAVERAS:** And other witnesses' written
3 statements?

4 **MR SILLEN:** A few of them, yes.

5 **MS TAVERAS:** So you've advised on the
6 overall strategy of the case, you would say?

7 **MR SILLEN:** I wouldn't say that, no.

8 **MS TAVERAS:** Are you being paid to testify
9 here today?

10 **MR SILLEN:** I'm being paid for, you know,
11 the lost opportunity costs.

12 **MS TAVERAS:** In 2011 through 2018, you
13 were responsible for overseeing the development of
14 the Mamacocha Project, correct?

15 **MR SILLEN:** Correct.

16 **MS TAVERAS:** Were you living in Peru at
17 the time?

18 **MR SILLEN:** For the first two years I was
19 spending probably three to four weeks in Peru, and
20 at that time I was living in London. That was my
21 residence. So I went back to London for a week, ten
22 days, and then I went back to Peru. So I spent a
23 lot of time in Peru.

24 **MS TAVERAS:** You said for the first
25 two years. And after that, what happened?

1 **MR SILLEN:** After that we had established
2 a team. We had good progress on it. I still
3 continued to travel very frequently. At that time I
4 had relocated to Miami so it was a lot more
5 convenient for me to travel back and forth, and
6 I spent considerable time but less time in one
7 stretch, so to speak.

8 **MS TAVERAS:** In your first witness
9 statement you had explained that you were the person
10 who oversaw fund raising efforts for the Mamacocha
11 Project, correct?

12 **MR SILLEN:** That's correct.

13 **MS TAVERAS:** You were the person that
14 developed and oversaw the financing strategy for the
15 Mamacocha Project?

16 **MR SILLEN:** Yes.

17 **MS TAVERAS:** In the end did the Mamacocha
18 Project secure financing?

19 **MR SILLEN:** Well, it would have, but it
20 didn't.

21 **MS TAVERAS:** I would like to pull
22 exhibit C-0144 on the screen. This is the CV that
23 you appended to your first witness statement, right?

24 **MR SILLEN:** That looks right.

25 **MS TAVERAS:** And I assume you reviewed it

1 before you submitted it to the Tribunal?

2 **MR SILLEN:** Yes.

3 **MS TAVERAS:** But the document on the
4 screen, that must have been an old CV, right? For
5 example, it still listed you as the president and
6 CEO of Latam Hydro, correct?

7 **MR SILLEN:** Yes, that could have been --
8 that could have been my mistake.

9 **MS TAVERAS:** In the description of your
10 work experience at Latam Hydro, your CV states that
11 you were "in charge of a team of 10 professionals,
12 developing a 20-megawatt hydro project".

13 The reference to the 20-megawatt hydro
14 project is to the Mamacocho Project, correct?

15 **MR SILLEN:** That is correct.

16 **MS TAVERAS:** The next sentence says: "The
17 total investment is 70 million and financing has
18 been secured through a combination of US and
19 Canadian investors and debt financing from DEG and a
20 consortia of European development banks".

21 Is that accurate?

22 **MR SILLEN:** It was accurate at the time.
23 We had the US investors, our sponsors; we had
24 Innergex, the Canadian investor; we secured the debt
25 financing from DEG and they were going to use a

1 consortia of European development banks. So that
2 was -- that was the setup.

3 **MS TAVERAS:** I just asked you a couple of
4 seconds ago if the Mamacocho Project secured
5 financing and your answer was it would have but it
6 didn't, so I ask you again, the description of the
7 status of the Mamacocho Project in your CV, do you
8 still believe it's accurate?

9 **MR SILLEN:** Well, I guess I should have
10 changed some of the wording. Again, when this CV --
11 when I provided that obviously we knew that the
12 Mamacocho Project wouldn't move forward. That's
13 correct.

14 **MS TAVERAS:** In your first witness
15 statement you explained that in September 2011 your
16 team at Greinvest came up with the plan to build a
17 run-of-the-river hydroelectric plant that used part
18 of the Mamacocho Lagoon to generate electricity,
19 correct?

20 **MR SILLEN:** It was to use the overspill
21 from the Mamacocho Lagoon to generate electricity.

22 **MS TAVERAS:** And as part of this process
23 Greinvest commissioned CESEL Ingenieros to do a
24 pre-feasibility study, correct?

25 **MR SILLEN:** Correct.

1 **MS TAVERAS:** The pre-feasibility study
2 focused on the hydrological, geological,
3 archeological, topographical, environmental, and
4 social conditions of the area surrounding the
5 Mamacocha Lagoon, is that accurate?

6 **MR SILLEN:** That's accurate.

7 **MS TAVERAS:** CESEL Ingenieros delivered
8 its final pre-feasibility report on 26 October 2012?

9 **MR SILLEN:** Correct.

10 **MS TAVERAS:** In paragraphs 25 to 28 of
11 your first witness statement you described CESEL
12 Ingenieros' findings with great specificity. Did
13 you append that study to your witness statement?

14 **MR SILLEN:** I'm not sure if it was
15 appended or not. No, I don't think we did that.

16 **MS TAVERAS:** But you must know the
17 document fairly well because you describe its
18 contents in your witness statement at length,
19 correct?

20 **MR SILLEN:** That's correct.

21 **MS TAVERAS:** Claimants submitted CESEL
22 Ingenieros' pre-feasibility report along with the
23 memorial as exhibit C-100A through E. I will now
24 ask that exhibit C-100A be put up on the screen
25 where you will see the cover page of the report.

1 Could you please confirm that this is the
2 document you are referring to in paragraphs 25-28 of
3 your first witness statement?

4 **MR SILLEN:** Can I have a look at the date
5 of that document, please?

6 **MS TAVERAS:** Yes, hold on.

7 **MR SILLEN:** That seems to be the correct
8 document.

9 **MS TAVERAS:** You indicate in paragraph 30
10 of your first witness statement that based on the
11 positive results of the pre-feasibility report, the
12 team at Greinvest decided to create CHM, which is
13 the company that was formally known as
14 Hydroeléctrica Laguna Azul.

15 **MR SILLEN:** That's correct.

16 **MS TAVERAS:** CHM is one of the Claimants
17 in this arbitration.

18 **MR SILLEN:** Yes.

19 **MS TAVERAS:** CHM, then called
20 Hydroeléctrica Laguna Azul, is the company that bid
21 for and was eventually awarded the RER Contract for
22 the Mamacocha Project, correct?

23 **MR SILLEN:** It's correct.

24 **MS TAVERAS:** Let's pull C-100A back up
25 again. Exhibit C-100A contains the pre-feasibility

1 report's executive summary. Let me direct you to
2 pdf page 13. Under number 3 you can find the
3 subsection titled "Conclusiones y Recomendaciones"
4 or "Conclusions and recommendations" in English. Do
5 you see that?

6 **MR SILLEN:** I do.

7 **MS TAVERAS:** Let's scroll down to page 14.
8 On the next page CESEL Ingenieros highlights its
9 main three conclusions identified as A, B and C. Do
10 you see that?

11 **MR SILLEN:** I can see B and C. I can't
12 really see A, but if you scroll up.

13 **MR MOLINA:** I'm so sorry to interrupt,
14 Mr President and members of the Tribunal. I believe
15 Mr Sillen testified he does not speak Spanish so I'm
16 not sure --

17 **PRESIDENT:** Mr Molina, I thought there was
18 also an English version of this report, isn't it? I
19 remember this page.

20 **MR MOLINA:** I'm not aware of one.

21 **PRESIDENT:** I read it but in my mind
22 I thought I read English but it turns out to be
23 Spanish. Fine. But then slowly, Ms Taveras, if you
24 point the witness to any text, I would suggest that
25 you first give a translation under the control of

1 Mr Molina.

2 **MS TAVERAS:** Thank you, Mr President.

3 I will, and I will also remind Mr Molina that
4 Mr Sillen already testified that he is intimately
5 familiar with this document.

6 **PRESIDENT:** But he doesn't speak Spanish,
7 as he testified earlier.

8 **MS TAVERAS:** So let me continue.

9 So I want to -- let's go to conclusion B
10 and highlight that. Conclusion B states -- and
11 I will translate, hopefully I will not get anything
12 wrong, but I'm sure I will be corrected if I do --
13 it states: "The construction stage of the plant is
14 the most sensitive part of the project, so the
15 possible impact to the people of Ayo and the
16 environment must be managed with many precautions".

17 Therefore, Mr Sillen, at the time
18 Greinvest decided to create CHM in 2012 and to move
19 forward with its investment in Peru, it had already
20 been warned that the environmental impact of the
21 plant could be an issue, is that accurate?

22 **MR SILLEN:** Well, as always during
23 construction, there are -- you know, you have to
24 take environmental precautions. I mean you're
25 moving big vehicles, you are excavating tunnels,

1 using explosives. Of course you have to take care.

14:22

2 **MS TAVERAS:** At the time that you decided
3 to invest in Peru you were aware of potential
4 environmental issues to consider?

5 **MR SILLEN:** You know, we didn't have
6 specific issues that we had to consider. I mean we
7 knew that of course, as a diligent and respectful
8 developer, you always have to take care of the
9 environment.

10 **MS TAVERAS:** And it was one of the three
11 main conclusions in the pre-feasibility report that
12 many precautions had to be taken in this case with
13 regard to the construction phase of the Mamacocha
14 Project, correct?

15 **MR SILLEN:** As always, in any type of
16 civil works construction, you have to do that.

17 **MS TAVERAS:** You can pull down the
18 exhibit. Thank you.

19 In 2011 the Greinvest team selected the
20 Mamacocha Lagoon as the location where the Mamacocha
21 Project was to be built, correct?

22 **MR SILLEN:** That's correct.

23 **MS TAVERAS:** And after CHM was created in
24 late 2012, CHM hired Pöyry -- is that how you
25 pronounce it?

1 **MR SILLEN:** Pöyry.

2 **MS TAVERAS:** Pöyry, thank you, to finalise
3 the design for the Mamacocha Project, correct?

4 **MR SILLEN:** That's correct.

5 **MS TAVERAS:** When MINEM published the
6 terms of the Third Auction under the RER promotion
7 programme in late 2013, CHM submitted a bid for the
8 Mamacocha Project, correct?

9 **MR SILLEN:** Yes, that's correct.

10 **MS TAVERAS:** And to participate in the
11 auction, prospective concessionaires had to submit
12 numerous documents containing information about the
13 characteristics of the project, correct?

14 **MR SILLEN:** It wasn't too much of the
15 characteristics of the project. Essentially what
16 was being requested was a price, the amount of
17 energy, and that was essentially -- you know,
18 primarily what they were looking for, including a
19 bid bond at the time, I think it was \$50,000, to
20 participate in the tender.

21 But it wasn't -- you know, we didn't have
22 to submit a feasibility study. We didn't have to
23 submit any of the permits that we were trying to get
24 at the time.

25 **MS TAVERAS:** Would you have had to submit

1 specifics in regard to the location of the project?

2 **MR SILLEN:** Yes, I believe that was one of
3 the requirements.

4 **MS TAVERAS:** Would you have had to submit
5 general specifics -- sorry, general information or
6 specific information about the concept and design of
7 the project you were submitting?

8 **MR SILLEN:** I believe we had to submit
9 some design information on the project. We had to
10 submit specifically what we intended to connect the
11 project to the electricity grid, so there were
12 certain, you know, characteristics, but I wouldn't
13 necessarily call it that we had to submit a lot of
14 documentation.

15 **MS TAVERAS:** And this is because the
16 auctions related to the RER promotion -- in the
17 auctions related to the RER promotion programme,
18 each prospective concessionaire was responsible for
19 the design of their own project and determining the
20 feasibility of their own projects, correct?

21 **MR SILLEN:** Yes, that's correct.

22 **MS TAVERAS:** In December 2013, MINEM
23 announced that CHM was one of the 19 successful
24 bidders in the third public auction, correct?

25 **MR SILLEN:** That's correct.

1 **MS TAVERAS:** CHM and MINEM executed the
2 RER Contracts on 18 February 2014.

3 **MR SILLEN:** That's correct.

4 **MS TAVERAS:** The RER Contract is in the
5 record as exhibit C-0002. I will project Claimants'
6 English translation of the RER Contract, and we'll
7 turn to article 4.6.

8 Article 4.6 of the RER Contract --
9 according to article 4.6 of the RER Contract, the
10 concessionaire shall submit a works schedule to
11 OSINERGMIN within six months of the closing date,
12 correct?

13 **MR SILLEN:** That's correct.

14 **MS TAVERAS:** And such works schedule shall
15 include deadlines for certain specified milestones,
16 is that correct?

17 **MR SILLEN:** That is correct.

18 **MS TAVERAS:** CHM submitted its proposed
19 works schedule on 18 August 2014, correct?

20 **MR SILLEN:** That's correct.

21 **MS TAVERAS:** CHM's 18 August 2014 works
22 schedule set forth the dates in which CHM expected
23 it would be able to complete each project milestone,
24 correct?

25 **MR SILLEN:** I believe it did, yes.

1 **MS TAVERAS:** You refer to the works
2 schedule in your first witness statement at length,
3 Mr Sillen?

4 **MR SILLEN:** I refer to it, yes, correct.

5 **MS TAVERAS:** I would like to pull up your
6 first witness statement. In paragraph 61 you
7 explain that, "In addition to the commercial
8 operations date, the execution works schedule
9 included various milestones that CHM had to meet to
10 demonstrate that the project was on track to achieve
11 commercial operation by the contractual deadline,
12 including a financial close milestone".

13 Is that correct?

14 **MR SILLEN:** That is correct. You know,
15 this was an information we had to provide to
16 OSINERGMIN at the time we were in discussions
17 actually with OSINERGMIN about it, so yes.

18 **MS TAVERAS:** In paragraph 62 you go on to
19 say that "CHM never planned to finance the Mamacocha
20 Project by itself" and it also states that to
21 achieve financial close CHM had to secure equity
22 capital and loans for the project, is that correct?

23 **MR SILLEN:** That is correct, yes.

24 **MS TAVERAS:** And then in paragraph 63 you
25 say that it would not be possible to close on

1 financing if you didn't have the permits in place.
2 Then for the sake of clarity when you say "we" in
3 paragraph 63, you mean CHM, correct?

4 **MR SILLEN:** Correct.

5 **MS TAVERAS:** You can take down the
6 exhibit.

7 The works schedule CHM submitted to
8 OSINERGMIN on 18 August 2014 had a financial closing
9 milestone of 1 November 2014, correct?

10 **MR SILLEN:** Yes, but we also had
11 discussions with OSINERGMIN, and we were in the
12 process of, you know, getting it updated.

13 **MS TAVERAS:** When you submitted on
14 18 August 2014 you established the deadlines for the
15 financial closing milestone, right?

16 **MR SILLEN:** And those were the ones that
17 we had previously targeted, but we also knew that we
18 had, you know, permitting delays so we engaged with
19 OSINERGMIN over September, through November, to
20 rectify that. In August we hadn't had, you know,
21 the opportunity because we were still at that time
22 waiting for the environmental permit.

23 **MS TAVERAS:** So on August 18, 2014, the
24 date when CHM submitted its original works schedule,
25 the Mamacocha Projects did not have environmental

1 permits, correct?

2 **MR SILLEN:** That's correct.

3 **MS TAVERAS:** Then on August 18, 2014, the
4 Mamacocha Project did not have its final
5 concessions, correct?

6 **MR SILLEN:** Correct.

7 **MS TAVERAS:** And on 18 August 2014, the
8 Mamacocha Project had not secured equity capital and
9 loans to finance the project, correct?

10 **MR SILLEN:** We were in discussions, but we
11 hadn't secured it.

12 **MS TAVERAS:** And still, the financial
13 closing milestone communicated to OSINERGMIN on
14 18 August 2014 was the 1st of November 2014,
15 correct?

16 **MR SILLEN:** As I said, you know, we were
17 in discussions with OSINERGMIN. We submitted
18 something that was, you know, our original works
19 schedule. OSINERGMIN worked with us over the time.
20 They advised us to move the dates, which we did, and
21 that's when in November we decided to submit a
22 request for moving the dates and works execution
23 schedule.

24 **MS TAVERAS:** So when you submitted your
25 original works execution schedule, you were aware

1 that you would not be able to comply with that works
2 execution schedule?

3 **MR SILLEN:** I don't understand the
4 question. Can you repeat that again, please?

5 **MS TAVERAS:** I am asking you if you were
6 telling me that when you submitted the works
7 execution schedule in 18 August 2014, you already
8 knew you would not be able to comply with the dates
9 you set out in that works execution schedule?

10 **MR SILLEN:** Yes, and OSINERGMIN, they were
11 aware of that as well.

12 **MS TAVERAS:** In paragraph 76 of your first
13 witness statement you state that the Mamacocha
14 Project required additional investments of
15 approximately \$60 million?

16 **MR SILLEN:** Let me get to that paragraph.

17 [Pause]

18 So that refers back to the construction
19 phase?

20 **MS TAVERAS:** Yes.

21 **MR SILLEN:** Yes.

22 **MS TAVERAS:** So, however, you explain that
23 CHM investors had not planned to finance the
24 construction operation phases of the project by
25 themselves, correct?

1 **MR SILLEN:** I'm sorry, can you repeat
2 that?

3 **MS TAVERAS:** So my first question was did
4 the Mamacocha Project require additional investments
5 of approximately \$60 million?

6 **MR SILLEN:** Yes.

7 **MS TAVERAS:** And my second question was if
8 it is correct that you explained that CHM's
9 investors had not planned to finance the
10 construction and operation phases of the project by
11 themselves?

12 **MR SILLEN:** That is correct, yes.

13 **MS TAVERAS:** Your plan was to secure close
14 to 20 million from third-party equity investors and
15 obtain a project finance loan for more than
16 \$40 million, is that correct?

17 **MR SILLEN:** That's correct.

18 **MS TAVERAS:** As of March 2017, you were in
19 negotiations with DEG to finance the Mamacocha
20 Project, correct?

21 **MR SILLEN:** Which date did you state? I
22 didn't hear that.

23 **MS TAVERAS:** As of March 2017.

24 **MR SILLEN:** Yes. Yes.

25 **MS TAVERAS:** And as of March 2017 you were

1 in negotiations with Innergex to finance the
2 Mamacocha Project, correct?

3 **MR SILLEN:** Well progressed, yes.

4 **MS TAVERAS:** I will pull up exhibit C-0163
5 on the screen. You describe this document as the
6 contemporaneous timeline created by Latam Hydro and
7 approved by Innergex and DEG that sets out the dates
8 relevant to the negotiations, is that correct?

9 That's in paragraph --

10 **MR SILLEN:** Yes.

11 **MS TAVERAS:** Pardon. Go ahead.

12 **MR SILLEN:** Those were the timelines that
13 were shared between parties.

14 **MS TAVERAS:** If we can have the
15 attachments open, please, the attachment is the
16 actual Excel spreadsheet of the timeline.

17 **MR SILLEN:** If I may maybe help you out on
18 this one, because I had the same problem like you
19 that the attachment is not included in that, or
20 I couldn't open it-- oh, there we go.

21 **MS TAVERAS:** Thank you. We seemingly
22 worked it out.

23 Based on such timeline, you expected to
24 sign the Innergex contract by January 2017, correct?

25 **MR SILLEN:** We expected to have -- if you

1 move -- go down --

2 **MS TAVERAS:** Scroll down? Yes. Scroll
3 down. Innergex. Thank you.

4 And where it says "Signing"?

5 **MR SILLEN:** Yes, that was the intention,
6 to have at least an agreement in principle on, you
7 know, the main documents and terms, and then could
8 potentially work with that for a longer time.

9 **MS TAVERAS:** However, as of 13 March 2017,
10 the partnership agreement with Innergex had not been
11 signed, correct?

12 **MR SILLEN:** No, but soon after we agreed
13 with Innergex in principle again, you know, on the
14 budget, but that's correct, in that we had -- we had
15 a meeting in Montreal actually. We didn't get to
16 sign the contract but, as I said, we agreed in
17 principle. There were still, you know, some details
18 to be taken care of.

19 **MS TAVERAS:** So by March 13, 2017 you had
20 not signed the partnership agreement with Innergex?

21 **MR SILLEN:** No, because as I said, you
22 know, we had an agreement in principle. They had
23 agreed to -- on signing to put down, you know,
24 \$400,000 -- \$400,000 I think was the amount, to help
25 with the financing to bring all the permits up to --

1 up to financial closing.

2 **MS TAVERAS:** I can't see the answer to my
3 question has been recorded because you were
4 mentioning a \$400,000 payment, but my question was
5 as of 13 March 2017 was the partnership agreement
6 signed?

7 **MR SILLEN:** We hadn't signed at that time,
8 correct.

9 **MS TAVERAS:** You had not signed at that
10 time?

11 **MR SILLEN:** We didn't -- we hadn't signed
12 the partnership agreement. We had a Letter of
13 Intent, and we had an agreement in principle, but we
14 didn't have the final document signed.

15 **MS TAVERAS:** Thank you. I just wanted to
16 make the transcript clear.

17 **THE COURT REPORTER:** Is it on your screen
18 now?

19 **MS TAVERAS:** I only have the Spanish up,
20 so that's why I couldn't find it.

21 In your expert -- pardon. In your witness
22 statement you state that you expected the finalised
23 negotiations of the loan agreement and closed the
24 loan transaction in mid May 2017, is that correct?

25 **MR SILLEN:** That's correct.

1 **MS TAVERAS:** And in early 2017 DEG sent an
2 updated list of conditions for the loan, right?

14:41

3 **MR SILLEN:** Well, this was a -- I think
4 I know which document you're referring to and that
5 was a document where we noted down issues that were,
6 you know, being discussed between the parties to be
7 as clear as possible what to expect. Some of them
8 were hard conditions, some of them were soft
9 conditions and not really, you know, related to
10 whether or not to provide financing.

11 **MS TAVERAS:** Can we please pull up the
12 first witness statement, paragraph 116. I'm going
13 to read it. Paragraph 116 of the first Sillen
14 witness statement, "We were also confident that we
15 would soon close on the loan with DEG.
16 In January 2017, DEG sent us a spreadsheet that
17 detailed its preconditions for credit approval, for
18 closing on the loan, and for first disbursement".

19 Can you tell me where in that paragraph
20 you explain that these conditions were subject to
21 discussion, were not firm?

22 **MR SILLEN:** Well, the conditions are not
23 firm until you have them in an actual term sheet.
24 As I said, you know, this was something that we
25 shared with the bank or they shared with us. We

1 added to it. It was to memorialise the discussions
2 that we had ongoing.

3 Basically it was a document to make sure
4 that we understood each other and that we understood
5 what the bank required from us in terms of going
6 through the steps of credit approval up to signing
7 and then to disbursement, but, as I've said, you
8 know, it's a document.

9 **MS TAVERAS:** It's a document that
10 memorialised what the bank would require from you to
11 move forward in each of the steps of credit
12 approval, signing and disbursement. Did I
13 understand that correctly?

14 **MR SILLEN:** On most of them. There were
15 some that we had, you know, addressed with the bank,
16 and so it was also a document to follow up on
17 issues, and it certainly wasn't, you know, a
18 document that couldn't be changed.

19 **MS TAVERAS:** Is there anything in the
20 record that reflects that DEG had that same
21 understanding?

22 **MR SILLEN:** I don't know. I don't know
23 exactly what's in the records.

24 **MS TAVERAS:** Can we please turn to C-0162
25 on the screen?

1 This document includes conditions for
2 signing and for the disbursement, correct?

3 **MR SILLEN:** Credit, signing, disbursement.

4 **MS TAVERAS:** And financial close, as
5 defined in the RER Contract, was tied not to signing
6 but to disbursement, right?

7 **MR SILLEN:** In the contract, yes.

8 **MS TAVERAS:** Can you go back to 162,
9 please? One of the conditions of C-0162 is the
10 financing partner, correct? The very last line of
11 the conditions table.

12 **MR SILLEN:** Financing partner, yes.

13 **MS TAVERAS:** This was going to be a
14 requirement either for signing or for disbursement,
15 correct? That the financing partner had agreed to
16 the loan, correct?

17 **MR SILLEN:** It was essentially, you know,
18 something that DEG took care of. They had, you
19 know, a syndication with other European development
20 banks like the Dutch development bank, FMO, Austrian
21 development banks -- yes. There were, you know, a
22 few of them.

23 **MS TAVERAS:** And the inclusion of a
24 financing partner is sometimes also referred to as
25 syndication of the loan, correct?

1 **MR SILLEN:** That's correct.

2 **MS TAVERAS:** And the financing partner
3 would also review the term sheet, correct?

4 **MR SILLEN:** Yes. And the way it works,
5 you know, is they -- it's like a club. Normally
6 when one of the banks that bring in someone else,
7 they rely on the due diligence that has been done by
8 the lead bank, they rely on the credit committee,
9 they rely on, you know, the lead bank to have done
10 its due diligence. It might require -- not always
11 but quite commonly -- an additional credit committee
12 at the syndicated bank.

13 **MS TAVERAS:** Yes. In fact, if we pull up
14 C-0163, please, row 82 says "Syndication". Can we
15 highlight that? Can we scroll? So your timeline
16 for the loan actually considered that the financing
17 partner had a credit approval process and that that
18 would take time, correct?

19 **MR SILLEN:** That's correct. At that time,
20 you know, this was our understanding of it. We were
21 having close meetings with DEG; we knew that they
22 were progressing on it. We understood that there
23 would be a credit approval but that -- you know, the
24 syndicated banks would rely on DEG's due diligence
25 and negotiation.

1 **MS TAVERAS:** In this timeline it states
2 that you expected the financing partner's credit
3 approval process to take at least a week, correct?

4 **MR SILLEN:** I think I put it for a week,
5 yes. That looks like it.

6 **MS TAVERAS:** And this process was supposed
7 to be completed by March 10, 2017, correct? That's
8 what the timeline envisioned?

9 **MR SILLEN:** That's true. This -- you
10 know, and if you can scroll up a little bit just so
11 I can see the credit approval by DEG, because I'm
12 pretty sure you're going to go there as well, so we
13 had the approval sometime mid February for the
14 credit committee, and that was what we were aiming
15 for. In our negotiations, which Innergex was
16 involved in, we decided to get clarity on the term
17 sheets and so -- it was, you know, well developed.
18 We had no reason to believe that we couldn't get the
19 approval from the bank.

20 **MS TAVERAS:** By March 10, 2017 -- going
21 back to the timeline the process for credit approval
22 according to the timeline was supposed to be
23 completed by March 10, right? That's where we left
24 off.

25 **MR SILLEN:** That's correct.

1 **MS TAVERAS:** Under the parties' timeline,
2 it would take about two months from the credit
3 approval from the financing partner until the close
4 of the loan, right?

5 **MR SILLEN:** That was provided, you know,
6 if we had any conditions that we needed to close in
7 that time, and this is for signing.

8 **MS TAVERAS:** You testified that, based on
9 DEG's assertions at the time, you believed the
10 process of bringing in syndication partners would
11 not have impacted your ability to achieve financial
12 close by May 2017. This is in your second witness
13 statement. Is that correct?

14 **MR SILLEN:** That is correct.

15 **MS TAVERAS:** But by March 6, 2017, DEG had
16 not even selected their financing partner, correct?

17 **MR SILLEN:** Not finally selected but we
18 knew that they had a lot of interest and, as I said,
19 this is a very conventional setup where they
20 participate in each other's -- in each other's
21 engagement, so to speak.

22 **MS TAVERAS:** No financing partner had been
23 selected by March 6, 2017, correct?

24 **MR SILLEN:** Well, I think I responded to
25 that question.

1 **MS TAVERAS:** Another condition precedent
2 to closing was the extension of the PPA, correct?

3 **MR SILLEN:** It wasn't a proper -- you
4 know, it wasn't a condition, it didn't really have
5 any impact on -- what was a condition was that we
6 had the COD date extended which we, by the way, got
7 on January 3rd. The extension to the termination
8 date was simply a way for us, you know, to see if we
9 could extend the tenure of the loan. It didn't have
10 any impact on whether the bank would provide us with
11 a loan or not. The bank is not interested in the
12 project's profitability; the bank is interested in
13 us being able to make the repayments on the loan
14 during the tenure, and if we could extend --

15 **MS TAVERAS:** And if -- pardon. Go ahead.

16 **MR SILLEN:** If we could extend the tenure,
17 that would be good for us. The bank didn't really
18 care in that respect.

19 **MS TAVERAS:** Can we please pull up C-0162
20 again? It says DEG conditions. PPA extension.
21 Credit, positive indication that PPA extension will
22 be considered/resolution process is about to start.
23 Signing, indication of positive resolution process.
24 Disbursement, PPA extended.

25 Do you see any indication in this list

1 that this was not really necessary?

2 **MR SILLEN:** I know the discussions from
3 the time. As I said, the term date of the PPA
4 simply didn't have any impact on DEG's appetite to
5 finance the loan. It was important to us because
6 with the delays that we had experienced, we only had
7 a 17-year PPA. Obviously we wanted to, you know,
8 reinstate that so that we could get a longer loan
9 tenure, because a longer loan tenure means we can
10 have higher debt because it's all controlled by the
11 debt service coverage ratio. And if we get more
12 debt, less equity is required. Less equity
13 required, higher leverage on the project, but it
14 didn't have any impact on the bank's appetite to
15 close the loan, which we also, by the way, showed in
16 the financial model that we provided to DEG, the
17 so-called Innergex model.

18 **MS TAVERAS:** Mr President, can I have a
19 two-minute break to consult with my team as to if
20 we're going to stop today?

21 **PRESIDENT:** By all means. If you want to
22 continue, you have heard the Claimants are available
23 and the Tribunal is also available. So if you want
24 to do that.

25 (Recess taken 14.56 EST to 15.02 EST)

1 **PRESIDENT:** Can you see me, Ms Taveras?

2 **MS TAVERAS:** I do.

3 OK. Well, Ms Taveras, what is the result
4 of your internal consultations?

5 **MR SILLEN:** Mr President, I think we're
6 ready to pass the witness. I think I'm done with my
7 interrogation.

8 **PRESIDENT:** Thank you, Ms Taveras. But
9 then I turn to Mr Molina.

10 **MR MOLINA:** Thank you, Mr President. I'm
11 going to have to do my zoom in thing again.

12 **PRESIDENT:** I see you are on a steep
13 learning curve!

14 **MR MOLINA:** Exactly.

15 **PRESIDENT:** Mr Molina, are you ready for
16 redirect?

17 **MR MOLINA:** Yes. Yes, we are,
18 Mr President. Thank you.

19 **PRESIDENT:** How many minutes do you
20 estimate?

21 **MR MOLINA:** We have until today -- remind
22 me, we have until 9.30 CET time, Mr President?

23 **PRESIDENT:** Yes -- but OK. I was minded
24 to go longer but I thought in light of Ms Taveras'
25 shorter cross-examination than estimated then your

1 redirect also would be shorter.

2 **MR MOLINA:** That's fine. That's my
3 expectation as well.

4 **PRESIDENT:** We are in your hands, so you
5 tell us.

6 **MR MOLINA:** Yes, that's my expectation as
7 well. I believe this will be shorter than
8 anticipated.

9 **PRESIDENT:** OK. Let's go.

10 Re-examination by Claimants

11 by Mr Molina

12 **MR MOLINA:** Mr Sillen, good afternoon.

13 You were just shown the document entitled DEG
14 Conditions. Do you mind putting up C-0162 on the
15 screen again, please?

16 Mr Sillen, do you remember being asked
17 about this document?

18 **MR SILLEN:** Yes, I do.

19 **MR MOLINA:** Remind me again. You sent
20 this document -- or you received this document
21 in January 2017, is that right?

22 **MR SILLEN:** I believe it could have
23 been January, yes, correct.

24 **MR MOLINA:** And you've confirmed,
25 Mr Sillen, that by March 14, 2017, the PPA had not

1 been extended, is that fair to say?

2 **MR SILLEN:** As I tried to explain, it
3 hadn't been extended, but it was not a requirement
4 as such.

5 **MR MOLINA:** By March 2017, DEG had paid
6 for due diligence -- legal due diligence, is that
7 fair?

8 **MR SILLEN:** All those costs were assumed
9 by us. That was pass-through costs but they had
10 invested significant of their own time, you know, in
11 travelling to the site, in participating in
12 meetings, in facilitating meeting with us in Cologne
13 I don't know how many times, but yes.

14 **MR MOLINA:** Would they have done all of
15 that if it was necessary for them for the PPA to be
16 extended?

17 **MR SILLEN:** No, they wouldn't have spent
18 any time on us. I mean, it's a bank. They're
19 professionals. They wouldn't have asked us to do
20 something that, you know, wouldn't mean any
21 difference to them in reality which is shown by the
22 Innergex model, which we shared with the bank. We
23 never in that Innergex model anticipated that we
24 would get an extension of the term date of the PPA.

25 **MR MOLINA:** Mr Sillen, you were asked

1 about the first works schedule by Ms Taveras, do you
2 remember that?

3 **MR SILLEN:** I do.

4 **MR MOLINA:** And what was the result -- and
5 you mentioned that there had been -- there was an
6 extension request. Shortly after that first works
7 schedule was sent, there was a request for an
8 extension by Mamacocho. Is that right?

9 **MR SILLEN:** That's correct.

10 **MR MOLINA:** And what was the result of
11 that request?

12 **MR SILLEN:** Well, we had I think
13 calculated the delays that had occurred to the
14 project up to that date to 705 days. That was, you
15 know, what we were requesting. The Ministry of
16 Energy and Mines, OSINERGMIN, they spent, I don't
17 know, six months reviewing it, doing their own
18 analysis. They came up with a higher number -- I
19 can't remember but it was significantly higher, but
20 they also only gave us the 705, which is what we
21 asked for.

22 **MR MOLINA:** So it was your understanding
23 that there were independent levels of review to the
24 application for extension that you submitted?

25 **MR SILLEN:** Both at the Ministry of Energy

1 and Mines and at OSINERGMIN.

2 **MS TAVERAS:** Mr President, excuse me.

3 **PRESIDENT:** Yes?

4 **MS TAVERAS:** Some of the questions being
5 asked are extremely leading. I object to having
6 leading questions presented to Claimants' own
7 witness by Claimants' attorney so I would ask that
8 the Tribunal interfere, if it deems appropriate.

9 **PRESIDENT:** OK. Sustained.

10 Mr Molina, could you not be unreasonably
11 leading?

12 **MR MOLINA:** Absolutely, Mr President.

13 I think that, with this, we're done.

14 Thank you.

15 **PRESIDENT:** I look to my colleagues.

16 Professor Vinuesa?

17 **PROFESSOR VINUESA:** No, I have no
18 questions.

19 **PRESIDENT:** Professor Tawil?

20 **PROFESSOR TAWIL:** No, Albert Jan, I have
21 no questions. Thanks.

22 **PRESIDENT:** I have one small question on
23 page 12 of your report.

24 Questions by the Arbitral Tribunal

25 **MR SILLEN:** Of my first witness statement

1 or second?

2 **PRESIDENT:** Your first.

3 You have it in front of you? And maybe it
4 can also be shown on the screen. On page 12 there
5 is an image of Laguna Mamacocha?

6 **MR SILLEN:** Yes.

7 **PRESIDENT:** See that? So you see there
8 the Laguna, which is where the otters are, this is
9 upstream, isn't it?

10 **MR SILLEN:** That's correct. There was a
11 small number of otters in that area.

12 **PRESIDENT:** And shrimps?

13 **MR SILLEN:** Not in the Lagoon.

14 **PRESIDENT:** Where was the shrimp?

15 **MR SILLEN:** That's in the Colca River, in
16 the confluence with the Mamacocha. The Mamacocha
17 River, and the lagoon, is very, very clean. It
18 doesn't have -- it doesn't have nutrients enough to
19 sustain and certainly not the habitat for the
20 shrimp.

21 **PRESIDENT:** Now, the intake is Toma.
22 Maybe your first lesson in Spanish?

23 **MR SILLEN:** I can understand Toma.

24 **PRESIDENT:** OK. Good. So you have
25 intake, then you have the canal, and you have the

1 tunnels, the head race tunnel.

2 **MR SILLEN:** Correct.

3 **PRESIDENT:** And about the tunnel, was
4 lining necessary for the tunnel?

5 **MR SILLEN:** I'm sorry, can you repeat
6 that?

7 **PRESIDENT:** Was a lining necessary for the
8 tunnel?

9 **MR SILLEN:** Yes, yes, there was a lining.
10 Concrete.

11 **PRESIDENT:** And concrete. How much lining
12 and how much concrete?

13 **MR SILLEN:** Oh, I don't have those numbers
14 exactly. No.

15 **PRESIDENT:** Do you know the composition of
16 the stones?

17 **MR SILLEN:** Of the rock quality, you mean?

18 **PRESIDENT:** Yes, exactly.

19 **MR SILLEN:** Well, we did substantial
20 geotechnical investigations in the area. We were
21 drilling 100 metres into the mountain. What we
22 found in those investigations was yes, there was
23 some porous rock at the first stretch but, you know,
24 the longer in you got into the mountain the more
25 solid it was. Even more importantly, there were no

1 water infiltration which obviously is a concern when
2 you're building something, a structure.

15:12

3 **PRESIDENT:** Are you familiar with other
4 projects in Latin America about these type of
5 tunnels, hydroelectric projects?

6 **MR SILLEN:** If I'm familiar with other
7 projects in Latin America? Was that your question?

8 **PRESIDENT:** Yes, that was my question.
9 With these head race tunnels.

10 **MR SILLEN:** Some of them, yes.

11 **PRESIDENT:** They have problems with leaks.

12 **MR SILLEN:** They can have problems with
13 leaks, yes, correct.

14 **PRESIDENT:** One question I have further on
15 this slide is if you look for the intake, so they
16 call it canal but is there still free water flowing,
17 because on another picture I saw in the file it said
18 it became dry. "Seco" it said.

19 **MR SILLEN:** We always -- and this is by
20 the laws in Peru -- the regulation requires you to
21 always have what is called an ecological flow.

22 **PRESIDENT:** Exactly. Talking about this
23 can you go to paragraph 99 of your first witness
24 report? You talk here about the environmental
25 concerns. What type of concerns were expressed?

1 **MR SILLEN:** The otter was one of the
2 concerns, you know, that this was a habitat for the
3 otter. What we understand from the experts that
4 were advising us was that it was not a permanent
5 habitat, because it's also a very steep region to
6 get -- their natural habitat is in the Colca River.
7 So that's one of the concerns.

8 The other one was that we would dry the
9 lagoon, you know, that we -- essentially the levels
10 of the lagoon would disappear. There were concerns
11 about the shrimps which, as I explained, did not
12 live in the lagoon. They had concerns about the
13 shrimps -- or that the water in the turbines would
14 somehow, you know, do something to the water that
15 would affect the shrimp fishing in the Colca River.

16 There were, you know -- as far as we
17 understand there were no technical reports or
18 anything in the findings in our technical reports
19 that showed, you know, that it would have had a
20 considerable environmental impact.

21 **PRESIDENT:** Have you visited the site?

22 **MR SILLEN:** I have been to the site
23 several times, yes.

24 **PRESIDENT:** Would you describe it as a
25 natural wonder?

1 **MR SILLEN:** The lagoon is very beautiful,
2 yes.

3 **PRESIDENT:** Thank you. I have no further
4 questions. Any follow-up questions?

5 **PROFESSOR TAWIL:** Albert Jan, can I have a
6 question prior to counsel?

7 **PRESIDENT:** Sure. Go ahead.

8 **PROFESSOR TAWIL:** On a different matter,
9 Mr Sillen, there have been allegations about the
10 division of the project between the grid and the
11 plant for the environmental authorisations. Could
12 you develop a little bit what was the rationale, why
13 you did that separately, and how did that work?

14 **PRESIDENT:** Maybe I will give a little
15 detail here. So originally it was a Category III,
16 and then what we heard yesterday was the argument
17 yes, it was split between a permit for a tunnel and
18 one for the transmission line so that it could then
19 become a Category I authorisation -- project. Is
20 that the question, or is it not what you have?

21 **PROFESSOR TAWIL:** I'm not sure it was that
22 way. It was for the plant and for the grid more
23 than for the tunnel only. And I want to understand
24 why did the company separate the two projects.
25 I mean, what was the rationale and how did that work

1 with the authorities, et cetera? Why did that
2 happen.

3 Sorry, Albert Jan, if you want to
4 complete, then of course...

5 **PRESIDENT:** No, no. What I meant by
6 "tunnel" is the same as what you meant by "plant"
7 but "plant" is more accurate.

8 **MR SILLEN:** OK. So the transmission line
9 is, or was supposed to be, a little bit more than 60
10 kilometres long. It goes a long way through certain
11 parts of -- not outside of Ayo, it goes over
12 Andagua, it goes through Chilcaymarca before it
13 connects at the Chipmo substation. We had already
14 then with Pöyry realised that it was a possibility
15 to upstream of the project build a cascade of small
16 hydros, between 9, 12, maybe up to 15, you know,
17 megawatts that could use the same transmission line,
18 and that was one of the reasons why we -- or that
19 was, you know, the significant reason, and we also,
20 by the way, we decided to divide it and have a
21 separate environmental impact assessment for the
22 transmission line.

23 And it was also designed, you know, for a
24 much larger transmission volume than could be
25 sustained by the Mamacocha Project. That was the

1 main reason. And, again, what -- I hope I answered
2 your question. I know, Mr President, you had a
3 slightly different angle to it.

4 **PRESIDENT:** It's not my angle, but it was
5 the angle I heard yesterday by argument, so that was
6 also -- and that raised questions and we thought we
7 could explore it with the witnesses. But now I have
8 heard the answer.

9 Guido, anything further?

10 **PROFESSOR TAWIL:** Not really. I just
11 wanted to know the rationale of what was discussed
12 at that time. But, I mean, if that's what Mr Sillen
13 has to say, that's fine.

14 **PRESIDENT:** Raúl, anything further?

15 **PROFESSOR VINUESA:** No, no.

16 **PRESIDENT:** Thank you. I look to
17 Mr Molina. Any follow-up questions?

18 **MR MOLINA:** Thank you, Mr President.
19 I think it might be useful and I think for Professor
20 Tawil's -- in furtherance to Professor Tawil's
21 question, it might be useful to pull up C-0229?

22 **PRESIDENT:** So you have a question?

23 **MR MOLINA:** Yes. The question is if the
24 analysis at the bottom of page 53 and top of page 54
25 comports with Mr Sillen's understanding of this --

1 of why the transmission line was separate from the
2 plant.

3 **MS TAVERAS:** Excuse me. Mr President, I'm
4 sorry. Again, Mr Molina is trying to testify on
5 behalf of the witness. This should not be allowed.

6 **PRESIDENT:** This is leading. Can you do
7 that in argument, Mr Molina?

8 **MR MOLINA:** Yes. That's perfectly fine.

9 **PRESIDENT:** Have you any questions?

10 **MR MOLINA:** Other than that, no questions.

11 **PRESIDENT:** Ms Taveras?

12 **MS TAVERAS:** No follow-up, thank you.

13 **PRESIDENT:** OK. Then Mr Sillen, thank you
14 for testifying. You are excused as a witness now.

15 **MR SILLEN:** Thank you, Mr President.
16 Thanks to the Tribunal.

17 **PRESIDENT:** I look now to counsel because
18 we have made progress. We are one hour in advance
19 for tomorrow, so we can start immediately with
20 Mr Ísmodes Mezzano, and I invite counsel to consult
21 with each other whether we can have now an update of
22 the schedule.

23 **MR GRANÉ:** I was going to say,
24 Mr President, that I believe we are on schedule and
25 we can start with Francisco Ísmodes, as you

1 indicate, and in fact it seems that we are ahead of
2 schedule so --

3 **PRESIDENT:** Exactly the question. So,
4 Mr Grané, if you can talk to Mr Reisenfeld or people
5 of your team with the team of Mr Reisenfeld to
6 update the agenda as you've sent to us, because we
7 are ahead of schedule. We are now where we would
8 have started tomorrow at 5.30, so that's two and a
9 half hours. We are making progress. If I may
10 invite the parties to do that, it would be
11 wonderful.

12 **MR REISENFELD:** Yes. We'll be happy to do
13 that.

14 **PRESIDENT:** Mr Reisenfeld, anything
15 further for today on procedural matters? Household?

16 **MR REISENFELD:** No. Thank you very much.

17 **PRESIDENT:** Mr Grané, anything from your
18 side?

19 **MR GRANÉ:** Nothing from our side. Thank
20 you.

21 **PRESIDENT:** Then I wish you all a good
22 evening and see each other tomorrow at three o'clock
23 CET.

24 (The hearing was adjourned at 15.22 EST)

25