



1 [START First\_Session\_-  
2 \_Audio\_Recording\_-\_Part\_1.mp3]

3 MR. MICHAEL MOSER: That's fine, yes.

4 HONORABLE L. YVES FORTIER: Again, it's  
5 a tight fit. There's no tape yet running, is  
6 that--no, all right.

7 MS. NATALI SEQUIERA: It's audio.

8 MR. MOSER: Okay. But before we begin,  
9 I just have one request on behalf of Mr. Fortier,  
10 he has his assistant here with him, Ms. Annie  
11 Lesperance. Would there be any objection to  
12 have her attend today's session?

13 MR. EDWARD KEHOE: No objection.

14 MR. MOSER: No?

15 MR. JONATHAN HAMILTON: No objection.

16 MR. MOSER: All right. Thank you.

17 MR. FORTIER: Thank you ver-, thank you  
18 very much. Annie works in my cabinet in  
19 Montreal. She's as conflict free as I am and  
20 she happens to be in, in London for another  
21 hearing, which took place on Tuesday and  
22 Wednesday. She was assistant to the tribunal,  
23 so since we're flying to Montreal together this  
24 afternoon, I thought it would be good experience  
25 for her to see professionals at work. I, I'm

1 referring to the chairman.

2 MR. MOSER: Suave as ever. All right.

3 Shall we formally begin then. It's 9 o'clock.

4 Good morning, ladies and gentlemen. On behalf

5 of the arbitral tribunal, allow me please to

6 welcome you all here today to this initial

7 meeting in the case of the Renco Group, Inc. v.

8 the Republic of Peru. My name is Michael Moser.

9 To my right is Mr. Yves Fortier. To my left is

10 Mr. Toby Landau. And together, as you know, we

11 constitute the arbitral tribunal in this case.

12 Now, assisting us here, also to my left, is Ms.

13 Natali Sequeira, who will be serving as tribunal

14 secretary. Could I please now invite each of

15 the parties to state for the record the names of

16 the persons who will be in attendance for each

17 side today, perhaps begin with Mr. Kehoe.

18 MR. KEHOE: Yes.

19 MR. MOSER: Thank you.

20 MR. KEHOE: Ed Kehoe, King & Spalding,

21 representing the claimant.

22 MS. SEQUEIRA: Mr. Kehoe, just--

23 MR. MOSER: [Interposing] Yeah.

24 MR. KEHOE: Yeah. Ed Kehoe with King &

25 Spalding, representing the claimant. To my

1 right is Henry Burnett, also with King &  
2 Spalding and my partner. And to his right is Mr.  
3 Dennis Sadlowski, the Vice President and General  
4 Counsel, Senior Legal Officer, of the Renco  
5 Group.

6 MR. DENNIS SADLOWSKI: And if I might  
7 add, the, if I might add, the record should show  
8 it's the Renco Group Inc., I-N-C. It's a  
9 corporation.

10 MR. MOSER: Thank you very much.

11 MR. SADLOWSKI: Rather than a  
12 partnership.

13 MR. MOSER: All right. Thank you. And  
14 respondent, please.

15 MR. HAMILTON: Thank you, Mr. President  
16 and members of the tribunal, secretary of the  
17 tribunal. I'm Jonathan Hamilton, partner and  
18 head of Latin arbitration with White & Case. To  
19 my left is Andrea Menaker, my partner of White &  
20 Case. Maria del Carmen Tovar of Estudio  
21 Echeopar in Lima. Carlos Jose Valderrama the  
22 President of the Commission for the Defense of  
23 the Peruvian State from the Ministry of Economy  
24 and Finance. To his side is Jacob Stoehr, our  
25 associate from White & Case and, like me, a

1 former visiting attorney with Estudio Echeopar  
2 in Lima. And at the end of the table, we're  
3 pleased to be joined by Alejandro Manrique from  
4 the Embassy of Peru to the United Kingdom.

5 Thank you.

6 MR. MOSER: Welcome all. Thank you  
7 very much. All right. Gentleman, you will--  
8 ladies and gentleman, you will now recall, I'm  
9 sure, that a draft agenda for this meeting and a  
10 draft procedural order number 1 were both  
11 circulated by ICSID, sent to the parties on the  
12 24th of May, 2013, initially. The tribunal  
13 notes that since that time, the parties have  
14 been working very diligently, I might say, it  
15 seems even to the last hour to try to reach an  
16 agreement on a number of items in that  
17 procedural order and for that we are very  
18 grateful. But differences, apparently, still  
19 remain and so I think we can use today's time  
20 profitably to try to hear you as to what those  
21 differences are. And then, eventually, deal  
22 with them. So subject then to your views and to  
23 the views of my colleagues, what I would propose  
24 to do today is to perhaps walk through this most  
25 recent draft, which we received late yesterday,

1 17 July 2013. And to hear each of the parties  
2 on these outstanding points. Perhaps we could  
3 walk through page by page. Would that be  
4 acceptable to you, Mr. Kehoe?

5 MR. KEHOE: Yes, it would.

6 MR. MOSER: Mr. Hamilton?

7 MR. HAMILTON: That's fine. Thank you.

8 MR. MOSER: All right. Very good.

9 Gentleman, how is that?

10 MR. FORTIER: Let me make sure that I--  
11 I'm sorry.

12 MR. MOSER: 13, 17th of July.

13 MR. FORTIER: Yeah, I know. That's the  
14 one that--

15 MR. MOSER: [Interposing] Yeah.

16 MR. FORTIER: Because of someone's  
17 mistake, reached me late last night. And, yes,  
18 I do have it. I have a copy. My apologies. I  
19 do have it. My apologies.

20 MR. MOSER: Very good. All right.  
21 We're--there's a cover. There's a cover e-mail  
22 that focuses on each.

23 MR. FORTIER: Right. Mentions it.

24 MR. TOBY LANDAU: Yes, yes.

25 MR. MOSER: There are a couple of other

1 points though, apart from those noted, Mr. Kehoe.

2 So I think--

3 MR. KEHOE: [Interposing] Okay.

4 MR. MOSER: --we could just walk  
5 through it page by page and we'll--

6 MR. KEHOE: [Interposing] Right.

7 MR. MOSER: --catch all of them. All  
8 right. So we'll begin with the cover. I don't  
9 see anything there, except to delete the draft  
10 eventually. And we have on Page 2 the same,  
11 deletion of the draft. Page 3 at the top, once  
12 again, deleting the draft. Down three-quarters  
13 of the way, we did start promptly at 9:00 a.m.  
14 and so that would be the time to be inserted.

15 MR. KEHOE: That needs to be changed.

16 MR. MOSER: The Renco Group, Inc. would  
17 be the name of the company, correct?

18 MR. KEHOE: Yes.

19 MR. MOSER: Sadlowski has brought that  
20 to our attention. And then coming down, just to  
21 the penultimate line there, the comments on  
22 draft procedure are submitted by the parties on  
23 June 28th, July 14th was a further draft we  
24 received, comments, and July 17th. We could add  
25 those in. The draft procedural order is

1       circulated. Well, I'll leave that in  
2       parentheses now to see whether we come back to  
3       you with a further draft or whether we agree to  
4       something final. So if you could leave that in  
5       our hands, we'd be grateful. All right. Thanks.  
6       Let's move on then to Page 4. Well, we don't  
7       know when we'll stop yet, so we can't insert  
8       that time, but we will do that. Likewise, with  
9       the draft we'll get rid of. 1.1, would it be  
10      useful to add something at the end to the effect  
11      and the provisions of this procedural order 1?

12                 MR. KEHOE: Claimant has no objection  
13      to that.

14                 MR. HAMILTON: Agreed.

15                 MR. MOSER: If, if you find it useful,  
16      I think it might be clearer to do that. There  
17      are no comments, I take it, on 2, Constitution  
18      of the Tribunal?

19                 MR. KEHOE: That's right, Mr. President.

20                 MR. MOSER: And 3, Fees?

21                 MR. KEHOE: Correct.

22                 MR. MOSER: And that brings us to Page  
23      5. And, again, deleting draft at the top onto  
24      the first point in issue that deals with the  
25      decisions of the tribunal and the differences



1 appear in 4.2. So perhaps we could invite  
2 claimant to address us first, because they have  
3 their comments set out there first as to how  
4 they would like to deal with it and then hear  
5 from respondent as to why they would like to see  
6 the wording that they had proposed.

7 MR. KEHOE: Thank you, Mr. President.  
8 The claimant has adapted and adopted, I should  
9 say adopted, the, the exact language that the  
10 tribunal proposed in its initial procedural  
11 order that was circulated on May 23rd or May 24th.  
12 And we believe that the flexibility afforded in  
13 that language is appropriate here. We believe  
14 that the respondent is, is narrowing the ability  
15 of the tribunal, of the, the president to rule  
16 on simple procedural issues in a way that is not  
17 very helpful.

18 MR. MOSER: Mm-hmm. All right. And  
19 that provision, you said, mirrors what was in  
20 the procedural order that we originally  
21 circulated?

22 MR. KEHOE: That's correct.

23 MR. MOSER: All right. And I believe  
24 that is the UNCITRAL provision 33, 1 and 2.

25 MR. KEHOE: It does, it does summarize

1 those provisions well.

2 MR. MOSER: Now, perhaps we could  
3 invite then respondent to help us to understand  
4 what changes they would like to introduce here.

5 MR. HAMILTON: Thank you very much, Mr.  
6 President. I'm going to pass out some handouts  
7 that we may occasionally refer to. Nothing too  
8 intense. But if I would just pass those out for  
9 your convenience.

10 MR. MOSER: Thank you.

11 MR. HAMILTON: And at the outset here,  
12 I, I would like to just take literally a couple  
13 of minutes and, and make a general observation  
14 about sort of the guidepost for all of the  
15 comments that respondent will make with respect  
16 to the procedural order and the procedural  
17 schedule today, starting with Page 2 of this,  
18 this handout. Peru has over a period of more  
19 than two decades had legal framework and a  
20 policy framework oriented toward fostering  
21 foreign investment, including a very pro  
22 arbitration legal environment. As reflected in  
23 its attitude towards arbitration, domestically  
24 and also arbitration under investment treaties  
25 and under legal stability agreements and

1 concession contracts in which Peru repeatedly  
2 has incorporated over two decades arbitration  
3 clauses. And so Peru has developed both at the  
4 state level and its domestic legal culture a  
5 very pro arbitration environment. It also is  
6 part of a corollary to its commitment to foreign  
7 investment has undertakings under other types of  
8 treaties and instruments, including human rights  
9 treaties and undertakings and environmental  
10 protection obligations. One thing that has been  
11 clear throughout its record and investment  
12 disputes, which is very briefly summarized on  
13 Page 2 here, is that Peru has been a fair and  
14 due process oriented participant in investment  
15 arbitration proceedings. And that has included  
16 not only its respect for awards and payment of  
17 those limited awards that have been made in  
18 contra in Republic of Peru, but also its  
19 commitment to efficiency. And so the--

20 MR. KEHOE: [Interposing] Mr. President,  
21 I don't mean to interrupt.

22 MR. HAMILTON: The--

23 MR. MOSER: [Interposing] Sorry, Mr.  
24 Hamilton. You are being interrupted.

25 MR. HAMILTON: Sure.

1 MR. MOSER: But what would you, what  
2 would you--

3 MR. KEHOE: [Interposing] Yes.

4 MR. MOSER: --like to say?

5 MR. KEHOE: I'm wondering if, if, if we  
6 might have the presentation responsive to the  
7 area of the procedural order that we're covering.  
8 It sounds as though Mr. Hamilton is getting in  
9 front of us on issues, such as the place of the  
10 arbitration and the like. I could make an  
11 opening and an introductory statement. I didn't  
12 think that was called for in the agenda. I, I  
13 won't ask to cut Mr. Hamilton off right now, but  
14 I would ask that if he's going to touch upon  
15 subjects that are covered later in the  
16 procedural order that we cover them later when  
17 we get to those sections.

18 MR. HAMILTON: I'm, I'm wrapping up, so  
19 I don't think that, I don't think there will be  
20 any, any issue.

21 MR. MOSER: You, you, you just want to  
22 make some introductory remarks, is that, is that  
23 correct?

24 MR. HAMILTON: Yeah. Just a couple of  
25 minutes, because this is the basis for our

1 positions--

2 MR. MOSER: [Interposing] Right.

3 MR. HAMILTON: --that are reflected in  
4 everything that we're talking about here today.

5 MR. MOSER: But we'll hold on to this  
6 and then come back to those specific points--

7 MR. HAMILTON: [Interposing] Sure.

8 MR. MOSER: --and refer to this again,  
9 is that--

10 MR. HAMILTON: [Interposing] That's  
11 fine.

12 MR. MOSER: All right. Thank you very  
13 much. Please proceed.

14 MR. HAMILTON: So in, in, in conclusion,  
15 what I was indicating is that, is that Peru's  
16 attitude historically in, in cases and also its  
17 approach in what our aim is here is to have due  
18 process, equal treatment, openness, and clarity.  
19 And I, and I hope and, and think that we share  
20 that with our counterparts. So specifically  
21 coming to the issue of, to the issues that are  
22 pending, the issue of decisions of the tribunal  
23 is one of a hodge podge of items related to the  
24 conduct of the proceeding. And it is Peru's  
25 position, with great deference and respect to

1 the President and each of the members of the  
2 tribunal, that of a case of this nature, scope,  
3 and size that it's advisable for there to be  
4 interaction among the tribunal members on all  
5 procedural issues to the extent feasible. While,  
6 of course, deferring to the presiding arbitrator  
7 with respect to urgent questions of timing, such  
8 as related to correspondence and submissions,  
9 subject to consultation where feasible. Mr.  
10 Kehoe mentions deferring simple procedural  
11 issues to the president, but it's unclear to us  
12 what constitutes a simple procedural issue.  
13 What seems simple to some may seem less simple  
14 to others and we think that it would be the most  
15 orderly approach to encourage and facilitate  
16 consultation among the arbitrators where  
17 feasible. And we've seen similar provisions  
18 adopted in case after case in other investment  
19 proceedings.

20 MR. MOSER: All right. Thank you very  
21 much. May I just ask, Mr. Hamilton, did the  
22 first sentence there of your proposed draft,  
23 bearing in mind that the first sentence above  
24 under claimants draft, is the language from the  
25 UNCITRAL rules. Does the first sentence of your

1 draft really differ starkly from what's above?

2 MR. HAMILTON: Well, there's only one  
3 sentence in the standard provision and it refers  
4 to a lack of a majority allowing--

5 MR. MOSER: [Interposing] Yes.

6 MR. HAMILTON: --the presiding  
7 arbitrator to decide alone. And so what we are  
8 highlighting is we think that it would be most  
9 appropriate to be clear that unanimity or  
10 majority is appropriate.

11 MR. MOSER: Mm-hmm.

12 MR. HAMILTON: And the presiding  
13 arbitrator is authorized to make decisions that  
14 are urgent questions of timing is the position.

15 MR. MOSER: Right. That's what I got.  
16 I really was referring--sorry if I'm unclear.  
17 That first sentence you have "decisions of the  
18 arbitral tribunal shall require participation of  
19 all members-." Well, I mean, I guess it goes  
20 without saying, you have to participate to make  
21 a decision. And then shall be unanimously or by  
22 majority of the tribunal.

23 MR. HAMILTON: The, the only difference  
24 there is that in theory there could be a  
25 decision made by a majority without consulting

1 with a third arbitrator. We have seen  
2 interesting examples in the past in some of the  
3 language that we used is based on things that  
4 we've observed over the course of our--

5 MR. MOSER: [Interposing] Okay. I  
6 understand.

7 MR. HAMILTON: --experiences of  
8 practice as well as respondents experience.

9 MR. MOSER: They were trying to get it  
10 that way.

11 MR. HAMILTON: Mm-hmm.

12 MR. MOSER: All right. Very good.

13 MR. HAMILTON: Thank you.

14 MR. MOSER: Thank you. Mr. Kehoe, any  
15 follow up on that?

16 MR. KEHOE: Just simply I, I believe  
17 that Article 33.1, when it provides of the  
18 UNCITRAL rules that where there is more than one  
19 arbitrator, any award or other decision of the  
20 tribunal shall be made by a majority certainly  
21 applies consultation among the tribunal. And I,  
22 I think that adding that extra language proposed  
23 in procedural order 4.2 is unnecessary, could  
24 add to confusion. But, but more, more focused  
25 on a specific point, the, the narrowing of the



1 president's authority to decide procedural  
2 issues and limiting it to "urgent questions of  
3 timing related to correspondence and  
4 submissions" is not only inconsistent with the  
5 tribunals desire, as evidenced by its initial  
6 proposal to us and the UNCITRAL rules. But it  
7 is, it is, it, it will cause, as I said earlier,  
8 it would be unhelpful. It will cause  
9 unnecessary delay, even, for example, the  
10 communications leading up to this hearing. The  
11 parties communicated directly with the president  
12 via e-mail on issues that were not timing  
13 related to correspondence or submissions, but  
14 rather drafts of the, of the procedural order.  
15 I guess that could be considered a submission.  
16 But there are going to be examples where we have  
17 hearings, the time may be changed of the hearing,  
18 the location may be changed. There are any  
19 number of procedural issues that could fall  
20 within the ambit of something that the president  
21 could handle quite easily. And it seems, it  
22 just seems unnecessary to limit that. I just  
23 don't really understand why they would want to  
24 do that.

25 MR. MOSER: Is--yes, Mr. Hamilton,

1 please.

2 MR. HAMILTON: Thank you. I think that  
3 in the first instance, of course, and I think it  
4 should go without saying that we respect the  
5 president and this is a practical issue. In our  
6 experience, this clause is unremarkable the idea  
7 that a president would consult with co-  
8 arbitrators on issues of procedure. I think  
9 what Mr. Kehoe might be suggesting is that, for  
10 instance, if the president has sent electronic  
11 correspondence confirming receipt of a letter or  
12 something that's really ad ministerial in nature,  
13 then why should that require consultation. But  
14 I don't think any decision has actually been  
15 reached. And so, again, the question that we  
16 would have is what is the difference between  
17 something that's ad ministerial in nature and  
18 something that is more substantive in nature and  
19 would make it more appropriate to consult with  
20 the other members of the tribunal. And, also,  
21 it may be that the members of the tribunal can  
22 make that determination among yourselves as  
23 highly experienced arbitrators that there's a,  
24 that there's a practical line, that there are  
25 certain things that people would like to be

1 consulted on. Every tribunal has its own  
2 internal dynamic as well in terms of ad  
3 ministerial type issues. But in our experience,  
4 this is not a remarkable clause. Our experience  
5 either as a practice or the Republic of Peru's  
6 experience in other cases.

7 MR. MOSER: All right. Thank you very  
8 much. And do either of my colleagues have any  
9 comments you'd like to make? Mr. Fortier? Mr.  
10 Landau? Very good. Thank you. All right. Can  
11 we move down then to 4.3. If you look at the  
12 second line there, beginning with by the, it  
13 seems to me we probably don't need that language,  
14 since we've amended that provision earlier.  
15 Yeah?

16 MR. KEHOE: There's a, there's a typo.

17 MR. MOSER: Yes. To take that out, yeah.

18 MR. KEHOE: In agreement.

19 MR. MOSER: All right. Then we move on  
20 to Page 6 of 20. Anything there apart from  
21 removing draft?

22 MR. KEHOE: Not from the claimant.

23 MR. MOSER: Mr. Hamilton?

24 MR. HAMILTON: No.

25 THE COURT: No. You know what, thank

1 you.

2 MR. MOSER: Then Page 7, please. The  
3 first point I would note is 7.2 and here I  
4 understand from the tribunal secretary that both  
5 parties have made their payments now to ICSID  
6 and, and receipt has been confirmed, is that  
7 correct, Ms. Sequeira?

8 MS. SEQUEIRA: For the order?

9 MR. MOSER: Yes.

10 MS. SEQUEIRA: Yeah. That, that is  
11 correct.

12 MR. MOSER: Thank you very much. So I  
13 have the date of the claimant's payment May 27,  
14 2013. I believe that's the date. I don't know.  
15 You can inform us in due course of the date of  
16 payment of respondent. All right.

17 MR. HAMILTON: We believe that it was  
18 July 12th, but I'm not sure if that's--

19 MR. MOSER: [Interposing] Thank you  
20 very much.

21 MR. HAMILTON: --the date it actually  
22 showed up in the account.

23 MR. MOSER: Very good. All right.  
24 Thank you, gentleman. If we could move then  
25 down to something perhaps more interesting,

1 that's Item 8, the place of arbitration. And  
2 8.1, we have at least the initial sentence there  
3 sets out some different views. So perhaps we  
4 could start with 8.1, the place of arbitration  
5 and invite claimant to address us first.

6 MR. KEHOE: Thank you, Mr. President.  
7 It's in the interest of both parties, as, as I  
8 have discussed with Mr. Hamilton, or at least it  
9 should be in the interest of both parties, that  
10 there be minimal, if any, interference from the  
11 judiciary in these arbitration proceedings. And  
12 that the tribunals ultimate award or any interim  
13 awards be enforceable in a court and not easily  
14 vacated by the local courts on grounds of public  
15 policy, local public policy, competence, or  
16 anything of the sort. The parties here are  
17 proposing a joint procedural schedule. That  
18 depending on how the tribunal ultimately rules  
19 on the, on the schedule, the time may differ,  
20 but in all circumstances it will probably last  
21 for at least three years. So over the next  
22 three years, the parties and this tribunal are  
23 going to expend a lot of time and effort and  
24 resources in reaching an ultimate result. And  
25 the parties will expend a significant amount of

1 cost in that regard. And we would prefer to  
2 pick a seat where the likelihood of vacating an  
3 arbitration award, win or lose, whoever wins or  
4 loses, is minimized. And we believe that the  
5 Hague is one such seat. The Hague has a, a, an  
6 arbitration act that is over 175 years old. It  
7 was enacted back in 1838. That act has been  
8 amended rigorously and thoughtfully over the  
9 years, including in just the past two years by  
10 the Netherlands legislature. The Dutch courts  
11 similarly have a long and good history of  
12 restraining themselves from getting involved  
13 unduly and unnecessarily in ongoing  
14 international arbitration procedures and they  
15 have a similarly long history of enforcing and  
16 respecting international arbitration awards. We  
17 see this, for example, in the Yukos v. Russia  
18 case where a Russian court annulled an  
19 international arbitration decision. And  
20 notwithstanding that purported annulment, the  
21 courts in, in the Netherlands enforced the award.  
22 So we believe that selecting the Hague as the  
23 seat of arbitration will provide the parties in  
24 the confidence with, or the parties and, and the  
25 tribunal with as much confidence as we, as we

1 can have that these proceedings will have some  
2 relevance and will render an enforceable award.  
3 Now, to the contrary, Colombia's international  
4 arbitration act is only 9 months old. It was  
5 enacted back in October of 2012. And I have  
6 three points to make in this regard. The act  
7 itself contains provisions of concern. It's  
8 based on the model UNCITRAL law, but, but it  
9 deviates from the law in certain respects that  
10 I'll, I'll mention. It is untested, completely  
11 untested in that court's judiciary and that  
12 judiciary has historically shown hostility  
13 towards international arbitrations, particularly  
14 when the state is involved. So I'll go through  
15 each point briefly. While the act does adopt  
16 the UNCITRAL model arbitration law, a variation  
17 from that law is found in Article 891.1, which  
18 provides that the Colombian courts may refuse to  
19 enforce an interim award or a final award if  
20 such an award is contrary to the internal public  
21 policy of Colombia. Yeah, the, the internal  
22 public policy of Colombia. Not, not contrary to  
23 international public policy, which would be,  
24 which would be one thing. But to the internal  
25 public policy of Colombia, so that opens a, a

1 significant doorway for these proceedings to be  
2 jeopardized by an enforcement action or set  
3 aside action for the seat to be Colombia.  
4 Second, as I mentioned, Colombia's courts have  
5 no track record. They have no precedent that we  
6 can rely upon in evaluating how those courts are  
7 going to interpret the, the new act that was  
8 enacted nine months ago. And, finally, and, and  
9 perhaps most importantly, as I mentioned, it's  
10 been reported that the Colombian courts  
11 historically have shown hostility towards  
12 international arbitration. It's very unlikely  
13 that those old trends and thoughts are going to  
14 change overnight as a result of this law being  
15 enacted. It will take time and we should not be  
16 a front-runner in attempting to develop  
17 Colombia's laws on interpreting its own, its own  
18 act. It's completely unnecessary. An example  
19 of these reports is found in a, a May 2011 joint  
20 publication, Mr. President, and members of the  
21 tribunal by the United States Embassy in Bogota,  
22 joined by the Counsel of American Enterprises,  
23 as well as the Colombian American Chamber of  
24 Commerce. And the document, the report, is  
25 entitled An Overview of Arbitration in Colombia



1 for U.S. Companies. And it states, for example,  
2 at Page 17, "Case law and intervention by public  
3 surveillance or oversight authorities has  
4 created hostility towards arbitration between  
5 state entities and private parties." It goes on  
6 to say, "High courts and judicial organs lack  
7 knowledge of international arbitration process  
8 and trends." Then it goes on to say, "Case law  
9 has generated legal uncertainty for arbitration  
10 awards, said Page 20 of that report." And, and  
11 the reason for this uncertainty, according to  
12 the report, is that there is a widespread  
13 application of constitutionally authorized  
14 complaints against arbitrations. And that may  
15 be relevant with this carve out for vacating an  
16 international arbitration award on the grounds  
17 of Colombia's own internal public policy. So on  
18 this point, the claimants feel that the, the  
19 arbitral process and the tribunals award will be  
20 jeopardized unnecessarily if Colombia is  
21 selected as the seat. And for that reason, we  
22 respectfully request that the Hague, which has a  
23 strong track record in all of the other features  
24 I mentioned earlier, should be the seat for this  
25 arbitration. On the issue of convenience and

1 travel, this is a significant case. Obviously,  
2 convenience and travel costs are relevant, but  
3 they are not so relevant that they should cause  
4 a, a, a poor decision on the ultimate  
5 arbitration process or the ultimate award. And  
6 I'll note that over 100 flights, over 130  
7 airlines, fly to the Hague from the United  
8 States every day and counsel for the parties are  
9 in the United States and there are quite a few  
10 flights from London and Canada and even China to  
11 get to the Hague. So while that's a, sort of a  
12 side point, I did want to note that getting to  
13 and from the Hague is not an undue burden.

14 MR. MOSER: I think we've all been  
15 there.

16 MR. KEHOE: I think so, too.

17 MR. MOSER: All right. Anything  
18 further then, Mr. Kehoe?

19 MR. KEHOE: Not on the, on the first  
20 sentence--

21 MR. MOSER: [Interposing] Right.

22 MR. KEHOE: --of 8.1.

23 MR. MOSER: Let's leave--

24 MR. KEHOE: [Interposing] Yeah.

25 MR. MOSER: --the Washington D.C.

1 option and other options perhaps for the moment  
2 and first invite Mr. Hamilton to address us on  
3 Bogota and the, the issue with the Hague.

4 MR. HAMILTON: Thank you very much, Mr.  
5 President. And I'll be referring starting with  
6 Page 4--

7 MR. MOSER: [Interposing] Right.

8 MR. HAMILTON: --of the handout. And  
9 the, the first thing that I want to comment on  
10 is that we live in a multipolar world with  
11 multiple and diverse interests in investment  
12 arbitration procedure and, in particular, in  
13 cases of this nature where there are many  
14 affected citizens and legal issues. It is  
15 incumbent upon the tribunal to take into account  
16 the multipolar nature of the universe in which  
17 this arbitration is playing out. A failure to  
18 do so, in my view, only falls into the hands of  
19 those parties in groups that make broad  
20 complaints against investment arbitration. And  
21 I'll expand on that a little bit as I go into  
22 further detail. With respect to the place of  
23 arbitration as it relates to law and with  
24 respect to the convenience and logistics factors  
25 that Mr. Kehoe commented on. As a starting

1 point, I direct your attention to slide 4 and  
2 the UNCITRAL notes on organizing arbitral  
3 proceedings, which lay out a series of factors  
4 that should be taken into account in determining  
5 the place of arbitration where there's a lack of  
6 agreement. And those factors include the law  
7 and arbitral procedure, ratification of treaties,  
8 unenforcement of awards. But also convenience,  
9 cost of support services, and proximity of  
10 evidence. It's important to keep these factors  
11 in mind with the particularities of this case.  
12 I turn to slide 5. Now, in this case, Renco, a  
13 US party with a US treaty case, rejects a place  
14 of arbitration in the United States or any place  
15 in the western hemisphere. As a matter of fact,  
16 when we inquired if any place was acceptable  
17 other than the Hague, we were told only maybe  
18 Paris. Now, in this day and age after decades  
19 of efforts around the world, and certainly in  
20 Latin America and in Peru, to promote the  
21 development of arbitration, it cannot be the  
22 case that the only acceptable place to hold an  
23 arbitration of this nature is the Hague, either  
24 legally or practically. It cannot be the place  
25 in this multipolar world that we live in. And

1 this is not only about what is convenient for  
2 international lawyers or international companies,  
3 there are many different factors involved. And  
4 I would also say with respect to the scenario of  
5 seats in the Americas that Latin America has  
6 proven itself particular jurisdictions,  
7 including Colombia, which recently hold, hosted  
8 a large conference of International Bar  
9 Association specifically because of its  
10 recognized role as a seat of arbitration,  
11 including for international arbitrations. It  
12 cannot be the case that there's no such thing as  
13 an acceptable seat of arbitration in Latin  
14 America. It's simply incompatible with the  
15 reality of today's arbitral practice. And I  
16 would say it also is that kind of thinking that  
17 leads some countries, particularly countries  
18 such as Ecuador or Bolivia or other countries,  
19 to, to try to create entirely different systems  
20 of arbitration. In other words, if the existing  
21 system of arbitration is unwilling to view the  
22 world as multipolar, it has a negative effect on  
23 the entire system. And so as a starting point,  
24 we think that it is important to, to, to take  
25 those factors into account. It simply cannot be

1 the case that we only have to go to the Hague.  
2 There is other good options. Now, looking at  
3 the particularities of those options, I turn  
4 your attention to slide 6. Now, as a starting  
5 point, we've all ready heard about the Hague.  
6 We're all familiar with it. It has definitive  
7 disadvantages with respect to convenience,  
8 logistics, proximity of evidence, and certainly  
9 of cost. Which may, may be less of a concern  
10 for claimant, but it certainly is a concern for  
11 respondent to be practical here. One thing that  
12 we haven't done is propose perhaps the most  
13 obvious option, which is this arbitration could  
14 be held in Lima. As a matter of fact, the  
15 Methanex tribunal found specifically that  
16 neutrality, meaning the case not be held in the  
17 location of the host state, was, was not a key  
18 factor. Lima is one of the most pro-arbitration  
19 cities in the world. Not only with a 1995  
20 arbitration law, but then with a new, another  
21 law based on the model arbitration act from 2008.  
22 And it's a very pro-arbitration environment with  
23 a state that has proven itself over more than  
24 two decades to be very committed to arbitration.  
25 And this was a case that involves the impact of

1 the operation of the lor-, Oroya facility on  
2 hundreds and hundreds or thousands of Peruvian  
3 citizens. This is a critical matter with  
4 respect to social development and investment in  
5 Peru. We have not proposed that, other than it  
6 may be in some casual banter among counsel,  
7 assuming that that would not be comfortable to,  
8 to claimant. And so we have suggested as an  
9 alternative, while also inviting claimant to  
10 make any proposal of a seat in Latin America,  
11 are the Americas, Bogota. Which is not only a,  
12 a very well established seat of arbitration with  
13 one of the best arbitral institutions and  
14 arbitral facilities, the Camara de Comercio de  
15 Bogota, which hosted recently the IBA conference  
16 that I mentioned. But, also, in fact, has a  
17 good record with respect to court attitudes  
18 towards arbitration. There is an ICSID  
19 institutional arrangement between the ministry  
20 in authority and the Camara de Comercio de  
21 Bogota. We have had hearings, including video  
22 conference participation, out of Bogota before.  
23 The proximity of the evidence to the evidence in  
24 Peru is close. It's equidistant between Renco's  
25 headquarters in New York and Lima. And, and so

1       there are many strengths with respect to Bogota.  
2       As a matter of fact, Mr. Kehoe himself published  
3       an article that touched on Colombia arbitration  
4       and identified the respect for arbitration under  
5       the Colombia constitution and legal mechanisms.

6                 MR. MOSER:   That's a reference?

7                 MR. HAMILTON:  I will provide you with  
8       the full cite.  It's the article that he quoted  
9       from earlier.  I'm sure that we could each pull  
10      out different pieces from that particular  
11      article.  And that article also, I think, pre-  
12      dates--

13                MR. MOSER:   May 11.

14                MR. HAMILTON:  --the, the change in, in  
15      law.

16                MR. MOSER:   Mr. Kehoe referred to a May  
17      11 article.  Is that the one you're referring  
18      to?

19                MR. HAMILTON:  Yes.

20                MR. KEHOE:   Just for the record, I  
21      didn't publish that article.

22                MR. HAMILTON:  Yes, sorry.  I, I meant  
23      the article that he cited.  I apologize.  I, I,  
24      I would, you, you asked me to hold off on  
25      referencing Washington D.C.  Do you want me to--



1 MR. MOSER: [Interposing] Well, let's  
2 just--

3 MR. HAMILTON: --continue to hold?

4 MR. MOSER: --see. We, we've now,  
5 we've now had--

6 MR. HAMILTON: [Interposing] Okay.

7 MR. MOSER: We've heard about the Hague.  
8 We've heard about Bogota.

9 MR. HAMILTON: Okay.

10 MR. MOSER: First, perhaps, if I could  
11 come back to Mr. Kehoe. Do you have any  
12 comments further about the--

13 MR. KEHOE: [Interposing] I have one  
14 comment for the record. It, I have one, maybe  
15 two comments for the record. The first one I  
16 have to make, which is that under no  
17 circumstances would claimant accept Ecuador as  
18 the seat of the arbitration. But beyond that,  
19 my comments will be few. I, I did not hear--I  
20 heard Mr. Hamilton say that it's, it's, it's the  
21 claimants, it sounds as though he's saying it's  
22 the claimant's obligation to propose seats in  
23 Latin America and we don't see it that way. We  
24 have proposed the Hague. Respondents have  
25 proposed Bogota. Washington D.C. seems to be at

1 issue, which we'll move to. But that's where  
2 the ball is lying in the field. I don't think  
3 it's appropriate to open it up to a debate about  
4 which countries across the entire world might be  
5 appropriate seats. So I'm prepared to move to  
6 the second point--

7 MR. MOSER: [Interposing] All right.

8 MR. KEHOE: --unless you'd like to hear  
9 more on the first.

10 MR. MOSER: Yes. One question. Mr.  
11 Landau?

12 MR. LANDAU: I, I'd just like to go  
13 back to, if I may, with the respondent, slide 6.  
14 The, the four factors are highlighted there in  
15 line with the UNCITRAL notes, but it seems to me  
16 that it may be an important crossover on this  
17 issue with Paragraph 8.2 of the draft order.  
18 Because three of the four factors, that is  
19 convenience, logistics, and evidence, would  
20 ordinarily be addressed by a discretion on the  
21 part of the tribunal to have hearings elsewhere  
22 than the seat. And at the moment, the position  
23 that the respondent seems to be taking in 8.2 is  
24 that that's not an option sub-, absent an  
25 agreement between the parties. So my, my three

1 of the four factors actually would be addressed.  
2 I know we're taking it slightly out of order.  
3 But might three of the four factors be addressed  
4 if, indeed, there was a, the normal course,  
5 which is we agree upon a legal seat with the  
6 discretion in terms of location of hearings in  
7 order to address any issues with respect to  
8 those three factors.

9 MR. HAMILTON: Thank you for your  
10 question. Respondent does agree that  
11 flexibility with respect to location of actual  
12 hearings is important and our position, and  
13 we'll come to it later with respect to 8.2, is  
14 simply that it considers that to be something  
15 that, that it wants to comment on and hopefully  
16 reach agreement on our advice of the tribunal on  
17 rather than the tribunal taking its own  
18 decisions. But it's a, it's, it's agreed that  
19 some of the critical factors can be addressed in  
20 other ways.

21 MR. MOSER: Anything further, Mr.  
22 Landau? Mr. Fortier?

23 MR. FORTIER: Yes. One question, if I  
24 may, for, I guess, it's, it's, it's for Mr.  
25 Kehoe. I heard Mr. Hamilton say that the

1 claimant was not amendable to any venue not in  
2 South America, in the Americas. Did I hear you  
3 well?

4 MR. KEHOE: Yeah.

5 MR. FORTIER: I wonder if Mr. Kehoe  
6 could comment--

7 MR. LANDAU: [Interposing] I think he  
8 said North America.

9 MR. FORTIER: No, no. He said in the  
10 Americas.

11 MR. LANDAU: Yes.

12 MR. FORTIER: Correct? I'm sorry.

13 MR. KEHOE: That's correct. Yes. In,  
14 in the sense that, as Mr. Hamilton described,  
15 lunch banter as we were discussing all of this,  
16 would you be open to Washington D.C. No, I  
17 wouldn't and we'll get to that.

18 MR. MOSER: Yeah.

19 MR. KEHOE: Anywhere else in the United  
20 States? Well, there are, there are, there is a  
21 decision now out of the Second Circuit, which  
22 covers New York, which does shed some doubt on  
23 enforceability of international arbitration  
24 awards. I can go into that if, if you want.

25 MR. MOSER: Well, since we're moving in

1 that direction, shall we just do that?

2 MR. KEHOE: Yeah.

3 MR. MOSER: Why don't we begin then.

4 MR. KEHOE: Okay. And it--

5 MR. MOSER: [Interposing] So the other  
6 option was respon-, the respondent may be open  
7 to Washington D.C., but claimant has said no.

8 MR. KEHOE: Yes. And, and forgive me  
9 for this, Mr. President.

10 MR. MOSER: Speak to us.

11 MR. KEHOE: Forgive me for this, but  
12 just one last point on the prior point.

13 MR. MOSER: Yes.

14 MR. KEHOE: Simple because Mr. Hamilton  
15 raised in his presentation that there is some  
16 type of an institutional arrangement between  
17 Bogota and ICSID.

18 MR. MOSER: ICSID.

19 MR. KEHOE: And I hadn't mentioned this  
20 in my initial presentation, because the ICSID  
21 rules do not govern here, so I didn't think it  
22 was particularly relevant. But let me respond  
23 to Mr. Hamilton by pointing out that the new act  
24 that Colombia has enacted, some people have  
25 taken issue with the fact that, "Interestingly

1 the statute indicates that its provisions on  
2 recognition enforcement apply without prejudice  
3 to any multilateral or bilateral treating,  
4 treaty, but does not expressly provide for  
5 enforcement of an ICSID award as if it were a  
6 final judgment of a Colombian court in  
7 accordance with the ICSID convention. This  
8 issue is likely to come up in the future as  
9 Colombia is a party to the ICSID convention and  
10 a number of international investment treaties  
11 with investor-state resolution provided for in  
12 the ICSID arbitration." So the, whatever the  
13 institutional arrangement is between Bogota and  
14 ICSID, we still have a shadow and a cloud over  
15 this new act and how the courts of Bogota might  
16 interpret those provisions. And unless there's  
17 any question with that, I'll move on to  
18 Washington D.C.

19 MR. MOSER: I thank you. Mr., Mr.  
20 Landau, any question? Mr. Fortier, any further-  
21 -all right.

22 MR. HAMILTON: May I--

23 MR. MOSER: [Interposing] Sir?

24 MR. HAMILTON: May I inquire as to the  
25 citation there, please?

1 MR. KEHOE: Yes. It's  
2 www.latinarbitrationlaw.com, the overview. L-A-  
3 T-I-N-A-R-B-I-T-R-A-T-I-O-N-L-A-W, dot, C-O-M.

4 MR. HAMILTON: May, may I make a very  
5 brief intervention just to close the topic--

6 MR. MOSER: [Interposing] Please.

7 MR. HAMILTON: --of Colombia before we  
8 go to--

9 MR. MOSER: [Interposing] Please.

10 MR. HAMILTON: --to Washington. Which  
11 is simply to say that with respect to this  
12 comment as to ICSID awards, the ICSID convention  
13 says what it says. It has been ratified,  
14 doesn't apply here, and it was claimant's choice  
15 not to avail itself of the option of proceeding  
16 under ICSID and to pursue an UNCITRAL  
17 arbitration. In any event, Peru has  
18 consistently respected all awards and  
19 participated diligently, so I'm not sure what  
20 the issue is. We can move on to the issue of  
21 Washington now.

22 MR. MOSER: Thank you, sir. Washington  
23 D.C.

24 MR. KEHOE: Washington D.C. The, the  
25 concern of uncertainty with, there are two

1 concerns with uncertainty. The first, obviously,  
2 is the, the proceedings themselves. And as I  
3 mentioned, the second is with enforcement. Our  
4 concern with Washington D.C. relates to the  
5 second prong of uncertainty and that arises from  
6 a recent case out of the District of Columbia  
7 circuit court captioned Argentina v. BG Group  
8 PLC. The tribunal is probably aware of it. The  
9 citation in the US Court system is 665 F3d 1363,  
10 DC Circuit, January 2012. And we can obviously  
11 provide copies if the tribunal wishes. That  
12 case calls into question what we thought before  
13 that case was relatively strong, stable law on  
14 an arbitrators authority to decide its own  
15 jurisdiction. In that case, there was an  
16 arbitration proceeding that arose from an  
17 investor state dispute in Argentina and the  
18 district court upheld, recognized, and enforced  
19 the award in favor of the claimant and on appeal,  
20 the circuit court reversed the district court  
21 and vacated the award. And, and the, very  
22 briefly, the substance of the case was that the  
23 treaty required the claimant to go to  
24 Argentina's courts for a period of 18 months,  
25 litigate the, the dispute in Argentine courts



1 for a period of 18 months. And if the court  
2 didn't rule within that time or if the case  
3 couldn't be resolved within that time, then you  
4 could resort to international arbitration. In  
5 this case, according to the published reports  
6 and opinion and award and court opinion, the  
7 Argentine government shut down the courts to  
8 these types of claims. And the tribunal  
9 concluded that as a result of that act, the, the  
10 investor, the claimant, was not required to  
11 spend 18 months in, in the closed Argentine  
12 courts, because it couldn't. So it took up the  
13 case, decided the jurisdiction and the merits  
14 issues, and issued its award. The circuit court  
15 of appeals concluded that the, the tribunal was  
16 wrong. That it had no authority to make that  
17 decision. The tribunal had gone through the  
18 Vienna Convention. It rejected a number of  
19 other arguments, but concluded, excuse me, that  
20 the closure of the courts was the dispositive  
21 fact that, that enabled them to hear the case.  
22 Now, this case has been accepted by the United  
23 States Supreme Court on certiorari and we don't  
24 know where it's going to go. And similar to the,  
25 to the, to the Bogota point, claimant feels, and

1 we feel that the parties in the tribunal should  
2 agree that what we're trying to do in this  
3 exercise is avoid uncertainty and avoid the cost  
4 and expense of arbitrating this for, for the  
5 next few years, potentially be sidetracked with  
6 ancillary litigation, which a court in DC may,  
7 may require. Now, we have had some success in  
8 enforcing international arbitration awards in DC.  
9 I was personally involved in one recently. We  
10 were pleased with what the judge wrote. He  
11 wrote a well-reasoned decision. We don't think  
12 it will be appealed. If it's appealed, we'll  
13 hope for the best. And, and we, we would, we  
14 would hope that the Supreme Court will get this  
15 one right, but we, again, we would rather not be  
16 a test case. We'd rather not be BG 2 should  
17 that, should the, the tribunal chose Washington  
18 DC as a scene. So that, that case is really the  
19 main reason that we object to Washington DC.

20 MR. MOSER: That's the concern. All  
21 right. Thank you. Then, Mr. Hamilton, anything  
22 in reply?

23 MR. HAMILTON: Yes, thank you. And I,  
24 again, refer you generally to the table on Page  
25 6. Respondent is open to the designation of

1 Washington as the place of arbitration. And  
2 respondent, also based on discussions overnight,  
3 is open to the possibility and would suggest  
4 Miami as another alternate place of arbitration  
5 in the United States, including given that it's  
6 in a different circuit of the Courts of Appeals  
7 than Washington DC, which is raising the concern  
8 of, of claimant. It seems that from Claimant's  
9 point of view, the sky is falling in every place  
10 except the Hague. And that it's claimant's way  
11 or the highway. I think that one of the more  
12 noteworthy comments from claimant is that they  
13 would not accept a seat of arbitration in, in  
14 Quito, in Ecuador, nor have we proposed it. But  
15 I think that probably experience arbitrating  
16 opposite certain states that conduct themselves  
17 very differently than the Republic of Peru may  
18 have traumatized claimant over time or their  
19 counsel. Which I, I can understand. But, again,  
20 it simply cannot be the place that there's only  
21 one place in the world where the sun shines on  
22 arbitration. It's simply not legally or  
23 practically a, a reasonable point-of-view. And,  
24 and Peru objects to that approach. With respect  
25 to the particular issue as to Washington, the

1 BG-Argentina case is, is a very notorious issue  
2 related to the 18 month requirement under  
3 Argentine bilateral investment treaties. I  
4 think probably virtually everybody in the room  
5 has, has dealt with this issue in somehow, in  
6 some way. We have. I know that our  
7 counterparts have. And it's an issue that goes  
8 specifically to the issue of when consent to  
9 arbitrate has been perfected in effect. It's an  
10 issue that arises specifically by the choice to  
11 go to UNCITRAL arbitration instead of, for  
12 example, electing to go to ICSID arbitration.  
13 That is the reason why the court in Washington  
14 was in a position to make the ruling that it did  
15 and claimant chose to come to, to, to this case  
16 as an UNCITRAL case. That, that decision is an  
17 outlier. It's subject to certiorari of the US  
18 Supreme Court. It's a very particular issue.  
19 There's been no suggestion showing our  
20 indication or implication that there's any  
21 reason to have a particular fear about an  
22 obstruction of strategy by this particular  
23 respondent. Its record is entirely to the  
24 contrary. And, as I mentioned, we also offer as  
25 yet another compromise the possibility of

1 designating Miami as a place of arbitration as a  
2 balance of all of the relevant factors,  
3 including legal certainty as well as convenience  
4 factors. Subject, of course, also, to the  
5 possibility of still using a Latin American  
6 location for certain hearings.

7 MR. MOSER: All right. Thank you, Mr.  
8 Hamilton. Mr. Kehoe, what about Miami?

9 MR. KEHOE: We're hearing this for the-  
10 -

11 MR. MOSER: [Interposing] Since that's  
12 been thrown out.

13 MR. KEHOE: We're hearing--I see.  
14 We're hearing this for the first time and, and I,  
15 I would like to correct that a perception that  
16 it's, it's our way or the highway. That's not  
17 the way this has played out. We, we have been  
18 presented un-, until a minute ago with Bogota  
19 and possibly Washington. Until just now, I  
20 didn't even realize that Washington was a firm  
21 proposal by Peru. It was something Peru would  
22 consider. We had proposed, we had discussed  
23 possibly Miami. I mean, possibly Paris. Geneva  
24 is, is, is a reasonable seat. So it, but we  
25 didn't discuss that. It is not as though a

1 number of, of places across the world had been  
2 proposed to claimants and that we had rejected  
3 them. We, we had both presented our two choices  
4 and, and that's where we, that's where we are  
5 right now. I'm hearing about Miami for the  
6 first time. When, when Washington DC was first  
7 proposed, I didn't really understand it. I  
8 explained, well, let me, let me think about this.  
9 It's a surprise. It's an American company and  
10 it didn't take me long to, to, to stumble upon  
11 the BG case or remember the BG case. And so  
12 what, you know, what is it about Miami? I don't  
13 know. But why are we working so hard to avoid a  
14 neutral setting in Europe that neither party is  
15 a citizen of in the Hague, which is proven for  
16 all of the reasons I won't repeat now. Why, why,  
17 why would we take risks in places? I don't know  
18 what the Supreme Court is going to say. If the  
19 Supreme Court upholds what Mr. Hamilton  
20 graciously described as an outlier case, if it  
21 is not an outlier after the Supreme Court rules,  
22 well, then in Miami we're going to be stuck with  
23 that ruling, obviously. Because the Supreme  
24 Court governs all jurisdictions in the United  
25 States. So we would recommend that we just keep

1 put this seat in the Hague and, and, and, and,  
2 and move on. Unless there is a reason, and I  
3 haven't heard it today, that the Hague is an  
4 inappropriate location. And Mr. Landau made a  
5 very good point. I mean, we're, we're proposing,  
6 claimants are proposing that the tribunal have  
7 as much flexibility as it would like in setting  
8 a place for the hearing, even for the final  
9 hearing on the merits and the issue of location  
10 and logistics can be handled that way. It's a  
11 very good point.

12 MR. MOSER: All right. Mr. Landau?

13 MR. LANDAU: All right. If you can  
14 read that. One of the thoughts that had  
15 occurred to us--well, I mean, there are several.  
16 First of all, you have mentioned Paris. You  
17 have mentioned Geneva. And I wonder, has that  
18 something that has been discussed with Mr.  
19 Hamilton or not? If not, what reaction would  
20 you have to that, Mr. Hamilton, in any case?

21 MR. KEHOE: Geneva has not. I, I just  
22 spontaneously mentioned Geneva, because I know  
23 it to be a, a good--

24 MR. LANDAU: [Interposing] Right.

25 MR. KEHOE: --forum.

1                   MR. LANDAU: You mentioned Paris twice  
2 I think so far.

3                   MR. KEHOE: And, and Paris, Mr.  
4 Hamilton and I, I said we, we might be open to  
5 Paris. I never got any feedback on Paris. That  
6 sort of just fell by its own weight.

7                   MR. LANDAU: I see.

8                   MR. MOSER: Mr. Hamilton, any thoughts?

9                   MR. HAMILTON: It hasn't been fully  
10 vetted through the, through the client process  
11 and so I'm unable to comment further on Paris.  
12 I don't exclude the possibility that we could be  
13 open to Paris as a, as a place of arbitration.  
14 I think that, again, it's far from respondents  
15 position that we should be looking for a non-  
16 neutral seat. It's our view that there are many  
17 diverse options for a seat of arbitration that  
18 are neutral, reliable, and practical all at the  
19 same time. And not that there's only one or two  
20 or now maybe three places in the world  
21 conceivably that could be acceptable. And to  
22 the contrary, what we've been trying to do  
23 through this process is, is raise and look for  
24 options in the western hemisphere, because we  
25 think it's certainly in today's world absurd to



1 think that there's nowhere in the western  
2 hemisphere to hold an international arbitration  
3 or investment arbitration of this nature. And  
4 it's also our position that, that holding such a  
5 case in Latin America would be important and  
6 that there are reliable seats of arbitration.  
7 But in any event, going back to the options of  
8 Washington DC or Miami, Miami is yet another  
9 effort that we're making overnight, taking into  
10 account the concern that there's been about the  
11 BG case. We, again, consider that to be a very  
12 narrow and specific case and one could go  
13 through different jurisdictions around the world  
14 and, and pull out a case here or case there to,  
15 to raise issues of concern. But we think that  
16 there are multiple options, all of which might  
17 be acceptable and we've tried to put a variety  
18 of options on the table here.

19 MR. FORTIER: How about another one?

20 On the, on, on the issue of western hemisphere,  
21 perhaps we could throw out Toronto, Vancouver,  
22 as possibilities. What would be an initial  
23 reaction to something like that, Mr. Kehoe?

24 MR. KEHOE: My initial reaction, with  
25 all due respect, Mr. President, is that we would

1 have to look into it. We, we would be open to  
2 it. Our goal is to find a place that reduces  
3 the risk--

4 MR. MOSER: [Interposing] Yes, yes.

5 MR. KEHOE: --to the maximum extent. I  
6 am not familiar, as I'm sitting here right now,  
7 as I, as I would be able to generally discuss  
8 with you Geneva and, and Paris and--

9 MR. MOSER: [Interposing] Right.

10 MR. KEHOE: --their arbitration acts  
11 and enforcement of their courts. I'm not  
12 prepared or able to do that right now  
13 spontaneously with, with Canada's.

14 MR. MOSER: Fair enough. Mr. Hamilton?

15 MR. HAMILTON: Just speaking--

16 MR. MOSER: [Interposing] Conceptually.

17 MR. HAMILTON: --speaking purely  
18 conceptually, it, it may be a possibility. We  
19 had not explored it, frankly, in part due to the  
20 nationality of the arbitrators and just keeping  
21 things neutral. And, also, frankly, as a  
22 practical matter, given the role of, of the  
23 centers, the administering authority, we thought  
24 that that gave some credence in practicality to  
25 the possibility of Washington as the place of

1 arbitration for a lot of practical reasons.

2 MR. MOSER: All right.

3 MR. KEHOE: Would you like us to, we  
4 offered in the procedural order draft to, to--

5 MR. MOSER: [Interposing] I see that,  
6 yeah.

7 MR. KEHOE: --follow up on this.

8 MR. MOSER: Yes.

9 MR. KEHOE: If you'd like us to, to, to  
10 get back to you on, on Canada, claimants are  
11 certainly happy to, to do that promptly.

12 MR. MOSER: Well, yeah. I, I think it,  
13 since it appears neither of you have really  
14 discussed it.

15 MR. KEHOE: Yeah.

16 MR. MOSER: I mean, we floated several  
17 ideas, I think, this morning and which probably  
18 you really haven't seen much engagement on your  
19 part yet and, and it might be useful for you to  
20 consider those with a bit more depth. I'm not  
21 sure whether we need 30 page exhibitions about  
22 the legal position, but I think it would be  
23 worthwhile certainly for you to have a  
24 discussion about that. And, as you say, take  
25 instructions from clients, vet it if you will,

1 and then come back to us.

2 MR. KEHOE: Thank you.

3 MR. MOSER: I think we have a number  
4 options out there spanning the globe now, which  
5 would be worthwhile to, to reconsider. All  
6 right. Well, let's assume that we do find a  
7 place, which we ultimately will I'm sure.

8 MR. LANDAU: Short lived arbitration.

9 MR. MOSER: [laughter] But let's go to  
10 8.2 then, 'cause here we have another difference,  
11 which as Mr. Landau noted earlier, is not  
12 unrelated to some of the issues in 8.1. But  
13 let's first hear from claimant, if we could, on  
14 that initial sentence of 8.2.

15 MR. LANDAU: Can I, can I just point  
16 out--

17 MR. MOSER: [Interposing] Yes.

18 MR. LANDAU: --forgive me, there,  
19 there's actually at the moment an inconsistency  
20 between this and 18.2 in the draft. At least, I  
21 think on the respondents formulation.

22 MR. KEHOE: There is--shall I, shall I  
23 begin?

24 MR. MOSER: Please, Mr. Kehoe.

25 MR. KEHOE: There is not--let me back

1 up. It, it, yeah. The, the, the issue that we  
2 take with respondent's proposal, I, I'm reading  
3 it again, because this, this language has gone  
4 through a few iterations--

5 MR. MOSER: [Interposing] Yes.

6 MR. KEHOE: --and I just want to make  
7 sure I had my thoughts correct before I comment.  
8 I'll just focus on the very last version that  
9 we're looking at right here. So respondent  
10 proposed that the tribunal may meet at any  
11 location it considers appropriate for  
12 deliberations, good. We're fine with that.  
13 Hearings may only be held at a location other  
14 than the place of arbitration upon agreement of  
15 the parties. And, and claimants would, would  
16 rather not limit the arbitral tribunals  
17 authority in this fashion. In, in our  
18 experience, the tribunal will work tirelessly to  
19 have the parties agree on, on procedural issues  
20 as we're doing right now, obviously, with the  
21 scene. And even some, maybe some substantive  
22 issues. And we have confidence that this  
23 tribunal will, will do the same with respect to  
24 the hearing locations. And we would prefer to  
25 have the tribunal have the authority and the

1 power to have the last word on it to the extent  
2 that the parties just simply refuse to agree on  
3 a hearing location. And, and that's really the,  
4 the, the, the crux of our disagreement on this  
5 point. Peru would rather have the parties need  
6 to agree on a place other than the seat and we  
7 would rather have the tribunal afford it a  
8 little bit more flexibility on that point. At  
9 the end of the day, if it's probably not a major  
10 issue, but that's our position.

11 MR. MOSER: Yeah. Just to note, of  
12 course, I mean, eight-, 18.2 of the UNCITRAL  
13 rules--

14 MR. KEHOE: [Interposing] Right.

15 MR. MOSER: --begins with the tribunal  
16 may meet at any location it considers  
17 appropriate for deliberations. Either first  
18 sentence of respondent's bracketed language.  
19 And then it goes on with the sentence above from  
20 claimants bracketed language unless otherwise  
21 agreed by the parties. So, in other words,  
22 claimants bracketed language is the second part  
23 of 18.2 of the UNCITRAL rules. The first  
24 sentence in respondent's bracketed language is  
25 part of 18.2 in the UNCITRAL rules. And what's

1 different is the last bit, hearings may only be  
2 held at a location other than the place of  
3 arbitration upon agreement of the parties.

4 MR. KEHOE: Right.

5 MR. MOSER: So the question, I think,  
6 there would be for Mr. Hamilton is why do we  
7 want to move away from the UNCITRAL rules to  
8 adopt that final sentence which you have  
9 proposed?

10 MR. HAMILTON: Thank you very much and  
11 thank you, Mr. Kehoe, for your comments.  
12 Respondent would be open to a formulation where  
13 hearings may be held at a location other than  
14 the place of arbitration, based on agreement of  
15 the parties or decision of the tribunal based on  
16 submissions of the parties.

17 MR. LANDAU: That's always after  
18 consultation.

19 MR. HAMILTON: Excuse me?

20 MR. LANDAU: In other words, after  
21 consultation.

22 MR. HAMILTON: After consultation. And  
23 the rationale, as with other issues that we've  
24 discussed already, is that the, the fact is that  
25 for a sovereign, we are, as counsel and Mr.

1 Valderrama as President of the Commission for  
2 the Defense of the State, is accountable not to  
3 a general counsel or a company, but rather to  
4 the Peruvian state, to multiple ministries and  
5 there are multiple interested parties. And so  
6 the opportunity to comment on an issue such as  
7 where would the hearing on the Aroya case be  
8 held, that's material to respondent. And so  
9 that's the reason why we would put a greater  
10 emphasis on an effort of the parties to reach  
11 agreement or a decision of the tribunal based on  
12 consultation, which I think is a, a, it, it, it  
13 may be implied that the tribunal would consult  
14 with the parties, but we would prefer to make  
15 it--

16 MR. MOSER: [Interposing] Specific  
17 language, all right. Mr. Kehoe, can we have  
18 your reaction to that proposal?

19 MR. KEHOE: Yes. We have no objection  
20 to adding at the end of our proposal in the  
21 bracketed language in 8.2, after consultation  
22 with the parties. If, if, if I'm understanding  
23 things correctly. But we, we prefer to simply  
24 follow the, the normal course in, in UNCITRAL  
25 arbitrations and allow the tribunal to make this



1 decision after consulting with the parties. If,  
2 if, if consulting with the parties is the hang  
3 up there, we absolutely agree to add that in.  
4 We, we would expect that to occur, of course.

5 MR. MOSER: All right.

6 MR. HAMILTON: As a slight variation on  
7 that, respondent would prefer that the language  
8 say the tribunal may meet at any location it  
9 considers appropriate for deliberations. The  
10 venue shall be decided by the tribunal in  
11 consultation with the parties, so that there is  
12 a, the presumption is more clearly oriented  
13 around the consultation. I'm not sure that the  
14 outcome is no difference.

15 MR. FORTIER: NO. Except that this  
16 would encompass deliberations and I, is this  
17 really what you're saying that for, the wording  
18 that you have just extemporaneously offered  
19 would include deliberations and hearings.

20 MR. HAMILTON: Yeah. We would  
21 distinguish--

22 MR. MOSER: [Interposing] You're  
23 concern is hearings.

24 MR. HAMILTON: --you can deliberate in  
25 the seashells if you so choose. But with

1 respect to the hearing, consultation with the  
2 parties would be necessary.

3 MR. FORTIER: Okay. That's, that's  
4 understood.

5 MR. KEHOE: I think we may--

6 MR. MOSER: [Interposing] Well,  
7 basically--

8 MR. KEHOE: --all be getting to the  
9 same place. We just don't have the language  
10 pinned down yet.

11 MR. MOSER: Let me, let me try to help.  
12 I mean, what I understand is that you are both  
13 content with what is in the UNCITRAL rules 18.2,  
14 except what Mr. Hamilton would like to do is to  
15 make clear that any decision with respect to a  
16 place of the hearing other than at the place of  
17 arbitration would only be made after  
18 consultation with the parties. Is that a fair  
19 summary?

20 MR. HAMILTON: That's correct.

21 MR. MOSER: Thank you. Mr. Kehoe?

22 MR. KEHOE: And we're absolutely fine  
23 with that.

24 MR. MOSER: Very good.

25 MR. KEHOE: Thank you.

1 MR. HAMILTON: And, again, in, in  
2 respondents view, that's consistent with our  
3 approach to consultation among all members of  
4 the tribunal, consultation with the parties at  
5 each step is appropriate for a case of this type.

6 MR. MOSER: Will we be hearing anything  
7 further from you then on, on this point?

8 MR. KEHOE: Not from claimants.

9 MR. MOSER: Any submissions?

10 MR. KEHOE: We'll go on the seat.

11 MR. MOSER: Yes. On the seat,  
12 certainly. We, we want to hear back from you,  
13 as indicated earlier, to reconsider those extra  
14 options.

15 MR. KEHOE: Yes.

16 [Pause]

17 MR. MOSER: All right. Let's march  
18 ahead and then at some point we'll take a break,  
19 probably in another 15 minutes or so, and then  
20 we can perhaps come back to it.

21 MR. KEHOE: As house-, housekeeping  
22 matter, Mr. President.

23 MR. MOSER: Yes.

24 MR. KEHOE: Should we decide now the  
25 date on which you would like the parties written

1 follow up on--

2 MR. MOSER: [Interposing] Let's go back  
3 after the break--

4 MR. KEHOE: [Interposing] Okay.

5 MR. MOSER: --if we could please.

6 MR. KEHOE: Okay.

7 MR. MOSER: We'll have a chat about it.

8 MR. KEHOE: Okay.

9 MR. MOSER: All right. Thank you.

10 MR. KEHOE: Thank you.

11 MR. MOSER: All right. So that's  
12 Section 8 and that's the end of Page 7. If we  
13 could perhaps move on then to Page 8. Now, here  
14 under 9.3 and 9.4, we have some differences and  
15 this all has to do with submissions and, and  
16 when we get the translations for the various  
17 documents. So it also links in to Section 11  
18 later on. The two are connected. But why don't  
19 we hear first from the claimant, if we could,  
20 and explain to us how you would see the two  
21 working.

22 MR. KEHOE: Thank you, Mr. President.  
23 I think that Section 11 will largely take care  
24 of itself based on how, how we resolve Section 9.

25 MR. MOSER: Mm-hmm.

1 MR. KEHOE: And the, the, the big issue  
2 with Section 9.3 and .4 is whether, is, is, is,  
3 is the burden of providing what we feel is  
4 unnecessary translations. And the reason I say  
5 that is that the tribunal all speak English.  
6 Claimants, lead counsel all speak English. Mr.  
7 Valderrama speaks English. Mr. Sadlowski speaks  
8 English. And some of us don't speak Spanish.  
9 And the, the issue really comes into, into light  
10 with the submissions of the memorials. Because  
11 we obviously agree that if a party is submitting  
12 a witness statement, I'm focusing on 9.3 now,  
13 the main documents. The party is submitting a  
14 witness statement or an expert report in the  
15 Spanish language, that it's incumbent upon that  
16 party, obviously, to provide English  
17 translations, so that the full tribunal can read  
18 and understand the document. It is not  
19 necessary for a document, a, a, a, a witness  
20 statement that's originally written in English  
21 or an expert report that's originally written in  
22 English and certainly not a memorial or a  
23 counter memorial or a reply memorial that's  
24 originally written in English to be translated  
25 into Spanish if it, it is by the party who is

1 submitting the English language version. When  
2 you consider that Peru has selected English  
3 speaking counsel and has appointed an English  
4 speaking arbitrator, it is just a, it is here a  
5 burden, an unnecessary burden, on the parties to  
6 be submitting simultaneous Spanish translations,  
7 which, which to a large degree will, will never  
8 be looked at. It also may cause unnecessary  
9 fights over translation, really irrelevant  
10 translation, if somebody submits a, a memorial,  
11 drafts a memorial that could be, you know the  
12 size of memorials, significant documents to then  
13 translate them into Spanish to be read by who  
14 knows who. Because the original English will  
15 govern when it's drafted that way and everybody  
16 speaks English. It's just, it's just an  
17 extraordinary and unnecessary burden. If Peru  
18 wishes to translate a memorial that's written in  
19 English by both its counsel and claimant's  
20 counsel, then certainly Peru can do that. But  
21 it's not fair to put that burden on, on Renco  
22 and raise these issues in, in the procedural  
23 order. As to the supporting documents, we  
24 originally had agreement that the supporting  
25 documents could be submitted in English without

1 need for a Spanish translation. But be-,  
2 because we couldn't reach agreement on, on the  
3 main documents, Peru went, because we, we  
4 reconsidered our position on the main documents.  
5 Peru then reconsidered its position on the, on  
6 the supporting documents. And so now we have a  
7 situation where supporting documents need, all  
8 need to be translated into Spanish even there,  
9 even though they were originally in English and  
10 I think that was just because we were proposing  
11 the more practical approach for 9.3. So that's  
12 how, that's where we are on 9.3 and 9.4.

13 MR. MOSER: All right. Very good.

14 Thank you. Mr. Hamilton, please?

15 MR. HAMILTON: Thank you, Mr. President.

16 And I direct your attention to slide number 7.

17 I have a few preliminary comments and then I'm  
18 going to be assisted by my colleagues from Lima.

19 And the first comment that I have is that  
20 claimant says that it's a burden, and  
21 unnecessary, to translate documents into Spanish.

22 In terms of sovereign practice, some states  
23 would avoid compromise of any type on this issue.

24 Peru, at the outset, sought a pragmatic  
25 compromise approach with respect to this issue

1 and still does. But I think one thing should be  
2 clear. If it's Renco's view of the world that  
3 there's only one or two, maybe three places to  
4 hold an arbitration, and their view of the  
5 telescope is that everything is in English and  
6 anything else is a burden and unnecessary, that  
7 might tell us a lot about their approach to  
8 doing business in Peru. Renco or the people in  
9 this room are not the only people involved in  
10 this proceeding or with interest in this  
11 proceeding. I mentioned earlier that we live in  
12 a multipolar world. We also live in a world in  
13 which there are diverse interests in investment  
14 arbitration, and particularly a case of this  
15 nature involving the social and human impact of  
16 a case such as this. So there are a series of  
17 interested players. And as a practical matter,  
18 due process and equal treatment and the right of  
19 respondent to respond requires a more bilingual  
20 approach. So there is an agreement of the  
21 parties that the procedural language of  
22 arbitration shall be English and Spanish, but  
23 claimants new proposal effectively converts this  
24 to an English arbitration. And anything  
25 involving Spanish is just a burden that Peru



1 should have to bear itself. It really is a  
2 matter of due process that there must be use of  
3 the Spanish language. There's no other  
4 pragmatic way to look at it. I'm surprised,  
5 frankly, that this is such a complication for  
6 claimant. The underlying documents, the treaty,  
7 is in both languages. The underlying documents  
8 largely are in Spanish. Laws in Spanish. The  
9 initial filings in this case by both parties  
10 were filed in both languages. Witnesses and  
11 experts will require Spanish. The official  
12 language of Peru is Spanish. The state  
13 representatives use Spanish. And critically the  
14 transparency obligations under the applicable  
15 treaty mean that there are interested parties  
16 that may choose to review the materials of this  
17 case in Spanish as well as in English, including  
18 the many effected Peruvian citizens who have an  
19 interest in what's going on in this proceeding.  
20 And we will come further to transparency later,  
21 but all of these pieces are tied together. And,  
22 finally, there's really no prejudice to claimant.  
23 It's an inconvenience for multi-national  
24 corporation to arrange for some translations?  
25 Not that much given the scope of what we're

1 dealing with here. I'd like to invite just very  
2 brief comments by my colleagues from Lima.  
3 First, Maria Carmen Tovar of Estudio Echeconpar  
4 and then Carlos Valderrama of the Ministry of  
5 Economy and Finance. And we'll try to keep it  
6 brief, but we would like to hear from them on  
7 this critical issue.

8 MR. MOSER: Thank you.

9 MS. MARIA DEL CARMEN TOVAR GIL: Good  
10 afternoon. Well, I want to share just three  
11 very simple ideas that support the importance of  
12 having a real bilingual process for the Republic  
13 of Peru. First of all, as you might be aware,  
14 the investment of the claimant was done in Peru.  
15 And specifically in a small town in the  
16 mountains of Peru. The name of this town is La  
17 Oroya. The story that you will hear in the  
18 process happened in Peru and happened in Spanish.  
19 The relevant facts will take us back to 1996.  
20 And in this 17 years, different officers and  
21 people of Peru and people of La Oroya have been  
22 dramatically been involved in this story. It is  
23 important to have the right to receive and to  
24 transmit to them the entire story told by an  
25 investor in the language of our country. The

1 second idea to have in mind is that investment  
2 and economic activities of investor has been  
3 made under the laws and regulations of Peru.  
4 Those laws and regulations, as the tribunal can  
5 guess, were fought and were written in Spanish.  
6 We shall read and hear the claimant and his  
7 witnesses and experts not only in English, but  
8 in Spanish. And to have the correct  
9 understanding of the legal position that is  
10 important to be con-, contemplated by the  
11 tribunal. Finally, it is not fair that the  
12 claimant avoids delivering to the respondent a  
13 translation of the main documents of the  
14 proceeding. As Mr. Valderrama will explain, the  
15 case involves several and different  
16 administrative bodies of the Republic of Peru.  
17 And to answer to the investor claim, we will  
18 have to work with dozens of officers, experts,  
19 and witnesses in Spanish. So I leave Mr.  
20 Valderrama to close his comment on the  
21 importance we find to have a real bilingual  
22 process for the Republic of Peru.

23 MR. MOSER: Thank you, ma'am. Sir?

24 MR. CARLOS JOSE VALDERRAMA: Thank you  
25 very much. [Speaking in Spanish] I'm going to

1 speak in English for everybody. The Republic of  
2 Peru takes seriously the importance of foreign  
3 investment develops the economy while reasonably  
4 expecting investors to follow the rules and laws  
5 of our country. Peru has the most traded over  
6 two decades consistent, con-, consistent  
7 economic and legal policy facilitating  
8 investment. Peru is very active on the  
9 international scene of investment protection and  
10 conflict resolution practices developing during  
11 the years a very comprehensive and responsive  
12 scheme of rules and practices for investment  
13 disputes as well as reflected in international  
14 treaties and investment contracts. In order to  
15 efficiently attend controversies arising from,  
16 from investment treaties and contracts, the  
17 Republic of Peru has created a commission  
18 integrated by the Ministry of Economy, Ministry  
19 of Foreign Affairs, Ministry of Justice,  
20 Ministry of Trade and Commerce, the investment  
21 promoting agency, in this case, the Ministry of  
22 Energy and Mine, among, among other entities.  
23 To coordinate its fair participation and defense  
24 before tribu-, international tribunals, that  
25 necessary requires Spanish to allow the

1 representative and other government officials to  
2 understand, act, and cooperate through this  
3 arbitration process. As chair of the commission  
4 and representative of the Republic of Peru,  
5 before this high tribunal, it is also my  
6 intention to reaffirm our commitment. Although  
7 being aware of the high burden of discussing  
8 publicly such an important matter as this, again,  
9 I will like to reaffirm our commitment with  
10 transparency. Transparency agreed by an FTA  
11 with the US and owed to the people of both  
12 nations. Therefore, transparency is in English  
13 and in Spanish, the Peruvian official language.  
14 Thank you.

15 MR. MOSER: Thank you, sir.

16 MR. HAMILTON: In short, we think that  
17 the necessity of Spanish, of Spanish language is  
18 critical. It's, it's, it's obvious the fact  
19 that there are participants in, in the immediate  
20 proceeding, either members of the tribunal or  
21 counsel that are fluent in English is not the,  
22 the end of the story, not even for me. I dream  
23 in Spanish, not in English. And would not be  
24 sitting here if I wasn't fluent in Spanish. And  
25 clearly there are many participants within the

1 Peruvian state who require the use of Spanish.  
2 And there are many externalities to this case  
3 that make it incumbent upon the proceedings to  
4 be sufficiently open and transparent in both  
5 languages. And, really, at the end of the day,  
6 there's no prejudice to claimant, particularly  
7 given that what we have suggested is not a rigid  
8 and inflexible approach, but rather a practical  
9 approach. And we have specified that main  
10 documents of the case, pleadings, witness  
11 statements, expert reports are submitted in one  
12 language with a translation a week later. That  
13 supporting documents are submitted with relevant  
14 parts translated. International legal  
15 authorities do not require translation. And,  
16 also, routine correspondence of the case would  
17 be conducted in English, because we think that  
18 in terms of the day to day coordination and also  
19 the transparency factors, this is a practical  
20 approach. Now, we've tried to lay out a, a, a  
21 practical approach. We could take a, a, a  
22 completely rigid approach, as many states do,  
23 and say everything that occurs can only happen  
24 in, in both languages. Day to day we've tried  
25 to find a balance that takes into account all of

1 the different factors and all of the different  
2 players who are involved. Thank you.

3 MR. MOSER: All right. Thank you very  
4 much. Mr. Kehoe, do you have any further  
5 comments on--

6 MR. KEHOE: [Interposing] Just briefly.  
7 Counsel for the, counsel for the respondent  
8 stated, stated that our proposal effectively  
9 converts this into an English arbitration and,  
10 and that's simply not true. There will be a  
11 significant portion of this arbitration that is  
12 done in the Spanish language. And where  
13 necessary, where helpful, where appropriate,  
14 they will be tran-, they will be translated into  
15 English. It is not helpful, it's not  
16 appropriate, and it's not a due process issue to  
17 translate English legal documents into Spanish,  
18 so that people in the country can read them. I  
19 think that, that the issue here is being  
20 exaggerated a bit. If Peru would like to tr-,  
21 translate the English, the memorials that will  
22 be written in English for this tribunal, they  
23 certainly can do that. But to make it part of  
24 the process and to put that burden on, on Renco  
25 is, is more of a cost and a practicality issue

1 than it is a due process issue.

2 MR. MOSER: Thank you, Mr. Kehoe. Mr.  
3 Landau, any comment?

4 MR. LANDAU: No. Why, why don't we  
5 deal with--no.

6 MR. MOSER: No. All right.

7 MR. LANDAU: Why don't we deal with 11.  
8 Sorry.

9 MR. HAMILTON: I, I'm sorry. I, I'll  
10 keep this very brief. I just only want to say  
11 we repeatedly hear about the great burden on  
12 Renco. It certainly would be the only  
13 legitimate expectation that an investor  
14 investing in the Republic of Peru could have  
15 that they would need to potentially provide  
16 documents in Spanish in the course of a  
17 proceeding of this type. It's just been made  
18 very clear the burden on the state internally,  
19 just in order to communicate, coordinate, and do  
20 business in the official language of the country  
21 with respect to a case of this magnitude and  
22 importance and social impact that it has. And  
23 so, again, the repeated discussion of burden on  
24 Renco, the reason that we're, we're hearing this  
25 is because the way that claimant operates



1 principally is by one law firm dealing with a  
2 couple of people down the street in New York  
3 City. That is not the entirety of people  
4 involved in this matter. There are many  
5 different participants in this matter, both  
6 within the state and beyond, witnesses, experts,  
7 and interested parties that will have an  
8 expectation through transparency to have access  
9 to information. Thank you.

10 MR. MOSER: All right. Thank you very  
11 much.

12 MR. KEHOE: I'd just like to correct  
13 the record. We have a little bit more going on  
14 in this case than that which happens in New York  
15 City, including down in Peru, in litigations and  
16 the like. But I would note, again, under  
17 Section 9.4, that Peru did not have a problem  
18 with having exhibits, legal authorities, and  
19 annexes submitted in English only until, until  
20 we, we ask that essentially memorials need not  
21 be submitted in, in Spanish as well, since we're  
22 going to be drafting them in English. So I, I  
23 mentioned that for the tribunals consideration  
24 if it's, when it's considering 9.3 and 9.4  
25 together.

1 MR. MOSER: Yes. All right. Mr. Kehoe,  
2 could I now invite you to have a look at your  
3 proposal under 9.3 and tell us how it then fits  
4 into 11?

5 MR. KEHOE: Yes. So 11 becomes  
6 complicated and appears somewhat complicated  
7 simply because the different tribunal members  
8 and, and parties are asking for copies of  
9 filings and different forms.

10 MR. MOSER: Well, maybe 11.1, please,  
11 first.

12 MR. KEHOE: Okay. So on the relevant  
13 filing date, the party will submit an ele-, by  
14 electronic e-mail an electronic version of the  
15 main document. Now, we're saying in one of the  
16 procedural languages with an English translation  
17 where the party elects to file in English. And,  
18 and what we're getting at here is that we're not  
19 requiring documents to be, or requesting that  
20 documents be filed in English only, obviously.  
21 If a party has a witness or an expert that  
22 speaks Spanish, the, the, the bilingual  
23 proceedings enable and allow that person to su-,  
24 prepare and submit a Spanish original governing  
25 witness statement or expert report.

1 MR. MOSER: Right. Now, that's as per  
2 9.3?

3 MR. KEHOE: Correct.

4 MR. MOSER: Submitted in English or  
5 Spanish.

6 MR. KEHOE: Or Spanish. And if it is  
7 submitted in Spanish, which both sides are  
8 probably going to do--

9 MR. MOSER: [Interposing] Yes.

10 MR. KEHOE: --we certainly have Spanish  
11 experts and the like.

12 MR. MOSER: Then an English translation  
13 comes.

14 MR. KEHOE: Yes, so the tribunal can,  
15 all members can understand it, and that's, and  
16 that's that.

17 MR. MOSER: But--sorry. But it comes,  
18 just to be clear--

19 MR. KEHOE: [Interposing] Seven days  
20 later. It comes seven--the filing mechanism  
21 would be that, where does it say it, that the--

22 MR. MOSER: [Interposing] This is  
23 where--

24 MR. KEHOE: --the procedure that we  
25 agreed upon is that translations come seven days

1 after the original.

2 MR. MOSER: Okay.

3 MR. KEHOE: Thank you, yes.

4 MR. MOSER: But take a look at 11.1.

5 MR. KEHOE: Yes.

6 MR. MOSER: With an English translation,  
7 where the party elects to file in Spanish.

8 MR. KEHOE: Right. You raise a good  
9 point.

10 MR. MOSER: There's a bit of confusion-  
11 -

12 MR. KEHOE: [Interposing] There is.

13 MR. MOSER: --as to when the  
14 translation comes.

15 MR. KEHOE: It's a very good point.  
16 Our, our, and I think this was just a function  
17 of us going back and forth. Claimants proposal  
18 is that the English translation would come a  
19 week later.

20 MR. MOSER: Okay. So you're both, I  
21 mean, that's common ground it appears now that  
22 you have these initial filing and then you have  
23 the supplemental filing, is that, is that  
24 correct? And the translation comes seven days  
25 later with a supplemental filing.

1 MR. HAMILTON: Right. It's our view  
2 that the main documents are submitted on the  
3 filing date in either language.

4 MR. MOSER: Correct.

5 MR. HAMILTON: And then any translation,  
6 seven days later. And we went back and forth  
7 and actually went to some significant effort and  
8 practical coordination to try to come up with a,  
9 I'll call it a humanitarian clause here for  
10 counsel. So that we submit--

11 MR. MOSER: [Interposing] Right.

12 MR. HAMILTON: --the main documents and  
13 you have a week to get everything else  
14 translated.

15 MR. MOSER: Yes. That, that I see and  
16 that's in your bracketed language under 9.4  
17 where you have the two steps, right. And what  
18 confused me a bit was then going on to 11.1--

19 MR. KEHOE: [Interposing] You're right.

20 MR. MOSER: --what you seem to suggest  
21 there is that if a filing is made in Spanish,  
22 then the English translation must come at, must  
23 come at the same time with the filing date.

24 MR. KEHOE: That's right.

25 MR. MOSER: But that's a bit

1 inconsistent with 11.2.

2 MR. KEHOE: You're right. And, and  
3 that's a mistake. We are--

4 MR. MOSER: [Interposing] Okay. That's  
5 out.

6 MR. KEHOE: You are--that would be out.  
7 If, if--

8 MR. LANDAU: [Interposing] Just the  
9 words with an English translation?

10 MR. KEHOE: With an English translation,  
11 yes.

12 MR. MOSER: Okay.

13 MR. KEHOE: The translations come a  
14 week later. Now, yeah.

15 MR. FORTIER: I, I'm--if I may?

16 MR. MOSER: Please, sir.

17 MR. FORTIER: No. I, I'm surprised to  
18 note in 11.3.3 that I'm an outlier here. This  
19 may have been done by my, by my, my office  
20 without my knowledge, but I would also like the  
21 A5 double sided letter format, and like the  
22 Chairman and my friend Mr. Landau.

23 MR. MOSER: Okay.

24 MR. FORTIER: Natali? Got it.

25 MR. MOSER: Very good. All right.

1 Well, that makes life a bit simpler I think.

2 All right. So let's come back then to, to the  
3 two proposals and, and--

4 MR. KEHOE: [Interposing] Sorry, Mr.  
5 President. Of course, the parties can elect to  
6 file an English translation with their filing,  
7 so that the, the tribunal members, all of them,  
8 can begin reading it right away--

9 MR. MOSER: [Interposing] Right.

10 MR. KEHOE: --obviously. So that, that,  
11 that--

12 MR. FORTIER: [Interposing] Except  
13 postponing the--

14 MR. KEHOE: --postponing it for seven  
15 days, right, and having to prioritize your  
16 reading pleasure. So we're fine. We, we  
17 intended to, to have it one week later. That's  
18 a typographical error.

19 MR. MOSER: Okay. Thank you. That's  
20 very helpful. Anything further from your side,  
21 Mr. Hamilton, on this point then?

22 MR. HAMILTON: The only further comment  
23 I would make is that there was a lot of back and  
24 forth, obviously, on all procedural issues. And  
25 it's, it's respondents position based on

1 extensive discussions of the multi-sectorial  
2 commission that's involved on this issue that,  
3 that the main documents need to be translated  
4 and the supporting documents need to be  
5 translated with respect to the relevant parts  
6 thereof. This is necessary to the ability of  
7 individuals within the government as well as  
8 witnesses and experts who principally speak in  
9 Spanish. For instance, we just heard from my  
10 colleagues in Spani-, in English, but I assure  
11 you that they prefer and do read in, in, in  
12 Spanish. And they represent many other people  
13 back in Lima who would not typically be reading  
14 in English, and that includes supporting  
15 documents as well. So we, we, we, honestly, we  
16 consider this such an obvious issue and, and  
17 basic due process issue that, that we would  
18 appreciate even if in the coffee break claimant  
19 could find a, a, a more interactive approach on  
20 this issue. But in any event, we think we've  
21 made Peru's position quite clear.

22 MR. MOSER: All right. Mr. Kehoe,  
23 anything further to be said at this moment  
24 before we go to the coffee break?

25 MR. KEHOE: Before we got to coffee



1 break. One, one question, a practical question  
2 from, from my client. Which is in the, in the  
3 event of a translation of a legal document,  
4 let's say the memorial, from English to Spanish,  
5 which document will control? Obviously, we all  
6 understand that documents that are corporate  
7 documents that are written in a certain language  
8 will control, that that language will control.  
9 And a witness statement written in Spanish, the  
10 Spanish will control and the translation will  
11 have to take a second seat. And, similarly, if  
12 a witness statement is written in English  
13 originally and a translation company makes a  
14 mistake, then we'll fix that. But for the  
15 memorial, we, we would need to know which of  
16 those two languages is going to control in the  
17 event of a dispute over translation and who  
18 would decide that dispute with a tribunal that  
19 doesn't all speak Spanish.

20 MR. MOSER: Any suggestions from your  
21 side?

22 MR. KEHOE: Yeah. 9.3 and 9.4. I, I  
23 would propose, although I'm going to be  
24 criticized for it, because there seems to be  
25 some suggestion that it's, it's, it's sort of a

1 one, one way street when this has actually been  
2 pretty, I thought, productive compromise. But I  
3 would suggest that if, if, that the English will  
4 control. The, if the tribunal is inclined to  
5 allow or to require translations of the memorial,  
6 since both parties are probably going to write  
7 the memorial in English, I would propose that  
8 English control and that any Spanish translation  
9 not control.

10 MR. MOSER: Mr. Hamilton?

11 MR. HAMILTON: First of all, we will  
12 draft bilingually. Our counterparts assume a  
13 little too much that our internal functions are  
14 the same as theirs or that the Peruvian state  
15 works the way that their client works. But in  
16 any event, we'll, I suggest that we take the  
17 opportunity of the coffee break and we'll  
18 discuss on our side any practical observation we  
19 might have to resolve that issue.

20 MR. MOSER: All right. Very good,  
21 gentlemen. So why don't we stop now. It's  
22 10:35. And could we come back in 15 minutes at  
23 10:50.

24 MR. KEHOE: Thank you.

25 MR. HAMILTON: Yes.

1 MR. MOSER: Very good. Thank you, sir.

2 [END First\_Session\_-\_Audio\_Recording\_-  
3 \_Part\_1.mp3]

4 [START First\_Session\_-  
5 \_Audio\_Recording\_-\_Part\_2.mp3]

6 MR. MOSER: All right, let's reconvene.

7 Now, during the break, the parties had said that  
8 they would have a word about a couple of the  
9 matters that were left on the table unresolved.

10 And Mr. Kehoe, anything to report? Any white  
11 smoke or--?

12 MR. KEHOE: Yes. We have some white  
13 smoke. And I would ask my colleague, Mr.  
14 Hamilton, across the way to tell you what we  
15 have agreed to.

16 MR. MOSER: Very good. Cardinal  
17 Hamilton?

18 [Laughter]

19 MR. HAMILTON: Thank you very much, and  
20 thank you to our counterparts for our productive  
21 discussions. So, I direct your attention to  
22 page number eight and draft sections 9.3 and 9.4,  
23 with respect to the procedural language. And  
24 the parties have agreed as follows -- I would  
25 also like to thank the representatives of Peru

1 for their collaboration in finding a compromise  
2 here.

3 The draft versions of 9.3 and 9.4,  
4 submitted by Claimant, are stricken. The draft  
5 language submitted by Respondent is adopted,  
6 with the changes that I will now describe. Just  
7 to confirm, per sub point A, pleadings, witness  
8 statements and expert reports will be submitted  
9 in both languages, as set forth here. And the  
10 pleadings may be relied upon, principally, in  
11 the English language. Witness statements,  
12 expert reports and any supporting documents  
13 should be relied upon in their original language,  
14 whatever that might be. And obviously, if there  
15 are issues of translation, they would be  
16 addressed. It may be easiest to include the  
17 proviso that I just made, as a new sub section D.  
18 So, that there would be a sub section D that  
19 says the governing language of pleading shall be  
20 English, and the governing language of witness  
21 statement, expert reports and supporting  
22 documents shall be in their original language --  
23 as a new sub section B.

24 And the one other change would be in  
25 Section B regarding supporting documents. Here

1 we would introduce the following change.  
2 Exhibits, legal authorities and annexes,  
3 together the supporting documents, may be  
4 submitted in any language. There is always the  
5 chance that there could be something other than  
6 English or Spanish. Provided that any document  
7 submitted, in a language other than English,  
8 will be translated into English for the  
9 convenience of the tribunal, with respect to the  
10 relevant parts thereof. Or we could put that  
11 language earlier in the sentence and say  
12 relevant parts thereof -- provided that relevant  
13 parts thereof shall be translated into English  
14 for the convenience of the tribunal, noting that  
15 -- and then we could continue the last two lines  
16 -- the tribunal may require a fuller or a  
17 complete translation.

18 And I think that that might obviate the  
19 need for -- well, I guess that would obviate the  
20 need for subsection C, regarding international  
21 legal authorities. Because it would now be  
22 subsumed in the agreed version of subsection B.

23 So, in short, subsection A stays the  
24 same. Subsection B is revised as I just set  
25 forth. And subsection C, as it exists, would be

1 omitted and in its place would be the language  
2 regarding the governing language of the  
3 pleadings and the other documents.

4 MR. MOSER: All right, and any changes,  
5 then flipping over to eleven, where we deal with  
6 the submissions and the translation issues that  
7 appears there, any -- anything need to be  
8 changed there, other than striking out with an  
9 English translation where the party elects it?

10 MR. HAMILTON: In our view, we did not  
11 discuss this, in fairness. But in our view, the  
12 language in brackets would come out.

13 MR. MOSER: Right. Right.

14 MR. HAMILTON: The language would be --  
15 the submission will be made and one week later--

16 MR. KEHOE: [Interposing] Correct.

17 MR. HAMILTON: -the other submission  
18 will be made as well.

19 MR. MOSER: I think that was agreed  
20 earlier by Mr. Kehoe, just to tie that end up.

21 MR. KEHOE: Yes.

22 MR. MOSER: Okay. Very good. Now,  
23 I'll come back, in a moment, if I could, to a  
24 request to you, with respect to the place of  
25 arbitration. And then I'll pick up again on

1 this particular point, that we have just been  
2 discussing, under 9.3. I guess this will be 9.3,  
3 this what now picks up from 9.3 and four.

4 MR. KEHOE: That's right.

5 MR. MOSER: So, the subtenant number  
6 five, six, seven, etcetera, would be changed  
7 accordingly, as well. But what I simply want to  
8 do, for the moment, let's put these aside.  
9 We'll come back to them later on. But let me  
10 just say thank you very much, to both parties,  
11 for helping us through that particular thicket.  
12 I think that is a very good solution. And let's  
13 carry on.

14 MR. KEHOE: Thank you.

15 MR. MOSER: If we could then, the next  
16 sections.

17 MR. KEHOE: May I simply - I'm sorry.

18 MR. MOSER: Mm hmm.

19 MR. KEHOE: I think I am stating the  
20 obvious, but one can never be too careful, which  
21 is that obviously relying on the English version  
22 of a brief doesn't mean that you are relying on  
23 the English translation of the original document  
24 in Spanish, for example--

25 MR. HAMILTON: [Interposing] Right.

1 MR. MOSER: Mm hmm.

2 MR. KEHOE: -that may be cited, in the  
3 brief.

4 MR. HAMILTON: And we agree with that.

5 MR. MOSER: All right. Any comments,  
6 further, from either of my colleagues? No? All  
7 right. Let's move to ten if we could, then,  
8 that's on page nine where we deal with routing  
9 of communications. And we have two again very  
10 different proposals before us. Mr. Kehoe first  
11 please.

12 MR. KEHOE: Thank you, Mr. President.  
13 The claimant wishes to be able to communicate  
14 directly with the tribunal where appropriate.  
15 Just as we have been doing by email in the days  
16 leading up to this hearing. Hopefully we will  
17 get Mr. Fortier's email address right at some  
18 point, but--

19 MR. FORTIER: [Interposing] You better.

20 MR. KEHOE: -it is a -- it is the  
21 normal practice, in our experience, in UNCITRAL  
22 arbitrations, in all arbitrations, obviously we  
23 would copy the secretary at ICSID on all  
24 communications. UNCITRAL Rule 17.4 implies --  
25 it may not say it directly, but it certainly



1 implies that direct communications, with the  
2 tribunal, is expected. It says, "All  
3 communications, with the tribunal, by any party,  
4 shall be communicated by that party, to all  
5 other parties." And we just don't see a reason,  
6 a practical reason, to filter and delay any  
7 potential communications with the tribunal  
8 through -- through the secretary, for practical  
9 reasons. Just delay things unnecessarily.

10 MR. MOSER: All right. Thank you, Mr.  
11 Kehoe. Mr. Hamilton?

12 MR. HAMILTON: Ms. Menaker is going to  
13 address this issue. Thank you.

14 MR. MOSER: Very good. Ms. Menaker?

15 MS. MENAKER: Thank you. When Peru  
16 agreed to have ICSID act as the administrating  
17 authority, it was its expectation that it would  
18 serve the role that it does in the types of  
19 arbitrations when it does administer. And one  
20 of the functions that it typically undertakes,  
21 which we have found to be particularly useful,  
22 is to guide the correspondence, and between and  
23 among the parties and the tribunal. And you  
24 know I would indicated that Peru is not  
25 advocating a very extreme position whereby all

1       communications, even between and among counsel,  
2       have to go through the secretariat.

3                 So, for instance, when we were filing a  
4       memorial, we would directly copy opposing  
5       counsel. So, there is no threat of having any  
6       sort of prejudicial delay, you know if ICSID  
7       would, for some reason, be otherwise unavailable.  
8       But just insofar as communications with the  
9       tribunal, we think that it imposes a certain  
10      order on the proceedings that is beneficial for  
11      both -- really both parties, and the tribunal.  
12      We have found that ICSID does act very -- in a  
13      timely manner, is very attentive when the ICSID  
14      secretary is out at another hearing or otherwise  
15      out of pocket, there is always somebody, in her  
16      place, that is appointed which serves us well.  
17      And quite frankly, we think it imposes a certain  
18      decorum on the proceedings. It -- it declutters,  
19      sometimes some excess or unnecessary  
20      correspondence, and I think makes the proceeding  
21      run smoothly. And of course, we also avoid and  
22      you know I don't mean say anything negatively,  
23      the email miscommunication over the address. I  
24      mean that happens to everybody. So, no one will.  
25      No, that's what I'm saying; it happens to

1 everybody. But -- and that's -- you know  
2 certainly we do that too, but it just takes  
3 another layer out of that. And, you know  
4 leaving the communication to go through ICSID.  
5 I think it just makes it smoother. It makes the  
6 proceeding operate better, and like I said, it  
7 declutters some of the back and forth  
8 communications.

9 MR. MOSER: Okay. Mr. Kehoe, anything  
10 further for either side?

11 MR. KEHOE: Just briefly, Ms. Menaker  
12 said that when Peru agreed to ICSID, it has an  
13 expectation that somehow the ICSID rules or  
14 procedures would act as some sort of overlay or  
15 umbrella, to these proceedings. That was not  
16 our understanding at all. That certainly was  
17 never communication to the Claimant. We  
18 certainly have had good experiences with ICSID,  
19 but ICSID was actually Peru's proposal. We were  
20 proposing a PCA originally. And we agreed to  
21 ICSID. But had we been told, at the time, that  
22 ICSID rules, which Claimant could have chosen  
23 under the treat, and opted not to, would somehow  
24 influence this UNCITRAL proceeding, we may very  
25 well not have agreed to ICSID acting as the

1 Secretariat. So, we would rather, not only for  
2 practical purposes, especially with the Chairman  
3 who is in a time zone, for -- for rules purposes,  
4 we would rather follow the UNCITRAL Rules and  
5 not being a procedure deviating from them and  
6 moving into ICSID's rules.

7 MS. MENAKER: And I would just note, in  
8 that regard, that we are certainly not seeking  
9 to impose ICSID's arbitration rules on this  
10 procedure, and that this is a common method of  
11 communicating with tribunals, even in UNCITRAL  
12 proceedings. We have UNCITRAL proceedings that  
13 are administered by the PCA and the PCA does  
14 follow, at least in the proceeding in which I am  
15 currently involved, the same methodology whereby  
16 the parties send their communications directly  
17 to the PCA secretariat who then forwards it to  
18 the tribunal and the parties are actually  
19 prohibited from sending the communications  
20 directly to the tribunal. So, it is not at all  
21 uncommon and we have seen it in lots of UNCITRAL  
22 proceedings as well and we do think that it  
23 serves; you know an efficient and beneficial  
24 purpose.

25 MR. KEHOE: Just note that in UNCITRAL

1 proceedings that I am involved in right now,  
2 that is not the process. We -- we copy the  
3 tribunal and the tribunal feels free, just as  
4 this President has, when necessary, to  
5 communicate with the parties. This would  
6 eliminate that ability. That's what we object  
7 to. We don't intend to clutter the tribunal  
8 with internal correspondence or anything of the  
9 sort.

10 MR. MOSER: All right. Well, thank you  
11 both. I think that is clear enough, where you  
12 both stand, subject to my colleagues. Any views,  
13 Mr. Fortier or Mr. Landau? No? All right then.  
14 Shall we move on then, if we could, to the next  
15 point? We have dealt with eleven, I believe.  
16 Is there anything further, in eleven?

17 MR. KEHOE: I'm sorry; we will add Mr.  
18 Fortier's request for double A--

19 MR. MOSER: [Interposing] Yes, of  
20 course.

21 MR. KEHOE: -and other than that, no,  
22 Mr. President. Claimant has nothing further to  
23 add.

24 MR. MOSER: Mr. Hamilton, anything? Ms.  
25 Menaker?

1 MR. HAMILTON: Nothing further.

2 MR. MOSER: Nothing? Thanks. Okay.

3 All right, page 11 then, if we can go next.

4 Anything there?

5 MR. KEHOE: Not from the Claimant.

6 MR. HAMILTON: No.

7 MR. MOSER: Very good. And then we  
8 move to page 12. I have one small point. And  
9 that is 14.1a, five lines up; you have this  
10 bracket and then a semicolon. I think it's --  
11 yeah, that was your major substantive point  
12 about--

13 MALE VOICE: [Interposing] It was.

14 MR. MOSER: Good, well we both are on  
15 the same page. That's the only point the  
16 tribunal has, on this page. Do either of you  
17 have anything to say? No? Mr. Kehoe,--

18 MR. KEHOE: [Interposing] Claimant  
19 proposes and moves to delete the bracket.

20 MR. MOSER: Very good, thank you.  
21 Seconded by?

22 MR. HAMILTON: So agreed.

23 MR. MOSER: Excellent, very good, sir.  
24 So ordered. Let's move on, if we could, to page  
25 13. I see nothing there, for my part. Mr.

1 Kehoe or Mr. Hamilton?

2 MR. KEHOE: Nothing from Claimant.

3 MR. HAMILTON: No.

4 MR. MOSER: All right. Fourteen?

5 MR. KEHOE: Nothing from Claimant.

6 MR. HAMILTON: - - .

7 MR. MOSER: Thank you. And fifteen?

8 Now, there is an issue arising under 16.2.

9 MALE VOICE: Big issue here.

10 MR. MOSER: And Respondent has raised  
11 this point. So, if I can perhaps invite  
12 Respondent to address us on this please?

13 MS. MENAKER: Certainly. What we have  
14 proposed is keeping in mind that in  
15 international arbitration, the parties will be  
16 submitting witness statements and expert reports  
17 to serve principally as the direct testimony of  
18 those witnesses and experts. And the parties  
19 will each have an opportunity, prior to the  
20 hearing, to designate or to call certain of the  
21 other parties' witnesses and experts, to appear  
22 for cross examination. That while Claimant then  
23 proposes that if no one may appear, to testify,  
24 if they are not called for cross. We have  
25 proposed that if the other party calls fewer

1 than two of the counter -- the opposing party's  
2 witnesses or experts, that that party may itself  
3 call two of its own witnesses, up to two of its  
4 own witnesses, or up to two of its own experts,  
5 to testify briefly in direct examination.

6 And we believe this is useful because  
7 we have seen, in some circumstances, for  
8 whatever reason, some parties choose not to call  
9 the other party's witnesses or experts, for  
10 cross, and it leads to a very unbalanced hearing.  
11 Where the tribunal is listening to one party's  
12 experts and witnesses, for nearly or the  
13 entirety of the case. And that does leave an  
14 unbalanced impression in the tribunal's mind,  
15 keeping in mind of course that of course you  
16 have the written direct testimony. But just as  
17 a practical matter, sitting in a room, day after  
18 day, listening to witnesses, experts, seeing  
19 them face to face, that leaves an impression in  
20 your minds, and we think that it would be unfair,  
21 to the other party, not to at least have the  
22 ability to bring in a couple -- we are not  
23 asking, you know for this to be unlimited, but a  
24 couple of the witnesses and experts of its own  
25 party, so that the tribunal could then see those



1 witnesses and experts, in person, could be  
2 reminded, briefly, of the conclusions that they  
3 testify to, and would have the opportunity, if  
4 it so chose, to ask those witnesses and experts  
5 some questions.

6 MR. MOSER: Ms. Menaker, if I can just  
7 follow up on that, the inter relationship  
8 between your proposal and 16.4.4. So, with that  
9 same time limit, whatever it is, that is  
10 ultimately agreed, be applied in that case?

11 MS. MENAKER: Yes, it would.

12 MR. MOSER: Okay, thank you very much.  
13 Mr. Kehoe?

14 MR. KEHOE: Mr. President, Mr. Burnett  
15 will handle this--

16 MR. MOSER: [Interposing] All right.  
17 Mr. Burnett please?

18 MR. KEHOE: -part of the argument.

19 MR. BURNETT: As I understand the  
20 proposal, if Claimant calls one or zero of a  
21 fact or expert witness, of Respondent, for cross  
22 examination, they can then put on two witnesses  
23 that they choose, to testify in some way. And  
24 this is, just in my experience, not in accordance  
25 with arbitral practice. Certainly, the tribunal,

1 if the tribunal wishes to hear from an expert,  
2 or a fact witness, that we have chosen not to  
3 cross examine, they obviously can do so. And it  
4 is really the party's choice as to how they want  
5 to handle and present their case. And what this  
6 invites is really to call witnesses up, and  
7 frankly I doubt that this is ever going to  
8 coalesce into reality, but it invites them to  
9 put witnesses on who will just basically get up  
10 and vouch for their testimony that has already  
11 been before the tribunal. So,--

12 MR. MOSER: [Interposing] They would  
13 have 15 or 45 minutes to do that, depending on  
14 what - - I guess. It would probably be a bit  
15 more than vouching, I guess under the--

16 THE HONORABLE MR. FORTIER:

17 [Interposing] Except that the--

18 MR. MOSER: [Interposing] Hmm? I mean  
19 that is what I was wondering about, what -- how  
20 far would it go really is what I was asking.

21 THE HONORABLE MR. FORTIER: Except that  
22 the Respondent's proposal is that if that comes to  
23 pass, that witness would be examined for a  
24 maximum of 15 minutes.

25 MR. MOSER: Or 45.

1                   MALE VOICE: No, no, I'm looking at the  
2 Respondent's--

3                   MR. MOSER: [Interposing] I'm sorry;  
4 yes.

5                   MR. BURNETT: I'm not sure that those  
6 were intentionally -- that those were related in  
7 the first instance.

8                   MS. MENAKER: Well, they -- the are  
9 related.

10                  MR. MOSER: That's why I asked the  
11 question.

12                  MS. MENAKER: They are related.

13                  MR. MOSER: She confirmed it was  
14 related.

15                  MS. MENAKER: And so, yes, that is  
16 correct, that if it were -- if we were calling  
17 our own witness or expert to testify, then we  
18 would be limited to whatever timeframe the  
19 tribunal ordered. But here, our proposal is the  
20 15 minutes.

21                  MR. KEHOE: Okay.

22                  MS. MENAKER: And so, yes, you would be  
23 reiterating your primary conclusions, perhaps  
24 responding to something that, you know came up  
25 before hand, but essentially reiterating. But

1 again, I think, and just to make one point of  
2 clarification, I think in the example you gave,  
3 you said if you had called one of our witnesses,  
4 we would then be able to call two. No, we would  
5 be able to call one. If you called zero, we  
6 would call two. If you called one, we would  
7 have the option of calling yet another one.

8 THE HONORABLE MR. FORTIER:

9 Respectively up to--

10 MALE VOICE: [Interposing] Yes.

11 MS. MENAKER: [Interposing] Exactly, up  
12 to two. And I think the -- again the important  
13 point, of course it is up to each party to  
14 decide how to present its case, or defense, as  
15 the case may be, but part of our presentation of  
16 our defense is the ability to have our witnesses  
17 and experts heard by this tribunal, in -- in a  
18 manner that gives them really an opportunity --  
19 a true opportunity to be heard. And we think  
20 that that does sometimes get lost and that it  
21 does present an unfairness to one party, if the  
22 other party just chooses not to call any experts  
23 and witnesses and to sit through an entire  
24 hearing hearing only one side's witnesses and  
25 experts orally, it just leaves an unbalanced

1 image in the tribunal's mind.

2 MR. LANDAU: so, the concern, as I hear  
3 it, is a concern about being shut out completely.

4 MS. MENAKER: Yes.

5 MR. LANDAU: And you accept the fact  
6 that even in that scenario, there would be some  
7 limitation of time?

8 MS. MENAKER: Yes.

9 MR. MOSER: Mr. Burnett, anything  
10 further to add to--?

11 MR. BURNETT: Yes. If it is limited to  
12 15, frankly this is a first; with all due  
13 respect, we have heard that these were somehow  
14 linked. So, if -- if it is limited to 15  
15 minutes, I guess we have no problem with it.

16 MR. MOSER: You wouldn't be -- about  
17 that. Fine.

18 MR. KEHOE: But of course, we had  
19 proposed 45--

20 MR. MOSER: [Interposing] Your proposal  
21 is 45--

22 MR. KEHOE: -versus 15. Sorry, we --  
23 which was for direct testimony of witnesses--

24 MR. MOSER: [Interposing] Right.

25 MR. KEHOE: -who were about to be cross

1 examined.

2 MR. BURNETT: So, this changes the  
3 equation, because we did not understand that  
4 this 16.4.4 was tied to 16.2. We had actually  
5 sought a compromise at 30 minutes for all of  
6 this, but that was not acceptable. But now that  
7 we understand the -- the link, let us confer and  
8 get back to the tribunal.

9 MR. MOSER: All right. On both -- on  
10 both points, Mr. Kehoe, correct?

11 MR. KEHOE: Yes.

12 MR. MOSER: Yes?

13 MR. KEHOE: Yes.

14 MS. MENAKER: And may I just ask for --  
15 I guess if you are just going to get back to us,  
16 should -- on the number, because we don't think  
17 there ought to be a difference. I mean if  
18 someone is testifying for direct, whether it is  
19 because we called your witness for cross and you  
20 have a direct, or whether we are calling our own  
21 witness for direct, the timeframes ought not to  
22 change. They should be the same regardless. So,  
23 at least that -- that is our position.

24 MR. KEHOE: Why don't we -- can we just  
25 caucus for 15 seconds here, right here in our

1 chairs?

2 MR. MOSER: Yes, and just to point out  
3 too, so we don't miss the point. I mean 16.4.3  
4 goes to fact witnesses and it has been agreed by  
5 both parties that that would be 15 minutes.

6 MR. HAMILTON: Right.

7 MR. MOSER: And 6.4.4. -- 16.4.4 is a  
8 45 versus 15 and that relates to experts.

9 MR. KEHOE: Yes.

10 MR. MOSER: 16.2 goes to calling two --  
11 fewer -- a party's witnesses and those could be  
12 experts or fact witnesses.

13 MR. KEHOE: Or both.

14 MR. MOSER: Or both, correct.

15 MR. BURNETT: Well, we had proposed, on  
16 16.4.4, with respect to experts, we had proposed  
17 a compromise of 30, but that was rejected.

18 MR. MOSER: All right. Well,--

19 MR. BURNETT: [Interposing] It seems to  
20 make a little more sense.

21 MR. MOSER: Yeah, I think we see the  
22 issues now and where they lay. I mean how do  
23 you want to deal with it? Do you want to try to  
24 address it now or--

25 MR. KEHOE: I think we may make some

1 progress if we can just have a second to speak.

2 MR. MOSER: Please.

3 MR. KEHOE: So, the Claimants will  
4 propose, and this will require a response from  
5 the Respondents, that Claimants agree to 16.2 as  
6 it is written. And we propose that 16.4.4 be  
7 changed to 30 minutes. And with that, 16 would  
8 be concluded.

9 MR. MOSER: Ms. Menaker? Can you help  
10 us here?

11 MS. MENAKER: Yeah, I think that --  
12 Respondent believes that 30 minutes is still a  
13 bit excessive for direct, considering the  
14 purpose of direct testimony and the fact that  
15 the direct is contained within the expert's  
16 report, but we would be willing to compromise to  
17 20. So, just -- I just did think that once it  
18 goes beyond that, we are getting away from the  
19 fact that we -- direct is really meant to remind  
20 the tribunal of the conclusions that are already  
21 in the report, and not to, you know have a full  
22 blown examination.

23 MR. MOSER: I'll allow 16.4.1.

24 MR. BURNETT: I was going to counter  
25 with 25, but we will just accept 20. That's



1 fine.

2 MR. MOSER: All right, thank you very  
3 much. So, that then resolves these issues.  
4 16.2 we adopt the bracketed language at the end.  
5 And 16.4.4, without the tribunal direct  
6 examination of experts shall not exceed 20  
7 minutes, shall be limited to the scope of prior  
8 testimony. All right? Yes?

9 MR. KEHOE: Yes. I'm sorry, Mr.  
10 President, yes, that is correct.

11 MR. MOSER: All right, thank you very  
12 much. All right. With that then, we then move  
13 on to page 16 and here we have an overlap, it  
14 seems to us, with 18.2, under 18.2 with the  
15 earlier discussion we had about hearings. I'm  
16 wondering whether we need 18.2 or if it really  
17 just doesn't fall to determined under the  
18 earlier discussion.

19 MS. MENAKER: Perhaps now that we  
20 negotiated the language under the other  
21 provision, we ought to just strike this.

22 MR. KEHOE: Yes, agreed.

23 MR. MOSER: Thank you very much. Then  
24 18.2 goes out. And numbers are changed  
25 accordingly. All right, that then brings us,

1 ladies and gentlemen, to page 17 where we have  
2 again a difference of opinion under C and -- C,  
3 18.4.c, and perhaps we can invite Claimant to  
4 address us first on this, and then Respondent?

5 MR. BURNETT: Okay, we had initially --  
6 we have proposed that the case proceed as  
7 follows. That direct and cross examination of  
8 Claimant's witnesses and experts is then simply  
9 followed by direct and cross examination of  
10 Respondent's witnesses and experts. This is how  
11 we customarily do it. We think that we should  
12 have the option to put on our entire case,  
13 before they put on their entire case. And  
14 really it is nothing more than that. This is  
15 the way that we would like to proceed, in  
16 connection with putting on our case, as we would  
17 -- we would like to obviously, subject to views  
18 that the tribunal may have.

19 MR. MOSER: All right, thank you.  
20 Respondents?

21 MS. MENAKER: What Respondent proposes  
22 is that Claimant -- Claimant's witnesses would  
23 testify first, after opening of course. Then  
24 Respondent's witnesses and then the experts  
25 would testify and this is not -- we discussed

1 this, but I don't think the language is  
2 particularly clear. What we were envisioning is  
3 that they would be grouped by subject. So, we  
4 don't obviously know what experts will be called,  
5 at this point, but for instance if both parties  
6 have an environmental law expert, if both  
7 parties have a Peruvian law expert, if both  
8 parties have, I don't know an expert, Quantum is  
9 now bifurcated, but if it were Quantum, that the  
10 Claimant's expert on environmental law would  
11 testify followed by Respondent's expert on  
12 environmental law. Then Claimant's expert on  
13 Peruvian law, followed by Respondent's expert on  
14 Peruvian law, etcetera. And we have found that  
15 this is just a very practical and beneficial way  
16 to organize the testimony of the witnesses,  
17 especially in a case of this scope. You will  
18 see that we have -- the parties have both  
19 proposed that the hearing be one week with one  
20 week in reserve. So, there is a possibility,  
21 subject of course to the tribunal's comments on  
22 this, that this could be as long as a two week  
23 hearing. And it is very disjointive to have --  
24 hear from all witnesses and experts -- imagine  
25 you hear an environmental expert on Wednesday

1 and then you don't hear the other side's expert  
2 responding to that same material, until a week  
3 later. I think it is much easier, for the  
4 tribunal, to hear the experts back to back like  
5 that. And quite frankly, it is easier for  
6 counsel as well, for counsel prepping during the  
7 hearing. You are dealing with doing directs and  
8 crosses at the same time. You are keeping the  
9 subject matter together, and I think it -- it  
10 keeps the story unfolding over a -- in a logical  
11 manner, that I think helps everybody follow what  
12 is going on and ask good questions. So, that's  
13 why we proposed it this way.

14 MR. MOSER: All right. Well, thank you.

15 Mr. Burnett?

16 MR. BURNETT: Well, we simply think  
17 that it is disruptive to interrupt Claimant's  
18 case like this and while we understand what she  
19 is saying, a lot of these issues overlap and we  
20 are not talking about a hearing that is going to  
21 last for four months. I think that the tribunal  
22 is perfectly capable of listening to an expert  
23 on a Thursday and then another one the following  
24 week. And so, we just think that it would be  
25 too disruptive to the way we like to present our

1 case.

2 MR. MOSER: All right. Well, it looks  
3 like this particular issue goes into the  
4 tribunal's box. I think we will, you know we  
5 will deal with that. Thank you very much. No  
6 comments from either of my colleagues, I take  
7 it?

8 MS. MENAKER: And I would just note  
9 that our language that we have proposed here  
10 perhaps didn't fully say everything that I had  
11 just indicated--

12 MR. MOSER: [Interposing] Did you want  
13 to say by topics, or did you want to--

14 MS. MENAKER: [Interposing] By topics,  
15 exactly.

16 MR. MOSER: -add that in?

17 MS. MENAKER: Yes, just so you recall  
18 that that was our proposal.

19 MR. MOSER: That's what I had marked,  
20 yeah. Thanks for that extra bit.

21 MS. MENAKER: Sure.

22 MR. MOSER: Okay. I don't note  
23 anything else on page 17. I can stand to be  
24 corrected. Anything further? If not, let's  
25 move to 18 and here again we have something -- a

1 difference of opinion under 21.2. Now, this  
2 deals with the sending of updates.

3 BURNETT: Actually, there is a typo, in  
4 ours; it should be four under the update, after  
5 last step--

6 MR. MOSER: [Interposing] Update after  
7 the--

8 BURNETT: Right next to Claimant it  
9 should be four instead of two.

10 MR. MOSER: I see. All right, thank  
11 you.

12 MR. KEHOE: Mr. President, I'm sorry to  
13 do this, but because of that last comment, on  
14 18.4, I am compelled to go back to it.

15 MR. MOSER: Yes, sir.

16 MR. KEHOE: What is written is direct  
17 and cross examination -- what is written by the  
18 Respondent--

19 MR. MOSER: [Interposing] Mm hmm.

20 MR. KEHOE: -of Claimant's witnesses  
21 and then Respondent's witnesses, and now I  
22 understand that the words by topic would be  
23 written in there, and that is very different.  
24 It is -- it is one thing to disrupt the  
25 Claimant's case, by having Respondent's fact

1 witnesses follow Claimant's fact witnesses--

2 MR. MOSER: [Interposing] I think it's  
3 a misunderstanding.

4 MR. KEHOE: Oh good.

5 MR. MOSER: This s what I understood.

6 MR. KEHOE: Oh good.

7 MR. MOSER: Ms. Menaker?

8 MS. MENAKER: No, only by topic for the  
9 experts.

10 MR. MOSER: Yes.

11 MS. MENAKER: Not the - - witnesses.

12 MR. KEHOE: oh, so the fact witnesses -  
13 - Claimant's fact witnesses would all go?

14 MS. MENAKER: Yes.

15 MR. KEHOE: Okay, thank you.

16 MR. KEHOE: I didn't understand that.

17 MR. MOSER: I think by topic would be  
18 at the end of the sentence.

19 MS. MENAKER: That's correct.

20 MR. KEHOE: Thank you. I apologize.

21 MR. MOSER: All right. Coming back  
22 then to the updates. So, we have -- I mean it's  
23 still a straightforward, Claimant's four,  
24 Respondent's 6 update after last step. And then  
25 further updates two and three, right? Why do we

1 have this difference? Ladies and gentlemen?

2 Principle basis for it or--?

3 MR. KEHOE: Not really.

4 MR. HAMILTON: It's probably something  
5 we wrote. We being the Respondent--

6 MR. MOSER: What do you think?

7 MR. HAMILTON: Yeah, that's fine.

8 MR. KEHOE: We agree.

9 MR. HAMILTON: We can agree with them.

10 MR. MOSER: You can live with--

11 MR. HAMILTON: [Interposing] This isn't  
12 something that got a lot of discussion between  
13 us.

14 MR. MOSER: Right, and that's what I  
15 was--

16 MR. HAMILTON: [Interposing] I think it  
17 just kind of laid out there for a while.

18 MS. MENAKER: And I believe that we had  
19 just adopted what was in the draft order that  
20 you sent us.

21 MR. MOSER: So, we are going to go with  
22 six and three, is that correct?

23 MR. HAMILTON: Yes.

24 MR. MOSER: All right.

25 MR. BURNETT: And I would like to note,



1 we are going to get to the issue of scheduling  
2 and document production--

3 MR. MOSER: [Interposing] We are indeed.

4 MR. BURNETT: -shortly, but you know  
5 the fact that -- that the Claimant is -- is not  
6 pushing the time schedule here, should not go  
7 unnoticed when we get to an important scheduling  
8 issue. I would like to--

9 MR. MOSER: [Interposing] The marker is  
10 down--

11 MR. BURNETT: [Interposing] Thank you.

12 MR. MOSER: -and well noted.

13 MS. MENAKER: But again, I would say  
14 that this was not -- I mean all we did here was  
15 this is a proposal by the tribunal, and we just  
16 sought not to change it. The tribunal was  
17 proposing that it give us these updates, at  
18 these time periods, and we saw no need to change  
19 it. So, it doesn't reflect any -- anything on  
20 our position with respect to the timing of the  
21 procedure.

22 MR. KEHOE: And we were proposing to  
23 move it along quicker, and now we are not, by  
24 agreeing to those dates.

25 MR. MOSER: Right. Maybe we better

1 stick with the agreement we have now, six and  
2 three, and move on, shall we?

3 MR. KEHOE: Yes.

4 MR. MOSER: 22.1 we have brackets here  
5 with a note that Respondent has a request to add  
6 this language. Is that Ms. Menaker or Mr.  
7 Hamilton?

8 MR. HAMILTON: I will address this  
9 issue, thank you, Mr. President. And I direct  
10 your attention to slide number eight, in our  
11 packet. Clearly the applicable treaty requires  
12 transparency in connection with this matter.  
13 And I would like to thank my counterparts for  
14 the extensive discussions that we have had on  
15 this issue, and I appreciate that we have now  
16 reached agreement on substantially all of this  
17 section, whereas in our initial draft, we had a  
18 transparency section proposed by Respondent and  
19 we had no -- no agreement. And so, we have made  
20 significant progress.

21 And the intention, of this section, I  
22 think is to do two things. One is to confirm  
23 and give effect to what the treaty says,  
24 including with respect to publication of  
25 documents, open hearings, etcetera, including

1 the safe guarding of protected information. And  
2 also to specify some of the ways that that will  
3 occur, from a logistical standpoint. Part of  
4 the aim that we have, with this section, is so  
5 that anyone who may ever consult this order,  
6 which will be made publicly available, will see  
7 and understand that there is a commitment to  
8 transparency. There is a commitment to giving  
9 effect to the language of the tribunal. And  
10 that it will be consolidated, in one place, what  
11 the concept here is, with respect to  
12 transparency. Given, as I have emphasized, the  
13 diverse interested parties in this matter, which  
14 -- which at any given point, during the  
15 proceeding, either side, or members of the  
16 tribunal, may appreciate or be frustrated with,  
17 but it is simply a fact that there are diverse  
18 interested parties and players, not only Renco,  
19 not only the Peruvian state, and its -- its  
20 various parts, but Peruvian citizens, the U.S.  
21 Government, nongovernmental organizations,  
22 creditor companies, and participants in -- in  
23 other proceedings including other litigation  
24 proceedings, and also participants in a human  
25 rights proceeding before the Inter American

1 Commission of Human Rights, who consider  
2 themselves to be affected by this matter.

3 And so, the specific purpose of clause  
4 22.1 is to make expressly clear what the  
5 transparency objective is, and how that is being  
6 carried out. Because it involves the specifics  
7 of transparency with respect to documents and  
8 hearings and also the opportunity of  
9 participation of non disputing parties. And  
10 that is the reason that 22.1 is here, because we  
11 think that it helps give context and clarity to  
12 the purpose of this section. And also,  
13 indicates the -- the objective and intent with  
14 respect to transparency and openness.

15 And I would just add, with respect to  
16 some of the other provisions here, we -- we  
17 again are appreciative that we now have  
18 agreement, with respect to some of the details  
19 of the role of administering authority, in this  
20 context, especially given that the center has  
21 significant experience with respect to  
22 transparency issues.

23 MR. MOSER: All right, thank you.

24 Claimant?

25 MR. KEHOE: Yes. Mr. President, the --

1 as an initial matter, I will note that the  
2 transparency of these proceedings is governed by  
3 Article 10.21 of the Trade Promotion Agreement.  
4 Whereas the amicus submissions are governed by  
5 10.20. There are two different issues that are  
6 being conflated, and frankly that is the reason  
7 that we originally objected to what was proposed  
8 to us, as transparency, because it was presented  
9 as transparency and amicus submissions, and they  
10 are different. And that has been fixed.

11 The only objection that we have to 22.1  
12 is the first sentence. We believe that that is  
13 some type of public relations statement, or the  
14 like, and doesn't have any place in the  
15 procedural order. We agree that these  
16 proceedings will be transparent, as the treaty  
17 provides, as 22.2 provides, and we agree to the  
18 second sentence of 22.1. We just don't  
19 understand the reason, when the treaty requires  
20 transparency, to say that the proceeding are  
21 important given the issues of public interest  
22 and tying transparency to that. It is  
23 unnecessary and we don't understand why it needs  
24 to be in a procedural order.

25 MR. MOSER: Any further response, Mr.

1 Hamilton?

2 MR. HAMILTON: Well, the -- the  
3 objective of the clause is to -- as stated. But  
4 can you clarify, Ed, what are you proposing?  
5 You said--

6 MR. KEHOE: [Interposing] Delete the  
7 first sentence.

8 MR. HAMILTON: You are proposing just  
9 to delete the first sentence?

10 MR. KEHOE: Yes.

11 MR. HAMILTON: If we delete the first  
12 sentence, you accept the rest?

13 MR. KEHOE: Yes.

14 MR. HAMILTON: Okay, we agree.

15 MR. MOSER: Thank you. I mean the  
16 treaty says what it says.

17 MALE VOICE: Yes.

18 MALE VOICE: That's correct.

19 MR. KEHOE: Well, that has been our  
20 position. There has been a lot of paraphrasing  
21 of the treaty and -- and counsel cooperated and  
22 agreed that we are just going to read Article  
23 10.21, which applies to transparency, and that  
24 will be it. That's all. It's not amicus,  
25 that's a different issue.

1 MR. MOSER: All right, thank you very  
2 much. So, that's then resolves as well? Yes?  
3 Now, can we -- we're all right there, yes?

4 MR. KEHOE: Yes.

5 MR. MOSER: All right, very good. May  
6 we then move on to the timetable and perhaps we  
7 can first invite Respondent to give us an  
8 overview of how they see this whole thing  
9 unfolding and from their perspective and what it  
10 is that they find problematic about the  
11 Respondent's proposal.

12 MR. KEHOE: Claimant's, I apologize, I  
13 thought you said Respondents.

14 MR. MOSER: I'm sorry; I did say  
15 Respondent's. I meant Claimant.

16 MR. KEHOE: Okay.

17 MR. MOSER: I'm looking at -- you saw  
18 it--

19 MR. KEHOE: [Interposing] I thought I  
20 had a break there for a few minutes.

21 MR. MOSER: No, no, sorry.

22 MR. KEHOE: The -- the major -- there  
23 are two major issues with the procedural  
24 schedule. And I comment my colleague across the  
25 table for -- and his team, for, you know the

1 work that we have done in arriving at this  
2 ultimate schedule. There was a lot of  
3 compromise by both sides. Where we could not  
4 compromise are on two important issues.

5 MR. MOSER: Mm hmm.

6 MR. KEHOE: The second of which, I  
7 believe, is the most important, which is down --  
8 the briefing on liability and jurisdiction, if  
9 applicable -- down at the very bottom of the  
10 first page. What the parties have agreed to, is  
11 a -- a bifurcated process, by which liability  
12 and jurisdiction will move forward together. So,  
13 that is a productive compromise. And that phase  
14 will be bifurcated from Quantum. Quantum will  
15 be handled after a determination of liability  
16 and jurisdiction, if there are any  
17 jurisdictional objections.

18 At the very beginning of the case,  
19 however, Plaintiff will file its memorial on  
20 liability, and if -- if Respondent has any  
21 arguments or -- or objections, based on Article  
22 10.20.4 of the treaty, which is, by its terms  
23 and according to the implementing bill, in the  
24 United States Congress, is similar to what we  
25 have in the United States, which is called a



1 Motion to Dismiss for Failure to State a Claim  
2 upon which relief can be granted. In this case,  
3 it is an application to dismiss a claim if an  
4 award cannot be rendered on that claim, under  
5 Article 26 of the treaty. And that is a simple  
6 application. It assumes all the facts to be  
7 true, and it is a legal determination by the  
8 tribunal, on the issue of whether a claim is --  
9 is justiceable, or just frivolous. And that  
10 does not include jurisdictional objections.

11 By its terms, if you turn to 10.20.4,  
12 sub four, it says - - terms, without prejudice  
13 to a tribunal's authority to address other  
14 objections, as a preliminary question. Such as  
15 an objection that a dispute is not within the  
16 tribunal's competence, a tribunal shall address  
17 and decide, as a preliminary question any  
18 objections by the Respondent that as a matter of  
19 law a claim submitted is not a claim for which  
20 an award, in favor of the Claimant, may be made.

21 So, it is our position, that in this  
22 very preliminary initial phase, right after  
23 Claimants submit their memorial, that the  
24 Respondents cannot advance jurisdictional  
25 objections. That is consistent with the treaty

1 language, but it is not as much consistent with  
2 the treaty language because they could advance  
3 jurisdictional objections if we all agreed to it,  
4 but it is consistent with the schedule that we  
5 have all agreed to, which is that jurisdictional  
6 objections will be handled in -- in a subsequent  
7 phase where the Respondent will brief liability  
8 and jurisdiction.

9           And what we want to ensure, in this  
10 procedural order, and the reason for our bracket,  
11 in the second box, is just to make it perfectly  
12 clear that we are not going to be hit with  
13 jurisdictional objections right up front after  
14 having worked so hard to reach an agreement on  
15 the process of this. And Respondent has said  
16 well, look, the 10.204 says what it says. Let's  
17 leave it at that. But we would rather have a  
18 little bit more fulsome open and transparent  
19 confirmation of that fact. This -- everything  
20 else we basically agreed on. These are just  
21 dates.

22           The other very big issue, is the one at  
23 the bottom of the page, where the Claimant  
24 proposed that the document production phase  
25 occur simultaneously while the Claimants are

1 preparing their memorial on liability and  
2 jurisdiction, the reply memorial. And  
3 originally, the amicus submissions were lumped  
4 in there too, which is essentially causing the -  
5 - the Claimants and its lawyers to be fighting  
6 wars on all fronts -- document issues, amici and  
7 we moved amici to the back, for that reason.

8 But the Respondent has refused to agree  
9 that our reply begins to -- the time for -- for  
10 Claimants to reply begins to tick based on the  
11 final document production. Claimant would  
12 rather have our time begin to tick right after  
13 Respondent files its counter memorial and it  
14 will continue to tick all throughout the time of  
15 the document production, which leaves Claimants  
16 only two weeks, in this case, to file its reply,  
17 after having received all of the documents. It  
18 is completely unfair. It is one sided and it is  
19 -- it is quite a serious issue.

20 And I put down my marker earlier, to  
21 note that we have not fought the timeframes on  
22 this arbitration very strenuously. Five months,  
23 six months for the initial submission and the  
24 like, and the one place where Peru seems to be  
25 interested in expediting the schedule is the one

1 place where we have our backs up against the  
2 wall, writing a reply memorial -- translating it  
3 now, by the way, and also responding to document  
4 requests. We had proposed, initially, to have a  
5 document phase at the very outset of the case,  
6 to have two document phases, because we do  
7 believe that the document production, in this  
8 case, is going to be very important. We no  
9 longer control the site, the - - facility. We  
10 have no access to the documents there. We  
11 believe Peru has a lot of documents that we  
12 don't have. But to facilitate cooperation, we -  
13 - we sacrificed that initial document production  
14 phase, to try to reach a compromise schedule.  
15 But to have us preparing our reply, at the same  
16 time that we are receiving rolling production of  
17 documents, is completely unfair and as the  
18 Claimants, we are prepared to have this  
19 arbitration prolonged, by the period of time  
20 that the document production occurs, such that  
21 our reply begins to run right after the last  
22 documents are produced. It is not a, in my  
23 opinion, a very onerous request. And if ever  
24 there were a -- we discussed Due Process a  
25 little bit earlier, this is one of them. Two

1 weeks to get a reply memorial done in this case  
2 is -- is unfair. Those are the two big points,  
3 on the schedule, from our perspective. Thank  
4 you.

5 MR. MOSER: Thank you very much. All  
6 right. Mr. Hamilton?

7 MR. HAMILTON: Yes. Thank you very  
8 much. And at the outset, I would also like to  
9 thank our colleagues across the table for the  
10 extensive rounds of efforts that both sides made,  
11 which has certainly involved significant  
12 discussion, with Lima and compromise as there  
13 were compromises on both sides. And there  
14 really are two issues. One is timeframes for  
15 principal submissions and the second is the  
16 scope and procedure with respect to Article  
17 10.20.4. I'm going to address the first and Ms.  
18 Menaker will address the second.

19 With respect to the timeframes, I  
20 direct your attention to slide number nine,  
21 which just focuses in, sort of cuts out some of  
22 the clutter, from the longer schedule. And at  
23 the outset, of our discussion today, I  
24 emphasized that Peru has always been and remains  
25 a fair and due process oriented participant in

1 international arbitration and certainly any  
2 suggestion to the contrary is ill founded. To  
3 the contrary, we would say that were we simply  
4 to agree to Renco's proposal that we would be  
5 agreeing to unequal treatment, which we are  
6 unable to do. But let's take a look,  
7 practically speaking, with what we are dealing  
8 with, if you look at slide nine there.

9 I have basically collapsed the special  
10 phases, which is the Article 10.20.4 phase, the  
11 document production phase, and the non disputing  
12 party amicus phase. And what you see, with  
13 respect to the memorial, we basically are saying  
14 26 weeks each, for Claimant's memorial and  
15 Respondent's counter memorial. They are  
16 proposing 20 weeks from the date of the  
17 procedural order, and then 20 weeks for us, you  
18 know, in our view, obviously this case was  
19 commenced two years ago, or some months after  
20 that when they withdrew and amended their Notice  
21 of Arbitration. So, they certainly have had  
22 significant time to develop their case and we do  
23 not know exactly how their 20 page Request for  
24 Arbitration will turn into a full blown memorial.  
25 So, it is important to respondent that

1       it have ample time to prepare the counter  
2       memorial.

3                       With respect to reply rejoinder, what  
4       Renco is proposing is that a counter of 20 weeks  
5       commence at the end of an 18 week document  
6       production period. So, that's a total of 38  
7       weeks -- 38 weeks for Renco. So, the suggestion  
8       that they have two weeks is inaccurate,  
9       particularly given that there is an agreement by  
10      Respondent that document production would occur  
11      on a rolling basis. So, with respect to those  
12      document requests where there is no dispute,  
13      production would be on a rolling basis. And  
14      then obviously production as to any disputed  
15      documents promptly thereafter.

16                      There may be some medium that could be  
17      contemplated here, but the scenario that the 18  
18      weeks of document production, they are simply  
19      not going to review or work on their submission,  
20      we -- we all know is not -- not practical. It's  
21      not that they will not begin to respond to  
22      witnesses, experts, or arguments, in our brief,  
23      until the last -- the last document that they  
24      receive.

25                      We all know, from some of the larger

1 and long running cases, that that is simply not  
2 the way that it operates. And so, then, in turn,  
3 the real notable thing here is that Peru is  
4 proposing 20 weeks reply, 20 weeks rejoinder.  
5 Renco's proposal would give it 38 weeks for its  
6 reply and then we get 12 weeks for our rejoinder.  
7 I'm not clear on which planet 38 and 12 are  
8 equal. And so, if the real concern here, on  
9 timing, is the time period that Renco has after  
10 its reply, then what I would encourage, as a  
11 practical approach, is let's stick with 26 weeks  
12 from today for memorial, 26 weeks for counter  
13 memorial--

14 MALE VOICE: [Interposing] Slowly --  
15 slowly.

16 MR. HAMILTON: Excuse me; 26 weeks for  
17 the memorial, from today.

18 MALE VOICE: That -- which is what you  
19 have put forward, yes?

20 MR. HAMILTON: Yes.

21 MALE VOICE: Yeah.

22 MR. HAMILTON: Twenty-six weeks for the  
23 counter memorial, with respect to Claimant's  
24 reply, we are open to some kind of limited  
25 compromise, taking into account their concern



1 that -- that they would be prejudiced, but we  
2 cannot agree, to 38 weeks or anywhere close to  
3 it. It's simply a gross imbalance,  
4 notwithstanding the document production phase.  
5 And then on--

6 MALE VOICE: [Interposing] Why don't  
7 you -- why don't you make your offer?

8 MR. HAMILTON: Sorry. We may -- excuse  
9 me one minute. We propose 22 weeks to them,  
10 which would give them another month after the  
11 conclusion of -- after the conclusion of  
12 production, which already has occurred on a  
13 rolling basis, over an extended period of time.

14 MALE VOICE: Twenty-two weeks from?

15 MR. HAMILTON: From -- 22 weeks from  
16 the counter memorial. And then -- and then  
17 finally, 20 weeks for Respondent's rejoinder.  
18 So, that's simply as to these time periods. Now,  
19 we can pause there and try to address that  
20 further and then come back to the issue of  
21 Article 10.20.4, or we can go ahead and -- and  
22 discuss that now as well, whichever would be  
23 most - - .

24 MR. MOSER: Let's stop there for the  
25 moment, and--

1 MR. HAMILTON: [Interposing] Okay.

2 MR. MOSER: -and come back, if we could,  
3 to Mr. Kehoe and Mr. Burnett.

4 MR. KEHOE: Yes.

5 MR. MOSER: We have something on the  
6 table.

7 MR. KEHOE: Yes.

8 MR. MOSER: What is the reaction,  
9 gentlemen?

10 MR. KEHOE: The reaction is that with  
11 all due respect is not -- not something that we  
12 can accept.

13 MR. MOSER: So, we are down to that.

14 MR. KEHOE: Yeah.

15 MR. MOSER: The bottom of it.

16 MR. KEHOE: We are. And so with  
17 Respondent's rejoinder, Renco is proposing 12  
18 weeks. I would propose that a better compromise  
19 is that Renco agrees that Peru will have 20  
20 weeks to refile its rejoinder, if Peru agrees  
21 that Renco can have 20 weeks that it needs, from  
22 the end of document production, to submit its  
23 reply. The -- the document dispute issue is a  
24 significant one. It is, in my experience,  
25 commonplace that very important documents come

1 in near the end of a document production phase.  
2 A rolling production of documents that are non  
3 controversial and that are called for, does not  
4 solve this problem. Themes and arguments are  
5 developed around sometimes -- oftentimes,  
6 especially with states, documents that are held  
7 to the very end. And it is -- it is just unfair,  
8 from a Due Process perspective, to put us in the  
9 position where we have to get a reply in, in  
10 such a short period of time after potentially  
11 critical documents come rolling in at the end.

12 And we don't -- still don't understand  
13 why Peru, when we have compromised so much on  
14 these relatively lengthy dates, is insisting on  
15 pushing the schedule right at this exact time,  
16 right when it hurts us the most.

17 MR. MOSER: So, you are happy with --  
18 just to be clear, Mr. Kehoe, for memorial and  
19 liability 26 weeks from the first session, and  
20 then counter memorial 26 weeks thereafter. But  
21 coming down to Claimant's reply, you still are  
22 insistent upon 20 weeks from completion of  
23 document production, is that right?

24 MR. KEHOE: That's right. Mr.  
25 President, this issue is so important to us,

1 that we would compromise on all of these dates.  
2 We would agree to Peru's 26 weeks from the first  
3 session. We would agree to both, you know, 26  
4 weeks for both sides on the counter memorial.

5 MR. MOSER: Right.

6 MR. KEHOE: And we would increase  
7 Respondent's rejoinder -- we thought that if  
8 they were so insistent on making up time, in  
9 this proceeding, that they would be willing to  
10 give away the difference between 12 weeks and 20  
11 weeks.

12 MR. MOSER: Right.

13 MR. KEHOE: Apparently they are not.  
14 So, we are happy to give them, back those weeks,  
15 as long as we get our document production issue  
16 sorted out.

17 MR. MOSER: I see.

18 MR. HAMILTON: Well, I would propose a  
19 compromise then, and instead of having our  
20 position characterized, you can hear it from the  
21 horse's mouth, which is that nobody is trying to  
22 suddenly rush the proceeding, after document  
23 production, which of course is not anything we  
24 have articulated in any way whatsoever, nor  
25 consistent with the way that Peru conducts

1       itself.

2                   But I think that there was a sign of a  
3 possibility there, which is we accept 26 weeks  
4 and 26 weeks for the first two rounds.

5                   MR. MOSER:   Mm hmm.

6                   MR. HAMILTON:   Then we would accept 20  
7 weeks from document production?

8                   MR. MOSER:   Mm hmm.

9                   MR. HAMILTON:   As they have requested?

10                  MR. MOSER:   Mm hmm.

11                  MR. HAMILTON:   And then we get 30 weeks  
12 for our rejoinder.   And that way there is some  
13 kind of balance with the fact that they have  
14 taken 38 weeks total for their reply.

15                  MR. MOSER:   Mm hmm.   Mr. Kehoe?

16                  MR. KEHOE:   First, we have not taken 38  
17 weeks total for our reply, when -- when we don't  
18 have the evidence to prepare the reply, which is  
19 different than this proposal.   And so, I think  
20 that 20 weeks is more than generous, but to take  
21 a page from my esteemed colleague's book, why  
22 don't we split it down the middle and make it 25  
23 weeks?

24                  MALE VOICE:   This is like a bazaar.

25                  MR. MOSER:   I was going to say this is

1 very familiar territory to me, being in the  
2 markets in Shanghai.

3 MR. HAMILTON: This is obviously a very  
4 long procedure--

5 MR. MOSER: [Interposing] But what is  
6 your reaction to that, Mr. Hamilton? We have  
7 something on the table here.

8 MR. HAMILTON: Our reaction is that  
9 they are getting 38 weeks for their reply. I  
10 understand the points that they are making,  
11 that's why we have said that we are open to some  
12 kind of compromise. But 38 weeks, going through  
13 at 20 weeks or even 25 weeks, it's simply not  
14 the same, even considering the document  
15 production phase. You are proposing 26, 26,  
16 then 20 from conclusion of document production,  
17 and then 25 weeks for our rejoinder? That's the  
18 proposal on the table?

19 MR. KEHOE: Last and final.

20 MR. MOSER: That's what I understood,  
21 yes.

22 MR. HAMILTON: Give us just a moment  
23 please. We might need more than 30 seconds. We  
24 may be able to come to an arrangement, but it  
25 may take more than 30 second.

1 MR. MOSER: Please take more than 30  
2 second.

3 MR. HAMILTON: May I suggest that we  
4 pause on this, hear -- hear the issue with  
5 respect to Article 10.20.4, which is the last issue  
6 on the agenda, and then we can take five and see  
7 if there is any final element that we can sort  
8 out.

9 MR. MOSER: Mr. Kehoe, would that be  
10 acceptable?

11 MR. KEHOE: Sure.

12 MR. MOSER: Let's proceed then.

13 MR. HAMILTON: Thank you.

14 MR. MOSER: So, let's move on then to  
15 10.20.4 that issue. So, we have a separate  
16 phase being proposed here. Would you like to  
17 introduce that then, Mr. Kehoe? Or I guess  
18 it's--

19 MR. KEHOE: [Interposing] I think -- I  
20 think I have introduced it. I think Ms. Menaker  
21 is ready to pick it up.

22 MR. MOSER: Yes.

23 MS. MENAKER: Thank you. So, as you  
24 can see here, the parties have built in, you  
25 know this, the possibility of this extra phase.

1 We don't, at this point, know whether Respondent  
2 will be raising such an objection, and we have  
3 timeframes built in here. So, we would alert  
4 the tribunal, and then those times would come.

5 Now, what Claimant has sought to do is  
6 to restrict the scope of 10.20.4 and  
7 particularly to restrict the scope of the  
8 objections that Respondent may bring under that  
9 article. And with that, we disagree. And  
10 Claimant said before that there had been  
11 agreement that liability and jurisdiction would  
12 move forward together and that there would be  
13 bifurcation of Quantum. And that is not our  
14 agreement and I regret any misunderstanding in  
15 that regard.

16 What we have said, and have always said  
17 is that we have a right, under the treaty, to  
18 bring a preliminary objection pursuant to this  
19 article. And when you look at the article,  
20 first of all, I should say if we decide not to  
21 bring that, then of course we may bring  
22 jurisdictional objections in our counter  
23 memorial. If we decide to utilize that article,  
24 the article also makes clear that we don't waive  
25 our right to bring any other types of



1 jurisdictional objections. So, there may be  
2 other jurisdictional objections brought later.

3 So, where the controversy arises is the  
4 scope of 10.20.4. And if you take a look at  
5 that article, and I have reproduced it on slide  
6 11, so it's just a little bigger there. And I  
7 should just say, I think that the -- the  
8 language of the article, the context, the  
9 objective of the treaty article, as well as the  
10 manner in which the article had been interpreted,  
11 by other tribunals, all support the notion that  
12 an objection as to jurisdiction might very well  
13 be brought, pursuant to this article.

14 So, you see here, it says that without  
15 prejudice to a tribunal's authority to address  
16 other objections, as a preliminary question,  
17 such as an objection that a dispute is not  
18 within the tribunal's competence, a tribunal  
19 shall address and decide, as a preliminary  
20 question, any objection by the Respondent that  
21 as a matter of law, a claim submitted is not a  
22 claim for which an award in favor of the  
23 Claimant may be made, under the treaty. Now, if  
24 the tribunal lacks jurisdiction, or a claim is  
25 inadmissible, then as a matter of law, the claim

1 is not one for which an award in favor of the  
2 Claimant may be made. So, I think just pursuant  
3 to the clear ordinary meaning, of the article,  
4 if there is a jurisdictional defect, in the  
5 claim, then ipso facto the claim is not one for  
6 which an award may be made, as a matter of law.  
7 So, it fits within the plain terms of the  
8 treaty's language.

9 And if you look further, at 10.20.4  
10 subparagraph D, that says that the Respondent  
11 doesn't waive any objection as to competence or  
12 any argument on the merits, merely because the  
13 Respondent did or did not raise an objection  
14 under this paragraph, or make use -- that's a  
15 typo that should say use -- of the expected  
16 procedure set out in paragraph five. Now  
17 paragraph five of the treaty allows a Respondent,  
18 if it wishes, within 45 days after the  
19 constitution of the tribunal, to raise one of  
20 these preliminary objections, and have it  
21 decided on an expedited basis.

22 But the important thing here is that by  
23 virtue of this subparagraph, it makes it clear  
24 that the scope of a 10.20.4 objection has to  
25 encompass certain jurisdictional objections.

1 Because by stating that the Respondent does not  
2 waive any objection, as to competence, merely  
3 because it did not raise an objection, as to  
4 competence, right the necessary corollary has to  
5 be that the Respondent may raise an objection as  
6 to competence under the section. Otherwise you  
7 would not need that language saying that you  
8 don't waive it. Right, so that's really a  
9 necessary corollary, and makes very clear that  
10 certain objections, as to jurisdiction, fit  
11 within this article.

12 Now, the purpose of the article, the  
13 objective of the article, is to allow claims  
14 that would fail as a matter of law, to be  
15 dispensed with quickly, without going through  
16 having the time and the cost of a full blown  
17 evidentiary hearing. And that's also why, when  
18 I say jurisdictional objections, it's only  
19 certain types of jurisdictional objections. And  
20 so certain jurisdictional objections, as you are  
21 aware, would require the tribunal to make  
22 determinations, factual determinations. And  
23 those types would not be brought under this  
24 article. Because if you look further, at  
25 10.20.4c, which is on slide 13, it says in

1 deciding an objection, under this paragraph, you  
2 have to assume to be true all of the Claimant's  
3 factual allegations. So, if there are disputed  
4 factual allegations, that are integral to a  
5 jurisdictional determination, that type of  
6 objection would not be made. But certainly  
7 there are other types of jurisdictional  
8 objections that may be made, on the basis of the  
9 allegations, in the party's claim, when there  
10 are no disputed facts. And those types may very  
11 well be brought.

12           And I think also this is a very clearly  
13 seen when you look at the Kafka Decision in RDC  
14 versus Guatemala, the railroad development case  
15 versus Guatemala. In that case, the Respondent  
16 raised certain preliminary objections under  
17 10.25, which is the expedited procedure. And  
18 you can see this is in slide 12. And they  
19 raised jurisdictional objections, under that  
20 provision. And the tribunal issued its first  
21 decision on jurisdiction. Then what Respondent  
22 did, they raised this -- I should mention --  
23 before the Claimant filed its memorial. They  
24 had a phase on that. Then the Claimant filed  
25 its memorial. And then the Respondent raised an

1 objection to jurisdiction under 10.20.4. And  
2 the merits were suspended and they had another  
3 phase addressing these objections. And you can  
4 see here, that's what it says in paragraph six  
5 of the Decision, that they raised their Notice  
6 of Intent to raise preliminary objections under  
7 10.20.4.

8 And there, when you look at that  
9 Decision, let's see if -- the tribunal actually  
10 issued a second Decision on jurisdiction. The  
11 jurisdictional objections raised by the  
12 Respondent, in that case, under 10.20.4, there  
13 were three. They were all clearly  
14 jurisdictional in nature. One was a lack of  
15 jurisdiction because the acts predated the entry  
16 to enforce of the treaty. One was a lack of  
17 jurisdiction because of an alleged lack of a  
18 covered investment. And the other was because  
19 the claims at issue were subject to local  
20 proceedings. And you can also see, on slide 14,  
21 what the tribunal did there is it addressed  
22 these as issues of jurisdiction, but it assumed  
23 the facts as pled as true, as it needs to do  
24 under 10.20. And that shows how these types of  
25 objections are dealt with, under this provision.

1                   So, again, we are not seeking to do  
2 what Guatemala did in that case, which is to  
3 have two jurisdictional phases, that were  
4 bifurcated, because they used the expedited  
5 procedure first, then Claimant filed its  
6 memorial, then it had another jurisdictional  
7 phase, then it filed its counter memorial. So,  
8 we are not seeking to do that. We are seeking  
9 to have the opportunity to have one phase, if we  
10 determine there are objections that fall within  
11 the confines of this article. But we just want  
12 to make clear that our view as to the scope of  
13 that article, that that does encompass some  
14 jurisdictional objections. And that would not  
15 preclude us, of course, from raising other types  
16 of jurisdictional objections, if we had any,  
17 with our counter memorial.

18                   MR. MOSER: All right.

19                   MR. HAMILTON: And the final item, with  
20 respect to Article 10.20.4, is very simply that  
21 we -- we think, given the nature of the  
22 proceeding, that it would be appropriate for  
23 there to be reply and rejoinder in that sub  
24 phase, if any.

25                   MR. MOSER: Yes. Yes. We said that,

1 those are your brackets there.

2 MR. HAMILTON: Yes.

3 MS. MENAKER: Right. And we do think  
4 that is beneficial for everyone as otherwise we  
5 would come to the hearing when nobody would have  
6 heard our responses to Claimant's arguments.  
7 That would be really the first time anybody  
8 heard that. So, I think that it helps to join  
9 issue.

10 MR. MOSER: All right, thank you. Yes,  
11 of course, Mr. Fortier.

12 THE HONORABLE MR. FORTIER: Ms. Menaker,  
13 I want to be sure that I -- I follow your --  
14 your argument. You said you are not seeking to  
15 leave -- you are not seeking to have two  
16 jurisdictional phases. But in fact, it could  
17 lead to two phases, your position, does it --  
18 does it not, those objections to jurisdiction,  
19 which are raised under 20. -- 10.20.4? And then  
20 suppose that is disposed of, subsequently, any  
21 further objections to jurisdiction, which were  
22 not raised in the first instance, did I read --  
23 do I read you right?

24 MS. MENAKER: What I should have said  
25 is we are not seeking to have a separate phase,

1 two separate jurisdictional phases, bifurcation,  
2 in other words. But it is always the case, and  
3 the treaty makes very clear, that you are not  
4 precluded from raising additional objections --  
5 preliminary objections, even if they go to  
6 jurisdiction, because the scope of 10.20.4 is  
7 itself so limited.

8 THE HONORABLE MR. FORTIER: Yes.

9 MS. MENAKER: So, it would be, I mean  
10 fundamentally unfair to have the Respondent  
11 choose to waive its objections, if it were going  
12 to, you know raise some that do fit under the  
13 rubric of the Article. So, yes, it is possible  
14 that we would raise an objection under this  
15 phase, that could be deemed jurisdictional in  
16 nature. And then we would raise a  
17 jurisdictional objection that would require  
18 determinations, factual determinations, with our  
19 counter memorial. But we would not seek  
20 bifurcation on those.

21 THE HONORABLE MR. FORTIER: This would  
22 be dealt with--

23 MS. MENAKER: [Interposing] It would be  
24 dealt with,--

25 THE HONORABLE MR. FORTIER: -with the



1 merits?

2 MS. MENAKER: -with the merits, that's  
3 right. We have waived our right to seek--

4 THE HONORABLE MR. FORTIER: With  
5 liability?

6 MS. MENAKER: -that's correct. We have  
7 waived our right to seek any kind of bifurcation  
8 for those objections.

9 THE HONORABLE MR. FORTIER: I  
10 understand.

11 MR. MOSER: Clear enough?

12 THE HONORABLE MR. FORTIER: Thank you.

13 MR. MOSER: All right, thank you very  
14 much. Mr. Kehoe?

15 MR. KEHOE: Yes, Mr. President, we --  
16 we don't disagree with much of what Ms. Menaker  
17 has said, as far as interpreting the treaty. We  
18 agree that a party could bring a jurisdictional  
19 objection, together with a 10.20.4 objection.  
20 As Ms. Menaker just said, the scope of 10.20.4  
21 is very -- is so limited. It is focused on  
22 failure to state a claim. So, we are now  
23 bringing jurisdictional objections into this  
24 initial phase. We didn't understand this. We  
25 have asked, a lot, and this is the first time we

1 have really gotten a very good and detailed  
2 explanation. We would never agree to this  
3 overall schedule, and we do not agree to this  
4 overall schedule, if jurisdictional arguments  
5 are going to be included in an initial  
6 submission that is designed to -- to focus only  
7 on failure to state a claim.

8           If we are going to have jurisdictional  
9 briefing, then we have to completely redo this  
10 schedule. That's what we have been maintaining  
11 from the beginning. And Peru has not, even  
12 today, told us what type of jurisdictional  
13 objections they are even talking about. We  
14 actually have never heard from them what type --  
15 it's really kind of a game of hide the ball, on  
16 what we have to sit and wait, file our memorial,  
17 and then wait and see what they -- what they  
18 come back with, from a jurisdictional  
19 perspective, after having worked so hard, to  
20 hammer out a schedule.

21           So, we object -- we agree that the  
22 treaty would allow such a process, of hearing  
23 jurisdiction and failure to state a claim at the  
24 same time. And if that -- if Peru would like to  
25 do it that way, we can go back to the drawing

1 board. We are very concerned with both the  
2 timing of this, a very short period of time to  
3 deal with jurisdictional issues, and also two  
4 bites at the apple. The issue of facts is  
5 irrelevant here. The facts are assumed to be  
6 true, based on our Statement of Claim, for a  
7 10.20.4. Whether the facts are true or not, is  
8 irrelevant for the 10.20.4 application.

9           Once you start getting into facts, and  
10 jurisdictional objections, we are into  
11 jurisdiction, and then we -- then if we need  
12 another phase, a single phase for jurisdiction,  
13 which obviously was the subject of discussions,  
14 well then -- then let's go back to the drawing  
15 board and if the tribunal would find that to be  
16 helpful, then we will have one. And if the  
17 tribunal so orders it, we will have one. But we  
18 don't agree to shoehorning jurisdictional  
19 objections into a 10b4 simply because the treaty  
20 allows it. We don't disagree with that. It's  
21 just not appropriate in this circumstance, with  
22 this schedule. And if it is something that Peru  
23 insists on, we would ask at least tell us what  
24 jurisdictional objections you are talking about.  
25 And let's redo this whole schedule so that we

1 can appropriately deal with it.

2 MR. LANDAU: Can I ask a question?

3 MR. MOSER: Yes, Mr. Landau.

4 MR. LANDAU: I'm slightly puzzled,  
5 under the terms of the treaty itself, as to what  
6 room for maneuver there is, on this point.  
7 Because the Article 10.20 of the treaty, is  
8 drafted in mandatory terms.

9 MR. MOSER: Drafted in -- sorry; what  
10 terms?

11 MR. LANDAU: In mandatory terms.

12 MR. MOSER: Yes.

13 MR. LANDAU: It seems to be, it is  
14 without prejudice, under here 10.20.4, without  
15 prejudice to a tribunal authority, to do what it  
16 ordinarily may choose to do, without prejudice  
17 to that. It seems to give a right to a  
18 Respondent, to raise this kind of objection.  
19 And if -- if -- so, if the Respondent has that  
20 right, then looking further at that, what the  
21 process is, it then says that the tribunal --  
22 such an objection shall be submitted as soon as  
23 possible, with a timeframe. So, in no event --  
24 no event later than the date the tribunal fixes  
25 for the Respondent to submit its counter

1 memorial. So, if that right is then exercised,  
2 under B it says the tribunal shall suspend any  
3 proceedings on the merits and establish a  
4 schedule. So, what is the room for maneuvering  
5 actually?

6 MR. KEHOE: I agree with everything you  
7 said, with respect to a 10.20.4 application.  
8 There is no room for maneuvering. That's why we  
9 have agreed, and actually proposed this process  
10 up front.

11 MR. LANDAU: Right.

12 MR. KEHOE: What I -- what I  
13 respectfully disagree with is that you have no  
14 room to maneuver with respect to jurisdictional  
15 objections, which are different than 10.20.4  
16 objections.

17 MR. MOSER: Hence your bracket, right?

18 MR. KEHOE: Yes.

19 MR. MOSER: Ms. Menaker, can you  
20 respond to that?

21 MS. MENAKER: Yes, because although  
22 Claimant began by saying that he agrees with  
23 much of what we stated, including with respect  
24 to the scope, of 10.20.4, I mean his comments  
25 now are somewhat contradictory. Because then he

1 is saying, well, I don't disagree that it's  
2 mandatory, that you need to bifurcate this  
3 preliminary phase, with respect to 10.20.4, but  
4 not with respect to jurisdictional arguments.

5 But as we just discussed, some types of  
6 jurisdictional objections do fall within 10.20.4.

7 MR. KEHOE: I disagree -- that's what I  
8 disagree with.

9 MS. MENAKER: Okay.

10 MR. KEHOE: I disagreed with your  
11 statement that the scope is very limited of  
12 10.20.4, and some other statements, but clearly  
13 the one you just made is the one that I  
14 disagreed with.

15 MS. MENAKER: Well, that's -- that is  
16 the issue that I just spoke about, and I think  
17 that I have clearly shown that the language of  
18 the article itself contemplates certain types of  
19 jurisdictional objections. Subparagraph D  
20 certainly makes clear that objections as to the  
21 tribunal's competence, which includes  
22 jurisdictional objections, must be able to fall  
23 within 10.20 or otherwise you would never be  
24 able to have waived your right by not including  
25 them in your 10.20 application. And the RDC

1 versus Guatemala tribunal clearly thought that  
2 jurisdictional objections, for which there were  
3 no disputed facts, fell within 10.20.4 and they  
4 issued a second Decision on jurisdiction, under  
5 10.20.4.

6           So, I think all of that makes clear,  
7 and that's why really it wasn't until last night  
8 that I understood the scope of their objection,  
9 on this part of the schedule, which is when  
10 those brackets were added. Because it was never  
11 our understanding that 10.20.4 was limited in  
12 with regard to the way he is saying that, or  
13 that we had in any way agreed not to raise the  
14 types of jurisdictional objections that fall  
15 within that article, under that article. So, we  
16 have agreed to do that and as part of the  
17 compromise, on the overall schedule, we agreed,  
18 like I said, later, not to seek bifurcation for  
19 other jurisdictional objections that we could  
20 have done had we wanted to wait until after they  
21 file the memorial and when we filed our counter  
22 memorial, included jurisdictional objections and  
23 sought bifurcation. And that is a very  
24 significant compromise. And we did that, you  
25 know, on the basis of the overall schedule. So,

1 I just, again I, you know don't -- I think that  
2 the treaty is clear, as to its scope.

3 As far as our so called hiding the ball,  
4 we are certainly under no obligation, at this  
5 point in time, to preview any objection we may  
6 or may not have. All we have is a Request for  
7 Arbitration. That is about 20 pages. We  
8 haven't seen their memorial. You know, all --  
9 both the rules and the treaty certainly give us  
10 the time to determine later. So, that -- that  
11 really is not an issue, that they don't know the  
12 -- the scope of the objection at the time. And-  
13 -

14 MR. HAMILTON: [Interposing] And just  
15 to underscore, it was a significant effort, on  
16 Respondent's part, that we gave up what was in  
17 the first version that went to the tribunal,  
18 which was Article 10.20.4 plus reserving the  
19 possibility that we may seek bifurcation.

20 MR. MOSER: Yes.

21 MR. HAMILTON: And that was a long and  
22 extensive process that we went through, on our  
23 end, with all relevant participants, to reach  
24 the decision to abandon that possibility, which  
25 we have done. And is reflected in the schedule.



1 And beyond that, it is not for us sitting here  
2 today to try to rework what the treaty says as  
3 to this Article - - .

4 MR. KEHOE: Mr. President, if I may?  
5 Oh, sorry; of course.

6 MR. MOSER: Mr. Fortier has a comment.

7 THE HONORABLE MR. FORTIER: My comment  
8 and a question. If I understand the debate  
9 between counsel, at the moment, and please  
10 correct me if I'm wrong, Mr. Kehoe, you are  
11 saying that you have agreed to this calendar,  
12 because of a misunderstanding, is that -- is  
13 that what you are saying?

14 MR. KEHOE: It is either a  
15 misunderstanding, sir, or -- I believe that's  
16 right, because when I -- when I just heard  
17 counsel say that this is a new issue that they  
18 just heard of, we raised this issue on the very  
19 first call, with this language. I said  
20 jurisdic-- 10.b.20.4 is different than  
21 jurisdiction. There was a colloquy. We kept  
22 asking counsel or -- or the Claimant's counsel  
23 to take out the bracketed language that was  
24 causing the confusion, and that wasn't done. So,  
25 at the end of the day, I think you are

1 absolutely right. I think that there is a  
2 fundamental misunderstanding between the parties,  
3 as to what 10.20.4 would be and if it includes  
4 jurisdictional objections, which it can, if we  
5 all agree to a process--

6 THE HONORABLE MR. FORTIER:

7 [Interposing] You concede that?

8 MR. KEHOE: Yes. Then we have to go  
9 back to the drawing board, and it wasn't a  
10 concession on bifurcation, it was the way we  
11 went -- we may not have disagreed with that, if  
12 we understood what was being proposed.

13 MR. MOSER: Mr. Landau wants to comment.

14 MR. LANDAU: I'm sorry; I think I may  
15 be being a little bit slow on this, but -- but  
16 when you say that the scope of 10.20.4 can  
17 include jurisdiction--

18 MR. KEHOE: [Interposing] I misspoke,  
19 that's a very good point. 10.20.4, if you read  
20 it, by its full terms, I won't read it all out  
21 loud, but it talks about without prejudice to  
22 bring--

23 MR. MOSER: [Interposing] Other  
24 objections.

25 MR. KEHOE: -jurisdictional objections,

1 you may bring a 10.20.4 which is that as a  
2 matter of law a claim is not a claim for which  
3 an award in favor of the Claimant may be made  
4 under Article 10.26. When we turn to 10.26, it  
5 is caption awards, and it says where a tribunal  
6 makes a final award against a Respondent, the  
7 tribunal may award separately or in combination  
8 only monetary damages, and interest, and  
9 restitution. So, if we were asking for specific  
10 performance, a 10.4, 10.20.4 would be made.  
11 Failure to state a claim under 10.26, or not,  
12 but if we were, that would be a legitimate claim.

13 Respondent is incorporating a  
14 jurisdictional argument into the awards section,  
15 which we feel is misinterpreting the treaty.  
16 Had we understood that, we would have said if  
17 you want to make jurisdictional objections, then  
18 we need to talk about that and if you want  
19 bifurcation, we'll talk about it. We never  
20 would have agreed, and did not agree to two  
21 phases of jurisdictional briefing, especially on  
22 this schedule.

23 MR. MOSER: And your argument is that  
24 it is implied, in the language of the treaty,  
25 that you would have that right to bring that

1 jurisdictional objection, in any event?

2 MS. MENAKER: I think it is expressed  
3 and implied, through -- I mean I think you see  
4 it in the plain language. I think the context,  
5 including the subparagraphs, the objective, I  
6 mean why would you agree there are a number of  
7 different decisions, both in the Pack Rim case,  
8 the railroad case, commerce, where they brought  
9 it under the expedited procedure, and that is  
10 jurisdictional objections. Why would you agree  
11 to do that, and not under the 10.20? So,--

12 MR. MOSER: [Interposing] And you --  
13 sorry.

14 MS. MENAKER: So, if there was--

15 MR. MOSER: [Interposing] And you don't  
16 accept that or you do accept it?

17 MR. KEHOE: I absolutely do not accept  
18 it.

19 MR. MOSER: You do not.

20 MR. KEHOE: I don't believe the treaty  
21 says that. And the enabling legislation  
22 describes this 10.20.4 process, it says "in  
23 addition the chapter includes provisions similar  
24 to those used in U.S. Courts, to dispose quickly  
25 of claims a tribunal finds to be frivolous."

1 MS. MENAKER: Well, let me--

2 MR. KEHOE: [Interposing] This is not a  
3 jurisdictional provision.

4 MS. MENAKER: Let me just throw  
5 something out. What if in your statement of  
6 claim, your request, you had written Renco, Inc.,  
7 the Claimant, Renco Group, Inc. is incorporated  
8 under the laws of France. So, and everything  
9 else remained the same. And you brought this  
10 claim. Why could we not, pursuant to this  
11 language, bring a 10.20.4 objection, and say as  
12 a matter of law, this tribunal cannot enter an  
13 award in your favor. Now, also, isn't that a  
14 jurisdictional objection? Doesn't the tribunal  
15 lack jurisdiction over the claim because you are  
16 not an investor within the meaning of the  
17 treaty? Yes. So, it is a jurisdictional  
18 objection. It clearly falls under 10.20.4 and  
19 yet there are no disputed facts. Because the  
20 tribunal, in determining that -- that  
21 jurisdictional objection, is not going to  
22 inquire into your nationality. It's not as if  
23 you alleged that Renco was a U.S. national and  
24 we are bringing in, introducing evidence, and we  
25 want to show that they are not a U.S. national

1 or something like that. They are just looking  
2 at the face of your request and they would say  
3 well, no we are assuming all of the allegations  
4 is true. And I think there, clearly it is a  
5 jurisdictional objection and it is clearly under  
6 10.20.4.

7 Now, that is a very simplistic example,  
8 but I think that it shows that those types of  
9 jurisdictional objections are able to be brought  
10 under the article.

11 MR. KEHOE: May I respond?

12 MR. MOSER: Please.

13 MR. KEHOE: I would disagree that in  
14 that scenario, which is not the case here, but I  
15 would disagree that in that scenario the  
16 allegation -- that would be a 10.20.4 dispute.  
17 That would be a jurisdictional dispute, period.  
18 I know the facts are assumed to be true, and if  
19 the tribunal was concerned with its jurisdiction,  
20 then it would have a jurisdictional phase. If  
21 we understood, when negotiating all of this,  
22 that competence and jurisdiction and significant  
23 issues were going to be encompassed in a very  
24 short time period, without us even knowing what  
25 they were, in contravention of what we think the

1 treaty says, we never would have agreed to this.  
2 And we don't think that jurisdiction fits within  
3 10.20.4, even under the hypothetical.

4 MR. LANDAU: Can you help us on the --  
5 what meaning we give to 10.20.4d? In what--

6 MR. KEHOE: [Interposing] 10.20.4e?

7 MR. LANDAU: D--

8 [Crosstalk]

9 MR. LANDAU: If issues of competence,  
10 are not within this process, in what  
11 circumstances might a Respondent waive an  
12 objection as to competence by not activating  
13 this mechanism?

14 MR. KEHOE: I believe this was a -- a -  
15 - I would propose a belt and suspenders  
16 confirmation that a 10.20.4 application, which  
17 is designed to very quickly decide -- resolve  
18 frivolous claims, and which by admission of Peru  
19 is very narrow in scope, that someone wouldn't  
20 come in and argue that you had to make  
21 jurisdictional objections at that time. I think  
22 this is just to confirm that -- exactly that to  
23 the extent that anyone is confusing this with  
24 jurisdiction, please know this is not  
25 jurisdiction. You can make this application,

1 without worrying about any jurisdictional  
2 arguments. It is designed to focus on claims as  
3 set forth in the Notice of Arbitration; there is  
4 no reason for a memorial on the merits, to  
5 respond to a claim.

6 MR. LANDAU: I see.

7 MS. MENAKER: And I think there, the  
8 language does not state that. It can't be read  
9 as simply belt and suspenders, because in what  
10 way, when you say Respondent doesn't waive any  
11 objection as to competence, because it did not  
12 raise an objection under this paragraph, that  
13 means it could have raised an objection, as to  
14 competence, under this paragraph, under 10.20.4.  
15 It has to say that.

16 MR. KEHOE: No, it could have raised  
17 the objection.

18 MS. MENAKER: As to competence.

19 MR. KEHOE: As to competence, but--

20 MS. MENAKER: [Interposing] Because as  
21 to competence, right, it does not waive any  
22 objection as to competence because -- now read  
23 because it did not -- right? It says did or did  
24 not, but focus on the did not -- so a Respondent  
25 does not waive any objection as to competence



1 simply because it did not raise an objection  
2 under this paragraph. An objection as to  
3 competence under this paragraph, which means you  
4 can bring an objection, as to competence, under  
5 this paragraph, which is 10.20.4.

6 MR. MOSER: Can I just -- sorry.

7 MR. KEHOE: Sorry. I believe what this  
8 means is that you can bring challenges to  
9 competence, together with 10.20.4 objections.  
10 We can parse the words here, but by its entire  
11 meaning, this is designed to eliminate frivolous  
12 claims. Jurisdiction can be brought together  
13 with it, or not. If we are going to bring  
14 jurisdictional objections, together with this,  
15 which we will not object to, we need to revise  
16 the schedule.

17 MR. MOSER: Well, that was going to be  
18 my specific point. Assuming that that is the  
19 case, you had said earlier that you agreed to  
20 this timetable probably under a misapprehension  
21 as to--

22 MR. KEHOE: [Interposing] Their  
23 understanding.

24 MR. MOSER: Right. Right. Now, that  
25 we have it out on the table, how would you

1 change the timing?

2 MR. KEHOE: I would--

3 MR. MOSER: [Interposing] What would  
4 you do to the timetable?

5 MR. KEHOE: Well, first of all, the --  
6 the idea of a jurisdictional objection, we still  
7 don't know what -- what type they are talking  
8 about.

9 MR. MOSER: Right.

10 MR. KEHOE: And you know we discussed  
11 this internally at length, not understanding  
12 Peru's -- understanding that we probably not  
13 seeing eye to eye. It's not as though this is  
14 just being raised. We have argued about this,  
15 we have just never fully come to a conclusion  
16 that yes or no we are going to bring  
17 jurisdictional objections.

18 MR. MOSER: Sure.

19 MR. KEHOE: And so I don't have an  
20 answer to you. If -- if Peru wishes to -- we  
21 would rather just simply go forward with  
22 liability and jurisdiction together.

23 MR. MOSER: Mm hmm.

24 MR. KEHOE: If Peru insists on bringing  
25 jurisdictional objections, together with a

1 10.20.4 application, we would propose then that  
2 they bring them all together at the same time,  
3 and we will -- we will adjust this schedule to  
4 accommodate that, and then we -- we increase it  
5 and then we can reduce the amount of time needed  
6 for briefing on liability, down below, where we  
7 are at 26 weeks each, we should reduce that time  
8 because we will have a jurisdictional  
9 determination. We will still submit our  
10 memorial on liability and jurisdiction. That  
11 would stay the same. If Peru wishes to bring  
12 jurisdictional objections, together with a  
13 10.20.4 application, we would not object to that  
14 and we would allow for a -- we would require  
15 much more significant schedule. And we would  
16 pick up with the rest of the schedule from --  
17 that we would have to then develop a new  
18 schedule for a hearing on the merits.

19 MR. MOSER: Right. Right.

20 MR. KEHOE: It's bifurcating the--

21 MR. MOSER: [Interposing] Would that be  
22 a solution, Mr. Hamilton and Ms. Menaker?

23 MR. HAMILTON: We wouldn't -- well, a  
24 couple of comments. We would not see that as a  
25 solution, although I have some comments

1 hopefully aimed at facilitating greater  
2 understanding. The first is that we have  
3 repeatedly heard that, you know, for us what  
4 triggered this was the bracketed language that  
5 came in yesterday.

6 MR. MOSER: Yes.

7 MR. HAMILTON: So, we have gone through  
8 the process. We have gone through it's a little  
9 bit immaterial at this point. Obviously, I  
10 think both sides, in good faith. For us, as I  
11 mentioned before, and I'm not going to repeat it  
12 as many times as Claimant has mentioned their --  
13 their sacrifices, but for Peru, it was a very  
14 significant issue that we abandoned something  
15 that was in the first version of this that went  
16 to the tribunal, which is that we had Article  
17 10.20.4, which is not something that we are  
18 trying to hold onto, create -- it is what it is.  
19 It's in the treaty. We have this right. We are  
20 not going to take away from ourselves somehow  
21 the right that exists.

22 The second thing was the possibility of  
23 bifurcation. The further possibility, as would  
24 not be uncommon, that in a counter memorial, we  
25 would raise a jurisdictional objection and then

1 seek bifurcation. In other words, the first  
2 draft that went to you, left -- we left open to  
3 ourselves -- Peru left open to itself, to be  
4 more precise, because these positions depend on  
5 various consultations, the scenario of 10.20.4,  
6 which obviously is a right that Peru has, and  
7 the possibility of seeking bifurcation at the  
8 time of the counter memorial, with respect to  
9 other types of issues. We have abandoned that.  
10 That was a long process that we have been  
11 through over the past three weeks to get to that  
12 point.

13           With respect to the suggestion that  
14 this interim phase would not only include  
15 Article 10.20.4, but anything else under  
16 jurisdiction, we certainly would object to that,  
17 because it predates document production. Part  
18 of the reason this predates document production  
19 is for all of the reasons that Ms. Menaker has -  
20 - has explained the narrow scope of Article  
21 10.20.4, with respect to the assumptions as to  
22 the facts.

23           MR. MOSER: Facts, yeah.

24           MR. HAMILTON: And so, it certainly  
25 wouldn't be appropriate to then say well, we

1 have to say any potential scenario. And so, the  
2 final comment I would make is that if we have  
3 this phase, which is a fairly expedited phase,  
4 in the scheme of things, it's not a one year  
5 phase or something like that, if Respondent, in  
6 its response, its answer to our submission,  
7 under Article 10.20.4, thinks that we have  
8 somehow gone outside the scope of 10.20.4 in a  
9 manner that is problematic or abusive, they  
10 certainly will say that in their brief. And  
11 then we will submit reply and rejoinder as to  
12 that and the tribunal will so -- so decide.

13 MS. MENAKER: And the only other--

14 MR. HAMILTON: [Interposing] And all  
15 that does is just preserve what the treaty  
16 already says. Because it is not for us here to  
17 take away from what the treaty says.

18 MS. MENAKER: If I could just make one  
19 more--

20 MR. MOSER: [Interposing] I'm sorry.  
21 Please?

22 MS. MENAKER: If I could just note one  
23 other problem that I see with the proposal that  
24 we would raise all jurisdictional arguments in  
25 this preliminary phase, other than what Mr.

1 Hamilton was just saying about discovery, is  
2 that I mean some jurisdictional arguments, by  
3 their very nature, are intertwined with the  
4 merits. And that's why, for some, even  
5 Respondents don't ever seek bifurcation, because  
6 they just don't think it would be efficient.  
7 And so, that just wouldn't make sense. We might  
8 not be in a position to do that. I don't know  
9 if we have any such objections, at this time,  
10 but certainly we couldn't waive our right to  
11 bring them later.

12 MR. MOSER: Okay, thank you.

13 MR. HAMILTON: Would it might help for  
14 us to take a five minute break--

15 MR. MOSER: [Interposing] Yes, it would.

16 MR. HAMILTON: -for consultations all  
17 around?

18 MR. MOSER: Yes, please -- all around.

19 MR. KEHOE: Including on that timing  
20 issue?

21 MR. HAMILTON: Yes.

22 MR. KEHOE: Thank you.

23 [END First\_Session\_-\_Audio\_Recording\_-  
24 \_Part\_2.mp3]

25 [START First\_Session\_-

1 \_Audio\_Recording\_-\_Part\_3.mp3]

2 MR. KEHOE: We have nothing to report.  
3 We did, as always, have a cooperative and  
4 professional conversation about it, but we did  
5 not reach any -- any agreement. I think it's --  
6 unless the tribunal has something to say, I  
7 think it's my turn to respond, to what we heard.

8 So, it seems to us, that -- and it  
9 probably seems to the tribunal correctly, that  
10 the parties have a disagreement about whether or  
11 not -- let me back up. The parties agree that  
12 the Respondent has the right to bring an Article  
13 10.20.4 application, at the outset of the case,  
14 or at the latest with its counter memorial. It  
15 is quite clear. We believe that that is limited  
16 to applications that challenge the claim that is  
17 filed, and that it does not extend to  
18 jurisdiction, as to a requirement that the  
19 tribunal hear jurisdictional arguments.

20 Claimant proposes that the tribunal may  
21 hear jurisdictional arguments together with a  
22 10.20.4 but that the treaty does not obligate  
23 the tribunal to do that.

24 With respect to the -- the  
25 jurisdictional issue and when it should be



1 decided, and we don't have to go back and forth  
2 about where we got where we are, but Respondent  
3 proposes to file, even under this schedule, a  
4 counter memorial on liability, including any  
5 counter claims and or jurisdictional objections.  
6 That's in the sixth or seventh box. And then we  
7 will have document production, and then we will  
8 have briefing on liability and jurisdiction,  
9 with the Claimant's reply and the Respondent's  
10 rejoinder.

11 I mean that process satisfies  
12 Respondent's desire to have documents before  
13 briefing on jurisdictional issues. We had  
14 proposed that we will deal with jurisdiction  
15 right up front, in 10.20.4, if that is something  
16 that -- the Respondent would like to do and that  
17 the tribunal felt would be more appropriate.  
18 What Claimants cannot agree to, is to be left in  
19 the dark, for a period of more than six months,  
20 after, you know we file our memorial, and then  
21 six months later, we are going to get a 10.20.4  
22 application. We have no idea what type -- what  
23 these certain types of jurisdictional objections  
24 that counsel referred to are. We have no idea.

25 We have been given an example that

1 hypothetically, if Renco had claimed to be a  
2 French company, that that would be an  
3 appropriate issue to raise under 10.20.4,  
4 because Renco would not be an investor. We  
5 disagree with that. We think that is a  
6 quintessential jurisdictional argument, whether  
7 or not Renco is an investor. That should be  
8 handled in a jurisdictional phase.

9           It is inconceivable that we would  
10 respond and have a jurisdictional phase -- a  
11 preliminary jurisdictional phase, in the short  
12 time period on unknown jurisdictional arguments.  
13 The tribunal would be giving perhaps some type  
14 of advisory opinions or -- or rulings that would  
15 then dictate and inform and influence the actual  
16 jurisdictional phase. It is two bites at the  
17 apple, or at the very least it is -- it is --  
18 how should I say this -- it is sort of pulling  
19 out the -- the tribunal, on jurisdictional  
20 issues. And if we were to try to object, at the  
21 outset, and say this is really not 10.20.4, this  
22 is jurisdiction, that would be a major issue  
23 that we -- we would then be fighting about in  
24 this very short time period and the entire  
25 schedule would be ruined.

1           You know, one proposal that one might  
2 argue is well, why doesn't Claimant -- why don't  
3 you just wait and see, if they are going to file  
4 jurisdictional objections. And we deal with it  
5 then. The reason for that is we have a  
6 procedural schedule, so that we can have some  
7 certainly in these proceedings. We all have  
8 other cases. We all have other things to do.  
9 And that will become the tail wagging the dog.  
10 If we are going to have this dispute, let's have  
11 it please now. Let us know whether you would  
12 like to have jurisdictional arguments up front,  
13 if you think it is required. And if so, let's  
14 redo the schedule. If you don't think that  
15 jurisdictional arguments are required, with a  
16 10.20.4, and Peru does not wish to make all of  
17 them at the same time, because of this document  
18 production issue, then we propose to keep the  
19 schedule the way that it is.

20           MR. MOSER: All right. Thank you. Mr.  
21 Hamilton?

22           MR. HAMILTON: Thank you, Mr. President  
23 and thank you to our colleagues for -- for our  
24 sidebar, during the break. It is our view,  
25 first of all, that the parties have made

1 significant progress through a great investment  
2 of time, to get to the overall schedule that we  
3 have, including the compromises by each side,  
4 including as I have emphasized Respondent's  
5 decision to -- as one phrase was used, in the  
6 internal deliberations, cave in, as to  
7 preserving the possibility of seeking a full  
8 blown bifurcation on jurisdiction, apart from  
9 10.20.4. We have abandoned that.

10 We think that we are there, with  
11 respect to the rest of the schedule, including  
12 that, as part of an overall agreement, we are  
13 willing to reach the compromise that was sought,  
14 with respect to the timeframe as to the reply  
15 and rejoinder. They want 20 weeks from  
16 completion of document production and proposed  
17 25 weeks for our rejoinder. We would accept --  
18 we would accept 26 weeks, just to keep  
19 consistent with the 26 week pattern that we have  
20 used. And that would lock in the rest of the  
21 schedule.

22 Beyond that, we are not going to either  
23 A; agree to circumvent rights that Respondent  
24 already has, set forth in the language of the  
25 treaty, as to Article 10.20.4. That's obviously

1 not what we -- we would be in no position to do  
2 that, number one. Number two, with respect to  
3 the scope of what we would submit; it would be  
4 incumbent upon Respondent to say this is an  
5 Article 10.20.4 submission. This is what  
6 10.20.4 means. This is the objection that we  
7 are raising in that context. They would respond  
8 to that. We have already accounted for a reply  
9 and rejoinder. And then the tribunal would have  
10 an opportunity to decide.

11 One thing, again, that we have made  
12 very clear, is that this is limited with respect  
13 to facts, as reflected in the schedule, by the  
14 document production coming later. And so, we  
15 are having difficulty seeing what -- what we  
16 could do to compromise, other than if they want  
17 more time for this somehow. Because we have the  
18 right that we have under the treaty, with  
19 respect to this phase. And we have tried to  
20 find an approach to make it -- we thought, you  
21 know we are the ones who proposed the reply and  
22 rejoinder thinking that that would be in the  
23 interest of both sides, to -- to make sure that  
24 the phase was fleshed out. And if, as in any  
25 phase, it happens, even in regular

1 jurisdictional phases, Respondent might raise  
2 something, and a tribunal might decide we are  
3 not deciding this. Or this doesn't fit within  
4 the scope of this phase or the like. And so you  
5 could so decide that, or defer, and that happens  
6 too. Or determine that it requires something  
7 that is not within that particular phase. We  
8 would not, obviously, be seeking to raise  
9 something that we don't think is within the  
10 scope of what the treaty provides.

11 And I also think that it is not a  
12 logical or efficient way to begin this  
13 proceeding, for anybody, to start submitting  
14 briefs on what Article 10.20.4 means, in the  
15 abstract, at this point.

16 MR. MOSER: All right. Anything  
17 further?

18 MR. KEHOE: Briefly.

19 MR. MOSER: Yes, Mr. Kehoe?

20 MR. KEHOE: Briefly, yes. The  
21 Respondent agrees that 10.20.4 is limited in  
22 nature. They have said that. They agree that  
23 it is limited to questions of law. That's what  
24 the--

25 MR. MOSER: [Interposing] Yes.

1 MR. KEHOE: -treaty says. But they are  
2 arguing that document production is required  
3 before they are able to make a 10.20.4  
4 submission.

5 MR. HAMILTON: Absolutely not. Nor do  
6 I agree with the other things you said.

7 MR. KEHOE: 10.20.4--

8 MR. HAMILTON: [Interposing] We agree  
9 it says what it says. That's what we agree.

10 MR. KEHOE: But let me back up, they --  
11 they believe that document production is  
12 necessary for them to be able to make a 10.20.4  
13 application that includes a jurisdictional  
14 argument.

15 MR. HAMILTON: No.

16 MS. MENAKER: No.

17 MR. MOSER: You can say it out loud.

18 MR. BURNETT: As I understand it, you  
19 are claiming that you need document production  
20 to make jurisdictional--

21 MR. KEHOE: [Interposing]  
22 Jurisdictional arguments.

23 MALE VOICE: -arguments.

24 MS. MENAKER: Theoretically.

25 MR. KEHOE: But that -- that's my point.

1 (Crosstalk)

2 MR. HAMILTON: We will state for  
3 ourselves what our position is.

4 MR. KEHOE: Okay, thank you.

5 MR. MOSER: One by one. So, you can  
6 state, if you would please, what your  
7 understanding and then we will confirm.

8 MR. KEHOE: Yeah, my understanding is  
9 that 10.20.4, as we have stated previously, is a  
10 question of law, for which the facts are assumed  
11 to be true. If that is the case, the current  
12 schedule is -- is acceptable to the Claimants,  
13 because it will be limited to questions that do  
14 not include jurisdictional objections. They  
15 will be limited to failure to state a claim upon  
16 which an award can be granted under 10.26. To  
17 the extent that the substantive cause of action  
18 or the request in our Notice of Arbitration,  
19 does not comport with 10.26, they will make that  
20 argument. That is a different issue altogether  
21 from jurisdictional objections. And to the  
22 extent that jurisdictional objections are going  
23 to be subsumed within 10.20.4, we would ask that  
24 all jurisdictional objections be addressed at  
25 the same time. If that requires document



1 production, even though a 10.20.4 is as a matter  
2 of law, but if jurisdiction is going to be  
3 rolled in, then we are amenable to having some  
4 type of a jurisdictional bifurcation, after the  
5 document production or whatever. What we oppose  
6 is a piecemeal jurisdictional submission by the  
7 Respondent, beginning with 10.20.4.

8 MR. MOSER: All right. I think that is  
9 clear now. That is their understanding. Ms.  
10 Menaker? Or Mr. Hamilton?

11 MR. HAMILTON: We might both have a  
12 comment on different angles of it.

13 MR. MOSER: Yes.

14 MR. HAMILTON: I just want to be clear,  
15 nothing that we say today means anything with  
16 respect to Article 10.20.4, except that we think  
17 it applies and it says what it says. We are not  
18 interested in using a calendar annex to include  
19 brackets, to characterize what it -- what it  
20 means. It states what it states, and we have  
21 provided a definitive phase to accommodate that  
22 and bring clarify for both sides, as to what  
23 that means. And we have described how, as a  
24 matter of Due Process, we would raise any such  
25 objection, within the scope of 10.20.4. We are

1 not interested through this of drawing boxes or  
2 I think that there may be use of terminology  
3 that is trying to limit or change -- we are not  
4 going to limit or change what we already have.  
5 There is no basis for that.

6 And as a practical matter, to say that  
7 -- I mean we obviously are not going to agree,  
8 and could not agree that any jurisdictional  
9 issues would be resolved, any scenario that we  
10 don't know. These things evolve over the course  
11 of a case, including that this case has been --  
12 this case has been sitting for 139 weeks, so far,  
13 on a 20 page Request for Arbitration. And so we  
14 are going to see the memorial, and then we are  
15 going to determine what might fit into this box,  
16 and consider whether anything would come later.  
17 And under no circumstances would those later  
18 things that would be more factually intensive or  
19 involve document production, we are not going to  
20 seek bifurcation of that. And so, this brings  
21 clarity.

22 MR. MOSER: I'm so sorry; we are going  
23 to have to wrap up soon, so please briefly.

24 MS. MENAKER: Sure. No, I didn't  
25 intend to reiterate the arguments, other than to

1 say we have already said that we disagree with  
2 their characterization of 10.20.4. So, we are  
3 not going to agree to limit it in that nothing  
4 that could be characterized as jurisdictional  
5 could be made, as an objection, under that  
6 Article. Nor do we agree that we would have to  
7 make all of our jurisdictional objections at  
8 once, because 10.20.4 I mean d, expressly gives  
9 us the right not to do that. It says that we  
10 don't waive our right to do that. So, we are  
11 not agreeing to deviate from the treaty. And so,  
12 absent that agreement, I don't see how we can do  
13 anything other than what the treaty provides.  
14 And if their concern is that there was a  
15 misunderstanding between the parties, as to the  
16 scope of 10.20.4, and that they think that that  
17 phase deserves more time, then that is certainly  
18 something we can discuss. But I don't see  
19 otherwise the other options won't work, which is  
20 other than to put all -- agree to do all  
21 jurisdictional objections, you know afterwards  
22 or before or to limit the phase in some way.  
23 That we don't agree to. But if he wants to talk  
24 about timing, if you are concerned that it's too  
25 constricted, you know that is something we can

1 discuss.

2 MR. KEHOE: All right. We are -- I  
3 take your signal and we are prepared to break  
4 whenever you are.

5 MR. MOSER: Yes, I am afraid that we  
6 have to catch a plane. So, if we could wrap  
7 things up now. Regrettably it doesn't seem like  
8 we are going to solve this today, in any case,  
9 or in the next couple of minutes.

10 MR. KEHOE: I would like to note, I  
11 don't know if you caught it from what Mr.  
12 Hamilton said,--

13 MR. MOSER: [Interposing] Yes. Yes.

14 MR. KEHOE: -we countered best and  
15 final with 25 weeks.

16 MR. MOSER: Yes.

17 MALE VOICE: We heard it. We heard all  
18 of it.

19 MR. KEHOE: We are at 26 now. I was  
20 not best and final. Mr. Hamilton has persuaded  
21 me that--

22 MR. MOSER: [Interposing] I see.

23 MR. KEHOE: -they will agree to the  
24 document production from our counter memorial--

25 MR. MOSER: [Interposing] Okay.

1 MR. KEHOE: -from the end of -- 20  
2 weeks from the end of document production, which  
3 was important to us, and we are thankful, and we  
4 have agreed to 26 weeks, so there is some  
5 symmetry with the 26 all the way down.

6 MR. MOSER: All right. Very good. But  
7 we still have this middle bit.

8 MR. KEHOE: We sure do.

9 MR. MOSER: We sure do. All right.  
10 Gentlemen, and ladies, where I think the  
11 tribunal sees the day and the -- we have three  
12 things in our basket. If we could perhaps  
13 invite you to take a look at. The first one  
14 where we didn't reach agreement at all is on the  
15 issue of place of arbitration. You will  
16 remember that comes under Section 8. The  
17 tribunal's thinking, at this stage, is that what  
18 we would like to do is to put both The Hague and  
19 Bogota outside the box. And what we would do is  
20 invite you please to focus on Paris or Geneva.  
21 We would also like to say now, giving you an  
22 indication, that with respect to the place of  
23 actual hearings, and other meetings, subject  
24 again to consulting with the parties and hearing  
25 further from you, but in principle, noting the

1 concerns that have been raised, about  
2 convenience and so on and so forth, we would  
3 give you the indication now that the tribunal  
4 would be open to considering a venue somewhere  
5 in the Americas, for actually holding hearings.  
6 Although the legal place of the arbitration, as  
7 I say, we would ask you to please focus on  
8 either Paris or Geneva. Is that clear enough?

9 MR. KEHOE: Yes, thank you.

10 MR. MOSER: All right, thank you. The  
11 second point would be with respect to 9.3, as  
12 amended. We, I think, did agree in principle,  
13 that original 9.3 and 9.4 would go out. We  
14 would adopt that Respondent's proposal subject  
15 to a number of amendments, A, B and then a new C,  
16 you will remember. All we would do is to ask  
17 you to both please consult and agree on a nice  
18 cleaned up language for that provision and  
19 please send that to us.

20 The third point, of course, is the last  
21 one in our basket, and that is what we have been  
22 discussing for the last hour plus. We would  
23 invite you please to try again, in view of  
24 everything that has been said, perhaps -- you  
25 can perhaps walk away and -- and get a bit of

1 space away from the discussion and reconsider.  
2 Try again to see if you can't reach agreement.  
3 If you cannot, what we would like to do is to  
4 hear from you, let's say within the next seven  
5 days, in no more than five pages each, how you  
6 see these particular issues and in particular  
7 the 10.20.4 and - and/or jurisdiction issue, if  
8 I may characterize it as that. How you see that  
9 issue and to provide us with your own concrete  
10 proposal, for how we can best move forward.  
11 Your own concrete proposal about how we can best  
12 move forward, and that, of course, I am  
13 referring to the timetable. When I say your own  
14 concrete proposal, I mean the full timetable.

15 MR. KEHOE: Thank you.

16 MR. MOSER: So, those are the three  
17 things I had in my basket. I don't know whether  
18 anything else -- I said within seven days, yes.

19 MR. LANDAU: Seven days applies to the  
20 place of arbitration too.

21 MR. MOSER: All three issues, within  
22 seven days, if you could come back to use please.  
23 Any questions or comments? Mr. Kehoe, did I  
24 miss anything?

25 MR. KEHOE: No, I don't think you

1 missed it. Just a clarification. So, with  
2 respect to the 10.20 sub four--

3 MR. MOSER: [Interposing] Yes?

4 MR. KEHOE: -you are asking us to  
5 provide, within five pages, on that issue, our  
6 own interpretation,--

7 MR. MOSER: [Interposing] Yes.

8 MR. KEHOE: -the argument we  
9 essentially made--

10 MR. MOSER: [Interposing] Yes.

11 MR. KEHOE: -and then -- and then a  
12 schedule--

13 MR. MOSER: [Interposing] Attach your  
14 revised timetable as you see it, based on your  
15 understanding of the provision and how--

16 MALE VOICE: [Interposing] That's if  
17 you haven't been able to agree.

18 MR. KEHOE: If we haven't been able to  
19 agree--

20 MR. MOSER: [Interposing] Of course.

21 MR. KEHOE: -but that's what I  
22 wondered--

23 MALE VOICE: [Interposing] Ultimately  
24 we go to the bazaar.

25 MR. MOSER: Well, that is entirely up



1 to you gentlemen.

2 MR. KEHOE: But I wonder whether or not  
3 it might be more helpful that we propose a  
4 schedule that would -- with the understanding  
5 that you might rule against the party. Because  
6 frankly the way we interpret the treaty, what we  
7 have given you is our best run at it.

8 MR. MOSER: Yes, I understand.

9 MR. KEHOE: Maybe we should give you a  
10 schedule where, if you disagree with the five  
11 eloquent pages we have written, then if you are  
12 going to allow jurisdictional arguments, then we  
13 propose this schedule.

14 MR. MOSER: That seems fair.

15 MALE VOICE: Yeah, that does.

16 MR. MOSER: Mr. Fortier? Yeah?

17 THE HONORABLE MR. FORTIER: Yes, I  
18 agree.

19 MR. MOSER: That sounds very good. All  
20 right?

21 MALE VOICE: And then, if necessary--

22 MR. MOSER: [Interposing] You didn't  
23 follow that, or didn't agree with it?

24 MR. HAMILTON: I follow it. It's  
25 submit a plan B schedule, so to speak.

1 MR. MOSER: Yes.

2 MR. HAMILTON: But would we submit two  
3 schedules? In effect?

4 MR. MOSER: I think you would, in  
5 effect, - - , yes.

6 MR. HAMILTON: Our optimal schedule and  
7 then our plan B schedule.

8 MR. MOSER: Yes.

9 MR. HAMILTON: Okay.

10 MR. MOSER: But this is subject, of  
11 course, to your inability to agree on this,  
12 having reconsidered it. But in any case, all  
13 three of these issues, we would like to hear  
14 back from you within seven days. And to the  
15 extent that we really can't make any headway, on  
16 this issue, of the timetable, and so on and so  
17 forth, then to the extent you would find it  
18 useful, we are happy to try to find the time to  
19 reconvene by teleconference, to hear you again,  
20 before we make a final decision. All right?

21 MR. HAMILTON: Would it be convenient  
22 to make the seven days calculated to end next  
23 Friday, so we would have the entirety of next  
24 week to collaborate?

25 MR. MOSER: Mr. Kehoe?

1 MR. KEHOE: I'm fine with that.

2 MR. MOSER: I'm sure you won't object  
3 to that.

4 MR. KEHOE: I do not object to that.

5 MR. MOSER: That's fine with us, as  
6 well, I'm sure. All right? Ladies and  
7 gentlemen, anything further today? My  
8 colleagues?

9 MR. KEHOE: Mr. President, there is one  
10 we skipped over--

11 MR. MOSER: [Interposing] Yes?

12 MR. KEHOE: -and it is relevant because  
13 we will be taking time now before the procedural  
14 order is confirmed. In the very first box, on  
15 the schedule--

16 MR. MOSER: [Interposing] Renco is  
17 proposing 20 weeks from the signing of the  
18 procedural order. And Peru is proposing--

19 MR. MOSER: [Interposing] First  
20 session?

21 MR. KEHOE: Yeah, first session, we  
22 would ask that we be allowed to it from the  
23 signing of the procedural orders,--

24 MR. HAMILTON: [Interposing] Mr.  
25 Hamilton?

1 MR. KEHOE: -so we have some certainty  
2 on all this.

3 MR. HAMILTON: You want 20 weeks from  
4 the--

5 MR. KEHOE: [Interposing] From the  
6 signature on the procedural order number one.

7 MR. HAMILTON: Twenty weeks from  
8 signature of procedural order?

9 MR. MOSER: As opposed to--

10 MR. KEHOE: Or 20, it will be 26 now,  
11 we have agreed to 26.

12 (Crosstalk)

13 MR. MOSER: Is it from today or is it  
14 from whenever the P.O. signed and issued?

15 MR. HAMILTON: Okay. Agreed.

16 MR. MOSER: All right, thank you very  
17 much. Well, it remains then only to say thank  
18 you all very much for your very good cooperation  
19 and assistance. I think it has been very useful  
20 today. We certainly look forward to working  
21 with -- together with you in the months and  
22 seems like perhaps many years ahead.

23 MR. KEHOE: At least a few.

24 THE HONORABLE MR. FORTIER: Not just  
25 the next seven days.

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

2 We appreciate it.

3 MR. MOSER: Thank you very much for  
4 your assistance.

5 MR. HAMILTON: Thank you.

6 MR. HAMILTON: And Ms. Sequeira, thank  
7 you.

8 MR. HAMILTON: Thank you very much.  
9 Safe travels.

10 [END First\_Session\_-\_Audio\_Recording\_-  
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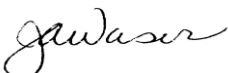
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