# CENTRO INTERNACIONAL DE ARREGLO DE DIFERENCIAS RELATIVAS A INVERSIONES

LATAM HYDRO LLC
Y
CH MAMACOCHA S.R.L.
Demandantes

Contra

REPÚBLICA DE PERÚ
Demandada

(Caso N° ARB/19/28)

## AUDIENCIA SOBRE LA JURISDICCIÓN Y EL FONDO

Día 9
Viernes 18 de marzo de 2022
Videollamada Zoom





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ÍNDICE







(A la hora 8:00 EST)

PRESIDENT: Good morning and good evening, everyone. First the usual question for Mr Reisenfeld, is everybody accounted for on the Claimants' side online? I can't hear you, Mr Reisenfeld.

MR REISENFELD: Yes, Mr President, everyone is here from the Claimants' side.

PRESIDENT: Thank you. Mr Grané, for the Respondent?

MR GRANÉ: Yes, sir, all of us are here and ready to go. Thank you.

PRESIDENT: Any of the two of has a question regarding procedure, admin or household?

MR REISENFELD: From the Claimants' side there is no question on procedure. I assume that after the closing we will deal with the question of the post-hearing submissions.

PRESIDENT: Yes.

Mr Grané?

MR GRANÉ: Likewise, Mr President.

PRESIDENT: All right. Mr Reisenfeld, you





have two times 60 minutes for the closing statement, you and your team.

ALEGATO DE CLAUSURA DE LA DEMANDANTE

MR REISENFELD: Thank you very much. On behalf of the Claimants and our entire Baker Hostetler team, we want to thank this distinguished Tribunal for its time and attention over the past two weeks. During this closing, Claimants will rely upon a tag team effort, as we had for the opening.

After I share several observations for the Tribunal's considerations, I will hand the baton to Mr Marco Molina. While Claimants maintain they are entitled to relief for both their treaty and contract claims and ask that the Tribunal review the treaty claims first, Mr Molina will lead off our closing to address many of the Tribunal's questions relating to the RER Contract. He will also establish that the Respondent's reliance on the post hoc Amparo decisions is totally misplaced, as they have absolutely no relevance to the Tribunal's

consideration of the instant claims.

Mr Carlos Ramos will then explain that both Claimants are entitled to full compensation on the basis of the treaty and international law. He will also respond to certain issues that were raised yesterday during the US government's oral non-disputing party submission. Ms Analia Gonzalez will then describe that none of Peru's jurisdictional objections are meritorious. Finally, Mr Gonzalo Zeballos will explain why the BRG calculations represent the proper measure of damages in this case.

Now I want to discuss my first observation, and that is Claimants have met their burden of proof on all claims. The facts are essentially undisputed. Claimants have established, largely through admissions by Peruvian officials, that they are entitled to full compensatory relief. Peru has offered no contrary evidence. Only arguments.

The evidence demonstrates that Claimants




were induced to invest in the Mamacocha Project by the RER programme. When the project was delayed by government action, Claimant invested millions of dollars in reliance on the government's official interpretation of Peruvian law and the RER Contract and its adoption of the extensions, amendments, and suspensions in addenda 1-6.

In the face of Claimants' substantial evidence of direct causation between Respondent's breaches and the resulting damages, including documentary evidence, the fact testimony of Messrs Jacobson, Sillen and Bartrina, and the expert testimony of Dr Whalen and Mr McTyre, Peru provided no contrary evidence or expert witness testimony to support their wholly rhetorical defences alleging Claimants' inability to complete financing or construction.

When the Peruvian government pivoted in December of 2018 and changed its interpretation of Peruvian law, Peru put the final nail in the




coffin of the Mamacocha Project by denying the third extension and giving Claimants three days to complete the project.

Respondent has not met its burden of proving any defence to these claims for treaty or contract breach, including the breaches relating to the RGA lawsuit, the AAA roller coaster, the unjustified criminal investigation, denial of the third extension, and commencement of the Lima Arbitration. Respondent has put all of its chips in the centre of the table on the bet that the post hoc Amparo decisions cited 49 times in its opening will redeem all of its past behaviours. Mr Molina will address Claimants' response to the Amparo decisions.

And on to my second observation. Peru's opposition to the project was never about legitimate environmental concerns. As recorded by its prospective lender, DEG, CHM applied the highest environmental standards, the equator principles, which required far more burdensome




technical analysis, social measures and monitoring than those required under Peruvian law for the Mamacocha Project.

So why did Mr Jacobson spend hundreds of thousands of dollars to satisfy these higher than necessary environmental standards? Well, he testified "because we thought it was the right thing to do". As we have proven and the Tribunal was able to witness firsthand, Mr Jacobson is a man of principle and legitimate concern for the environment, global warming, and the social wellbeing of the remote Andean communities.

The evidence shows that ARMA, the region's environmental authority, which conducted the only environmental impact studies of the project other than those commissioned by Latam Hydro, fully supported the project, both in opposing the RGA lawsuit and the Amparo constitutional court action.

Significantly, the allegations of the RGA and Mr Begazo were made without a scintilla of

evidence on the impact of the project on the habitat.

In this proceeding Peru submitted no evidence supporting any environmental concern. In fact, there simply is no proof on the record that the pristine lagoon would not remain a pristine lagoon. And, yet, it is undisputed that the citizens of Ayo were going to receive reliable electricity for the first time as well as other improvements to their standard of living.

Now my third observation. This case is not about whether Peruvian officials correctly interpreted the RER Contract and the 2013 RER regulations during the period from 2013 to 2018 but, rather, it is about the reasonable expectations of an investor who relied upon Peru's consistent interpretations of its own laws for a five-year period, until the pivot in December of 2018.

Although Mr Molina will explain this slide and Peru's administrative process for approving





RER Contract addenda, I note that there are at least 12 steps involved, which means, members of the Tribunal, that Claimants' legitimate expectations are supported by their reliance on over 70 decisions, resolutions and contract modifications entered into or issued by Peru.

As proven, Claimants increased their investment after each of addenda 1-6 and the statement of reasons on November 11, 2018 demonstrating their reliance.

Significantly, in each resolution and contract modification, Peru expressly recognised that it was compelled by Peruvian constitutional principles, RER Law, administrative law, and international law, to compensate its counterparty when government actions interfered with the investor's achievement of the milestone deadlines.

To be clear, Peru may change its interpretation of its laws or change its public policy, as it did during the pivot, but it must compensate its counterparty, as acknowledged by





all four Peruvian law experts. That is what this arbitration is all about.

Now my fourth observation. Peru's current post hoc interpretation of the RER Contract, regulations and law, is shortsighted, as it would, if accepted by this Tribunal, seriously discourage investment in Peru and around the world. Such an interpretation would undermine the essential purpose of the Trade Promotion Agreement and the ICSID Convention, which are designed to establish a transparent, predictable system of government commitments to protect investors investing in foreign countries.

Peru has not cited even one treaty case, supporting the proposition that a government can unilaterally interfere with its own contracts. Peru is asking this Tribunal to create a new precedent that would damage investment incentives worldwide by justifying unilateral government breaches and interferences with its own commitments, despite





the diligent efforts of the investor.

And now my last observation. The pivot in December 2018 was a classic instance of regulatory opportunism. Tribunal member Tawil asked several witnesses, including Mr Jacobson and former MINEM Minister Ismodes, for an explanation for MINEM's pivot in December 2018, at a time when he was minister.

Minister Ismodes admitted that the proposed Supreme Decree was rejected not due to a change in the legal interpretation of the RER regulations. No. It was because of the negative comments received by the natural gas producers responsible for production of nearly 25 to 30 per cent of the entire Peruvian energy market, in comments submitted by OSINERGMIN, raising concerns about possible end-user price increases that would have been unlikely, given the very small percentage of the overall energy market represented by the RER concessionaires.

It is unrebutted that MINEM capitulated, making the politically and economically

expedient decision, albeit administratively unreasonable and arbitrary, to let the 12 or so small hydro concessionaires with limited combined capacity of 200 to 300 megawatts die, rather than provide them the lifeline offered by the draft Supreme Decree.

As explains in his first and second witness statements, MINEM's opportunistic surrender to the political influence of the large producers, fundamentally breached the essential risk allocation and mitigation features of the RER Contract and the TPA.

In conclusion, Claimants respectfully request that this distinguished Tribunal rule in favour of Claimants on both its treaty and contract claims, and award damages in the amounts set forth in BRG's fair market value damages assessment of 45.62 million, updated to the date of the award, plus costs, attorneys' fees and such other relief as is deemed just and proper, or is set forth in Claimants'





request for arbitration.

Thank you very much. I will now turn over to Mr Molina.

MR MOLINA: Thank you. Good morning, members of the Tribunal.

After two weeks, we maintain that this is still a simple contract case. Nothing Peru's lawyers and experts said during this hearing change the fact that the RER Contract, as amended by its addenda, required Peru to hold CHM harmless from government interference. Next slide, please.

Here it is undisputed that on December 31, 2018, Peru repudiated this obligation when it refused to extend the contract or indemnify CHM from the harm it suffered from government interferences in month-long suspensions to the Mamacocha Project. Notably, Peru is not arguing that these addenda do not protect CHM from government interference, nor is Peru arguing that its conduct in the relevant period complied with those addenda. Instead, Peru's





position in this case is that this Tribunal should ignore these addenda. Why?

Because according to Peru it was always clear from the RER regulations that CHM had assumed the risk that government entities could interfere with the project with impunity.

Now, we spent two weeks looking at these regulations in this hearing, and none of them say that CHM assumed this risk. Literally none of them. Why would they? These regulations exist to implement the law designed to incentivise and protect investments in RER projects. The RER Law could not be clearer on this point, and Peru's interpretation would flip this law on its head.

Indeed, to agree with Peru's interpretation of the regulations this Tribunal would have to look at them in a complete vacuum. This Tribunal would have to ignore what the RER Law expressly says. This Tribunal would have to ignore what the constitution says. This Tribunal would have to ignore the good faith





principles in the Civil Code and administrative laws. This Tribunal would have to ignore the fact that this contract is borne out of a promotional regime. And, of course, this Tribunal would have to ignore the six addenda that are on the screen.

This Tribunal would also have to accept Peru's position that it was always clear to everyone that CHM assumed all risks related to the project -- everyone, that is, except for MINEM, the entity in charge of overseeing this legal regime, who, according to Peru, mistakenly granted extensions and suspensions to CHM for a five-year period and did not learn of its supposed mistake until its pivot in December 2018, when RER projects were no longer economically expedient.

This Tribunal would have to assume that was just a coincidence. Last, but certainly not least, this Tribunal would have to somehow nullify or modify these contract addenda sua sponte because Peru is not even seeking to

nullify or modify these addenda in this case. And then, if this Tribunal is somehow able to do that without violating the ICSID Convention and basic notions of due process, the Tribunal would have to then conclude that CHM could not have relied on Peru's interpretation of its own laws.

None of what I just said is possible and, because of that, Peru owes contract damages to CHM.

Now, for the remainder of my presentation I will focus on three different sections. First I will explain that the addenda in and of themselves, are sufficient for this Tribunal to issue an award of damages under the RER Contract. Second, I hope to answer the Tribunal's questions on other contract and Peruvian law issues, including the permitting issues, and explain why those issues are not dispositive here.

And, third, I will address the Amparo related defences and explain why they are red




herrings in this case.

Now, because it is our position that the Tribunal can find for Claimant based only on the addenda we want to address upfront the questions that this Tribunal has raised about them. The first question we want to address is question No 8, which asks on which occasion and in what context do Respondent take the position that addenda 1 and 2 of the RER Contract are null and void.

The first time that Peru took that position was on December 27, 2018. That's when it filed the Lima Arbitration to seek the nullification of addenda 1 and 2 as part of its pivot on its long-held positions under the contract. Prior to this filing, Peru had never indicated to Claimants that it believed that those addenda were null. We assure the Tribunal there is no document to the contrary, and if Peru's lawyers say otherwise today, I would hope they would put those documents on the screen.

In fact, the record contains numerous




documents, including from MINEM itself, that refer to addenda 1 and 2 as valid and enforceable contract terms. The Tribunal need look no further than addenda 3-6 and their underlying resolutions, which ratified addenda 1 and 2 when they left them completely unaltered, as confirmed by paragraph 3.2 in each of these addenda.

The Tribunal will also recall that ex Minister Ismodes, who actually signed the resolution approving addendum 6, confirmed that by July 2018, which is the date of that resolution, MINEM remained of the opinion that addenda 1 and 2 were valid. By the way, this wasn't some administrative error or oversight, as Peru has suggested in this hearing. What is on the screen is what I believe Mr President has called the "12 steps to heaven" slide. It shows the rigorous levels of review and approval that MINEM had to follow before entering into any of the addenda at issue in this case, including addenda 1 and 2. Now,




these steps may not get you to heaven but they got CHM to invest under the RER Contract for several years.

The next question we want to address is Tribunal Question No 9, which asks have addenda 1 and 2 to the RER Contract been declared null and void? The answer is no and this is why this is a simple contract case.

To be clear, the only way to annul the addenda is through clause 11 of the contract. Clause 11 sets out that any conflict or dispute that may arise between the parties as to the interpretation, execution, fulfilment or any aspect concerning the existence, validity or termination of the contract shall be settled in accordance with the procedure provided for in clause 11.3 if it is a non-technical dispute, as would be the case here.

And, in fact, Peru invoked this procedure in the Lima Arbitration when it tried to annul addenda 1 and 2. On December 2020 the Tribunal in that arbitration dismissed those claims

because Peru should have brought them at ICSID, not in Lima, and after this dismissal Peru could have brought those claims here but chose not to do so.

As seen on the screen the Tribunal gave Peru the opportunity to bring claims under the contract with its Counter-Memorial. We even organised the entire procedural calendar around this possibility. But Peru did not make any such claim under its Counter-Memorial or its Rejoinder, and as members of the Tribunal know the ICSID Rules and basic notions of due process prevent this tribunal from issuing rulings on issues that are not currently before it, which includes any issues relating to the validity of addenda 1 and 2.

It is for this reason that we said during the opening that Peru's arguments about the validity of these addenda are just theatre.

Now, there's a reason Peru tried to annul addenda 1 and 2 in the now dismissed Lima Arbitration and why Peru's lawyers and experts




spent two weeks in this hearing telling the Tribunal to ignore these addenda. It's because these addenda stand for the proposition that under the RER regime, CHM should be held harmless from government interference.

With that I want to address the next question, this is question 7A, which asks: Please advise what changes to the RER Contract were made in addenda 1 and 2 and how these changes correspond to clauses 1.4.23, 1.4.24, and 1.4.40 of the RER Contract.

Under addendum 1 the parties reaffirmed that CHM could not be held liable so long as it acted with ordinary due diligence, citing to article 1314 of the Civil Code for this proposition, and under addendum 2 the parties confirmed that the COS deadline in clause 8.4 must be extended when delays are attributable to CHM's counterparty. That's why the parties agreed to extend the COS deadline to March 14, 2020 beyond the original deadline of December 31, 2018.




To answer the Tribunal's question both of these addenda modified the works schedule, including the actual COS date, and because the actual COS date and the referential COS date are linked together, the addenda also modified the reference date of COS contained in clause 1.4.24.

There were no changes made to the contents of 1.4.23 or 1.4.40 other than the clarification that if CHM did not achieve COS because of Peru's interference, CHM cannot be held responsible.

Now I want to address the Tribunal's question number 10, which asks: To which rights and obligations under the RER Contract does the suspension referred to in addenda 3-6 apply? Our position is these addenda suspended CHM's obligations under the works schedule because that is what the suspension agreement says as seen on the screen. This agreement reflects the parties' understanding that CHM did not have to perform any of the obligations




under the works schedule, and the obvious consequence of this agreement is that the parties would, at a later time, return the suspended time to the works schedule.

Mr Jacobson used a soccer analogy during his testimony that I think nicely summarises how to interpret the suspension and the obligations it triggered.

A fundamental rule of soccer is that every game is played over 90 minutes, but if something occurs during those 90 minutes that interrupts the game play, like an injury, the referee will stop the clock and suspend the game play until that interference subsides. After the interference ends the referee will return the time to the clock to ensure that the teams play for 90 minutes, as the rules require.

The exact same thing happened under addenda 3-6. Back in January 2017 the parties agreed to a revised works schedule that CHM had to complete by March 14, 2020, giving CHM

approximately 38 months to complete those tasks, but when regional authorities interfere with the project, the parties agreed to stop the clock and CHM's obligations for a period of 17 months. Once the interference subsided, Peru had to return that time back to the works schedule.

This position is supported by our administrative law expert, Professor Maria Teresa Quiñones, who affirmed in her presentation, shown here, that it is Peruvian administrative practice to extend the works schedule after a suspension is given. She explained this extension would not be an augmentation of the obligation period; rather, it would simply restore the private party to where he or she was right before the suspension occurred.

Professor Quiñones' interpretation is also consistent with how Peru interpreted the suspensions in the relevant period. As seen on the screen, MINEM, Peru's contract





representative, and the entity that negotiated and executed the suspension agreement and addenda 3-6, adopted this position in July 2017, days before the suspension was entered.

And in December 2019, in a pleading submitted in the Lima Arbitration, MINEM ratified its long-standing interpretation of the suspension, confirming once again that the suspended time had to be restored under the works schedule.

In sum, we want to remind the Tribunal that while Peru's lawyers and experts regularly paid lip service as to what the parties intended about the suspension agreement, their interpretations about the agreement have been consistently refuted by the actual parties who negotiated and signed that agreement.

Members of the Tribunal, our position is that we complied with the contract and all the applicable laws, whose interpretation we largely shared with MINEM during the relevant period, and we are confident that our





interpretations under these legal instruments are the correct ones.

But here's the thing. The Tribunal does not have to decide any of the disputed issues under the contract or Peruvian law to award CHM contract damages. That's because CHM had every right to rely on how Peru interpreted its own laws during the relevant period. This fundamental principle is as true under Peruvian law as it is under international law, as confirmed by the doctrines of actos proprios and confianza legítima which evolve from the constitutional principle that the State should act in good faith.

Now, in the opening, lead counsel for Peru told the Tribunal that this case comes down to whether CHM had "good cause to know" that addenda 1 and 2 were wrong. That is a made-up standard, and we are not aware of any case from Peru or any other civilised nation that held that a private party should not have relied on how a country interprets its own laws.





The reality is that it was completely reasonable for CHM to rely on the addenda and their underlying resolutions. As seen on the screen, this is exactly what ex Minister Ismodes said to us last week. Next slide, please.

To finish this section I just want to return to the claims that CHM is pursuing against Peru under the contract. Once this Tribunal applies the legal principle from the addenda that CHM must be held harmless from government interference, it can find that Peru breached each and every one of these claims.

Next I will address the balance of the questions that the Tribunal has raised about the contract and Peruvian law. In the interests of time, I will keep my answers to your questions brief. My answers will also be brief because, as the Tribunal may have gathered by now, we do not think the Tribunal needs to resolve any of these issues to find in favour of CHM, but we are happy to expand our

answers to these questions should the Tribunal see fit.

The first question I want to address in this section is Question No 2, which asks: "In agreeing to clause 8.4 of the RER Contract, did CHM assume responsibility for potential delays to commercial operation start-up for which CHM is not responsible?"

The answer is no, and we know this for five reasons. First, we know this because the parties made it clear on the face of addendum 2 that CHM never assumed this risk. This is why I reiterate that most of these issues are not really before the Tribunal at this time.

Second, nowhere in this clause is it expressly written that CHM was assuming this responsibility. As Dr Monteza admitted to us this week, any pact where a party is assuming responsibility must be manifest and without ambiguities.

Dr Monteza went on to say that he believes such a pact could be interpreted from the face





of clause 8.4. We submit, however, that nothing in this clause manifestly and unambiguously provides that CHM assumed responsibility for Peru's measures, and the Lima awards that Peru touts in this case all agree with Claimants' position.

Another way to confirm that clause 8.4 is not a responsibility clause is because it is not in the chapter that talks about party responsibility. That chapter would be chapter 7, not chapter 8. And the first clause of chapter 7 confirms that CHM did not assume responsibility for Peru's actions. Instead, it provides that "neither party shall be liable for the non-performance of an obligation or for the partial, belated or defective performance thereof for as long as the party bound is affected by an event of force majeure".

Now, we do not cite to this chapter because we are bringing claims arriving from government interference, not force majeure, but the principle is the same. A party cannot be held





responsible when its failure to perform was caused by another party. That is exactly what Peru is trying to do here through its cynical interpretation of clause 8.4.

Fourth, any pact where one party tries to punish another for its own breaches is contrary to the Peruvian constitution and other applicable laws such as article 1328 of the Civil Code, which prevents contract parties from punishing their counterparties for their own bad acts. In fact, Peru's civil law expert, Dr Lava, admitted this week that this principle applies here. Now, we disagree with the scope of his interpretation but note that even he recognises that Peru cannot intentionally or recklessly interfere with impunity.

Fifth, such a pact would also violate the RER Law's express mandate to create a legal framework that promoted and encouraged investments in these projects. As the Tribunal may recall, this is one of the Echecopar





report's principal conclusions during the relevant period. What the Tribunal sees on the screen is a graphical representation of why Peru's interpretation is completely irreconcilable with the RER Law's express purpose of encouraging investments in RER projects.

As the Tribunal can see, Peru's interpretation is that, from the moment that the contract was executed in February 2014, over a 15-month period wherein the project has to make tens of millions of dollars in investments to develop and construct the project, according to Peru that is a time when the project assumes all risks and the government can interfere with impunity.

Turning to the next question, this is Question No 6, the Tribunal asked: Was the period of two years, also known as the "cushion", between the reference COS and the actual COS intended to accommodate delays attributable to CHM only or also delays

attributable to third parties, MINEM, Respondent or its government authorities?

The cushion was meant to accommodate delays attributable to concessionaires like CHM; it was not meant to accommodate delays attributable to Peru, as confirmed by addenda 1 and 2 to this contract. This interpretation is also confirmed by the legislative history of the regulatory changes in 2013. As lead counsel for Peru admitted in the opening, the delays that led to this change in the regulations were caused by concessionaires whose lack of due diligence forced these projects to be delayed for years at a time, and that's not the case that we have here.

Now, we also know from the official document that Peru published to explain the motives behind this regulatory change that Peru never intended to allocate to investors the risk of government interference. This is clear from the last phrase of the fourth paragraph in this document which makes clear that the purpose of





the modification was, at least in part, to serve the interests of private investors.

Dr Monteza admitted in this hearing that this document you just saw confirms that the regulatory changes were intended to ensure that investors in these projects realised their expected returns on their investments. But at the risk of stating what should already be obvious, allocating all risks to these investors, as Peru claims that these regulations did, would actually do the opposite.

Next I will address Tribunal Question No 4, which asks what is the legal significance, if any, of the declaration signed by CHM dated 30 October 2013?

The legal significance is that concessionaires assume the risk that force majeure events would reduce their term of validity. And this is exactly the kind of express assumption of risk that Peruvian law requires. The delegation of this risk is





clear, unambiguous, and the document is signed and even sworn. Had CHM assumed the risk of government interference, as Peru claims, there should have been a similar document that expressly said so, but there wasn't.

Next I will address Tribunal Question No 1, which asks what is the relationship between clauses 8.4 and 10.2(b) of the RER Contract? The short answer is that clause 10.2(b) is yet another way to confirm that Claimants' interpretation is correct. This clause confirms that Peru had discretion to activate the termination provision in clause 8.4, and that only makes sense if there are certain instances where said termination would not be allowed, such as when the failure to reach COS on time is due to government interference. Peru has no answer for this point, as evidenced by Dr Lava's admission that for Peru's interpretation to be correct, you would have to come to the conclusion that this clause is erroneous and incongruous with the regime.





Next I will address Tribunal Question No 5, which asks can the actual COS, reference COS and termination date be amended by contract or only by regulatory action?

The answer is yes, all three dates can be modified by the contract. Note, for example, as you see on the screen, that the regulations do not identify any specific date that has to correspond to each of these terms. The contract parties are free to modify them, just as they are free to modify other terms. There are, of course, certain parameters that must be followed. For example, the actual COS date cannot exceed the reference COS date by two years, and the reference date must be 20 years from the termination date. As long as they stayed within that framework, the parties could modify these terms in the contract.

Again, that's not just our interpretation. As with every other issue in this case, we have documents from Peru's agents during the relevant period that admit the same thing. For

example, here we have the Echecopar reports dated April 2018 where MINEM's outside counsel confirms that when there is government interference, you have to move these dates by addendum to the contract in order to ensure the concessionaires' right to a 20-year term is not unfairly expropriated.

Next I will turn to Tribunal Question No 7 which asks was the rejection of the Third Extension Request adopted by MINEM acting in its capacity as a contracting party to the RER Contract? And, if so, what is the relevance, if any, for Claimants' claims?

MINEM rejected the Third Extension Request in its capacity as the representative of the State, not as the contracting party. To answer the Tribunal's second question, if assuming, arguendo, that the Tribunal found that MINEM was CHM's counterparty and not the State, the claims arising from said rejection would still be actionable under the contract because MINEM was the party that signed the suspension





addenda, and hence it had a duty to restore the time to the contract, as CHM had requested in the Third Extension Request.

Professor Quiñones confirmed this a week ago when I asked her the same question. The reason is that when MINEM's -- I apologise.

In conclusion, even if MINEM is CHM's counterparty and not the State, as we argued, the denial of Third Extension Request would still be a material breach of the RER Contract.

Next I will address Question No 3 which asks three different questions related to clause 4.3. First it asks did CHM make a request for assistance under this provision? Then it asks is it CHM's position that Peru is in breach of this provision? And, finally, what is the support for that allegation, if made?

First, in response to the issue of whether CHM was obligated by this provision to formally request MINEM's assistance, our civil law expert Professor Eduardo Benavides explained last week that this requirement was linked to





the first obligation under the paragraph and not with the second obligation, which is the relevant one in this case, as shown by the use of a comma and the word "and" in that sentence to separate between the two obligations. Nevertheless, this distinction is basically without a difference because the record shows that CHM did formally request MINEM's assistance on no fewer than three separate occasions in the relevant period.

MINEM's failure to assist CHM in response to those requests resulted in a breach of this obligation.

Next I will address Question No 16, which asks does the fact that Respondent is a unitarian state and not a federation have any impact on how the Tribunal should examine the matter of permitting?

Absolutely. A unitary state means that similar to how states are treated under international law, the state must be imputed with acts and omissions of all government





entities, including national, regional, and local entities. If Peru were a federation, the same result would not occur, as explained by Professor Tawil during the hearing. And as the Tribunal can see on the screen, this is the Selva Report, where in the relevant period MINEM admitted that, because the state is unitarian in nature, it must be imputed with all acts of all government entities.

Next I address Tribunal Question No 13, which asks what is the relevance, if any, of the alleged delays in permitting prior to the date of the RER Contract?

Those delays are relevant to the parties' dispute about the term date extensions. As the Tribunal will recall, Peru partially cured these delays when it extended the works schedule via addendum 1 but Peru never extended the term date in response to those delays, nor compensated CHM for the value of the time that these delays took from CHM's 20-year term.

Our position here, just as it was in the

Third Extension Request, is that Peru must compensate CHM for those delays. I want to react to the use of the word "alleged" in this question. We believe that adjective is incorrect here. Peru had already accepted that those delays occurred and that they prejudiced CHM's performance under the contract. This is clear from addendum 1 which again Peru is not challenging in this arbitration and remains good law.

Next I want to address Question No 11, which asks what is Claimants' response to Respondent's argument that Claimants could not have completed construction by actual COS or COS under addendum 2. Members of the Tribunal, we covered these issues extensively in paragraphs 282 to 290 of our Reply Memorial, but in the interests of time I will only give the highlights here but I am happy to take any questions the Tribunal may have about this issue.

The first answer is that Peru's arguments




are premised on the construction start time of August 1, 2017 but that date is wrong. The correct start time is July 1, 2017 as confirmed by the schedule that the project's contractor, GCZ, committed to Claimants and Innergex before the measures began. A handwritten copy of the schedule is contained in C-111, as you can see on the screen, and the official version is contained in annex C-110.

Peru also alleges, incorrectly, that construction would have lasted 33 months using the 32.5 month schedule from Hatch, who was DEG's technical consultant. But GCZ, which had the most experience of any contractor in building projects in the mountains of Peru, estimated construction would last about 26 months, which would have meant that the project would have achieved COS some time in August 2019, several months ahead of the March 2020 deadline under addendum 2.

Innergex, which had a reason to be conservative, used a 30.5 month construction




period, and Peru's own expert, Versant, used a 30.3-month construction period. In other words, the Hatch report's 32.5-month projection was an outlier.

Third, if DEG was truly concerned about the project's ability to finish construction on time, it would have walked away before the measures even occurred. Indeed, the first Hatch report that contains this 32.5 month schedule, was circulated on March 13, 2017, a day before the RGA lawsuit was filed and weeks before Claimants and DEG understood the severity of the RGA lawsuit's impact. And when that report came out, DEG did not walk away from the project. To the contrary, it continued investing thousands of dollars and countless hours to finalise the term sheet that had been circulated days earlier.

Last, if construction went longer than expected, Claimants could have always invested more equity capital to speed up the process, as confirmed by the project's manager, Mr Andreas




Bartrina, in paragraph 33 of his second witness statement.

Next, this is Tribunal Question No 15. It's a long question so indulge me as I try to read it into the record. The question asks: Does a risk assessment for a project, which will require environmental permits to proceed, take account of the risk that such permits are delayed, not granted, or subsequently annulled by competent authorities due to objections to the environmental impact of the project? And, if so, did Claimants take account of such risk in their assessment of the proposed contract terms and planning for the Mamacocha Project, and how?

The answer is threefold. First, as we have covered at length in this hearing, CHM never assumed the risk of government interference. CHM only assumed the risk of its diligent compliance with the applicable laws, including the environmental permitting requirements. So to the extent that delays or denials are due to

arbitrary conduct by the government, CHM always understood that this conduct would never count against CHM. This understanding was confirmed by addenda 1 and 2, which granted extensions based on delays attributable to permitting authorities.

Second, if an environmental permit is granted and then years later annulled, because the permit was improperly issued, that circumstance should never count against CHM. This is because, as Dr Monteza confirmed this week, under Peruvian administrative law there is a presumption of validity. The private party, in this case CHM, had every right to rely on an administrative act, and if it turns out years later that the administrative act was deficient, that deficiency cannot be used against CHM.

Third, and notwithstanding the foregoing, Claimants still did everything they could to mitigate against the risk of permitting delays by the government. They started the permitting




process in 2012, more than one year before they even signed the contract. They hired a top Peruvian law firm that advises energy projects. They hired dozens of employees and consultants, whose job it was to liaise with the relevant permitting authorities.

Next I will address Tribunal Question No 14 which states: Please comment on the legal and factual basis required by Peruvian law to grant the environmental permits for projects such as the Mamacocha Project.

For this question we encourage the Tribunal to refer to the witness statement of Jorge Chávez, the independent environmental expert who closely studied the project in the relevant period. But here are some of his relevant considerations. Mr Chávez explains that there are three different environmental categories that apply to Peruvian projects. Each category imposes different requirements that must be met for environmental permits to be granted. The categories are made based on technical,




environmental impact analyses conducted by the relevant environmental authority. For the first years of the RER promotion, the competent authority was MINEM, but in 2013 this role was flowed down to regional authorities. Here, because the project was based in Arequipa, the competent authority was ARMA.

Now, for projects expected to have a minimal environmental impact, the proper category is Category I. Projects in this category can obtain their environmental permits based only on an environmental impact statement, or DIA, as it is called in Spanish. Based on public information every hydro project in the RER promotion received a Category I classification.

For projects expected to have a moderate negative environmental impact that can be mitigated with simple measures, the proper category is Category II. These projects have to submit a semi-detailed environmental impact study to obtain their permits.

And, last, for projects expected to have a




significant environmental impact, such as the resettlement of people, the deforestation of groves and the displacement of large bodies of water, the proper category is Category III. These projects must submit detailed environmental impact studies and submit their project to public scrutiny.

Next I will address Question 14A, which asks what were the environmental issues raised with respect to the Mamacocha Project from 2016 onwards, as compared to the years after that?

The record is clear that the environmental allegations against the project mostly began in 2016. Prior to that year the environmental concerns were minimal, mostly due to the fact that the project, by design, included almost all the structures inside of a mountain, where they would have had no visual or environmental footprint. But in 2016, the project faced increasing public attacks from the RGA, and specifically RGA politicians known for having an anti-development agenda.

This opposition culminated in a recommendation to the RGA Attorney General from those politicians to bring the RGA lawsuit in order to annul the environmental permits, which the RGA Attorney General did in March of 2017.

This lawsuit made several allegations that were debunked or discredited in the relevant period. For example, in this document one of the RGA officials behind the lawsuit said that certain of the allegations were really wrong and should not be talked about. International otter specialists also debunked the main allegation made by the RGA and the Amparo Claimant about the impact that the project would have on a local otter species. In this report these specialists confirmed that the impact to that species would indeed be minimal.

The top environmental bureaucrat in the region, Mr Benigno Sanz, said in a press interview that he had seen no technical report that supported any of the environmental allegations that the RGA had made about the





project. And the lawyer who brought the RGA lawsuit admitted that the allegations in the lawsuit were unfounded, that she had recommended against its filing, and that those who forced her to file it should be investigated.

This brings us to the final part of my presentation which deals with Peru's defences related to recent judicial decisions in the Amparo which Peru has raised time and time again in this hearing.

As Mr Reisenfeld said this morning, it is rather telling that during this two-week arbitration Peru decided to spend most of its time focusing on this proceeding rather than defending its own measures.

For now I will address Tribunal Question 18 which asks what is the significance, if any, of the Amparo action, and in particular the decision of the Arequipa Superior Court of 30 January 2020 for Claimants' claims on liability and damages?





The answer is this action has no legal or factual significance to this case. Let's start with Peru's baseless assertions that the judicial decisions in that proceeding are res judicata, final, and binding on this Tribunal.

First, Claimants were not defendants in the Amparo action. Latam Hydro was not involved in any way, and CHM was an interested third party to that proceeding. The action was actually brought by a private individual against MINEM and ARMA, which again underscores how ironic it is that Peru has made these decisions the sine qua non of its defences in this case.

Second, these decisions are subject to revocation. As Peru has admitted, CHM has filed a counter Amparo proceeding that, if successful, will result in the revocation of the Amparo decisions. And, third, the Amparo decisions are definitely not binding on this Tribunal. My colleague, Mr Carlos Ramos, will cover this issue in the international law section.





Now let's talk about the causation defences that Peru has raised about the Amparo. First, Peru suggests that the Amparo proceeding contributed to the project's demise because it existed in the relevant period, but that argument is baseless.

During the relevant period the Amparo proceeding had been rejected twice, was mired in appeals, and its probability of success was deemed to be remote in the December 2018 report from Estudio Grau, which was DEG's legal expert. The first time that the claims in that action were accepted was in January 2020, more than a year after the project ended, and that decision did not take any effect until February 2021, after it was affirmed on appeal.

Now, Peru tries to get around this fact by arguing that because the Amparo decisions nullified the project's environmental permits ab initio, this somehow means that the permits were never valid. But that argument doesn't work either because, as Dr Monteza admitted to

us this week, under Peruvian administrative law, administrative acts are presumed to be valid until they are declared invalid or null by a court or tribunal.

That means that, during the relevant period, these permits were valid as a matter of law, and they were not invalidated until February 2021, more than two years after the project ended.

Peru next argues that Claimants should not get any damages because their project would have failed in the but-for world where Peru never interfered with the project, but this also misses the mark because one simply cannot assume that the Amparo decisions would have been issued in the but-for world. We know this because the Amparo decisions confirm that they arrived at their decisions, at least in part, because the project was dead. Had it been alive, these decisions confirmed that the balancing of the equities would have been different.





And this brings me to what I think is the key point that Peru misses. If the project is alive and a court finds that these permits were issued incorrectly, it is highly unlikely that they would be declared null. Why? Because CHM had every right to rely on the validity of these permits. Indeed, they were issued by the competent authority, ARMA, and they were separately vetted by MINEM when MINEM granted the concessions. If nearly a decade later some court concludes that these authorities misapplied the environmental laws, that finding cannot be used to punish CHM. This is one of the key findings in the Morón report, as seen on the screen, and goes back to what Dr Monteza said about the presumption of validity. CHM had every right to assume Peru knows how to interpret its own laws. If Peru gets it wrong, that is Peru's responsibility, not CHM's.

Next I want to discuss why the Amparo decision has no probative value here and in no way justifies the regional government's





measures related to the environmental permits.

First and foremost, the Amparo decision is not based on technical studies that analyse the environmental impact of the project. Let me repeat that. The Amparo decision never concludes that the project would have impacted the environment in a significant way.

The study cited by these decisions are not environmental impact studies. All they conclude is that there are protected species of animals that live near the project site. And this Tribunal need not wonder what an actual environmental impact analysis would conclude because the Tribunal has access to numerous studies that actually analyse the environmental impact of the project and unanimously concluded it would have been minimal. As seen here, these studies were carried out by numerous independent environmental experts, as well as by the competent governmental authorities.

And that's precisely why MINEM and ARMA argued that these Amparo decisions were





completely illegal, as seen here. It's because these decisions effectively overrule the impact analyses by the competent environmental authority without relying on any other impact analysis on which to base that conclusion.

The other reason this decision has no probative value is that it entirely conflates what happened with respect to the reclassification of the project's permits. It assumes that the project's initial Category III classification was sound and that its subsequent reclassification under Category I is, per se, suspicious. But as Mr Jacobson and Mr Sillen testified in this hearing, and as supported by the documents the Tribunal can see on the screen, the reality is that ARMA's initial reclassification was made -- sorry, that ARMA's initial classification of Category III was made without a technical review or an on-site visit, and stemmed from ARMA's confusion about how to classify RER projects.

Once CHM learned about ARMA's confusion it

instructed its lawyer, [redacted] to ask ARMA to reconsider this classification, and when ARMA agreed to reconsider, it did not agree to reclassify the project. That only happened after many months of technical review and on-site inspections. But that's not how the story is retold by the Amparo decisions. Instead, the court assumes that ARMA had it right initially and reclassified the project based only on the legal application from [redacted][A2], which is wrong.

By the way, the criminal case against [redacted][A3][A4] is entirely based on this conflation, further underscoring the arbitrariness and bad faith of that measure.

Finally, as to the procedural irregularities cited by the Amparo decisions, such as the fact that the project received two permits rather than just one, these allegations have already been debunked in the Morón report. And, as I have stated throughout this presentation, even if those irregularities were true, they can





only count against Peru. They cannot count against CHM.

For my final slide I will address the three remaining questions from the Tribunal. These are questions 17(i), 17(ii) and 18A.

The first one asks is it Claimants' position that Respondent is in breach of the RER Contract, or the treaty, or both, in respect of the Amparo action? The answer is if the project were alive the Amparo decision would have breached both the treaty and the RER Contract, but because the project was dead when this decision occurred CHM had no actionable claim under either the treaty or the contract.

The second question asks does the issue of whether the Amparo action is challenged or not in this arbitration have any relevance to its outcome? The answer is no, it is completely irrelevant. The project died in December 2018 and had no value when the Amparo decision went into effect in February 2021. And last, this is one of the new questions that we received





yesterday. We have reworded it here and we hope that we accurately represented the Tribunal's inquiry, but we appreciate the Tribunal will let us know if we did not.

Based on our rewording this question reads why did MINEM defend the project's permits in the Amparo action but oppose the project in the pivot? We believe that the answer is that MINEM did not want to set a precedent where constitutional courts can nullify environmental permits and final concessions without even considering one environmental impact statement.

So with that, members of the Tribunal, thank you for your time, and I will pass it to my colleague, Mr Carlos Ramos-Mrosovsky.

MR RAMOS-MROSOVSKY: Thank you, Mr Molina. Mr President, we understood we were going to take a break now? I am happy to proceed, but --

PRESIDENT: Exactly. We have a 15-minute break and then you may proceed. Until 15.15.

(Pausa para el café.)





PRESIDENT: I see everybody is there. Mr Mrosovsky, please proceed with the closing statements for the Claimants.

MR RAMOS-MROSOVSKY: Thank you, Mr President and members of the Tribunal. Good morning.

My task is to address what we think are some key points under the treaty and public international law in a manner that I hope will be responsive to the Tribunal's questions and Peru's submissions.

Before I do so, however, I've been asked to touch on I believe it was Tribunal Question 12 about the sequencing of decision of the treaty and contract claims.

Very briefly, I think Claimants would simply say that in our view these are independent branches or approaches to liability, albeit they have interrelated facts, but either can stand on its own, and really our preference would be very much for the Tribunal to decide both in the interests of justice and a complete resolution of the dispute.

Having said that, I would propose to address four general topics this morning. First, why Claimants should prevail under the treaty's fair and equitable treatment clause. Second, why Claimants should prevail under the treaty's clause protecting them against unlawful expropriation. Third, the relationship between public international law and Peruvian law, both with respect to the Amparo and more generally, and, fourth and finally, I'll respond to some aspects of the non-disputing party submission of the United States earlier this week.

Given time constraints, members of the Tribunal, I cannot address every point and would respectfully hope to reserve any international law points left unaddressed for any post-hearing submissions that the Tribunal may order.

Turning, first, to the question of fair and equitable treatment -- next slide, please -- as you know, members of the Tribunal, there are contending views, at least in theory, between





the parties as to what the treaty's fair and equitable treatment obligation means. We say, backed by Professor Schreuer's report -- next slide, please -- that the prevailing modern interpretation of fair and equitable treatment under customary international law protects, among other things and crucially, an investor's legitimate expectations.

Peru -- next slide, please -- accepts at least the Waste Management II standard under which government representations relied upon by an investor are relevant to the FET analysis of whether a measure is arbitrary, grossly unfair, unjust or idiosyncratic.

Now rather than belabour that distinction that an eminent arbitral tribunal -- next slide, please -- called "more apparent than real", I would like to revisit briefly the bases for the investor's expectations which are relevant to the fair and equitable treatment standard under either account of what that standard is.





Next slide, please. In the first place, Claimants had expectations founded on the overall Peruvian legal framework, including the RER Law. These are expectations of due process, good faith and the rule of law, and also specifically the governments acting within the RER framework to advance renewable energy development. And Peru's law is, after all, a representation by the State about future conduct on which on investor might rely.

If we go to the next slide we see that Mr Jacobson relied upon it, and -- next slide -- so too did Mr Sillen, as they testified to last week.

Now, Arequipa, the province's essentially undefended measures beginning with the RGA lawsuit, all breached those expectations by placing Claimants' investment -- next slide -- under a cloud that made it impossible to finance.

Claimants also had expectations founded on the RER Contract. Contracts are, after all, a





classic instrument for delimiting expectations and obligations among specific parties, and under the RER Contract, as Mr Molina has explained, the Claimants had accepted numerous risks, including that of force majeure, but not that of interference attributable to their own counterparty, to the State. Instead, as Peru's counsel last week -- next slide, please -- actually acknowledged, the deadlines under the RER Contract were strict because of Peru's historical frustration with delays on past projects that were attributable to the contractor or perhaps to events of force majeure. Not to the State.

And so, with respect to opposing counsel, the strict timetables were put in place not to avoid the types of extensions that Claimants sought based on delays attributable to the State, but to prevent contractors from coming to the government with excuses. Very different inferences would be drawn. And, if anything, the weight of the risks that Claimants

willingly accepted would have given them all the more legitimate an expectation not to be assuming others, including especially, and as Peru's own legal advisers and officials believed prior to 2017, that of being pushed over the cliff of these strict contractual deadlines by the State itself.

Thirdly and relatedly -- next slide, please -- Claimants had expectations founded on Peru's consistent administrative practice, based on what was repeatedly communicated to the Claimants -- next slide, please -- as the State's interpretation of its duty under its own law as delays attributable to the State -- next slide, please -- arose.

Now, that's important, members of the Tribunal, that these expectations were not anchored merely on practice, not on Peru just granting extensions or waiving delays as a matter of grace, or in the interests of the project being built, but on Peru's repeatedly communicating to Claimants that the adjustments




it was making were anchored in its law.

Each of these decisions, moreover, was the result, and we have seen this chart before, of a complex administrative process within the State apparatus of Peru, a fact that can only have reinforced legitimacy of any expectations on which the Claimants continued to invest, and, as we see on the next slide, invest they did.

As Minister Ismodes testified, it was appropriate for investors to rely on the contracts they entered into with the State and on the content of statements from MINEM. This was even more reasonable -- next slide, please -- we submit, when, as Dr Monteza testified, admitted to us in the hearing, the Peruvian government's administrative acts are to be presumed valid under Peruvian law. Those, then, were the expectations breached by Peru's measures, and in particular by its refusal to grant a Third Extension Request after having repeatedly extended the completion period in




light of other state-caused delays.

Under the modern view of the FET standard, which we see on the next slide, where legitimate expectations are most explicitly protected, this should be an open and shut case, as I told you last week. Arequipa's own officials essentially admitted -- and they are notably not here testifying otherwise -- that the RGA lawsuit, as we see -- and this will be another familiar slide -- was arbitrary and meritless. Next slide, please.

The Claimants had also a legitimate expectation that they would not be the target of meritless lawsuits brought to harass or damage an investment or of unfounded criminal investigations, and the record confirms, as we see, that Peru recognised -- next slide -- that the RGA's lawsuit raised the prospect of liability under this very treaty.

So if we turn now to the ostensibly narrower Waste Management II standard that Peru accepts -- next slide, please -- this kind of conduct




embodied in the measures supports liability under either standard. I say "ostensibly" narrower because arbitrary, grossly unfair, unjust or idiosyncratic are hardly cabined terms, and even the Waste Management II Tribunal made very clear that the State's representations reasonably relied upon by an investor would be relevant to finding a breach of FET. Failure to satisfy such expectations so firmly anchored in law and policy, not to mention common sense or good faith in the context of a scheme aimed at developing these renewable projects constituted, as we've said -- next slide -- an unexpected and shocking repudiation of Peru's prior stated policy.

And just given some of the exchanges last week, we would note that in our view the standard for arbitrariness, whether in Waste Management or Cargill or ELSI, is not, practically speaking, different. As with words like "unjust" and "unfair", those being keywords in the formulation of the FET standard

in Waste Management II, all of these terms necessarily leave a great deal to the Tribunal's judgment in light of the facts.

But crucially, under either standard the Claimants' expectations, due process and the rule of law, and above all that Peru's central authorities would act as their past practice anchored in their communicated understanding of their legal framework -- all of those expectations were relevant. Greatly so.

Here, just turning to the next slide, we would commend to the Tribunal's attention the case of RDC v Guatemala cited under DR-CAFTA, under a similar treaty, wherein the Tribunal found a breach of the minimum standard, as understood under Waste Management II, in a context where the State had brought legal proceedings to undo a legal framework and related contracts years after their creation. That's interests, but despite the State's claims of formal correctness allegedly in the defence of its own internal rule of law, the




Tribunal found that the government Respondent State in that case should be precluded from raising violations of its own law when for a substantial period of time it knowingly overlooked them, obtained benefits from them, and had the power to correct them.

Now, here Peru, as far as we know, didn't overlook its prior law; it interpreted and it interpreted repeatedly, but I think the point to take from this case may be that the change in legal position was the kind of breach of representations upon which the investor had reasonably relied, that is raised, that is at issue under the Waste Management II standard. And Peru's breaches of expectations were likewise arbitrary. If we turn to the next slide we see that the sudden pivot that my colleagues have referred to occurred really in a handful of days after OSINERGMIN, the energy regulator, decided that it would be economically expedient to abandon the RER projects. So faithfully correcting for delays




attributable to the State to bringing arbitrations in Peru to challenge the validity of its own prior administrative actions took Peru a little more than a month. That is, we would say, a blink of an eye in bureaucratic time.

So for all those reasons, members of the Tribunal, we believe that Peru's conduct breaches article 10.5 under either standard, but that the expectations here were clearly delimited and they were repeatedly reinforced, both from the pre-existing legal framework, the contract, and even after that by Peru's own conduct interpreting both the contract and its legal framework over an extended period of time.

Now, with that, I would -- next slide, please -- turn to the question of expropriation, its mechanics and some of the comments that Peru has raised in this regard.

Now, first, and as we previously discussed, the RGA lawsuit in March of 2017 was an




expropriatory governmental act by the province of Arequipa -- next slide -- which under international law is an act by Peru. Though eventually withdrawn, that lawsuit destroyed the project economically -- next slide, please -- making it impossible to finance and to complete in time. The expropriation was complete as of the RGA lawsuit. That said, the central authorities retained the ability to cure this breach of the treaty, and they seemed about to do so up through the time of the Supreme Decree. Next slide.

But following OSINERGMIN's comment, we then come to the pivot, this economically expedient pivot, that it was decided it would be better to let the RER project die. I would note, of course, if we were to accept for purposes of argument that there had been no ability to extend the contract dates under Peruvian law, which for all the reasons Mr Molina went through is not correct, then the expropriation would have been uncurable. You would have had

a breach of a treaty, an expropriatory breach, a governmental act either way as of March 2017.

But there are a few points about our expropriation case that I'd like to respond to briefly.

First, Peru has insisted that only sovereign acts may amount to an expropriation and tried to dismiss the measures at issue here as contractual. We say that is not correct. First, the expropriatory measures by Arequipa, the initial expropriatory measures in March 2017 were all official government acts. We're talking about the lawsuit, the criminal investigation, permitting processes -- none of that is contractual. But so, too, were the central government's administrative authorisations -- next slide -- of addenda to the RER Contract and its later denial of the Third Extension Request.

That governmental resolutions were later implemented in the form of addenda to a public contract does not alter their substance as





public administrative acts of the government.

If we go to the next slide, we'll see all the steps again that the government had to take, and we fear boring with you this slide, to reach those resolutions.

And so the distinction that Peru draws here is again more apparent than real. If we turn to the next slide we see that in Waste Management, a case that Peru accepts, the Tribunal recognised that one could envisage conduct tantamount to an expropriation which consisted of acts and omissions not specifically or exclusively governmental. Alpha v Ukraine went even further, questioning whether any distinction between sovereign and commercial actions mattered, provided that all the measures at stake were the actions of the State and had, in fact, expropriated Claimants' investment. And we would, say that these authorities are all on point here to the extent that Peru's argument may be of any concern.

Now, Peru has also challenged the duration





of a deprivation caused by the expropriatory conduct here. Peru insists that the RGA lawsuit could not have destroyed the investment because it was later discontinued, and this again is not correct. First, of course, Tribunals have found that finite takings, the hotel in MENA v Egypt was seized for roughly a year by the Respondent state, can constitute expropriations where the deprivation of rights is sufficiently substantial.

But more importantly, and that would be the case here, the RGA lawsuit's eventual formal discontinuance made absolutely no difference to its economic impact on the project in the context where it arose. The lawsuit and the attendant measures have made the project impossible to finance, economically dead, as Mr Jacobson -- next slide -- and also Mr Sillen -- next slide -- testified here, and we would just say let's not forget Mr Whalen's report on these very themes, these very subjects, which Peru did not take the opportunity it had to





challenge.

Absent Peru's central government extending the RER contract periods to account for delays caused by Arequipa, another part of the State and something it refused to do, there was simply no way to complete the project on time. The damage was done. And regardless of the procedural status of the RGA lawsuit, the expropriation was complete.

With that, members of the Tribunal, turning to the next slide, I'd like to address the relationship between municipal and international law. Much of Peru's case has been an attempt to defeat international liability by a reference to its own internal law and, as Mr Molina laid out for you, an erroneous view of its internal law at that.

But even if Peru were correct this is an error. International law and Peruvian law are independent legal frameworks and the State cannot do this. This, as we see on the next slide, is a basic principle. A party may not

invoke its internal law to excuse a treaty breach, and if it did treaties would be quickly meaningless. That's why that's the rule. But Peru makes this error repeatedly, first of course with respect to the Amparo. Peru's position is that there was no investment to expropriate effectively because its own courts, after the issue was joined in this arbitration, retroactively reached back in time and nullified the investment ab initio and retroactively validated its breaches.

Now, even if this were possible in Peruvian law, and as Mr Molina explained it is not, it is not possible under international law. That's because whether there was a protected investment and a breach in Peru under the treaty as of 2017 is an international law question, not a Peruvian law question. Peru seems again to be seeking to bootstrap back in time to excuse itself by operation of its own courts and processes. Now, that's not the law and it's, if anything, reminiscent of a tall




tale, of a folk tale of Baron Münchhausen, who pulled himself out of a swamp by his own hair, as you can see here with some of the applicable principles of international law, but again reject this attempt to plead domestic law as a defence to international liability. Peru cannot pull itself out of a swamp of international liability by its own law, as it tries to do with the Amparo.

And, similarly, this argument does not work because, if you were to find a breach of the treaty, that breach would have given rise to an automatic obligation to make full reparation as of the date of the breach, and the existence of that breach and the compensation owed must be determined as of that time. Peru just cannot, by a decision issued in 2021, retroactively erase a liability it incurred under a different legal order in 2017.

Now, turning to the next slide, there's also been a question raised -- sorry, one more -- there's also been a question raised as to




whether we should have brought a separate claim over the Amparo or if it matters that we didn't. Peru has gone so far as to suggest to you that this is a critical point. It is not. To be sure, the Amparo is very convenient, but setting that aside, as well as the prejudicial delay of amending our claims in a very late stage in the proceeding, what in the end, members of the Tribunal, would our claim have been? The simple fact is that having been expropriated in 2017, Claimants no longer had an investment in respect of which to claim injury under the treaty by the time of the Amparo decision. Would we have claimed that our expropriated investment had been expropriated again? The Amparo, thus, is not a breach but a defence advanced in lieu of substantive defences that Peru presumably would have offered if it could, and where Peru is unable to provide, by way of example, a single environmental expert to substantiate the purported risks to the environment that




supposedly underlay its measures, it's instead lent into this Amparo decision as a sort of deus ex machina.

So the Amparo is really of a piece with Peru's broader legal strategy here. After all, Peru consistently presents its position on the meaning of the RER Contract as a complete defence to all liability that left no possibility for any other outcome. And, again, we've seen that's not correct, as a matter of basic international law nor even necessarily under Peruvian law where at the very minimum there was more than one view possible of a State's powers under the RER Law and Contract.

I recall in this regard that last week Mr Grané had described this case as an example of why people criticise investor-state arbitration, but I thought the context in which he said that was interesting. He was discussing the Lima Arbitration in which Peru had sought to apply its domestic law to this international dispute, notwithstanding its

obligations to arbitrate here in an ICSID forum.

So in many ways, like the Amparo and like these contractual arguments, it was again another attempt to use domestic means to escape or nullify international obligations, so we would just say that we think this case speaks to the value of investment treaties and their importance to foreclosing these kinds of manoeuvres, and to ensuring that international standards govern the State's treatment of foreign investors.

Very broadly, Peru must look to international law to defend against international liability.

Finally, if we might just turn briefly to the next slide, I'd like to change tacks briefly and say a few words in response to the presentation of the United States earlier this week, particularly with regard to what our colleagues in the State Department said about the character of their submission and its




effect, and I put it to you that is, given our limited time, more important perhaps than any of the specifics of their submission.

To be absolutely clear, the United States has every right to share its views as a non-disputing party to the treaty under article 10.20. That's undisputed. And we agree with some of what the United States has said, but we respectfully disagree with some of what the United States has said. That's fine, and the Tribunal should give the US submission the same respectful consideration it would give to any other amicus submission, and that, fundamentally, is what the United States' non-disputing party's submission is, an amicus submission.

So it was troubling, members of the Tribunal, both for this case but perhaps more systematically, to hear our colleagues from the Department of State appear to suggest that a non-disputing party submission was an instance of State practice that could be added up with




Peru's litigating positions to change the meaning of the treaty in the context of this arbitration in midstream. That, you may recall, was exactly the argument Peru advanced last week, and I don't doubt that we will hear later this afternoon. But that is not correct, and a plain reading of the treaty, of its own terms and provisions, as well as consideration of the consequences that would follow from adopting such a view, prohibits it.

If we go to the next slide we see that the treaty itself contains an express mechanism and a different mechanism by which Peru and the United States may, as they purported to do, issue interpretations of the treaty. That is, through a free trade commission which the treaty requires to comprise cabinet level representatives of the parties, in the case of the United States the US Trade Representatives' Office and not the State Department -- it is only a decision of the Commission declaring its interpretation of provision of this agreement




that shall be binding on the Tribunal. Where the treaty contains an express mechanism for its binding interpretation, members of the Tribunal, it is appropriate to read that mechanism as the mechanism, and that mechanism has not been used here.

By contrast, the mechanism that has been used here is article 10.20 -- next slide, please -- which authorises non-disputing submissions and only submissions, oral and written, on the interpretation of the agreement. Article 10.20 says nothing at all about those submissions being binding. Article 10.22 does, and we put it to you that that's on purpose.

The natural reading is that the US Government and Peru have not been operating within the mechanism of the treaty that would allow them to issue interpretations that bind you, so however much respect we may owe the US non-disputing submission -- and we owe it the respect we owe to any governmental submission -

- it is not binding on the Tribunal and it's essential to clarify that.

And it's a sensible rule. Because if United States, represented here by the same branch of its government that routinely defends investor-state arbitrations -- not the one that negotiates them, which is required to participate in the binding commission process but the part of the government that defends them -- we come very close to a sort of interpretative nihilism where the treaty has no reliable fixed meaning, and where both the state parties come very close to becoming judge in their own cause. And that's, of course, why, if we look at some of the next slides, we will see that in the past tribunals have been very reluctant to indulge the kind of manoeuvre that Peru and the State Department appear to have attempted here, whether individually or in collaboration.

We see in Renco the Tribunal is not bound by a non-disputing submission and noted that there




was a Free Trade Commission mechanism in the relevant treaty which had not been used, and on the next side we see Gas Natural v Argentina expressing the Tribunal's scepticism of giving too much weight to a litigating position advanced midstream in an arbitration.

That point being established, the US arguments, or comments, I should say, are largely what we would expect, consistent with its past litigating positions. Very briefly -- very briefly -- we stand by our past arguments that investor-state awards are a perfectly valid source of evidence of the content of customary international law, and indeed it is the practice, the evidence being before you in the papers in this case, of both Peru and the United States to look to them for that purpose.

Likewise, we maintain that your competence to make binding decisions interpreting the treaty is indeed delegated -- next slide -- by the sovereign parties to the treaty, and where else really would it have come from? On that




point we do recommend to the Tribunal's attention, and it's the voluminous record, this particularly good article by Professor Roberts, should this be an issue of any concern.

As for the rest of the State Department's points we're happy to rely on our prior submissions, emphasising just once again that you are not bound by them and that they should not distract you from finding that Peru is liable under the treaty under both FET and for expropriation and for such other provisions as it may be that you find imported by operation of the MFN clause.

Thank you very much, members of the Tribunal, for your kind attention. With that, I would yield the floor to my colleague, MsGonzález.

(Pausa.)

SEÑORA GONZÁLEZ: Muchas gracias.

Señor presidente, miembros del Tribunal: abordaré el tema de jurisdicción.

En sus escritos, así como en los alegatos de




apertura, las demandantes demostraron que el Tribunal Arbitral tiene jurisdicción para conocer de las reclamaciones de las demandantes, tanto bajo el tratado como bajo el contrato. En los alegatos de clausura seré muy breve.

Siguiente.

Perú presentó cinco objeciones a la jurisdicción del Tribunal bajo el tratado y ninguna objeción a la jurisdicción del Tribunal bajo el contrato. Las demandantes han explicado extensamente en este arbitraje las razones por las cuales dichas objeciones jurisdiccionales carecen de mérito y deben ser desestimadas por el Tribunal.

PRESIDENT: May I invite you to go slightly slower?

SEÑORA GONZÁLEZ: En sus alegatos de apertura, las demandantes decidieron enfocarse solamente en dos de dichas objeciones jurisdiccionales -siguiente, por favor-: la referente a la supuesta carencia de

jurisdicción ratione voluntatis para decidir las reclamaciones sobre la investigación penal de la Fiscalía Ambiental de Arequipa, y la referente a la supuesta carencia de jurisdicción ratione materiae sobre el Contrato RER porque, según Perú, este no es un acuerdo de inversión bajo el artículo 10.28 del tratado.

Siguiente, por favor.

No es mi intención repetir aquí nuestras defensas a las objeciones jurisdiccionales que Perú decidió no abordar o cuestionar en sus argumentos de apertura. Referimos al Tribunal a nuestro escrito de réplica y a nuestros argumentos de apertura. Por razones de tiempo, abordaré únicamente las dos objeciones a la jurisdicción bajo el tratado a las que se refirió Perú en sus alegatos de apertura.

Siguiente, por favor.

Con respecto a la objeción referente a las reclamaciones sobre la investigación penal de la Fiscalía Regional de Arequipa, quisiera





resaltar cuatro puntos.

Siguiente, por favor.

En primer lugar, es claro que el artículo 46 del Convenio CIADI y la regla 40 de arbitraje del CIADI contempla las demandas incidentales o adicionales, las cuales pueden presentarse en cualquier momento durante el procedimiento y a más tardar en el momento de presentación de la réplica, siempre que se relacionen directamente con la diferencia.

Siguiente, por favor.

En su presentación de apertura, Perú ignoró completamente la existencia de estas reglas, que son muy claras y que confirman que las demandantes correctamente podían agregar reclamaciones relacionadas directamente con la diferencia presentada a arbitraje, aun después de la notificación de arbitraje.

Como explicó el profesor Schreuer en su opinión legal, incluso si el tratado que estipula el consentimiento para el arbitraje contiene un requisito de notificación y espera,





estas reclamaciones incidentales o adicionales no están sujetas a procedimientos separados para la notificación de reclamaciones y para la observancia de un período de espera.

En segundo lugar, la jurisprudencia también ha permitido que los inversionistas planteen reclamaciones adicionales a las presentadas en la notificación inicial de la controversia en caso en que constituyen una excepción fáctica del caso y guarden relación con la misma controversia.

Siguiente, por favor.

Llama la atención que Perú se base en Kappes contra Guatemala respecto a este requisito. En este caso el Tribunal concluyó que el artículo 10.16.2 de DR-CAFTA establecían los requisitos para iniciar un arbitraje que incluían la identificación de los reclamos pretendidos en ese momento, pero permitió la posibilidad de reclamos adicionales hechos posteriormente al aviso de intención sin requerir la repetición de un nuevo aviso.





En tercer lugar, la acusación penal del [A5] y sus efectos adversos al proyecto no es algo que sucedió de un día para el otro; recorrió un camino que comenzó el 2 de febrero de 2018, cuando la Fiscalía Ambiental anunció que iniciaría una investigación penal en contra del [A7][A8], y aún a la fecha continúa pendiente. No fue una investigación en que sucedían acontecimientos diarios. Cuando las demandantes presentaron la notificación de intención el 28 de mayo de 2019 aún no era claro cuál sería el impacto de esta investigación. Recién fue el 18 de octubre de 2019, cinco meses después de la presentación del tercer aviso de intención, que el [A9][A10] fue formalmente acusado de haber cometido un delito.

Las controversias no son estáticas y no es necesario que una notificación de intención sea exhaustiva, completa o detallada, como explica el profesor Schreuer en los párrafos 93 y siguientes de su opinión legal.

En cuarto lugar, Perú alegó que el requisito de notificación es una condición jurisdiccional de carácter vinculante. Como explica el profesor Schreuer en su opinión legal, la jurisprudencia ha reconocido que este requisito no es en realidad de índole jurisdiccional.

Siguiente, por favor.

En el caso Casinos Austria contra Argentina, el Tribunal determinó que la inobservancia de una disposición similar no afectaba la jurisdicción del Tribunal y razonó que, salvo que los requisitos previos al arbitraje se formulen de manera clara como condiciones precedentes del consentimiento del Estado receptor, no necesariamente deben cumplirse en su totalidad con anticipación al inicio del arbitraje, sino que también pueden cumplirse con posterioridad a ese momento y hasta tanto se adopte una decisión en materia de jurisdicción.

Aun si el Tribunal considera que no tiene jurisdicción sobre las reclamaciones referentes





a la investigación penal en contra del [A11][A12], eso no menoscaba la jurisdicción del Tribunal para conocer de las reclamaciones de Latam Hydro bajo el tratado. Esta reclamación, como el Tribunal conoce, es únicamente una de las siete medidas que violaron el tratado.

La reclamación derivada de la acusación penal del [A13][A14]guarda relación con las reclamaciones originales presentada en la tercera notificación de intención y califica como una reclamación que pudo haber sido formulada hasta el momento de la réplica. Por lo tanto, el Tribunal debería rechazar la objeción jurisdiccional referente al requisito de notificación y espera.

La segunda objeción a la que Perú hizo referencia durante su alegato de apertura fue que el Tribunal no tiene jurisdicción ratione materiae sobre el Contrato RER, porque según Perú este no es un acuerdo de inversión bajo el artículo 10.28 del tratado.





Siguiente, por favor.

Repasemos la definición de acuerdo de inversión. Las demandantes se focalizan en el encabezado o chapeau del artículo 10.28 del tratado, el cual requiere que el inversor o la inversión cubierta que suscribió el acuerdo, en este caso CHM, se haya basado en dicho acuerdo para establecer o adquirir otra inversión cubierta diferente al acuerdo en sí mismo.

Perú argumenta que las demandantes no han probado que CHM se haya basado en el Contrato RER para establecer o adquirir otra inversión que esté cubierta por el tratado y sea diferente al propio Contrato RER.

Las demandantes han explicado durante este arbitraje que con posterioridad a la suscripción del Contrato RER, las demandantes realizaron varias inversiones que se establecieron sobre la base del Contrato RER, tales como la obtención de dos concesiones definitivas, permisos varios ambientales obtenidos después de la suscripción del





Contrato RER, tales como estudios realizados por firmas consultoras de ingeniería como Pöyry, Norconsult, Hatch y GCZ; la contratación de empleados y consultores; la obtención de servidumbres; la instalación de oficinas en Ayo, Andagua, Arequipa y Lima, y programas sociales.

Siguiente, por favor.

La diapositiva muestra claramente las inversiones realizadas por CHM con posterioridad a la suscripción del Contrato RER y muestra claramente que se invirtieron varios millones de dólares en el proyecto con posterioridad a la suscripción del contrato.

El intento de Perú de quitar relevancia a la obtención de la concesión definitiva en 2016, la cual califica bajo el tratado como una inversión cubierta, es fútil. Perú alega que la concesión no puede constituir una inversión cubierta dado que ha sido anulada por ser contraria al ordenamiento jurídico peruano, pero cabe resaltar que la resolución que anuló

los permisos ambientales y la concesión definitiva están sujetas a revocación. CHM ha presentado un contra amparo que, si es exitoso, resultará en la revocación de las decisiones de amparo. Y en todo caso, la decisión de amparo anuló únicamente la concesión definitiva de la planta de generación, no la concesión de la línea de transmisión, que también fue obtenida con posterioridad a la suscripción del Contrato RER.

En segundo lugar, las demandantes tramitaron y obtuvieron la concesión definitiva sobre la base del Contrato RER que se suscribió al amparo del régimen promocional establecido en el decreto 1002, y en base a ese Contrato RER es que las demandantes solicitaron la concesión definitiva. De hecho, obtener esa concesión definitiva era una de las obligaciones de CHM bajo el Contrato RER.

En sus alegatos de apertura, Perú también se focalizó en el requerimiento del artículo 10.28 que requiere que el acuerdo de inversión





otorgue derecho a la inversión cubierta para llevar a cabo algunas de las actividades descritas en los numerales A, B y C, y argumentó que el Contrato RER no otorgó a CHM ninguno de los derechos descritos en esos apartados. Y pido, por favor, si pueden volver a la diapositiva anterior. Según el Perú, el Contrato RER no otorgaba derechos a CHM a generar y suministrar electricidad. Perú ignora que las actividades descritas en los numerales A, B y C del artículo 10.28 son meramente enunciativas, dado que están precedidas de la expresión "tales como". Perú no incluyó en la traducción al español de la definición de acuerdo de inversión en la lámina 26 de su alegato de apertura la frase "tales como". La generación o distribución de energía es solo un ejemplo de tipo de actividades a las que el acuerdo de inversión otorga derechos.

De todas maneras, al Contrato RER se lo debe interpretar en el contexto del conjunto de autorizaciones y permisos necesarios para





producir electricidad y, finalmente, suministrarle al público. Las demandantes explicaron que en base en el Contrato RER las demandantes estaban requeridas a obtener varios permisos incluyendo la concesión, y esto no le quita al Contrato RER su carácter de acuerdo de inversión.

Siguiente y siguiente, por favor.

Un proyecto de inversión a gran escala debe ser considerado como un todo integrado, como explica el profesor Schreuer en su opinión legal. El Tribunal -- el Contrato RER es un acuerdo de inversión a los efectos del artículo 10.16.1 del tratado. El Contrato RER cumple con la definición de un acuerdo suscrito entre una autoridad nacional de una parte y una inversión cubierta o un inversionista de otra parte bajo el artículo 10.28 del tratado. Es un acuerdo escrito para suministrar servicios al público en nombre de la parte.

Las demandantes se basaron en el Contrato RER como una parte indispensable de su





inversión general para establecer su inversión en Perú.

El Tribunal, por lo tanto, debe rechazar la objeción del Perú en que el -- de que el Contrato RER no constituye un acuerdo de inversión.

Finalmente, Perú señaló que las demandantes no han demostrado haber cumplido con el último párrafo del artículo 10.16.1, que requiere para que el demandante pueda reclamar la violación de un acuerdo de inversión el objeto de las reclamaciones como los daños reclamados por las supuestas violaciones al Contrato RER se relacionen directamente con la inversión cubierta que fue establecida con base en el Contrato RER.

Este argumento no aborda la cuestión de si el Contrato RER es un acuerdo de inversión sobre el artículo -- según el artículo 10.28 del tratado, que es el artículo bajo el cual la demandante basa su objeción jurisdiccional.

Las demandantes y sus expertos en daños

demostraron que el objeto de la reclamación, el incumplimiento del acuerdo de inversión, y los daños reclamados se relacionan directamente con las varias inversiones cubiertas que se establecieron o adquirieron en virtud del tratado.

Muchas gracias, señor presidente, miembros del Tribunal. Con su permiso, cedo la palabra a mi colega, el señor Gonzalo Zeballos.

MR ZEBALLOS: I'd like to focus my remarks on the two damages assessments that Claimants have put forward in this case.

The first is an expectation-based damages assessment, and the second is a reliance-based damages assessment. The distinction, of which you are no doubt aware, is that expectation damages compensates the Claimant for the loss of the bargain. That is, what Claimants would have had without the breach. Reliance damages compensates the Claimant for losses incurred in reliance on the contract. That is what Claimants lost because of the breach.





The expectations damages proposal put forward by Claimants' experts BRG calculates damages by first determining the fair market value of the Mamacocha Project on the valuation date using the DCF method, and then comparing that quantum to the fair market value of the project on the date of the award. The difference between the two, plus pre-award interest and certain additional costs and expenses, comprises the damages to which Claimants are entitled. This approach seeks to wipe out the consequences of the breach as we are commanded to do by Chorzów Factory. The reliance approach is the investment value methodology put forward by BRG.

In this approach the valuation date is irrelevant. This approach looks to only two factors, the total amount invested by Claimants to develop the project, including costs and expenses incurred as a result of the measures, and an update rate, designed to compensate Claimants for the opportunity costs related to





the locking up of their moneys in a destroyed investment.

This total, plus certain additional costs and expenses, comprises BRG's reliance damages assessment.

Now, we've spent a great deal of time discussing the Innergex offer and even more time discussing whose interpretation of the Innergex offer is correct, but what's been lost in this discussion is that neither party proposes this as an alternative means of calculating the fair market value of the project. It's intended only as a benchmark, a check, to see if the parties' respective DCF analyses are reasonable. But there's no dispute among the parties as to the correct methodology to determine damages here. It's the DCF methodology. And the experts' direct presentations addressed in detail the components of their respective analyses. I'll focus instead on certain fundamental principles.





Each of the parties employ the same methodology and many of the same assumptions in the undertaking of their respective DCF analyses, and there are a few key commonalities I'd like to highlight.

First, neither Claimants' nor Defendants' DCF valuations identify or even care who invests in the project. As Mr Shopp stated in his cross-examination, you can sort of forget about Innergex when you're talking about the DCF model. It's not modelled in there. Innergex isn't part of this DCF.

Second, each of the parties' respective DCF models do assume that the investment necessary to complete the project has taken place. In other words, the requisite $25 million investment, together with any future investment, including debt financing, is incorporated into the DCF model. To again quote Mr Shopp regarding this model, it just assumes that Claimants would fund any equity investment they would get the future revenues,

and this is the key. The DCF model assumes that full investment is made, and it doesn't matter by whom. The DCF model further assumes that the project will generate cash flows. The DCF method determines fair market value by discounting those future cash flows to the valuation date.

Third, both DCF models purport to calculate the value of 100 percent of the equity of the Mamacocha Project net of debt as of the valuation date. The DCF approach doesn't care how that equity is split up. It can be one investor, two investors -- it doesn't matter. The DCF doesn't work that way. It calculates the value of the whole of the investment.

So why do the parties keep talking about the Innergex offer? It's not meant to be a substitute for the DCF methodology. Both parties argue that it supports their respective DCF analysis, but neither has argued that it should be a substitute. It's intended as a benchmark.





I'm going to start with Claimants' approach and why the Innergex offer supports BRG's DCF. First, BRG says that Innergex's February 2017 offer implies a minimum value for the project of about $25 million. Why do they say that? Because that is what will have to be spent to finish the project. Put in the simplest of terms, to finish the project an investor or a combination of investors will have to invest $25 million in order to get to the cash flow that the project will generate.

If the project is worth less than $25 million, you would have to be a fool to invest. You would have to be completely irrational. It's that simple. But remember, it's a benchmark, not a fair market valuation. And how do we know that Innergex thought it would cost $25 million to finish the project? Well, Innergex came in and said, OK, we want a 70 per cent stake in this project. We're willing to recognise Latam Hydro's investment of $7.63 million as the equivalent of a 30 per cent





equity stake in the project and we'll put up the rest. $17.8 million. And this is a good deal.

What does this tell us? It tells us that the absolute minimum implicit value of the project in Innergex's view, the view of an arm's length buyer, was at least $25 million around the valuation date, because if it was worth any less than that they would lose money on their proposed investment, and these highly sophisticated entities would be fools for proposing that investment, and DEG would be fools for proposing to finance it. And all of the experts and all of the consultants that said the project was economically viable would have to have been wrong.

Now, the Innergex offer doesn't tell us what Innergex thought the fair market value of the project was. We don't even know if this valuation was a DCF analysis. The only thing we do know is that whatever analysis Innergex did do, it could not have resulted in a net





present value for the project of less than $25 million, because if it had Innergex wouldn't have proposed to invest.

Now, this is the only logical way of looking at this offer if you want to use it to benchmark a DCF that's determining the fair market value of the project as of the valuation date.

Now, Versant comes in and they say no, you only consider the pre-money value of the investment. Does the concept of pre-money valuation exist? Of course it does. But it makes no sense to take this approach in this context because it tells you nothing about the fair market value or the future cash flows that the project is intended to generate. All it tells you is what Latam Hydro has invested to date. Without context, that $7.63 million investment figure is meaningless. And this is clear when we look at the farm hypothetical that I ran through with Mr Shopp.

In that hypothetical, I invest $10 million

in year one in a farm that will generate $100 million in year two. Mr Shopp agreed that if we apply a DCF analysis to that project, applying a 10 per cent discount rate, my farm would be worth $80 million on Day 1. On Day 1. And that's even though I'd only invested $10 million.

Why is it worth so much more than my investment? It's worth more because what matters isn't what I've invested; what matters is how much my investment is going to make. Now, we ran several changes to my hypothetical. Did it matter if I had a partner? I asked Mr Shopp, if I find a partner and we each invest $5 million, does that change the fair market value of my farm? And he confirmed that the answer was no, it did not, my farm was still worth $80 million.

Now, we can look at the joint investment and we can say with certainty that the value of my farm could be worth no less than $10 million because that's what we were prepared to invest,





but that doesn't tell us what the fair market value is. That's what the DCF is for. And the DCF, the methodology both experts agree applies here, tells us that the fair market value of my farm is $80 million.

Now, if you applied Mr Shopp's pre-money/post-money theory to my hypothetical, if you treated it like a piggy bank, he would say that on Day 1 my farm was worth only $10 million because that's all I've invested in it. This is absurd. And, worse, if I invested $5 million on Day 1 and Mr Shopp had invested $5 million on Day 3, Mr Shopp would say that on Day 2 my farm was only worth $5 million because that's all I'd invested in it. And that's also absurd. We all know what the farm is worth. It's worth $80 million.

Now, when asked to explain why my farm hypothetical didn't go to the issue at hand, Mr Shopp said so in that hypothetical what was being compared was sort of the future DCF value of the farm compared to what it would cost to





get it up and running --

PRESIDENT: Mr Zeballos, I can't hear you any more.

MR ZEBALLOS: Mr President, can you hear me now?

PRESIDENT: Now I hear you.

(Pausa.)

MR ZEBALLOS: I don't know where you lost the audio.

PRESIDENT: One minute ago. That's OK.

MR ZEBALLOS: So when asked to explain why my farm hypothetical didn't go to the issue at hand Mr Shopp said so in that hypothetical what was being compared was sort of the future DCF value of the farm compared to what it would cost to get it up and running, and I don't think there's any dispute that that's how projects work. You pay for something; you get benefits later on, but that's not what we're talking about here.

Now, let's deconstruct this statement. Let's first address the notion that my





hypothetical addressed the future DCF value of the farm. Each and every question I posed to Mr Shopp addressed the value of the farm on Day 1. Then he says I don't think that there's any dispute that that's how projects work. You pay something and you get benefits later on but that's not what we're talking about here.

This last bit's remarkable. That's exactly what we're talking about here. Expectation damages are all about the benefit of the bargain. What the DCF method determines is precisely the value discounted to an earlier date of the "benefits you would have gotten later on". What my farm hypothetical proves, and Mr Shopp confirmed this, is that the value of an investment doesn't necessarily bear any relevance to the fair market value of the project.

Now, here there's a lot of confusion arising from the fact that the 30 per cent investment in the Mamacocha Project happens to correspond quite closely to 30 per cent of BRG's fair

market value assessment of the Mamacocha Project. But that's happenstance. If the DCF had said that the project was worth a hundred million dollars on the valuation date, a 30 per cent share would still have been worth 30 million even if the investment was only 8 million.

Mr Shopp is right when he says that his assessment of the Innergex offer is not a DCF and it didn't project future cash flows. The point that Claimants' experts make is that a project that contemplates an investment of $25 million in equity can't have a fair market valuation of less than 25 million if we believe the investor to be a rational actor. It doesn't mean that the fair market value can't be higher but it does mean that it can't be lower, and the Innergex offer shows that.

Now, Versant's pre-money approach can't back up a DCF valuation because it ignores the very purpose of the DCF analysis, which is to consider the value of the completed project.





Mr Shopp only wants you to consider a percentage of the investment value, a percentage that wouldn't have got the project finished, but Mr Shopp's analysis is nothing more than a partial sunk costs analysis. He says it himself. It ascribes value on a dollar-for-dollar basis with each investment, while completely ignoring the future cash flows of the completed project. Such an approach could never apply in a check on -- excuse me -- such an approach could never apply a check on an expectation-based or even a reliance-based damages assessment because it doesn't correspond to either.

Now, when discussing the proposed Innergex transaction it's important to consider that, had it gone through, Innergex would have acquired a 70 per cent interest in the project, and Innergex would have contractually committed to invest at least $17.8 million into the project. Had Innergex failed to make its investment, you can be sure that there would





have been a lawsuit to either force Innergex to make that investment or to make Latam Hydro whole for Innergex's failure to do so. And had Innergex signed that deal and honoured its obligations, you can also be sure that it would be a co-claimant in this case and seeking damages, together with Latam Hydro, for the full fair market value of its 70 per cent share.

Now, that being said -- and it's essential to put this in sharp relief -- the Innergex transaction did not go through. Latam Hydro was, and is, the 100 percent shareholder of the Mamacocha Project, and Mr Jacobson confirmed that he had the ability to and would fund the entirety of the project if he had to. As such, Latam Hydro is entitled to 100 percent of the damages in this case. To give Latam Hydro anything less would be a windfall for Peru because in that case Peru would only be providing partial compensation for a project that Peru completely destroyed.





Now, as I noted in my hypothetical, it doesn't matter if Latam Hydro intended to sell a percentage of the project. It never, in fact, did so. And as I stated earlier, the DCF valuation methodology doesn't care who invested. It calculates the value of 100 percent of the value of the equity of the project net of debt. The holders of that equity, regardless of who they are, are entitled to that full value.

Now, when Mr Shopp was attempting to explain BRG's approach to the Innergex offer as absurd, he said "Imagine an investor comes to you and says I own a gold mine, I've done some feasibility studies, I have the rights to that concession, but that's where it stands".

Of course, Mr Shopp left out the part where, in addition to the feasibility studies and the rights of the concession, the investor also has a guaranteed buyer who's committed to buying a set volume of gold at a set price under the terms of something like the RER Contract. But

all that being said I like Mr Shopp's example of the gold mine, and we don't even have to make my factual modification.

I like Mr Shopp's example of the gold mine because it doesn't require us to imagine anything. As two of the most important cases of the last decade, Crystallex and Gold Reserve, each involve a project for a gold mine.

Let's take a look at what the Tribunal said in Crystallex about the gold mine. According to the Tribunal in that case, "The fair market value of an object is not related to its historical cost but to its future performance".

In Crystallex the total investment in the project was $644.88 million, and the award for damages before interest was $1.2 billion.

In Gold Reserve the value of the investment was $300 million. In that case the Tribunal found that the DCF method was the preferred method evaluation where sufficient data is available. And the total award? It was $713





million, more than twice the amount invested. In neither case was the gold mine ever in operation or even built. They were both greenfield projects.

Now, the Tribunal has been provided with two DCF analyses, one from BRG, which is based on a fair market value of $25.07 million that is consistent with the implied value of concurrent offers, and one from Versant, which is based on a $3.4 million fair market valuation that is consistent with nothing, which excludes millions of dollars in actual costs based on a construction budget of its own invention and based on speculation, which results in a negative $5 million valuation if we run their model with the Innergex spot prices that Versant claims are more reliable than the BA Energy Solutions spot prices, and which misleadingly cites to evidence in support of its DCF analysis that, one, occurs after the valuation date and, two, is contradicted by witness testimony that Mr Shopp admitted he had





both read and excluded from his report.

Even without all those factors, which if taken together fully justify disregarding Versant's expert report in its entirety, the Versant report's fair market valuation of $3.4 million is simply not credible. It's less than half of the investment --

PRESIDENT: Mr Zeballos, you are now in extra time.

MR ZEBALLOS: Thank you, Mr President. I'm very close to being finished.

It's less than half of the investment negotiated with Innergex to comprise a 30 per cent stake in the project, and while we don't know the precise mechanics of how Innergex determined the Mamacocha Project's fair market value, because the Innergex financial model is locked, we do know that the model Innergex used could not have been anything like the model employed by Versant because Innergex would never have invested in the project had that been the case since, as admitted by Mr Shopp in





his cross-examination, I don't think anyone would invest in a project with a negative NPV. Nor would Latam Hydro have invested $7.63 million in a project with a net present value of $3.4 million, to say nothing of Innergex's proposed investment of $17.8 million.

What this tells us is that Versant's discount rate is grossly overstated. And, finally, we shouldn't lose sight of the fact that we're talking about the value of a hydroelectric power plant, assuming it was up and running. The notion that such a project would only be worth $3.4 million is preposterous. If Mr Jacobson wanted to invest in a $3.4 million project, there were far easier ways for him to do so than to build a run-of-the-river hydroelectric power plant in the high mountain desert of Peru.

By contrast, BRG's fair market value analysis is conservative. It aligns closely with the implied value of the Innergex offer. Indeed, its proximity to what by definition

should be the minimum value of the project supports the assertion that BRG's model is not aggressive but, rather, quite conservative.

BRG's damages model adds actual cost offsets of $6.8 million, $2.5 million of which are rejected by Peru, but it should be clear that Versant's best judgments approach, excluding $2.5 million of those costs, which it did by creating budgets that didn't exist in Claimants' records and then allocating expenses from one category to another because, for example, an employee lived in Miami, should be rejected wholesale. It's clear from the materials on which BRG relied that actual expenses are lower than budgeted expenses, and to the extent that costs are excluded from the actual cost component of this DCF valuation it should nevertheless be included in the negative value of the real world project to which the but-for value must be compared to arrive at a fair damages claim.

The balance of the figures that make up the




total damages quantum of $45.62 million as of the date of BRG's Second Report, which includes pre-award interest and certain other expenses, are set forth on this slide. [Slide 150]

Should the Tribunal determine that Claimants' respective DCF models do not provide sufficient guidance for the rendering of a damages award, Claimants submit that their alternative damages methodology, the investment value approach, should provide a floor for damages in this case. Peru's sole objection to Claimants' investment value mirrors the argument set forth in Peru's request for production number 8, in which it asks for invoices and receipts that back up BRG's investment value analysis. In support of this request Respondent cited verbatim the argument set forth by its damages experts, and which their experts repeated again in their direct testimony and cross-examination.

Respondents' request for documents like invoices and receipts for the last ten years




was "granted as offered by Claimants, denied in all other respects" and what Claimants offered to produce were "certain audited financial statements".

Claimants produced this and more, and in response to Respondent's criticism Claimants indeed undertook the exercise to reconcile all the expenses included in their damages calculation with only the materials in the record and successfully accomplished that exercise. Mr Sillen testified to this fact in his second witness statement. Mr Sillen was called to testify before this Tribunal, and not one single question was put to him about his reconciliation exercise. Not one.

Should the Tribunal request to see that exercise, Claimants would be more than happy to include it in its post-hearing submissions.

Mr President, members of the Tribunal, Tribunal Question No 19 asked what the fair market value of the project was on the valuation date. I believe that my entire




statement sought to respond to this query. I'll leave you with this final slide which summarises BRG's damages approach, including its DCF analysis based on the project's fair market value on the valuation date of $25.07 million, and showing the balance of the components that comprise the final damages calculation of $45.62 million as of the date of BRG's Second Report. Also included on this slide is BRG's investment value assessment.

With that I'd like to thank you for your attention, and I'd be happy to respond to any questions the Tribunal might have.

PRESIDENT: Thank you, Mr Zeballos. That concludes the Claimants' closing statements. We have now a recess of 45 minutes. The Respondent will be granted also 7 minutes' extra because Mr Zeballos has used seven more minutes than allotted -- not only you, Mr Zeballos, it's your team, basically -- and then we will resume at 17.10 CET.

MR ZEBALLOS: Thank you, Mr President.

(Pausa para el almuerzo.)





SESIÓN DE LA TARDE

ALEGATO DE CLAUSURA DE LA DEMANDADA

PRESIDENT: It seems that we all are back. Mr Grané, please proceed with the closing statement for Respondent.

MR GRANÉ: Thank you very much, Mr President. With your indulgence, I will invite Ms Vanessa Rivas Plata, the president of the Special Commission, to start Respondent's closing argument. Thank you.

PRESIDENT: Ms Rivas, please proceed.

SEÑORA RIVAS PLATA SALDARRIAGA: Muchas gracias, señor Grané. Muchas gracias, señor presidente.

Buenas tardes y buenos días, señor presidente y miembros del Tribunal. Permítanme presentar unas reflexiones en torno a algunos temas fundamentales que en representación de la República del Perú, respetuosamente, les pediría tomar en consideración durante sus deliberaciones.

En la etimología quechua, la palabra





"Mamacocha" significa madre de las aguas. En la mitología y religión inca, Mamacocha era la diosa de las aguas. Los relatos y leyendas mitológicas incas no habrían podido jamás imaginar que la laguna Mamacocha, la laguna manantial más grande del mundo, designada como una maravilla natural, ubicada a más de 1700 metros de altura en el Valle de los Volcanes, se convertiría algún día en el escenario de una disputa de inversión contra el Perú.

Tal como han explicado los abogados de la República, el Contrato RER tiene su origen en la política energética peruana que en los últimos 10 años ha fomentado el uso de recursos energéticos renovables para reducir las emisiones de dióxido de carbono y mejorar la calidad de vida del pueblo peruano.

En este contexto, el Perú desarrolló un marco normativo que promueve proyectos de inversión para la generación de electricidad con fuentes de energías renovables, tales como la energía eólica, solar e hidráulica.





Como no podría ser de otra manera, la República desarrolló ese marco normativo respetando la gran autonomía y competencias que reconoce su Constitución a las diversas regiones y gobiernos locales del Perú.

El Perú es un Estado unitario, pero también es un Estado altamente descentralizado, que respeta y reconoce la diversidad e idiosincrasias de las regiones que lo componen, las cuales incluyen inquietudes de carácter medioambiental.

Las condiciones, los riesgos y las obligaciones a las cuales se sometieron las demandantes fueron establecidos de manera clara durante el proceso de subasta en el que participaron para presentar oferta y, si dicha oferta era aceptada, suscribir el Contrato RER con el Ministerio de Energía y Minas del Perú.

Durante ese proceso, las demandantes se comprometieron a observar la inamovilidad de ciertas fechas críticas establecidas en el reglamento, las bases y el Contrato RER. Estas

fechas, que fueron establecidas conforme a las proyecciones sobre demanda energética realizadas por diversas agencias, eran fundamentales para el objetivo perseguido por el Estado peruano.

No solo las demandantes conocieron las condiciones, los riesgos y las obligaciones para la ejecución del proyecto Mamacocha, sino que en múltiples ocasiones manifestaron su conformidad con el carácter inamovible de las fechas indicadas.

Según lo establece el artículo 1° de la Ley RER, el objetivo del régimen RER es, y cito: "Promover el aprovechamiento de los recursos energéticos renovables, RER, para mejorar la calidad de vida de la población y proteger el medio ambiente mediante la promoción de la inversión en la producción de electricidad". Fin de cita.

Una interpretación parcial y miope que pretenda subordinar ese objetivo a las estrategias de financiamiento y decisiones, en





este caso erradas, de los inversionistas es contrario al objeto mismo de la ley.

Los estados implementan marcos normativos para perseguir políticas de interés público, tales como la protección del medio ambiente. La implementación de las leyes, reglamentos y condiciones de competencia adoptadas por un Estado para cumplir objetivos legítimos no pueden ser interpretados como interferencias ni como obstáculos a la inversión extranjera.

Los argumentos de las demandantes están basados no en lo que dicen expresa e inequívocamente los instrumentos jurídicos invocados como base de sus reclamaciones, sino en una lectura forzada y entre líneas de esos instrumentos.

La República confía plenamente en que ustedes, miembros del Tribunal Arbitral del caso Mamacocha o, bajo la etimología quechua, el Tribunal del caso "Diosa de las Aguas", emitirán una decisión con trascendencia significativa, una decisión que sirva de





precedente y guía para que los inversionistas no recurran al arbitraje internacional de inversión con la finalidad de trasladar a los Estados su responsabilidad por el fracaso de un proyecto, ignorando el marco normativo, así como los términos contractuales a los cuales dichos inversionistas se sometieron expresa e inequívocamente, y pretendiendo desconocer decisiones judiciales que hacen valer la normativa medioambiental.

Reiterando la más alta consideración y respeto de la República del Perú a los miembros del Tribunal Arbitral, le doy a continuación el uso de la palabra al doctor Di Rosa.

MR DI ROSA: Thank you. Mr President and members of the Tribunal, greetings to you.

It's easy in these complex arbitrations to get caught up in the technical details but at some point you also have to take a step back, look at the big picture, and apply to that a filter of common sense. When you do that here it becomes evident just how fragile the key





premises of Claimants' case are. Let's review a few examples of that, starting with a couple of the key contractual issues that we've been debating.

First, the issue of whether the RER Contract binds the entire Peruvian State or just the Ministry, the MINEM.

And, sure, the State is mentioned in the preamble of the RER Contract, and sure, Peru is a unitary state, but ultimately one has to pay attention to what the contract actually says, and most of the contract treats MINEM as the contractual party.

Some of the relevant references appear on the screen. You've seen them before, so I won't recite them. The structure and implementation of the RER Contract simply don't make sense if you interpret the contract to bind the entire State at all its levels.

For example, if all of the State is bound, why does the contract include separate references to the term "Autoridad

Gubernamental"? Why does the contract specify that the MINEM had the obligation to "coadyuvar". If the State were the party, wouldn't that clause be redundant? I'll come back to that issue.

Let's now review through the prism of common sense another key contractual issue, which is whether the phrase "for any reason" somehow was intended to exclude delays attributable to State entities. The clause for any reason appears with unqualified wording in a variety of RER regime instruments. You see those on the screen now, and again, I won't refer to them individually.

Now, it's been said that if you torture a legal text enough it will confess, and Claimants strain to persuade you that the phrase "for any reason" actually means for almost any reason, but the simple conclusion that has to be drawn from the plain text of these clauses is that "for any reason" means literally for any reason.





Now, Claimants say, you know, it would be crazy for anyone to assume that "for any reason" includes delays by the government, we have no control over what the government does, and that argument has some intuitive surface appeal, but in the case of these RER Contracts, the assumption that "for any reason" really was intended to mean for any reason is not that crazy if you consider the context, because after the long delays in the projects of the first and second auctions, some of them five years or longer, the government evaluated the situation and concluded right, we need renewable energy and we need it now. We can't have these projects drag on endlessly, so going forward we will impose a firm deadline with absolutely no extensions and no exceptions. To account for the inevitable delays in these types of projects we will build into the system a two year cushion for the bidders, but beyond that it will be a risk that the bidders will have to assume, and they can account for that





risk in their offer price.

This is what the government tried to signal to the bidders in a variety of ways through these clauses that you see on the screen. The reference to force majeure in the sworn declaration that Claimants signed, for example, was meant precisely to emphasise that "for any reason" really did mean for any reason, even in cases of force majeure.

Claimants here would have you believe that in this project they accepted all of the risks posed even by force majeure events, so earthquakes, hurricanes, floods, pandemics, asteroids -- they were able to deal with all of that. But the one risk they never ever would have accepted had they known about it was the government bureaucrat with a big stack of pending applications on their office floor. That risk they couldn't handle.

One final point on the issue of the milestones. The immutability of the termination date was articulated expressly not





only in the contract but in the RER regulations. That means that in essence, with the Third Extension Request, Claimants were trying to modify the regulations via contractual amendment, and in most legal systems, including the Peruvian one, you simply cannot do that. Again, it's just common sense.

Let me focus now briefly on the permitting issue. You've seen clause 4.3 of the contract repeatedly and its reference to MINEM's obligation to coadyuvar whenever permits by other government agencies were not granted in a timely fashion.

Somehow Claimants and their expert, Mr Benavides, interpret the coadyuvar obligation as equivalent to guarantee, but coadyuvar simply is not a synonym of garantizar and the clause clearly imposes only a best efforts duty, not an obligation of result.

Another aspect that decidedly requires a filter of common sense in this case is the environmental protection aspect. Claimants

seek to persuade you that they undertook the Mamacocha Project to help protect the environment. On cross-examination last week I asked Mr Jacobson "Is it fair to conclude that one of your principal motivations for investing in Peru was to protect the environment?" And his response was "Absolutely".

We wish to pause for a moment to show you a very short video of the Mamacocha Lagoon so you can see what we're talking about.

(Se proyecta un vídeo en la pantalla compartida.)

Can anyone seriously argue that it would protect the environment to drill 100 metres into a mountain that's adjacent to the ecologically fragile and biodiverse lagoon that we just saw? Or to subject the area around this lagoon to hill-drilling blasting, or to line the surroundings of the Mamacocha Lagoon with a big concrete pipeline? Or, even worse, to dry up the lagoon. Mr Sillen was asked about this and he said that was one of the





concerns. The other one was that we would dry the lagoon, you know, essentially dry up the lagoon's level, water level.

Now, Claimants' own witness, Mr Sillen, admitted, as he had to, that the Mamacocha Lagoon is a natural wonder. The Andean community formally declared it as such in 2019. Mr Jacobson brushed that off last week, saying well, the designation was made after the Claimants had already exited the project. But was the lagoon any less of a natural wonder in 2012?

As you see on the screen, Mr Jacobson also admitted that there were ways to fund this project other than through project finance, but that such mechanisms were "not as profitable".

On balance, considering all the testimony last week and everything that you've seen in the record, what seems more likely to have been the Claimants' motivation here? Environmental protection or just plain, old-fashioned profit?

Finally, I have just a quick few





observations on the Amparo proceeding. Claimants have referred to this as a red herring and as background noise and today they said it was irrelevant for the Tribunal's purposes, but it's clear that it was anything but that because the Amparo ruling confirmed that Claimants failed to abide by the environmental rules. They cut the corners. They bifurcated their environmental application to avoid having to conduct a comprehensive environmental impact study. And, as Claimants' own experts admitted, the Amparo ruling had the effect of invalidating ab initio Claimants' environmental permits and their final concession.

Now, the point here is not boot-strapping, as Claimants' counsel today argued. The point, rather, is simply that without those permits, the project ultimately could not have gone forward, regardless of the measures that are being challenged in this arbitration.

The Amparo ruling also shows that the





environmental concerns that prompted the regional lawsuit were, after all, legitimate.

Now, Mr Jacobson suggested last week that the outcome of the Amparo ruling might have been different had the project still been ongoing, but that's incorrect for the reasons that Mr Monteza explained this week. Since Claimants concede that they are not challenging the Amparo in this arbitration, that means that the legal effects of the Amparo ruling must be fully recognised and upheld in this arbitration.

Now, we expect to show you today with concrete citations that the testimony you heard during this hearing confirms that Claimants' case is based on an incomplete and distorted rendition of the facts, distorted interpretation of the relevant norms as well as of the high standards under international law for treaty violations, and certainly an erroneous appreciation of the types of acts by a state that can be deemed to breach those high

standards.

That's all that I have to say for now. Thank you, Mr President, and members of the Tribunal. I will now yield the floor to Mr Grané to express the merits and jurisdictional issues.

MR GRANÉ: Mr President, members of the Tribunal, Claimants' case is based on the notion that Peru induced their investment, interfered with their project, and then pivoted -- their favourite word -- in its interpretation of the contract, and that in so doing destroyed their investment. And Claimants have attempted to tell you this story in three chapters, building up to a climax in the third chapter.

It is in that last chapter that, according to Claimants, the State abruptly turns on the hapless, unexpected foreign investor and deliberately destroys their investment. Theirs is at best a historical fiction, and like all historical fiction facts are laced throughout





the story as mere backdrop.

But claimants' story remains mostly a work of fiction and cannot be believed or taken at face value. Key facts essential to understand what really happened have been omitted and mischaracterised. Therefore, in the first part of my presentation I will recount some key facts in chronological order that have been confirmed or highlighted in this hearing.

In the second part of my presentation I will turn to the reasons why the measures that form the basis of their claims did not breach Peru's obligations. Let's start at the beginning.

Claimants' witness and owner of the project, Mr Jacobson, the self-professed environmentalist, confirmed that Claimants selected the Mamacocha Lagoon where the project was to be built, and designed the project without involvement from any governmental agency or entity. And you see that exchange on your screen.

Now, the concept and design for the project





was developed by Claimants between 2011 and 2013. That was well before the third auction for the RER contracts was even announced. Given the design of the Mamacocha Project was developed independently by Claimants, they were responsible for ensuring the project's feasibility. Mr Sillen admitted that Mamacocha was responsible for ensuring the feasibility of the project in the context of the Third Auction.

During his direct presentation we heard Peru's expert, Mr Claudio Lava, explained that the bidding rules expressly state that the bidder assumed the risk of its own due diligence, and that such due diligence includes the location of the generation plant, transmission line, financing and others.

Mr Lava also identified permitting as one of the risks associated with the location and the scope of the project.

The Mamacocha Project, as you know, was to be a 20-megawatt hydroelectric project





comprised of two interrelated parts. First, a run-of-the-river hydroelectric generation plant, and, second, a 65-kilometre transmission line connecting the generation plant to the national grid. An independent engineering firm, Hatch, explained that the construction of the project would be a significant endeavour requiring at least 33 months of heavy construction. On cross-examination Mr Sillen admitted that the scope of the project was such that it required environmental precautions.

It is an undisputed fact that Claimants chose to build their project in the Mamacocha Lagoon, the largest fresh water lagoon in the world, considered to be a natural wonder and renowned for its biodiversity.

Now, while Claimants and their two witnesses have attempted to dismiss the environmental concern related to the project, the record shows that Claimants' own consultants repeatedly advised that the Mamacocha Project was located in an environmentally sensitive

area that required special precaution.

The environmental sensitivity of the location of the project was also confirmed by the findings of fact of the Amparo ruling, which Claimants, as you know, called a red herring. And it did so, the court, based in part on reports from the Instituto de Ciencia y Gestión Ambiental de la Universidad Nacional de San Agustin de Arequipa and the Servicio Nacional Forestal de Fauna Silvestre. (Slide 34).

Tribunal Question 15 inquires about how risk associated with permitting is considered in a risk assessment and whether Claimants considered such risk in their assessment of the contract and planning for the Mamacocha Project.

Members of the Tribunal, there can be no doubt that a risk assessment of a project that requires environmental permits, especially given the site freely chosen by Claimants for their project, must identify the risk of





delays, opposition, legal challenges by individuals, NGOs and even independent governmental agencies. To believe or suggest otherwise is absurd. Not even Claimants deny that. In fact, Mamacocha's project's July 2013 feasibility report discusses the project risks and expressly mentions the risk of delays or retardation related to licensing and permits, including because of environmental concerns, and you have the reference on your screen.

Another fact which I will address in greater detail in a few minutes is that, even before they signed the RER Contract, Claimants had already experienced such delays. The risk of delays in permitting was such that the contract itself in clause 4.3 expressly contemplates delays in permitting.

In fact, such was the risk of delays, including those not attributable to the investor, as several arbitration awards have confirmed, that the RER regime and the contract provide a two-year cushion to achieve the COS,





but it is the investor who bears the risk of such delays. That is precisely why the RER regulations, the bidding rules, and the contract provide that failure to meet the real COS for any reason whatsoever and despite that two-year cushion, would lead to the automatic termination under clause 8.4 of the contract.

Now, what part of that is it that Claimants fail to understand? They were not tricked or hoodwinked. They knew the risk inherent in their investment, just as they knew the assured benefit in the form of a guaranteed income for no less than 18 years if and only if they managed to overcome those risks.

Mamacocha started the permitting process in late 2012 with a view to obtaining the final concession for the plant and the transmission line in 2014. This was admitted by Mr Sillen on direct examination, and you have the excerpts on your screen.

On 4 July 2013 Mamacocha started the environmental permitting process for the





Mamacocha plant. Now, Question 14 from the Tribunal inquires about the basis for granting environmental permits. Environmental permitting is governed by the environmental law, which is the law that creates the national system for environmental impact valuation and its regulation, both of which are on the record, and you have references to the legal exhibits on screen.

In Peru, any activity that has the potential to cause significant environmental impact is required to obtain an environmental permit, and a key principle that governs the environmental impact evaluations is the principle of "Indivisibilidad".

This principle requires assessment of the full impact of a project.

The artificial separation of components of the same project for permitting purposes is proscribed precisely because if a project is allowed to be sliced and diced, as Claimants did in this case, it would hide the true

cumulative environmental impact of the project.

And you have an excerpt on your screen from the Amparo ruling that discusses this principle of Indivisibilidad.

The Amparo ruling found that Mamacocha violated such principle when it submitted separate applications for environmental permits for the generation plant on the one hand and the transmission line on the other hand.

The first step in the environmental permitting process is to submit a preliminary environmental evaluation and request that the project be classified according to its potential impact on the environment. The categories 1, 2 and 3 correspond to the magnitude of environmental impacts that are foreseen, either minimal or moderate or significant.

Now, these categories are expressly set forth in the regulations as you see on your screen. Category II and III energy sector projects require environmental impact





assessment and a formal consultation process with the general public. Category I energy projects, by contrast, would have only required the presentation of a declaration or statement of environmental impact, and this is the DIA that Claimants fought for and obtained. The DIA does not require a formal public consultation process. [Slide 44]

Claimants did not want the population of Ayo to have a say. They wanted to speed through the permitting process and not allow citizens in civil society to be heard about any environmental concern that they had.

At the time the Claimants requested the classification of the Mamacocha Project in 2013 and '14, the minimum substantive criteria to determine the category of a project in the energy sector was provided in annex 5 of the environmental impact evaluation regulation.

Such criteria includes the protection of flora and fauna as well as biological diversity, which in this case included a





protected species that had its habitat in the Mamacocha Lagoon, as Claimants' own consultants warned, and you have these warnings in exhibits C-227 and C-180.

On July 6, 2013, two days after Mamacocha submitted its preliminary environmental evaluation, Peru issued the RER regulations, which provided that the commercial operation date for future RER projects could not be delayed for more than two years for any reason whatsoever. And, of course, I will come back to this point.

On 13 August 2013 the bidding rules for the Third Auction were published, and a draft of the RER Contract was appended to the rules.

Mr Jacobson testified that prior to his decision to submit a bid in the Third Auction, he had been informed about the bidding rules and the terms of the RER Contract, and indeed the record shows that on 19 August 2013 Mamacocha was informed of both the bidding rules for the Third Auction and the highlights





of the applicable RER regulations. And you have an excerpt of that e-mail from Santiváñez Abogados to Claimants.

Now, on 11 October 2013 the environmental regulatory authority, ARMA, issued its resolution that classified the Mamacocha Project as a Category III project requiring an environmental impact assessment and public participation plan, and indeed, under the regulations, similar projects of 20 megawatts or less and with transmission lines of more than 20 kilometres required more than a mere DIA. Please recall that the Mamacocha Project, as I mentioned earlier, had a transmission line of 65 kilometres.

Now, given Mr Jacobson's professed concern for the environment, counsel for Peru asked him on cross-examination why Mamacocha decided to appeal ARMA's decision instead of erring on the side of caution and going ahead and preparing an environmental impact study, and Mr Jacobson answered that ARMA's decision was so clearly

wrong that they didn't even consider it. According to Mr Jacobson ARMA's decision was, and I quote, "clearly wrong-headed and out of step", close quote.

Here we have Claimants once again believing that they know better than the local authorities and brushing aside what stood in their way and their timeline, and the facts properly told revealed that for Claimants, their project timeline was more important than the environment and the Mamacocha Lagoon, because recall that by this time, 11 October 2013, Claimants already had access to the bidding rules, and according to Mamacocha's works schedule in order to achieve commercial operation by 2 January 2017, the first workday after the reference COS date, and be in a position to benefit from the full 20 years of guaranteed tariff, financial closing needed to occur before 1 November 2014.

Mr Sillen explained that Mamacocha would need to have all the project's permits, the





final concession, and secure equity capital and loans to achieve that financial closing, and you have excerpts of this on your screen.

Now, knowing that it could not reach financial closing by 1 November 2014 if a detailed or semi detailed environmental impact assessment was required, on 30 October 2013 Mamacocha filed a reconsideration request with ARMA seeking to have the plant reclassified as a Category I project so that it could get its permits in 30 business days instead of nearly a year, which Claimants could not afford.

That same day Mamacocha also submitted its bid for the Mamacocha Project in the Third Auction, and to recall, as part of the bid documents, Mamacocha had to sign two sworn statements, which are documents R-138 and R-139, acknowledging the immovable nature of the termination date and the bidding -- I'm sorry, the binding nature of the bidding rules, and I will come back to this point to respond to one of the Tribunal's questions.





Now, given the time constraints Mamacocha essentially vets the entire feasibility of its project on reversing ARMA's decision, and on 12 December 2013, when Mamacocha was declared one of the successful bidders in the Third Auction, Claimants held their breath and hoped that ARMA would reverse its initial environmental classification of the project as Claimants had requested less than two weeks prior, on 29 November 2013, and as the Tribunal knows, on 17 February 2014, Claimants were able to reverse ARMA's decision and obtain the lower classification of Category I, requiring only a DIA, and Claimants did so in part by separating the generation plant and the transmission lines.

As Kurt Vonnegut would say, so it goes. But Claimants' position backfired in spectacular fashion. Their insistence that the Mamacocha Project not be subject to a more detailed environmental evaluation resulted in community opposition, numerous legal challenges and the





annulment of its environmental permits and final concessions. Claimants do not like to draw attention to that in their three chapter story.

On 18 February 2014 the RER Contract for the Mamacocha Project was signed. In the end Mamacocha was able to obtain environmental permits for both the plant and the transmission line separately, and as a Category I project without a proper impact assessment or community input, and as the Tribunal will recall the circumstances of the reclassification of the plant and issuance of the environmental permits for both the plant and the transmission line led to several legal challenges, including to the Amparo request and ruling, the RGA lawsuit, and later became the subject of a criminal investigation.

It was Claimants' conduct and in particular their dogged insistence on pushing the project through the lowest possible environmental impact assessment that led to the demise of the

project.

Claimants' exhibit C-117 prepared by Mr Sillen contains a list of the challenges against the project's environmental permits filed between April 2015 and March 2017, and leaving aside the inaccuracies of the characterisations of the events in that, the exhibit does show that since at least April 2015 several stakeholders had concerns in connection with the project's environmental permits.

In September 2015 ARMA convened round table discussions. In April 2016 the RGA, the regional government, convened round table discussions and those discussions broke down after Mamacocha was granted the final concession.

By June 2016, Mamacocha had obtained the final concession for both the transmission and the generation plant, and also in June 2016 Mamacocha informed the regional government that it would resume works and no longer abide by





the suspension it had agreed to when the April 2016 round table discussions had started. After the round table discussions broke down, the regional government's investigatory commission was formed and private individuals exercised the right to challenge the permits in court.

The Tribunal has invited the parties to provide context for the greater number of environmental issues that were raised with respect to the Mamacocha Project from 2016 onwards as compared to the years prior.

Now, once the chronology is taken into account, it becomes evident that there was a progression from administrative challenges to mediation in the form of the round tables, and then to litigation.

On 18 August 2014, Mamacocha submitted its works schedule in accordance with article 4.6 of the contract. However, as Mr Sillen admitted, the works schedule that Mamacocha submitted to OSINERGMIN on 18 August 2014 was





based on outdated expectations that Mamacocha knew it could not meet. You have an excerpt on screen of that exchange and cross-examination.

In response to Tribunal Question No 13 the alleged delays suffered by the Mamacocha Project prior to the date of the contract are relevant because, first, they confirm that Mamacocha participated in the Third Auction aware that some permitting may be delayed. Second, they confirm that Mamacocha knew, when it signed the RER Contract, that the Mamacocha Project could not meet the reference COS. Therefore, Mamacocha would never be entitled to the full 20 years of the guaranteed tariff, which they later demanded.

And, third, it confirms that the Mamacocha Project was at a greater risk of not being able to meet the real COS deadline because it had less cushion, that's two-year cushion, which in Spanish we have referred to as "holgura".

The fact that the Amparo ruling is not being challenged has two principal consequences, and





with this I answer Tribunal Question No 17.

First the Tribunal is not free to ignore its findings and should grant it special deference on matters related to how local Peruvian environmental law is to be applied. The Amparo ruling is particularly relevant to the criminal investigation and prosecution of

[A15]as the charges relate to granting of illegal rights that affect the environment. The Amparo ruling confirms that Mamacocha's environmental permits were irregularly issued, and the Amparo ruling also confirms that the RGA lawsuit was not arbitrary, as Claimants have insisted throughout this arbitration, and any attempt by Claimants to relitigate the issues decided by the Amparo ruling, as we have seen in the last two weeks, should be rejected.

For the sake of completion we do note that Claimants' attempt to explain the division of the project is unpersuasive. The plant could not operate without the transmission line. It's a simple fact. And the transmission line

had yet to be built. And the only use of the transmission line that was contemplated in the final concession and the environmental permit was to connect the Mamacocha plant specifically to the grid, and the Tribunal can verify all this in exhibits C-298, pdf page 6 and 42, and also in exhibit R-50.

It is also relevant that the Amparo request and ruling are part -- and I emphasise are part -- of the counterfactual scenario and has to be taken into account.

On 19 June 2017 Claimants submitted their first notice of intent based exclusively on the RGA lawsuit that had been filed three months prior. The Special Commission in good faith took steps to try to resolve the dispute. One such step was to commission a report from the lawyer, Mr Morón. This report was not binding but, rather, was simply intended to provide the Regional Government of Arequipa a second opinion about the likelihood of success of that lawsuit.





On 8 September 2017, after the notice of intent but before Mr Morón issued its report, Mamacocha and MINEM signed addendum 3, which was subsequently extended via addendums 4 to 6.

This fact brings me to Tribunal Question 10, which is displayed on the screen, and for the interest of time I will not read out.

But in response to that question, note that clause 2.1 of the addendum 3 to 6 suspended the enforceability of all the parties' rights and obligations under the contract. As explained by Mr Lava, to fully understand the scope of that suspension, clause 2.1 has to be read in its entirety and in accordance with the rest of the provisions under addenda 3 to 6.

Note 2 of clause 2.1 states that the suspension was agreed to facilitate negotiations. In that context, the main purpose of the addenda was to suspend the supervision of the obligations under the contract mainly to avoid requests to increase the performance bond that would result from not





meeting certain targets in the works execution schedule. Importantly the suspension did not waive or modify the real COS or the termination date under the contract, and contrary to Claimants' allegations the parties did not agree to restore the suspended time.

There is nothing in the addenda that says that the real COS or the termination date would be modified as part or as a result of the suspension.

The intention is clear from the additional provisions included in addenda 3 to 6 shown on the screen, which clarify that the addenda did not constitute admissions of any type of responsibility from MINEM or the State. The terms of the contract not expressly modified remain in force. This is all stated explicitly. And expressly state that the clause 8.4 remained completely unaltered and enforceable.

And this was confirmed by the independent legal expert during this hearing, as you may





recall, and you see on your screen some of the excerpts from that testimony.

On 5 December 2017 Claimants and the Special Commission signed a confidentiality agreement, which is C-28. On 14 December 2017, the Special Commission submitted the Morón report to the regional government. And as Mr Ricardo Ampuero, the former president of the Special Commission, testified, and contrary to what Claimants would have you believe, the Special Commission did not analyse the RGA's lawsuit's merits, nor did it order the RGA, the regional government, to withdraw its lawsuit, nor did it admit that the RGA lawsuit was contrary either to the contract or the treaty. The Claimants misrepresented the facts and brazenly attempt to use good faith actions of the State to resolve the dispute as an alleged acknowledgment of responsibility by the State. This was confirmed by Mr Ampuero in the hearing, as you may recall from his testimony and the expert displayed on the screen.

As a result of those good faith actions by the State, on 28 September 2017 the Regional Government of Arequipa withdrew the lawsuit. That withdrawal did not mean that the regional government or Peru as a whole accepted or acknowledged any responsibility.

On 1 February 2018, quick on the heels of the withdrawal of the RGA lawsuit, Claimants submitted a Third Extension Request. On 8 March 2018, well before the MINEM rejected Claimant's Third Extension Request, Claimants submitted their second notice of intent.

In August 2018 MINEM started to assess the possibility of amending the applicable legal framework so as to allow the critical immovable dates under the RER regulations and the RER Contracts of the third and fourth auction to be moved back in certain cases.

In this context on 9 November 2018, MINEM published the draft of the Supreme Decree and following the normal statutory process invited any interested party to submit comments.





As you can see in this slide [68] former Minister Francisco Ismodes testified before you Peru considered modifying the legal framework in the manner proposed by the Draft Supreme [Decree] as a good faith effort to relax the rules of the RER regime, and several private parties, OSINERGMIN submitted comments to the draft Supreme Decree.

Several companies complained that the proposal would change the legal framework of the Third Auction retroactively to the detriment of third parties and the public interest and the principle of legal certainty [Spanish spoken]. Kallpa was not the only company that opposed the draft decree. Peru submitted into the record of this arbitration comments from Kallpa and Inland Energy as examples of the comments that were received by MINEM, and these you find in R-133 and R-104.

In any event, in response to Professor Tawil's question, both Mr Jacobson and Mr Ísmodes confirmed that the RER project had





almost no impact on the system and energy costs. In the words of Mr Jacobson, the Mamacocha Project was, and I quote, a tiny drop in a large ocean.

Therefore any suggestion that the draft Supreme Decree was rejected in order to favour Kallpa or other large players in the Peruvian market, as Claimants did again in their closing today, is completely baseless.

Peru informed Claimants that the RER regulations on which the Third Auction was based could not be modified. They did this on 27 December 2018. Now, this decision was based on the legal arguments raised by third parties whose rights would have been violated by the later modification of the conditions of competition of the Third Auction. This is a basic concept, basic notion of competition.

Importantly -- and I want to be very clear about this -- the draft Supreme Decree was not dropped, as Claimants falsely posit, because the State wanted the RER projects to fail so





that it could call the performance bonds.

As you can see on the slide in front of you -- and I recognise that it's a heavy slide -- former minister Ismodes explained in his testimony that it was far more beneficial for the State that the RER projects go forward and achieve commercial operation than to let them fail.

On 27 December 2018 MINEM initiated the Lima Arbitration pursuant to its rights as a contractual party under clause 11.3(b) of the contract.

On 31 December 2018 the MINEM rejected Claimants' Third Extension Request on the basis that the extension of the COS was contrary to the RER Regulation, the bidding rules, and the RER Contract. In fact, as we reminded in our opening presentation, MINEM had previously rejected Mamacocha's request to extend the termination date of the contract. In fact, there's never been any extension of the termination date of the contract.

Claimants' grounds to justify the extension of the COS were meritless. Claimants invoked delays purportedly caused by addenda 3-6 to justify their request. Claimants also raised the purported delays caused by the RGA lawsuit. However, the Tribunal will recall that the filing of the RGA lawsuit did not revoke or in any way suspend or delay permits or create an obstacle to construction of the generation plant or the transmission line.

This brings me to the Amparo ruling. That ruling is devastating for Claimants' case. There's simply no way around that, and Claimants know this, which is why they have shifted tactics in every conceivable way in this arbitration. They have gone from trying to hide the Amparo ruling from this Tribunal, to dismissing it as background noise, a nuisance suit, red herring, trying to minimise its impact, second-guessing it, trying to discredit it and, most recently, misrepresenting it. We have seen it all.





Let me focus on Claimants' most recent tactic, that they have argued in this hearing -- and they've said that should the project have gone forward, the decision of the Amparo proceeding would have been different. Claimants have absolutely no basis for that. In fact, their argument is based on a selective and misplaced reliance on a single sentence -- not even a sentence, a phrase, from the Amparo ruling.

And that phrase says that the, and I quote, execution of the project (referring to the Mamacocha Project) has not commenced, and this is page 3 of exhibit C-295 and slide 173 of Claimants' opening presentation as well.

Claimants argued in this hearing based on that single phrase that if -- or had the project been built, the court, the constitutional court, would have balanced the harm to the environment with the benefits of the project. That is simply not true and based on pure conjecture or speculation.





It's also contradicted by the very next sentence of the Amparo ruling not mentioned by Claimants at all and omitted from their slide 173 of their opening. That sentence notes that there is no evidence adduced in the Amparo proceeding establishing that the Mamacocha Project had not been built. The Spanish original of the court's ruling says -- and you have it on screen and I'll read the sentence in Spanish: (En español) "No se ha acompañado al proceso ningún medio probatorio que determine formalmente la inejecución del proyecto por lo que la demanda debe ser declarada fundada, disponiendo la nulidad de todo lo actuado hasta el momento de clasificación del proyecto".

In other words, the fact that the Project had not been built made no difference whatsoever to the court's determination that the environmental classification of the Mamacocha Project as low impact was legally incorrect and therefore null and void ab initio.





But also Claimants' argument makes no sense. The Amparo proceeding was initiated because the environmental permits granted to Mamacocha were contrary to fundamental environmental rights of individuals in the local community.

The constitutional court would only issue a ruling to protect those rights if it considered that a threat to the environment still existed. In the absence of any such threat, there would have been no basis or need for a ruling in favour of the plaintiff, Mr Bengazo. And, as Mr Monteza explained this week, the constitutional court considered whether the nullity of Mamacocha's environmental permits and the final concession were still relevant, even though there was no evidence on the record that the Mamacocha Project had been built, and the court concluded that a legal basis still existed to declare the environmental classification as legally incorrect.

As Peru has demonstrated and Claimants cannot deny, the Amparo ruling is final and

legally binding. Even Ms Quiñones, expert for Claimants, admitted that when she said: (En español) "el Poder Judicial tiene la última palabra en relación con un contrato que es nulo o que es válido". And this you find in Transcript Day 5, page 1089.

She added that the only entity that could declare that a ruling is arbitrary in this case is the Peruvian courts, and this you find also in Transcript Day 5, page 1091. Which brings me to the Tribunal's Question No 18 concerning the relevance of the Amparo action not being challenged in this proceeding, which is, we argue, of the essence.

Peru respectfully refers the Tribunal to the sections of our written submissions as well as transcripts from Peru's opening statement that you see on screen, and without attempting to summarise what we have already argued in respect of the importance or the impact or the import that the Amparo ruling has on this case, I recall the following facts, and I'll be very





brief.

It has been declared by a constitutional court through the Amparo ruling that Claimants misclassified their project and did not obtain the necessary environmental permits. The Amparo ruling is res judicata, and its effects are retroactive to the issuance of the irregular environmental permits in late 2013. This has been recognised by both experts for Claimants, but we heard today during Claimants' closing arguments an attempt to do two things.

First, Claimants are trying to deceive this Tribunal by suggesting that the Amparo ruling is not final by arguing that their desperate counter Amparo, or Amparo contra Amparo, remains pending and could overturn the Amparo ruling. That so-called counter Amparo has already been thrown out on 5 July 2021, and I refer the Tribunal to exhibit R-182.

Yes, Claimants appealed that decision but the chances of that succeeding are non existent, and I refer the Tribunal to





paragraphs 41 and 42 of Peru's Rejoinder where we explain this and it has not been responded to by Claimants.

The second thing that I want to point out, which we saw Claimants try to do today, was their attempt to deny that the retroactive effects of the Amparo ruling existed by suggesting that the permits should be deemed to have remained valid for two years. That plainly ignores the legal effect and meaning of a judicial declaration of nullity ab initio under Peruvian law as well as what its own experts claim its own experts have admitted in this arbitration.

As res judicata and not having been challenged in this arbitration as a measure allegedly contrary to international law, the Amparo ruling cannot be second-guessed by the Tribunal. The Amparo ruling demonstrates that even in a but-for scenario, Claimants would not have achieved the original COS, or the COS under addendum 2, or even the COS requested by





Claimants through its Third Extension Request.

Put differently, even in the absence of any of the measures subject to this arbitration, Mamacocha, Claimants, would not have had the right to guaranteed tariff under the contract, because they didn't meet the basic condition of having a final concession. And even if the Amparo ruling had been challenged as a measure in this arbitration, which it has not, that judicial decision does not even come close to meeting the exceedingly high standard for denial of justice under international law.

Now, Mr President, I come to a natural breaking point. I am in your hands whether you wish for us to take a 15-minute break now, or if you wish for us to continue.

PRESIDENT: I think the 15-minute break was contemplated in the agreed agenda, so let's break for 15 minutes. We resume at 18.35 CET.

MR GRANÉ: Thank you.

(Pausa para el café.)

PRESIDENT: Mr Grané, you may continue your

closing statement.

MR GRANÉ: Thank you very much, Mr President.

I will now turn to Claimants' contractual claims recalling that Claimants admit, including through their closing statement today, that this is a contract case, but even though this is a contract case disguised in treaty clothes, I wish to make clear that Peru reiterates and stands by its rebuttal arguments under the treaty, and public international law, especially because we heard nothing new today from Claimants' counsel on treaty claims. But on the issue of treaty interpretation I do wish to make a brief observation, and that is that the United States' non-disputing party submission, as well as its intervention this week, can leave no doubt whatsoever that the treaty parties agree on the interpretation of the treaty, and that such agreement must be given weight by the Tribunal pursuant to the Vienna Convention. Conversely the United





States has completely debunked Claimants' treaty interpretation, including in respect to the waiver clause, the content of MST, the scope of MFN among many others, and not surprisingly Claimants' counsel today went out of his way to try to deny and dismiss the weight of the United States' treaty interpretation, and it did so by completely ignoring the Vienna Convention on the Law of Treaties. Indeed, there was not a single mention of article 31 of the Vienna Convention by Claimants' counsel, and that speaks volumes.

But let me turn to the contract. Claimants' case theory is that Peru breached the contract, deliberately interfering in bad faith with the project, according to them, in an attempt to destroy it for some unknown political motive. But the evidence shows that Peru did no such thing. The contract terminated as a result of Mamacocha's, or Claimants', own contractual breaches.

And Claimants' treaty claims are based on





the same unfounded allegations and fanciful conspiracy theories. Consequently these claims must fail as well, especially considering that the threshold the Claimants must meet to establish a treaty violation is even higher than the threshold for a contractual breach in this case.

This brings me to Question 12 from the Tribunal, and the Tribunal formulated these questions under the heading of jurisdiction.

Now, these questions arise because Claimants breached the waiver requirement contained in Treaty article 10.18 and have submitted duplicative claims based on the exact same measure under the treaty and the contract. And confirming the treaty parties' agreement on the interpretation of the waiver requirement, the statement of the United States two days ago in this hearing confirms that these types of duplicative claims are not contemplated in article 10.16.1 of the treaty, nor does the treaty allow that a locally incorporated





company like Mamacocha join the treaty proceedings, formulating its own set of claims.

As set out in Peru's pleadings, Claimants' breaches of the waiver requirement means that the Tribunal lacks jurisdiction over Claimants' treaty claims, and turning to the first question on your screen, (i), on the assumption that the Tribunal has jurisdiction the Tribunal should first consider Mamacocha's claims under the contract because the success of virtually all of Claimants' treaty claims is premised on their untenable interpretation of the contract.

If the Tribunal concludes that MINEM did not violate the contract, as we respectfully submit it should, then Latam Hydro's treaty claims must fail, given the applicable legal standard under the treaty, which we have expounded in our pleadings. But, conversely, a finding that MINEM violated the contract does not necessarily mean that Peru violated the treaty.

As the ICL Commentary to article 4 of the Articles of State Responsibility states, and I

quote, the breach by a state of a contract does not as such entail a breach of international law. Something further is required before international law becomes relevant. End of quote.

Importantly, for any of the treaty claims to succeed, Claimants would need to prove that Peru violated the contract, acting in its sovereign capacity, and I'll come back to this point, and that such sovereign conduct violates the treaty provisions and the applicable standards, which in this case as you know includes customary international law.

Here I wish to respond very briefly to what we heard from Claimants' counsel today, who attempted to suggest -- and this was said in the context of their arguments about expropriation -- that the distinction between sovereign and commercial actions do not matter.

Once again, Claimants are ignoring basic principles of public international law. Countless international tribunals have





confirmed that to establish a breach of international law Claimants must demonstrate that the State acted in its sovereign capacity rather than as an ordinary contracting party, and I respectfully refer the Tribunal to our Countermemorial in paragraphs 783 to 786, where we cite some of the many legal authorities that recognise that basic principle of public international law.

Now, in response to the other question on your screen, a finding that Peru violated a treaty protection would have no relevance for Mamacocha's contractual claims because those claims rely on a different applicable legal standard. By contrast, if the Tribunal rejects Latam Hydro's treaty claims that are premised on a violation of the contract, understood as an investment agreement, a term of art under treaty article 10.16, then it must reject Mamacocha's claims under the contract because in that case the applicable legal standard for both sets of claims is Peruvian law, and this





is pursuant to both articles 10.22.2 of the Treaty and clause 1.2 of the Contract.

Now, the hearing confirmed that Claimants' case theory is based on a manifest misrepresentation of Peruvian law, the RER regime and the contract, and Claimants challenge the reasonableness of numerous provisions of the contract and the regulations alleging that, pursuant to a literal interpretation of these norms, Peru would be allowed to deliberately sabotage or interfere with the project with impunity. It's a phrase that we kept hearing from Claimants' counsel, starting from their opening presentation and throughout the last two weeks.

But, indeed, we heard this theory based on several false premises, in a gross distortion of the contract and Peruvian law, and one such premise is that every single Peruvian State entity was contractually bound by the RER Contract. Ms Quiñones said so expressly in her reports. But Ms Quiñones' cross-examination





revealed that her theory has no basis under Peruvian law, and is in fact internally inconsistent and contrary to the existing jurisprudence on this issue.

For example, Ms Quiñones argued that every single Peruvian State entity is contractually bound by the contract because MINEM signed the contract on behalf of the Peruvian State. They made much of this. She tried to support that absurd argument by attempting to draw a distinction between the contract on the one hand and the plant's final concession on the other hand, arguing that the latter -- so the plant's final concession -- binds only MINEM because it was not acting in that case on behalf of the Peruvian State. You have an excerpt that goes to this point on your screen.

However, the Resolución Ministerial that approved that final Concession Contract expressly authorised, and I quote in Spanish: (En español) ". . . al Director General de Electricidad, . . . a suscribir en

representación del Estado el contrato de concesión aprobado". This is R-0098. Now, when confronted with this fact, Ms Quiñones simply disregarded that Resolución Ministerial, yet she had previously argued that the same language contained in the Resolución Ministerial that approved the contract proved that such contract is binding on each and every single State entity of the Peruvian State.

You have the exchange on the screen and, again, in the interests of time I will not go over the exchange.

Ms Quiñones then tried to gloss over the obvious contradiction in her position by arguing that the Electric Concession Law, unlike the RER regulations, does not state that the MINEM acts on behalf of the State. Ms Quiñones was wrong yet again.

Article 1 of the Electric Concession Law, which is MQ-116 on the record, expressly provides that, and I quote: (En español) ".[MINEM] y el OSINERGIM en representación del




Estado son los encargados de velar por el cumplimiento de la presente ley".

Under cross-examination Ms Quiñones finally admitted that not all State entities were bound by the contract after all, and the test that Ms Quiñones articulated which is contained in this excerpt -- but she said it several times so it's not only in this excerpt, you'll find it in other parts of the transcript -- the test that Ms Quiñones articulated during that oral testimony confirms that several measures challenged by Claimants simply have no basis and must be thrown out.

For example, none of the obligations set out in the contract concern entities such as the Procuraduria del Gobierno Regional de Arequipa, which filed the RGA lawsuit or Fiscalia which brought the criminal investigation. Therefore, pursuant to Ms Quiñones' own analysis, these entities' actions simply not constitute a contractual breach (slide 84) because the actions undertaken by those entities had




nothing to do with the performance of the contract, to use Ms Quiñones' test.

Also, Ms Quiñones was confronted with the findings of the Tribunals in the Conhidro, Electro Zaña and EGE Colca cases, all of which directly contradict her arguments. And she admitted that under cross-examination.

By contrast, she expressly confirmed that she was unable to identify a single arbitral decision that supports her original theory that every single state entity and not just MINEM is contractually bound by the contract, and you have the references on the screen to the transcript.

Now, contrary to Ms Quiñones and Claimants' theory, Peru and its experts have demonstrated, on the basis of the contract and Peruvian law and confirmed by the jurisprudence, that it is MINEM rather than every single Peruvian State entity who is contractually bound by the contract, and, members of the Tribunal, it could not be otherwise. MINEM cannot act on




behalf of or legally bind other State organs. And this, too, was admitted by Ms Quiñones, who testified that, and I quote in Spanish: (En español) "la administración no goza de autonomía; unicamente puede obligarse o cuenta con los derechos que le reconoce la normativa y el marco legal".

Ms Quiñones also admitted that the Egecolca tribunal rejected the thesis that the grantor is the Peruvian State as a whole rather than MINEM and concluded that, and I quote, a series of delays in the granting of permits by entities of the Peruvian State were not attributable to the grantor of the RER Contract precisely because these actions were not attributable to MINEM. Of course, Ms Quiñones, when confronted with the award, had to admit this.

Put simply, MINEM is the grantor of the contract. MINEM is the organ of the Peruvian State that is contractually bound. Other State organs and regional governments, including

those that are not involved in the performance of the contract, to use Ms Quiñones' formulation, are third parties.

Members of the Tribunal, if one were to conclude, as one should, that State entities other than MINEM are not contractually bound by the RER Contract and, instead, are third parties, Claimants' house of cards falls apart.

But, to be clear, the above does not lead to the conclusion that Claimants want to impress upon you that the State would be allowed to interfere with impunity in the performance of the contract, as Claimants have argued repeatedly, and this was explained by legal expert Mr Monteza in this hearing before you, and you find this in Transcript Day 6, page 1363, and on to 1367.

Now, Claimants also wish to modify the content of the RER Contract in a way that is contrary to the RER regime and the bidding rules and therefore precluded by law. Their attempt to move the immovable critical dates





under the contract is one of the main examples, and at the root of this attempt by Claimants is their belief that the RER regime and the contract are subordinate to their project financing strategy and schedule.

But how Claimants decide to finance their project was their exclusive responsibility and, thus, risk. And we saw this in the opening, we've said this in the pleadings, and we must insist on this because Claimants insist on their thesis that has no basis in the contract. Just to be very brief, for instance, pursuant to clause 3.3 of the Contract, Mamacocha had the obligation to finance the project, and as recognised by Mr Jacobson during the hearing the contract did not require Mamacocha to use any specific financing mechanism.

But Claimants nonetheless argue in this arbitration that the actions of a number of State entities prevented them from reaching the financial closing because they allegedly made it harder to obtain financing through one of





the multiple mechanisms available to Claimants, and Claimants argue that Peru therefore illegally interfered with the development of the project.

However, as Mr Lava explained, the State cannot be responsible for the lender's conditions or expectations or for Claimants' inability to meet those.

To accept Claimants' theory, the Tribunal would need to conclude that the actions of any State entity that could in any way discourage investor's lenders would make Peru liable under the contract and the treaty and public international law? It makes no sense.

I will now address questions 1 and 2 of the Tribunal, which you have on your screen, and these concern the much talked about clause 8.4 of the Contract, and of course, as you know, this is the clause that contains the automatic termination of the contract.

Put simply, the contract, its pre-existing legal framework and the entirety of the





relevant arbitral jurisprudence all confirm unambiguously that clause 8.4 means precisely what it says. If for any reason whatsoever the COS of the RER project has not been completed by 31 December 2018, the contract shall be automatically terminated.

Now, that's true for the Third Auction. The Fourth Auction is a different date. Therefore, by entering into the contract, Mamacocha voluntarily assumed the risk of any and all potential delays to the COS. These risks included delays for which Mamacocha was not directly responsible, and, as you will recall, Professor Tawil put Question 1 to Mr Lava during his presentation, and again, in the interests of time, I will not read the exchange. You have it on the screen.

In his testimony, Mr Lava explained in response that any tension between clause 8.4 and clause 10.2 is resolved by the statutory and legally binding provisions of the RER regulations, and specifically articles 1.13B to

1.13D, and the bidding rules, articles 1.2.31 and 10, which confirm -- these legally binding statutory provisions confirm that clause 8.4 prevails and establishes the automatic termination of the contract if the real COS is not met, and we respectfully refer the Tribunal to the Transcript Day 6, page 1393 to 1401.

And that is precisely why every single one of the four Lima Arbitration Tribunals have interpreted clause 8.4 in accordance with its plain meaning and express language. One example is what you have on your screen, and then you have additional citations at the bottom of your screen.

This slide contains these references to the other arbitral awards, and all four Tribunals have confirmed that if for any reason whatsoever the COS of the RER project was not completed by 31 December 2018, the contract shall be automatically terminated in accordance with 8.4.

And several of these Tribunals, and this is





important and goes to Professor Tawil's question, several of these Tribunals expressly refer to the wording of clause 10.2 and they nonetheless agreed with Peru's interpretation of clause 8.4. And, indeed, every single one of the Tribunals in those cases, in the cases of Santa Lorenza, Electro Zaña, Conhidro and EGE Colca, they all concluded that clause 8.4 contains a condición resolutoria, as Peru argues, and not a cláusula resolutoria expresa, as Claimants argue [slide 97].

Ms Quiñones admitted that all of these awards manifestly contradict her and therefore Claimants' position in this case and yet, despite all of above, Claimants have the temerity to assert, as they did today, that Peru's interpretation of clause 8.4 is quote unquote cynical (claimants' counsel's word).

I now turn to question 4 of the Tribunal, which you will see on the screen. Now, what is the legal significance of the sworn statements of 30 October 2013 of Claimants? This is again





R-138.

The legal significance of this sworn statement is that Mamacocha understood and accepted the immutability of the contract termination date. The slide identifies the sections of the transcript where Peru's legal counsel addressed this issue, and as they explain Mamacocha accepted that the termination date could not be modified for any reason whatsoever. The words "even when", "aun cuando" in Spanish, are evidently not exhaustive. That is, what it means is that force majeure, fuerza mayor, is only one of the reasons that could not justify a modification of the Contract's termination date, but reinforces the principle that even events that are not attributable to the investor cannot justify a change of the termination date.

Despite this Claimants several times requested that MINEM change that contract termination date, and MINEM rejected all of those requests, which takes me to Question 5





now on screen: Can the following dates be amended by contract or only by regulatory action?

The bidding rules that Claimants unconditionally accepted and which form an integral part of the contract by express provisions of the contract confirm that the three critical dates could not be contractually amended because those dates were set forth in the RER regulations, including articles 1.13B, C and D.

As Mr Monteza explained, precisely because none of these legal norms can be amended by contract, in November 2018 the MINEM published the draft Supreme Decree that sought to allow these three critical dates to be modified only in certain circumstances. Specifically only in the event of unjustified acts or omissions by any state agency, and this is RL-131, and you see this on your screen, this being the draft Supreme Decree.

And this is telling, members of the

Tribunal. It is so telling, it's such common sense that it can easily escape attention, which is why I wish to draw your attention to this.

If Claimants' interpretation of the contracts and the RER regime were correct, a Supreme Decree that said what you see on your screen would have been completely unnecessary, and Claimants would not be complaining so bitterly about the fact that the draft Supreme Decree was not approved. The draft Supreme Decree is further confirmation that what Claimants are asking this Tribunal to conclude is directly opposite to what the RER regime and the contract provides. But the draft decree was never approved and therefore the RER Regulations that Claimants expressly accepted remain in force, which means that those dates could not be changed because if they were changed, it would be contrary to the regime that the draft Supreme Decree was trying to relax.





Ms Quiñones admitted during cross-examination that every single one of the Tribunals in the cases of Electro Zaña, Conhidro, EGE Colca, confirmed that the parties to an RER Contract simply are not entitled to modify these dates, and, as we will see in a moment, the Tribunal in Electro Zaña also confirmed that these rules apply even when the concessionaire cannot comply with the real COS as a result of delays attributable to the State.

The slide contains references to other awards that also confirm that relevant dates cannot be modified by contract, regardless of the circumstances that caused those delays, and the above also answers Tribunal Question No 6, which is now on your screen.

It refers to this so-called two year cushion or holgura between the reference COS and the real COS, which is intended to accommodate delays attributable to Mamacocha and also delays attributable to third parties, including





the State or any of its governmental authorities.

It is simply untrue that the RER rules are unreasonable, as Claimants argue in this arbitration. Mr Monteza explained the crucial public interest that justified those rules. He also explained that during the two-year cushion Peruvian law provided Mamacocha with numerous effective legal tools to ensure that any State entity issued the permits required by Mamacocha to reach the COS by 31 December 2018. But Mamacocha failed to make good use of those legal mechanisms under Peruvian law, and it did so at its own risk.

Once again, as shown on the screen, multiple independent and impartial arbitral tribunals have analysed the purpose of the two-year cushion, confirming that it is intended to accommodate all types of delays.

I will now address MINEM's obligation to assist, or coadyuvar, under clause 4.3 of the contract.





As shown on screen, the president asked Mr Jacobson about this obligation. Mr Jacobson was evasive and alleged that, and I quote, "Presumably it means more than best efforts" and that Peru "is a unitary as opposed to a Federal state and that when the State speaks as the State, it is speaking not only on behalf of the central authorities but also the regional authorities".

Which brings me to Question 16, which is displayed on screen. This question about unitarian State.

The fact that Peru is a unitarian state and not a federation is entirely irrelevant to the matter of permitting. Just as many other unitarian states, Peru is decentralised, and this is by constitution, and as Mr Monteza demonstrated, pursuant to Peru's constitution, the regional and local governments entitled to grant most of the relevant permits in this case are autonomous and decentralised, and it would be unconstitutional for MINEM to encroach or

interfere with their competences, including the issues of permits of these other regulatory governmental regional agencies.

As noted earlier, even Ms Quiñones conceded this point, and this is precisely why clause 4.3 limits MINEM's obligation to assist Mamacocha in the obtention of the permits, provided that certain requirements are met, and to be clear, even Ms Quiñones admitted during cross-examination that the obligation contained in this clause 4.3 falls exclusively on MINEM.

Contrary to Claimants' allegations, neither MINEM nor the Peruvian State guaranteed that the investor would obtain the final concession or any other permit in a timely manner or at all. There's not a single contractual provision that guarantees that Mamacocha would obtain those permits in a timely fashion, and in fact, as I mentioned earlier, clause 4.3 expressly contemplates the real possibility that Mamacocha would not be granted the necessary permits.





It is only then that MINEM's obligation to assist or coadyuvar may kick in provided that the other requirements are met as well. This issue has been extensively briefed by Peru, and I respectfully refer the Tribunal to section VI.C of our Countermemorial and [V.]B.5 of our Rejoinder.

I will now turn to question 3, which is on your screen, and it's still related to this issue of the obligation to assist when certain conditions are met.

The answer to the first sub question is that Mamacocha did not request assistance in obtaining permits in accordance with clause 4.3. During his cross-examination Mr Benavides admitted that he included no evidence in his reports of a request from Mamacocha to MINEM that would have triggered the obligation to assist under clause 4.3.

Claimants, likewise, have not submitted any evidence of any such request. The only examples provided by Claimants of purported





assistance requests are a few letters sent by Mamacocha to MINEM. The first of these letters pertains to a document that has not even been mentioned by Claimants in this arbitration and is not part of their claims.

The other letters did not request MINEM's assistance to obtain permits. Even though Mamacocha only invoked clause 4.3 in one of its letters, that letter did not trigger the obligation to assist under that clause because Claimants asked MINEM to somehow block or reverse the regional government of Arequipa's lawsuit, the RGA lawsuit.

And on screen you have a slide that contains the references where you will find the supporting documentation on the record for the points that I just made. However, MINEM expressly informed Mamacocha that the obligation to assist does not require MINEM to defend the permits or to interfere with the powers of other entities, autonomous, decentralised entities, such as the Arequipa





regional government. And as explained by Mr Monteza, the obligation to assist cannot be deemed under any view a legal bar for the Regional Government of Arequipa or any other State organ to question the legality of certain permits.

Also, as Peru has explained, in order to trigger the obligation to assist, Mamacocha had to inform MINEM and duly prove that it had complied with all applicable requirements to obtain those permits.

Yet the Amparo ruling proves that Mamacocha failed to comply with the necessary requirements to obtain the permits such that MINEM's obligation to assist could not have been triggered. In other words, Claimants' allegations regarding MINEM's breach of clause 4.3 are unfounded.

I'm coming to the end of my presentation, Mr President, members of the Tribunal.

In any event, as Claimants have admitted in this arbitration, the MINEM did support

Mamacocha in defending the legality of the environmental permits in the context of the Amparo proceeding, and we've heard several references by Claimants in this arbitration about the fact that MINEM participated in that Amparo proceeding defending the permits. And although the constitutional court ultimately ruled that the permits were illegal, the fact that MINEM supported Mamacocha well after the alleged pivot and the third chapter in Claimants' novel, highlights the fact that MINEM was not intent in destroying the Mamacocha project, as Claimants falsely assert and would have you believe.

And this takes me to question 18A. MINEM's position during the Amparo proceeding regarding the validity of the environmental permits has no relationship with the actions that MINEM took in December 2018. All the actions taken by MINEM during that period, decision not to approve Supreme Decree, rejection of the Third Extension Request, the filing of the Lima





arbitration, were consistent with MINEM's understanding of the RER regulations, and specifically to the impossibility of extending the critical dates.

These are two separate matters, and in any event MINEM support during the Amparo proceedings confirms that it had no intention to destroy the project.

And, lastly, I will turn in just one minute to the Third Extension Request, and as we just explained, the real COS date and the contract termination date cannot be modified. That modification would be contrary to the legal regime and therefore precluded by law. Therefore, MINEM did not violate the contract, or Peruvian law, when it denied the Third Extension Request.

Moreover, addendum 2 cannot have created any expectation that MINEM would approve the Third Extension Request, because addendum 2 was contrary to law and the circumstances -- and this is important -- the circumstances that





gave rise to that addendum were different from the ones alleged in the Third Extension Request.

In response to question 7A, addenda 1 and 2 only modified the works schedule, and Dr Monteza confirmed this during his testimony, and both addenda expressly provide that the rest of the contract remained unchanged. Neither addenda amended clauses 1.4.24 and 1.4.40 of the RER Contract.

In response to Tribunal's Question No 7, Peru respectfully reiterates that the rejection of the third extension was adopted by MINEM acting in its capacity as a contracting party and, as we've discussed earlier, acts carried out in the State's capacity as sovereign authority are the only acts that are capable of giving rise to State responsibility under international law.

Mr President and members of the Tribunal, in the interests of time and so as to not encroach on my colleague's time, I will not refer to the





last measure, the Lima Arbitration, but simply reiterate the pleadings that we have made on this issue, perhaps only with the sole exception of responding very briefly to questions 8 and 9 of the Tribunal.

The simple response is that MINEM could not unilaterally declare the nullity of that addenda 1 and 2, and it is for that reason that on 27 December 2018 it resorted to local arbitration. But, as you know, the Lima Arbitration, or the Tribunal in the Lima Arbitration did not reach the merits of Peru's claims. Instead, it dismissed the claims on jurisdiction.

Due to time constraints I will not go over, once again, why each alleged contractual breach fails, but Peru has included a brief summary of the steps that lead to that dismissal of Claimants' contractual claims with references to our pleadings where we address those claims, and you have those few slides on your screen.

And with this, Mr President, members of the

Tribunal, I conclude my presentation and, with your indulgence, I invite Ms Endicott to address you on the issue of alleged damages. Thank you.

PRESIDENT: Thank you.

MS ENDICOTT: Hello, and good afternoon.

Testimony and argument at this hearing have not only established the absence of any merit to Claimants' claims but also that Claimants have no right to compensation.

First and foremost, the record shows that Peru's actions were not the proximate cause of Claimants' losses. Now, Claimants don't dispute that proximate cause requirement, but in their opening counsel for Claimants tried to bypass the causation requirement by asserting that Peru does not contest the impugned measures caused the harms alleged. They tried this narrative again today but it's false.

As Peru demonstrated in its pleadings and opening statement, even in the absence of the impugned measures, Claimants could not have





achieved commercial operation of their project. Even on their own case they can't show causation. Notably, as Claimants pointed out this morning, Mr Jacobson confirmed Claimants' position that it was the fact that the RGA lawsuit essentially threatened the environmental permit that rendered financial closing unattainable.

Now, if you accept Claimants' premise that a suit threatening those permits is enough to derail financial closing, then the September 2016 Amparo request threatening those same permits but not alleged as a breach must be deemed the intervening cause of Claimants' losses.

The reality here is that despite conceding that they assumed the obligation to achieve financial closing, Claimants would not have reached their scheduled May 2017 financial close, even absent the impugned measures, because they had been unable to timely satisfy the prerequisites for their filings.





Both DEG and Innergex required extension of the RER Contract term to extend tariff payments beyond the 16 years remaining.

Now, Mr Sillen tried to convince you that the term extension was insignificant. Next slide, please. But Mr Jacobson, who would have put up the extra equity in the event of a shorter term, testified he didn't know what they would have done if they hadn't gotten that extension.

Claimants also had not obtained necessary credit approvals, a process that both Mr Jacobson and Mr Sillen testified was time consuming but required to secure their project finance loan. Additionally, although the parties had scheduled signing of the Innergex deal by February 2017, both Mr Sillen and Mr Jacobson confirmed that the contract was not signed by the 14th of March 2017 valuation date.

Now, while Mr Dellepiane claimed that Innergex's participation was unnecessary





because Claimants could self-fund -- next slide, please -- communications between DEG and Claimant show that Innergex's participation was mandatory. You can see that there on the screen. Next slide, please.

In question 11 you, the Tribunal, have asked about the fact that Claimants weren't able to meet either the original operation start-up date, or the 14 March 2020 extended commercial operation deadline.

There is no dispute that Claimants could not have met the first deadline, and the extended COS of 14 March 2020 was equally unattainable, because Claimants had failed to fulfil the financing prerequisites they claimed were essential to break ground, throwing their July 2017 construction start date in doubt.

In any event, as we've discussed before, their "minimum" schedule left only a six-week buffer for completing construction with no safety margin. They failed to put forward any evidence that their financing partners would

have agreed to this tight timeline, particularly where DEG's independent technical adviser, Hatch Engineering, recommended 33 to 36 months for the project.

Claimants' construction schedule is particularly problematic because it fails to account for the serious geological risk involved, including the unknown rock class of the head race tunnel -- next slide, please -- an item on their critical path.

On this particular issue we commend the Tribunal to the Norconsult report, which is in the record as BRG-39.

Now, recall that Claimants were seeking an extension to commercial operation in late January 2017, six months before construction was scheduled to begin. You've got to ask yourselves why. If Claimants were confident they would achieve commercial operation by that deadline, why would they seek an extension, particularly when the sooner they began operations the sooner they could receive the





tariff with which they planned to pay back their multimillion dollar loan.

The truth is Claimants' inability to meet the deadline was of their own making, and it led them to seek a pretence for a further extension, so they blame the RGA lawsuit, the permitting delays, and the criminal investigation, asserting in their opening that these were "concurrently operating causes of their loss".

That's not so. The evidence they cite does not support their claims and, as you review the pleadings, please review that evidence carefully. As you can see on the screen, not everything that is suggested to be contained in the documents actually is.

Reality is that Claimants were hopelessly behind schedule before any of these alleged breaches took place.

I'd now like to turn to the issue of quantum. Now, if you were to reach the quantum analysis, which is unnecessary in light of the





lack of causation, you'd be required to answer three questions.

First, is fair market value the right measure of compensation here? Second, if it is, are Claimants entitled to receive the fair market value? And lastly, if so, what is that fair market value?

Turning to the first question, the parties agree that in the case of total deprivation of the investment, fair market value is the appropriate measure of damages. Now, Claimants presented an alternate damages remedy based on the cost they had spent, but this sunk cost approach was vociferously renounced by Mr Cardani on cross-examination, and that is for good reason. Claimants can't substantiate 46 per cent of the costs they allege.

You heard again today about the alleged detailed reconciliation Mr Sillen performed, but it's not in Mr Sillen's statement. It turns out it's not even in the record as made clear by Claimants' offer today to submit new





evidence with their post-hearing briefs.

Turning to the second question, are Claimants entitled to receive the fair market value of their investment in this case? The answer is no. The Tribunal in Question 18 -- next slide, please -- has asked about the impact of the Amparo ruling of 30 January 2020 and how it affects damages. [slide 151].

Its impact on damages is that it precludes any recovery by Claimants as already noted by Mr Di Rosa. The Amparo ruling is ex post information that must be considered in valuing compensation. Recall that Claimant is seeking $45 million on the premise that absent the breaches alleged in their counterfactual world Claimants would have achieved commercial operation by 14 March 2020. You can see that date there on the screen. The Amparo ruling, which is not alleged as a breach, means that even in the counterfactual world, Claimants' operations would have been inviable on 30 January 2020.

Having failed to grapple with this in their written pleadings, Claimants presented a lot of baseless new arguments on the Amparo today which my colleague, Mr Grané, has already addressed, but they don't challenge the rule that ex post information which would have prevented Claimants from operating their investment successfully must be considered. And here that rule precludes recovery, and it makes sense.

Claimants are asking you to award them $45 million through this arbitration, which they never could have earned operating their project because it would have been unviable 30 January 2020 even absent the measures they allege as breaches.

Claimants can't be permitted to recover through litigation what they could not have earned through operation of their investment in the but-for world. That's not what these proceedings are for.

And Claimants have no response to the legal





authorities in the record recognising the significance of such ex post information, or the US non-disputing party submission recognising the same. It bears repeating that Claimants' new argument on the Amparo is based on a truncated quotation of that ruling, and if you could flip forward to that slide, please, that's shown here on the screen. There's their reading, and if you could click, we have the remainder of the decision.

That is contradicted by the full text of that decision and it's been explained not only by Mr Grané today but also by Dr Monteza in his presentation. Tellingly, none of Claimants' experts were willing to endorse Claimants' meritless arguments concerning the Amparo.

The Amparo ruling means that Claimants cannot recover fair market value or any compensation. That's because they can't show that but-for the impugned measures they would have secured such value.

So let's turn now to the third question. If





you were to decide nonetheless to award fair market value, what should it be? This is also, conveniently, Tribunal Question 19. As Mr Dellepiane conceded the value at issue here is the price to which a willing buyer and willing seller would agree. Here we have an offer that models that scenario. Innergex was willing to invest in Claimants' project and, as Claimants have repeatedly indicated, they were ready to accept Innergex's terms. How did Innergex come up with its price? First it looked at what Claimants had invested. It agreed to recognise only $7.63 million of those costs in accordance with its verification process, which you can see on the next slide.

This shows Versant were not the only ones who found it impossible to reconcile Claimants' alleged expenses, by the way, and BRG has conceded this $7.63 million represented the investment value of Claimants' 100 percent stake, and we've got that on slide 164 for you. Now, Innergex also created a financial model to





model the cash flows. This was agreed with Claimant and shared with DEG, as Mr Sillen confirmed.

While Mr Dellepiane resisted this fact, he conceded there was no evidence that Claimants ever objected to or disagreed with this model, and he conceded that the Innergex model supported a finding that discounted cash flows for the project as of February 2017 indicated a value of 7.23 million.

We'll go ahead and add that to our chart as well. If you could move forward a few slides, please. Few more.

Having conducted its due diligence -- a couple more, please -- to where we have the chart that gives the two values. There we go. So there you can see the investment value and the Innergex financial model DCF. [slide 167]

Having conducted this due diligence, Innergex made an offer that recognised Claimants' existing investment as worth 7.63 million and offered a development premium of

1.5 million.

If we go to the next slide, as Mr Shopp explained the value implied from this offer is 8.84 million. If we go to the next slide, we'll add that to our chart as well. Counsel for Claimant tells you the "intrinsic" value was different and suggests it can only be captured through a discounted cash flow analysis, but the fair market value standard is not that narrow. It looks not just at discounted cash flows but more generally at what market participants would pay.

Now, since counsel for Claimant likes hypotheticals, let's use this one. Assume that rather than invest, Innergex was simply going to buy Claimant out. Having assessed an investment value of 7.63 million and a discounted cash flow of 7.23 million and knowing, after it made its purchase, it would have to invest 17.8 million, what would Innergex have paid Claimants on March 14, 2017?

Certainly not $25 million. Claimants





perhaps sensed this absurdity so, in closing, counsel for Claimants tried to argue that an offer from a willing buyer that would be accepted by a willing seller somehow fails to capture the true fair market because it's not a DCF model. But the DCF is just one tool and it can be flawed itself, as demonstrated by BRG's model, which Mr Dellepiane struggled to defend on cross-examination, in particular because that model violates a key financial principle that the cost of equity may not fall below the cost of debt.

Notably, Claimants chose not to cross-examine Mr Sequeira on this point. Now, if I can ask my colleague to jump to slide 177.

Finally, offers made by Claimants and willing buyers in 2018 were not distressed but, instead, as admitted by Mr Dellepiane, were subject to the same conditions as the but-for world. Notably, Claimants failed to address these offers in closing or cross-examination.

But if the Tribunal is still curious what a





willing seller would have offered a willing buyer, or what a willing buyer would have paid, these 2018 offers are quite instructive, so the answer to the final quantum inquiry, then, is that as of March 14, 2017, the fair market value of Claimants' investment was between $3 and $9 million, far short of the $25 million value Claimants put forward, and not due to them anyway for the problems that we have already explained in our case.

With that, I will now cede the floor to my esteemed colleague, Mr Di Rosa.

MR DI ROSA: Mr President and members of the Tribunal, I know we're at the very end of a long day and of a long hearing, so we will be brief in our closing thoughts.

In our introductory remarks today, we stressed the importance of assessing this case through the prism of common sense, and now that you've had the benefit of the rest of our presentation today, including specific citations to relevant documents and testimony,





it seems useful once again to apply the filter of common sense to certain foundational aspects of Claimants' case. Doing that reveals the many ways in which this case is nothing short of perverse.

It's perverse that the cornerstone of Claimants' narrative is an alleged 180-degree shift in the government's handling of their project, a vicious government conspiracy to destroy their project, they say, when there's actually zero evidence of that.

They identify a very specific moment, December 31, 2018, when the government supposedly radically changed its position on their project. That's when all of a sudden the government pivoted, to use their term. But the only purported evidence of the alleged conspiracy that they invoke consists first of measures like the withdrawal of the draft Supreme Decree and the denial of the Third Extension Request and then, second, negative comments that were filed during the comment

period of the draft Supreme Decree.

But none of that is real evidence. The measures that they invoke were simply measures that were designed to avoid an illegal modification of the contract and of the RER regime, and anybody has the right to put in comments during a public comment period of a draft decree. Negative comments are not tantamount to collusion.

So in the end Claimants have produced zero evidence of any government plan specifically designed to target their project, much less to destroy it, zero evidence of any larger government conspiracy against the Claimants, zero evidence of discrimination, zero evidence of political motivation, zero evidence of bad faith.

Aside from the fatal defect of lack of evidence, the other threshold question that Claimants have not been able to answer is why. What possible motive could the government have had for radically changing its position in




December 2018 after straining for five long years to help the Claimants?

Claimants have not articulated any plausible theory on that. One of their theories, which was reiterated by Mr Jacobson in his testimony last week, is that the government wanted to collect $55 million in performance bonds. But how likely is that? $55 million is a tiny amount for a national government and, as Mr Ísmodes explained, the government stood to gain far more in taxes and new jobs and clean energy, et cetera, if these RER projects had actually been completed.

In any event, the facts disprove the theory because the government called some of the bonds where it was appropriate to do that, but others it did not call.

Another factor that renders the alleged conspiracy unlikely is the tiny size of the Mamacocha Project in relation to the overall electricity production in Peru. As Mr Jacobson put it, their project was a tiny drop in a




large ocean. If that's the case, why would the government contort to destroy this particular little project? Doesn't it seem far more plausible that the issue was simply that, at the point of the Third Extension Request, the MINEM took stock of the situation overall and said this whole thing has gotten out of control. Under the RER regime, we actually can't lawfully do a lot of this stuff.

Another theory for the conspiracy is that a couple of nefarious and self-interested big gas producers colluded with the government to derail Claimants' project. But given what I just mentioned about the size of the project, did it really present a threat to anyone in the Peruvian energy market, let alone the big producers? And the only evidence that Claimants have invoked on this is that the gas producers objected during the public comment period. And that's a right that the gas producers exercised. As I mentioned, it's not evidence of any conspiracy.




And the third and final theory that Claimants have advanced is the alleged influence of local politicians. But how plausible is it, really, that some local politicians in a remote region in the south of Peru wielded enough influence to dictate the entire national government's handling of Claimants' project?

It's also perverse that Claimants base so much of their case on conduct by MINEM that was actually designed to help them. MINEM extended the contractual deadlines in addendum 1. It did it again in addendum 2. It went to the trouble of preparing and publishing a draft new Supreme Decree. It agreed in addenda 3-6 to suspend the enforcement of CHM's contractual obligations. It took Claimants' side even in formal submissions to the court in the Amparo proceeding, et cetera, et cetera.

MINEM didn't need to do any of that. It had zero contractual or legal obligation to do any of that. It did it simply to help the

Claimants as part, of course, of a larger effort to advance the government's policy goal of having these RER projects completed as soon as possible.

The government wanted this project and all the other RER projects to be completed, and that's precisely why MINEM bent over backwards to help the Claimants for five years. But now perversely Claimants are using as a sword against Peru all of the efforts that the MINEM and also the Special Commission made to help Claimants overcome the consequences of their own failures in the project, their own violations of the RER Contract.

It's perverse also that the very legal norms that were created to accelerate completion of the RER projects are now being used against Peru simply because MINEM refused to allow the very type of delays that those norms were designed to avoid in the first place. It's perverse that these types of arbitrations are having a distorted effect on the decision-




making of government officials. Nowadays the mere prospect of these arbitrations is constantly hovering like a sword of Damocles over the heads of government officials like Mr Ísmodes. There were several references in Claimants' opening powerpoint to expressions of concern by various government officials at different levels about the prospect of an arbitration.

Speaking of Mr Ísmodes, and also of Mr Ampuero, who were the two former government officials who testified in this hearing as fact witnesses, you saw them here last week. They're thoughtful, bright, articulate, well-trained people, exactly the type of people that we should all want serving in government.

Which seems to you more likely, that Mr Ísmodes and Mr Ampuero were sincerely trying to help Claimants with their project, or that they were viciously sabotaging it?

Finally, the overall perversity in this case is that, having failed in their project,




Claimants are now trying to make up for it by asserting treaty claims. In other words, they're using the treaty as an insurance policy, precisely what many Tribunals have observed cannot be done. As the Maffezini v Spain Tribunal put it many years ago, bilateral investment treaties are not insurance policies for bad business judgments.

These treaties were never intended to thwart good faith efforts by states to adopt sensible measures in the public interest, and it shouldn't be the case that a government acting to advance the public interest has to pay a fee to foreign investors to be able to do that.

When you examine this case on a macro level and you review everything that happened, what you have is an investor that had never invested in Peru before, an investor that had never invested in Latin America before, an investor that had never participated in a government tender before, an investor that didn't bother to ask the government the simple question when




you say "for any reason", do you really mean literally for any reason, an investor that underestimated the time and complexity of these types of projects, an investor that assumed risks that, as sometimes happens, ended up materialising -- in other words, an investor that made a bad business judgment.

And, on the other side, what do you have? You have a government that adopted a policy to promote renewable energy. We all need that now. You have a government that amended the legal regime to ensure that RER projects were completed on time, and you have a government that tried, to the best of its ability, to help the RER investors, including these Claimants, to advance their projects up to the very limit of what was legally permissible. And that's it.

Now, were there mistakes made along the way? Of course. Because government and governing is never perfect, even in the easiest of circumstances. To paraphrase the AES v Hungary

award, the standard is not perfection. These treaties should not be applied in ways that inhibit reasonable government measures. Governments have to have some latitude to govern, to act for the public good, without facing liability under these treaties.

Just one minute, Mr President, and members of the Tribunal, a couple of final thoughts.

The investment treaty system is under a lot of strain and criticism these days, and these types of cases have a lot to do with that. What would an award in favour of the Claimants here signal to the Peruvian officials who are charged with protecting the environment, officials like Mr Ísmodes, who was just doing his job and who did it well? What would such an award signal to environmental officials in other countries? And why should the Peruvian taxpayers bear the burden of Claimants' own failure to complete their project and Claimants' own poor business decisions?

That's all we have to say, Mr President, and





members of the Tribunal. Thank you for your attention.

ASUNTOS DE PROCEDIMIENTO

PRESIDENT: Thank you, Mr Di Rosa. This completes Respondent's closing argument, and we will now have a recess of 15 minutes.

Whilst in the recess, have you already discussed with the other side finally what will be with the post-hearing briefs? Can you also discuss the cost submissions, in what form and what timeframe you would like to have them.

MR GRANÉ: Yes, Mr President. There has been an exchange of communications between counsel. I of course will not purport to speak on behalf of Claimants. I can report that we received the proposal, we submitted a counterproposal, there was no response to our counterproposal, and we're happy to share with the Tribunal what we have proposed and why.

PRESIDENT: Can you use the 15 minutes to see what proposal will finally make it between the two of you?





MR GRANÉ: Certainly. In that case, Mr President, I would ask then for us to be moved to the counsel consultation break-out room. I understand that one had been set up, at least that's what we understood in the test session. If that's not the case, then we will need to perhaps log off to have the conversation.

PRESIDENT: Maybe by old-fashioned phone. You can also do that!

So take 15 minutes break. We will resume at 20.05 CET.

(Pausa para el café.)

PRESIDENT: Mr Reisenfeld, Mr Grané, any results from the discussion in the counsel room?

MR REISENFELD: Yes, Mr President, there has been a result, and the result is that we've agreed to disagree on whether or not there would be an opportunity for post-hearing briefs. Claimants would like that opportunity and we would like it to be 60 days after the finalisation of agreement on the transcript.





We believe that it should be limited, so we are suggesting that it be 75 pages or less.

In terms of the submission on costs, we both agree that it should be 45 days after the submission of a post-hearing brief, if there is one.

We disagree, we think that there should be a limit of about 10 to 15 pages for any argumentation on allocation of costs. We believe that would be important for the Tribunal to be able to assess the allocation.

Besides that, I think we're in agreement on everything.

PRESIDENT: Mr Grané?

MR GRANÉ: Thank you, Mr President. Our view, Mr President, members of the Tribunal, is that there has been extensive briefing in this case, totalling by our count more than 2,000 pages. We've had a fulsome, very productive two-week hearing; we've had long opening and closing statements; we've had the tremendous benefit of having a very active Tribunal with

many questions, both in writing and in the course of cross-examination, that, of course, reveal a deep knowledge of the record already.

Peru is concerned about the mounting costs of this arbitration, and it is for that reason that we would not favour post-hearing submissions.

However, what we would favour, Mr President, is your very good idea of having the parties submit references to the transcript where the Tribunal may find answers that go to the issues that have been identified in the table of contents of our respective submissions that could serve as a guide for the Tribunal during the deliberations, and we could extend that to include references to the respective pleadings without adding additional arguments.

In addition, what we could also suggest, Mr President, members of the Tribunal, is that following the final transcript and once the Tribunal meets to deliberate, should any questions from the Tribunal arise at that





moment, for the Tribunal to then invite the parties to respond in writing to those specific questions. The idea, as you can see, Mr President, is that we would prefer to be led by the Tribunal rather than inviting the parties to have free-flowing submissions that would just add to the amount that you need to read but also to the mounting costs.

I can stop there about the post-hearing submission and go to the submission of costs, unless you prefer to address first --

PRESIDENT: I prefer to deal with the post-hearing briefs.

Incidentally, before I proceed further on this one, the Tribunal has no further questions at this stage. We reserve the possibility of indeed, as you already anticipated, Mr Grané, asking questions which may arise further in the further deliberations and also the drafting of the award, because this is a case with many facets, so we have to be careful, and certainly there may pop up further questions.





Having said that, if I can make a compromise suggestion, the index, as I mentioned -- I think also Mr Reisenfeld also was in favour of the index -- what I then suggest is can we have an annotated index, so we may have short annotations on what you find very important by that point, and basically you follow your table of contents, so you may have your table of contents of your Memorial and your Reply and also the Countermemorial, the duplica, for the Respondent, so you go to your table of contents because they are fairly detailed and then what you do is you index that to the transcript and the must-reads, if I may call it that way, because I know you both are very thorough lawyers and you want to cross-reference everything, but the must-reads, could you put them in bold face so that we may not escape at all what, according to you, we should read in any event.

And then you may give a short annotation of one paragraph per entry, anything that you find





important to draw attention to.

Is that a workable solution, Mr Reisenfeld, for your side?

MR REISENFELD: Our only concern about the idea of doing an index is that it doesn't allow us to put in context what the arguments have been. We have seen, as we saw in the closing by Respondent, that there were a lot of things that were taken totally out of context and a lot of quotations which were taken totally out of context, and because of that we think that it's better to have it be in a more organised fashion in the form of a substantive presentation, and then have our citation to the places of the transcript that support that notion, and also citations to the various pleadings that support that argumentation.

That would be our first choice.

With respect to the annotated index I just think it could be -- well, I'd be interested in seeing what you have in mind. If you've seen it in other cases it might be persuasive, but

it strikes us that it would not be as useful to the Tribunal than if we're able to put it into our arguments and the transcript citations into a substantive context.

PRESIDENT: Actually to remind, but now I make publicity for my own website. If you know the newyorkconvention.org website I have, on that website I have indexed all the provisions of the New York Convention and the various issues that have arisen, and there you see each time for each of those entries a short description, and that mentions what happens, what are the issues in that respect. So that's what I call an annotated index. If you would like to visualise it, you can see it. It's a 94 pages which I immediately disclaim, I should update it, but I have to spend so much time on your cases I have no time to update that annotated index!

So if you want to have an idea, that's where you see it. It's not a commercial website so I can make publicity for it, but it's only that





you ask me that I point you to it.

Then, Mr Grané, what is your position?

MR GRANÉ: Mr President, we continue to agree with your wonderful idea. Perhaps the only request that we would have, or suggestion, is the annotation also be limited.

You know, I hate to impose, for instance, a word limit but I think that that would be a wise decision. Having to deal with lawyers we always, you know, like to say too much, and so perhaps setting a word limit to the annotation per issue identified in the table of content -- obviously not with reference to the transcript because then we'll have thousands of pages. So that would be the only suggestion that we would have.

And, of course, Mr President, just for the record, I thought that the time for argumentation had ended and so therefore I will not respond to Mr Reisenfeld's characterisation of our closing. I will not go into that, but I take objection to that.





PRESIDENT: Don't worry about it.

So what I suggest is then maybe the better thing is that you first have a look through it to see how it would look, and then you try to agree amongst yourselves that this is the way to do it, otherwise we'll give you directions and say you have one week to resolve this. We have given you the elements, you can look at it.

What you may add in addition is that you have an introductory couple of pages because, Mr Reisenfeld, I appreciate what he says. He says he would like to put things in context -- not because of you, Mr Grané, and your arguments you have made, but I can see as lawyer you would want to put your case in context and not only be kind of a clerk in a library making indexes.

So I can see you have, say, five pages or ten pages or so forth for an introduction to put everything in context.

MR REISENFELD: Mr President, I do recall





well, when your index first came out at the 50th anniversary of the IBA, an event where I was at, it was well received. But I do look forward to looking at it again to see how it would work in the context of this case.

If I might suggest, so that we can make sure we're thinking along the same lines, it might be helpful in terms of the introduction for it to be, let's say, a 30-page introduction and then the annotated index.

PRESIDENT: One finger. Don't take the whole hand.

MR REISENFELD: Maybe it's best for us to look at the suggestion, which is a wonderful suggestion, and then we will come back with views first to our opposing counsel and hope that our distinguished counsel can come to some agreement, and if not we'll bring it to the Tribunal in any event for a decision.

PRESIDENT: One point also. In your consultation with each other I am mindful also of Mr Grané's argument that the annotations

should not of themselves be each time a pleading, so appropriate restraint should be exercised for these annotations.

MR REISENFELD: We'll come up with some suggestions, having consulted.

PRESIDENT: Look to the format I did in that document online.

MR REISENFELD: Perfect.

PRESIDENT: And then the next item is the cost submissions, and also the dates. We have to consult with each other about these post-hearing briefs, how many days you need for them.

And you suggested, Mr Reisenfeld, 60 days after the transcript has been corrected?

MR REISENFELD: Yes, for the index or post-hearing submission, whatever we were going to call it, yes, 60 days after the transcript agreement.

PRESIDENT: Mr Grané, is that acceptable to your side?

MR GRANÉ: It is acceptable in principle, Mr





President. The difficulty is that without knowing when the corrected transcript will come out it's difficult for us to say now. We have a very busy schedule of filings and hearings, so before committing to 60 days we would need to look at when that exactly would fall in our calendar.

PRESIDENT: Then, statement of costs. Have you been able to actually agree on it, or is it still under discussion between the two of you?

MR REISENFELD: If I may, I think that that, too, would need to be subject to further discussion. I think we have two different theories on it. If I could suggest I think Respondent's counsel is thinking in terms of merely a chart of costs. It's our view that in addition to whatever the facts and those numbers reflect, we should also have argumentation on allocation issues, and so we would suggest an argumentation section of about 10 to 15 pages.

PRESIDENT: Mr Grané, what is your position





there?

MR GRANÉ: Our position, Mr President, is that that again is unnecessary. We favour, instead, the prevailing practice of having what we call the bare bones cost submission, which as you know, Mr President, members of the Tribunal, consists simply of a breakdown of the costs incurred by the party indicating legal fees, also indicating arbitration costs, experts' fees and expenses, witnesses' costs. No need to attach invoices, of course, but the Tribunal, as always, retains the right to request supporting documentation in exceptional circumstances, protecting the privilege, of course, that comes with any narratives attached to invoices.

We would agree with the 45 days that has been proposed by Claimants' counsel, but we do not believe that 10 or 15 pages of argumentation is necessary. We all know that the parties these days will ask that the costs follow the event principle be applied, and I





think the Tribunal is sufficiently experienced that it would know how to apply that principle in this case, having seen the manner in which the parties have conducted themselves and also the relative strength of their arguments.

PRESIDENT: You may remember, Mr Grané, that 20 years ago I was one of those who started actually costs follow the event in ICSID cases, and I was immediately bestowed with a very lengthy dissenting opinion -- I think almost three times the real award. Maybe you remember the case which it was.

Anyway, coming back on this one, some insight of how the costs are built up would be helpful, absolutely not going into detail but what you would usually expect, unless you have a different fee arrangement or you have a third party funder behind you, then we expect you to have hourly rates, number of hours spent, and by whom it's spent.

MR GRANÉ: If I may suggest, Mr President, something that we've done in other cases is

that for the breakdown of the legal fees in particular, what we have is simply the amount per invoice per month, so it gives an indication to the Tribunal of how fees have been incurred throughout the life of the proceeding, but again, without attaching invoices as supporting documentation.

PRESIDENT: Invoices I don't expect, but what I expect is simply some idea how these invoices are built up so you can see number of hours times hourly rates. That's usually what you see.

The problem is you have all kinds of different arrangements with your clients and I wonder how detail should go, because in a number of case you have discount or no discount or blended rates, there's all kind of systems in the field, so you don't need to go too much in detail. I can see that.

The only situation where it really changes is if you have a contingency arrangement or a third-party funder, but I have not heard





anything of that in this case. I'm not against it, incidentally, so don't worry about that one, but simply that changes for us how to address costs.

MR REISENFELD: I can state on the record that there is no third-party funding in this case.

PRESIDENT: No, I understand. Otherwise I would have already noted that one way or the other. Sorry, Mr Grané, you want to say something?

MR GRANÉ: Yes, one question, Mr President.

Could you perhaps clarify what you have in mind when you say hourly rates? Because of course we have a large team that changes over time. How do you envision us specifying hourly rates in a way that would be useful for the Tribunal to know how that translates into fees incurred throughout the life of the proceeding?

PRESIDENT: I don't know, is it an issue for you to disclose the rates? So simply you get Ms X has spent, has an hourly rate of, let's





say, $400/$500 per hour and has spent so many hours in that month.

MR GRANÉ: OK. How do we account, Mr President, for the fact that since this has been going for quite some time, the hourly rates have changed every year for each of the members of our team?

PRESIDENT: OK, but that's -- yes, you mention what the rates are, then you give a range of rates for yourself. So if, for example, it's $400 and then it became $500 or $525, you say well $400-$525.

MR GRANÉ: OK.

MR REISENFELD: Mr President, it might just be easier to use the rate that was used for the monthly charge to the client, and that way we don't have to worry about coming up with some artificial average or weighted rate. It would be backed up by our own cost records.

PRESIDENT: Exactly, but you have then each month to give the rate or rates overview and that becomes a lengthy document. But don't





mind doing it that way. Again, you could also simply submit it in an Excel sheet, the rates and the overtime.

So if you do your monthly rates, monthly hours times rates, that will do, I think.

MR GRANÉ: May I propose, Mr President, that this also be part of the consultation amongst counsel so that we come up with a common format and submit that for your approval?

PRESIDENT: Absolutely. Let's do it that way. Also within one week, is that OK for you?

MR GRANÉ: Yes, Mr President. We have a filing next week, but we will endeavour to --

PRESIDENT: I see you both thinking. Two weeks also I grant to you because I know you have worked hard on this case and you want simply time to relax, so I don't want to pressure you too much. OK.

MR REISENFELD: Mr President, I just wanted to make sure that we have the opportunity of having what we'll call the argumentation portion of the cost submission in order to put

into context the request for costs.

PRESIDENT: A narrative of five pages? Would that do?

MR REISENFELD: We could do five pages. 10 or 15 would be better.

PRESIDENT: No, but I saw in a number of cases that these type of arguments become a stealth pleading, a superimposed hearing brief, if I may call it that way. So in five pages you can explain it, isn't it?

MR GRANÉ: That is fine with us, Mr President. Hopefully we don't need to clarify that it would be five pages, point and a half spacing, 12 font, Times New Roman, normal margins -- but we don't need to say all those things because I think we understand.

PRESIDENT: The two of you work very well.

MR REISENFELD: We are fully in agreement on the normal course as we've been doing. I think we've both been very good about leading to the same conclusion on the normal course.

PRESIDENT: OK. So there's a couple of





other admin things. We have the hearing demonstratives, so after the conclusion of the hearing all the demonstratives should have been uploaded, and there is a sub-folder created.

Maybe Ana, are you there? Ana, you are very much in charge of this.

MS CONOVER: Yes.

PRESIDENT: Can you tell me what the parties have done and what they have not done?

MS CONOVER: Yes, thank you. So as mentioned by the President, we have created a sub folder in Box for uploading the demonstratives used at the hearing. It is titled "Sub-folder 8, Demonstratives-Demonstrativos". As of today the Respondents have uploaded demonstratives RD-1 to RD-6, so we understand that those correspond to the entirety of the demonstratives used by the Respondent. However, we notice that the Claimants have not uploaded any of its demonstratives, which would be CD-1 to CD-6 and, therefore, we would invite them to do so





in the course of today, if possible.

MR REISENFELD: Mr President, if I could remind Ana and all of us that we need to go through the task of reviewing anything that would be made public. It needs to have the redaction that has been agreed by both parties.

PRESIDENT: That is the next point on the admin agenda. Maybe, Ana, you can also deal with recordings and transcripts from the hearing?

MS CONOVER: Yes, and just to address Mr Reisenfeld's last comment, a reminder that the Box folder is only accessible to the parties and the Tribunal in the arbitration, so any documents that have been uploaded there are confidential and are not accessible by the public.

So pursuant to Procedural Order No 6, paragraph 43, it was agreed that after the conclusion of each hearing day, each party would upload their respective demonstratives used during the hearing day, so that is to





which we are referring. Any discussion regarding documents to be uploaded to the website would be part of a separate stage in the proceeding.

In that respect we note that the audio and video recordings of the hearing shall be made available to the parties and the members of the Tribunal by ICSID at the conclusion of the hearing. This is according to paragraph 49 of PO6. I wanted to inform the parties that the audio and video recordings of Days 1 through 8 of the hearing are already available in Box, and the recordings of today, which is Day 9, will be uploaded shortly.

Then with respect to the transcript of the hearing, pursuant to Annex C, paragraph 3, of PO6 -- and we understand also as part of the agreement by the parties during Day 1 of the hearing -- the transcript will be edited by the parties to exclude protected information as well as any references to CHM's Peruvian counsel, Mr Roberto Santiváñez[A16], and this is

within 45 calendar days after the conclusion of the hearing, which will correspond to Monday, May 2, 2022. So that would be the deadline for the redactions to the transcript.

Then with respect to the recordings, in accordance with paragraph 3 of Annex C of PO6, the recordings shall be edited by the parties to exclude any protected information after the parties have submitted their proposed redactions to the hearing transcript, and the Tribunal has decided upon any disagreement between the parties concerning such redactions, and, therefore, the recordings shall be edited in accordance with the revised transcripts.

As well, a copy of the public version of the recordings of the hearing in the floor language will be posted on the ICSID website within 60 days after the conclusion of the hearing, which would correspond to Tuesday, 17 May 2022. This is according to PO6, paragraph 60, and Annex C, paragraph 2.

And finally, in accordance with paragraph 62




of PO6, the availability of the hearing recordings will be announced publicly via the ICSID website in English and Spanish.

Thank you.

PRESIDENT: Thank you, Ana. Mr Reisenfeld, any further admin, procedural matter or household matter you would like to raise?

MR REISENFELD: I just wanted to clarify that the redactions to the transcript is a separate process from the agreement to any corrections of the transcript. I want to make that clarification, so that we don't have to wait until after May 2nd before we begin the process of coming to agreement on any corrections to the transcript.

PRESIDENT: Mr Grané, this is also your understanding?

MR GRANÉ: Mr President, we are flexible on this. As we've said in the past, we have consented to redact the name of [A17]. Whether that is done before the transcript corrections or after, we are flexible in that




respect.

PRESIDENT: Anything else? Mr Reisenfeld?

MR REISENFELD: No. I think that takes care of our issues, assuming that we've identified both that we're going to get something to you with respect to what we think should be the appropriate post-hearing submission, and we have been given advice as to what we should do for our cost submission, and with those, I think that's all we have for the Tribunal today.

One thing I will say is we certainly appreciate and thank the Tribunal for its attention to this case. It has been valued by everyone, and particularly by our clients, so we are thankful for your devotion.

PRESIDENT: Mr Grané, anything else of procedural or administrative nature?

MR GRANÉ: Nothing procedural, Mr President, other than to thank Ms Conover, the court reporters, the interpreters, FTI, also our opposing counsel and, of course, you, Mr




President, the members of the Tribunal, for your attention and in particular, as I mentioned earlier, for having been so active and posing questions. We truly appreciate and welcome that. So thank you very much.

PRESIDENT: Also on behalf of the Tribunal I would like to thank FTI very much. Andrew, you did a wonderful job for Australia. I would like to thank the interpreters. You did a fantastic job under difficult circumstances from time to time -- as usual, but that's the human aspect, that people speak sometimes very fast. And I would like to thank the court reporters, they also have done a fabulous job, also under not easy circumstances always.

I would like to thank Ana very much for what she did, Emily also for what she did, and above all I want to thank you and your teams. You both did a fantastic professional job here. I have enjoyed professionally the way both sides have presented your cases. The result is still to come, but I hope it will be in the eyes of

both sides a justified result.

I would be remiss if I didn't ask you the one question which I usually ask, which is have you been treated on an equal footing and have you had an opportunity, a real opportunity, to present your case. I ask that question in light of waiver provisions, and if anything has gone wrong we can still rectify it, to the extent it's possible.

Mr Reisenfeld?

MR REISENFELD: Mr President, we believe the Tribunal has been extremely fair and even-handed. We appreciate very much your indulgence of all of our questions and our submissions, and we think that this has been very well handled. We have very much appreciated, as Mr Grané has said, the questions that were extended and how active the Tribunal was throughout the hearing.

Thank you very much.

PRESIDENT: Thank you. Mr Grané?

MR GRANÉ: On Peru's side, Mr President, we





believe that we have been treated very fairly, have been given a full opportunity to present our case, and we say both things without any hesitation. So thank you very much.

PRESIDENT: Thank you. The last word goes to my colleagues. Professor Tawil, any further comment, question?

PROFESSOR TAWIL: Not from my side. Just sharing what the President said. Thanks, everyone, for all their assistance in the case.

PRESIDENT: Professor Vinuesa?

PROFESSOR VINUESA: No, thanks to everyone for being so dedicated and very instructive. Thank you.

PRESIDENT: Thank you.

Then I thank you all, and I close now the hearing, not the proceedings. I wish you an enjoyable, peaceful and restful weekend.

(Es la hora 14:38 EST)





CERTIFICADO DEL ESTENOTIPISTA DEL TRIBUNAL

Quien suscribe, Leandro Iezzi, Taquígrafo Parlamentario, estenógrafo del Tribunal, dejo constancia por el presente de que las actuaciones precedentes fueron registradas estenográficamente por mí y luego transcriptas mediante transcripción asistida por computadora bajo mi dirección y supervisión y que la transcripción precedente es un registro fiel y exacto de las actuaciones.

Asimismo dejo constancia de que no soy asesor letrado, empleado ni estoy vinculado a ninguna de las partes involucradas en este procedimiento, como tampoco tengo intereses financieros o de otro tipo en el resultado de la diferencia planteada entre las partes.

_____

Leandro Iezzi, Taquígrafo Parlamentario
D-R Esteno