INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

FIRST SESSION OF THE ARBITRAL TRIBUNAL

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THE RENCO GROUP, INC.,
Claimant,

vs.
REPUBLIC OF PERU (UNCT/13/1)
Respondents.
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JULY 18, 2013

BEFORE:

MICHAEL J. MOSER, Presiding Arbitrator
THE HONORABLE MR. L. YVES FORTIER, CC, QC, - Arbitrator
TOBY T. LANDAU, QC - Arbitrator

FOR THE CLAIMANTS:

DENNIS A. SADLOWSKI, The Renco Group, Inc.
EDWARD G. KEHOE, King & Spalding LLP
HENRY G. BURNETT, King & Spalding LLP

FOR THE RESPONDENTS:

JONATHAN C. HAMILTON, White & Case LLP
ANDREA J. MENAKER, White & Case LLP
MARIA DEL CARMEN TOVAR GIL, Estudio Echecopar
JACOB S. STOEHR, White & Case LLP
CARLOS JOSE VALDERRAMA, Ministry of Economy and Finance of the Republic of Peru
ALEJANDRO MANRIQUE, Embassy of Peru in the United Kingdom

Job No. 32888
MR. MICHAEL MOSER: That's fine, yes.

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

MS. NATALI SEQUIERA: It's audio.

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

MR. EDWARD KEHOE: No objection.

MR. MOSER: No?

MR. JONATHAN HAMILTON: No objection.

MR. MOSER: All right. Thank you.

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

MR. MOSER: Suave as ever. All right.

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

Good morning, ladies and gentlemen. On behalf of the arbitral tribunal, allow me please to welcome you all here today to this initial meeting in the case of the Renco Group, Inc. v. the Republic of Peru. My name is Michael Moser.

To my right is Mr. Yves Fortier. To my left is Mr. Toby Landau. And together, as you know, we constitute the arbitral tribunal in this case.

Now, assisting us here, also to my left, is Ms. Natali Sequeira, who will be serving as tribunal secretary. Could I please now invite each of the parties to state for the record the names of the persons who will be in attendance for each side today, perhaps begin with Mr. Kehoe.

MR. KEHOE: Yes.

MR. MOSER: Thank you.

MR. KEHOE: Ed Kehoe, King & Spalding, representing the claimant.

MS. SEQUEIRA: Mr. Kehoe, just--

MR. MOSER: [Interposing] Yeah.

MR. KEHOE: Yeah. Ed Kehoe with King & Spalding, representing the claimant. To my
right is Henry Burnett, also with King &
Spalding and my partner. And to his right is Mr.
Dennis Sadlowski, the Vice President and General
Counsel, Senior Legal Officer, of the Renco
Group.

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

MR. MOSER: Thank you very much.

MR. SADLOWSKI: Rather than a
partnership.

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

MR. HAMILTON: Thank you, Mr. President
and members of the tribunal, secretary of the
tribunal. I'm Jonathan Hamilton, partner and
head of Latin arbitration with White & Case. To
my left is Andrea Menaker, my partner of White &
Case. Maria del Carmen Tovar of Estudio
Echecopar in Lima. Carlos Jose Valderrama the
President of the Commission for the Defense of
the Peruvian State from the Ministry of Economy
and Finance. To his side is Jacob Stoehr, our
associate from White & Case and, like me, a
former visiting attorney with Estudio Echecopar in Lima. And at the end of the table, we're pleased to be joined by Alejandro Manrique from the Embassy of Peru to the United Kingdom. Thank you.

MR. MOSER: Welcome all. Thank you very much. All right. Gentleman, you will-- ladies and gentleman, you will now recall, I'm sure, that a draft agenda for this meeting and a draft procedural order number 1 were both circulated by ICSID, sent to the parties on the 24th of May, 2013, initially. The tribunal notes that since that time, the parties have been working very diligently, I might say, it seems even to the last hour to try to reach an agreement on a number of items in that procedural order and for that we are very grateful. But differences, apparently, still remain and so I think we can use today's time profitably to try to hear you as to what those differences are. And then, eventually, deal with them. So subject then to your views and to the views of my colleagues, what I would propose to do today is to perhaps walk through this most recent draft, which we received late yesterday,
17 July 2013. And to hear each of the parties on these outstanding points. Perhaps we could `walk through page by page. Would that be acceptable to you, Mr. Kehoe?

MR. KEHOE: Yes, it would.

MR. MOSER: Mr. Hamilton?

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

MR. MOSER: All right. Very good.

Gentleman, how is that?

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

MR. MOSER: 13, 17th of July.

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

MR. MOSER: [Interposing] Yeah.

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

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

MR. FORTIER: Right. Mentions it.

MR. TOBY LANDAU: Yes, yes.

MR. MOSER: There are a couple of other
points though, apart from those noted, Mr. Kehoe.

So I think--

   MR. Kehoe: [Interposing] Okay.
   MR. Moser: --we could just walk
   through it page by page and we'll--
   MR. Kehoe: [Interposing] Right.
   MR. Moser: --catch all of them. All
right. So we'll begin with the cover. I don't
see anything there, except to delete the draft
eventually. And we have on Page 2 the same,
deletion of the draft. Page 3 at the top, once
again, deleting the draft. Down three-quarters
of the way, we did start promptly at 9:00 a.m.
and so that would be the time to be inserted.

   MR. Kehoe: That needs to be changed.
   MR. Moser: The Renco Group, Inc. would
be the name of the company, correct?
   MR. Kehoe: Yes.
   MR. Moser: Sadlowski has brought that
to our attention. And then coming down, just to
the penultimate line there, the comments on
draft procedure are submitted by the parties on
June 28th, July 14th was a further draft we
received, comments, and July 17th. We could add
those in. The draft procedural order is
circulated. Well, I'll leave that in parentheses now to see whether we come back to you with a further draft or whether we agree to something final. So if you could leave that in our hands, we'd be grateful. All right. Thanks.

Let's move on then to Page 4. Well, we don't know when we'll stop yet, so we can't insert that time, but we will do that. Likewise, with the draft we'll get rid of. 1.1, would it be useful to add something at the end to the effect and the provisions of this procedural order 1?

MR. KEHOE: Claimant has no objection to that.

MR. HAMILTON: Agreed.

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

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

MR. MOSER: And 3, Fees?

MR. KEHOE: Correct.

MR. MOSER: And that brings us to Page 5. And, again, deleting draft at the top onto the first point in issue that deals with the decisions of the tribunal and the differences
appear in 4.2. So perhaps we could invite claimant to address us first, because they have their comments set out there first as to how they would like to deal with it and then hear from respondent as to why they would like to see the wording that they had proposed.

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

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

MR. KEHOE: That's correct.

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

MR. KEHOE: It does, it does summarize
those provisions well.

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

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

MR. MOSER: Thank you.

MR. HAMILTON: And at the outset here, I, I would like to just take literally a couple of minutes and, and make a general observation about sort of the guidepost for all of the comments that respondent will make with respect to the procedural order and the procedural schedule today, starting with Page 2 of this, this handout. Peru has over a period of more than two decades had legal framework and a policy framework oriented toward fostering foreign investment, including a very pro arbitration legal environment. As reflected in its attitude towards arbitration, domestically and also arbitration under investment treaties and under legal stability agreements and
concession contracts in which Peru repeatedly has incorporated over two decades arbitration clauses. And so Peru has developed both at the state level and its domestic legal culture a very pro arbitration environment. It also is part of a corollary to its commitment to foreign investment has undertakings under other types of treaties and instruments, including human rights treaties and undertakings and environmental protection obligations. One thing that has been clear throughout its record and investment disputes, which is very briefly summarized on Page 2 here, is that Peru has been a fair and due process oriented participant in investment arbitration proceedings. And that has included not only its respect for awards and payment of those limited awards that have been made in contra in Republic of Peru, but also its commitment to efficiency. And so the--

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

MR. HAMILTON: The--

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

MR. HAMILTON: Sure.
MR. MOSER: But what would you, what
would you--

MR. KEHOE: [Interposing] Yes.

MR. MOSER: --like to say?

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

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

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

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

MR. MOSER:  [Interposing] Right.

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

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

MR. HAMILTON:  [Interposing] Sure.

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

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

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

MR. HAMILTON:  So in, in, in conclusion, what I was indicating is that, is that Peru's attitude historically in, in cases and also its approach in what our aim is here is to have due process, equal treatment, openness, and clarity. And I, and I hope and, and think that we share that with our counterparts. So specifically coming to the issue of, to the issues that are pending, the issue of decisions of the tribunal is one of a hodge podge of items related to the conduct of the proceeding. And it is Peru's position, with great deference and respect to
the President and each of the members of the
tribunal, that of a case of this nature, scope,
and size that it's advisable for there to be
interaction among the tribunal members on all
procedural issues to the extent feasible. While,
of course, deferring to the presiding arbitrator
with respect to urgent questions of timing, such
as related to correspondence and submissions,
subject to consultation where feasible. Mr.
Kehoe mentions deferring simple procedural
issues to the president, but it's unclear to us
what constitutes a simple procedural issue.
What seems simple to some may seem less simple
to others and we think that it would be the most
orderly approach to encourage and facilitate
consultation among the arbitrators where
feasible. And we've seen similar provisions
adopted in case after case in other investment
proceedings.

MR. MOSER: All right. Thank you very
much. May I just ask, Mr. Hamilton, did the
first sentence there of your proposed draft,
bearing in mind that the first sentence above
under claimants draft, is the language from the
UNCITRAL rules. Does the first sentence of your
draft really differ starkly from what's above?

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

MR. MOSER: [Interposing] Yes.

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

MR. MOSER: Mm-hmm.

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

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

MR. HAMILTON: The, the only difference there is that in theory there could be a decision made by a majority without consulting
with a third arbitrator. We have seen interesting examples in the past in some of the `language that we used is based on things that we've observed over the course of our--

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

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

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

MR. HAMILTON: Mm-hmm.

MR. MOSER: All right. Very good.

MR. HAMILTON: Thank you.

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

MR. KEHOE: Just simply I, I believe that Article 33.1, when it provides of the UNCITRAL rules that where there is more than one arbitrator, any award or other decision of the tribunal shall be made by a majority certainly applies consultation among the tribunal. And I, I think that adding that extra language proposed in procedural order 4.2 is unnecessary, could add to confusion. But, but more, more focused on a specific point, the, the narrowing of the
president's authority to decide procedural issues and limiting it to "urgent questions of timing related to correspondence and submissions" is not only inconsistent with the tribunals desire, as evidenced by its initial proposal to us and the UNCITRAL rules. But it is, it is, it, it will cause, as I said earlier, it would be unhelpful. It will cause unnecessary delay, even, for example, the communications leading up to this hearing. The parties communicated directly with the president via e-mail on issues that were not timing related to correspondence or submissions, but rather drafts of the, of the procedural order. I guess that could be considered a submission. But there are going to be examples where we have hearings, the time may be changed of the hearing, the location may be changed. There are any number of procedural issues that could fall within the ambit of something that the president could handle quite easily. And it seems, it just seems unnecessary to limit that. I just don't really understand why they would want to do that.

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

MR. HAMILTON: Thank you. I think that
`in the first instance, of course, and I think it
should go without saying that we respect the
president and this is a practical issue. In our
experience, this clause is unremarkable the idea
that a president would consult with co-
arbitrators on issues of procedure. I think
what Mr. Kehoe might be suggesting is that, for
instance, if the president has sent electronic
correspondence confirming receipt of a letter or
something that's really ad ministerial in nature,
then why should that require consultation. But
I don't think any decision has actually been
reached. And so, again, the question that we
would have is what is the difference between
something that's ad ministerial in nature and
something that is more substantive in nature and
would make it more appropriate to consult with
the other members of the tribunal. And, also,
it may be that the members of the tribunal can
make that determination among yourselves as
highly experienced arbitrators that there's a,
that there's a practical line, that there are
certain things that people would like to be
consulted on. Every tribunal has its own internal dynamic as well in terms of ad ministerial type issues. But in our experience, this is not a remarkable clause. Our experience either as a practice or the Republic of Peru's experience in other cases.

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

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

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

MR. KEHOE: In agreement.

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

MR. KEHOE: Not from the claimant.

MR. MOSER: Mr. Hamilton?

MR. HAMILTON: No.

THE COURT: No. You know what, thank
you.

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

MS. SEQUEIRA: For the order?

MR. MOSER: Yes.

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

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

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

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

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

MR. MOSER: Very good. All right. Thank you, gentleman. If we could move then down to something perhaps more interesting,
that's Item 8, the place of arbitration. And 8.1, we have at least the initial sentence there `sets out some different views. So perhaps we could start with 8.1, the place of arbitration and invite claimant to address us first.

MR. KEHOE: Thank you, Mr. President. It's in the interest of both parties, as, as I have discussed with Mr. Hamilton, or at least it should be in the interest of both parties, that there be minimal, if any, interference from the judiciary in these arbitration proceedings. And that the tribunals ultimate award or any interim awards be enforceable in a court and not easily vacated by the local courts on grounds of public policy, local public policy, competence, or anything of the sort. The parties here are proposing a joint procedural schedule. That depending on how the tribunal ultimately rules on the, on the schedule, the time may differ, but in all circumstances it will probably last for at least three years. So over the next three years, the parties and this tribunal are going to expend a lot of time and effort and resources in reaching an ultimate result. And the parties will expend a significant amount of
cost in that regard. And we would prefer to
pick a seat where the likelihood of vacating an
arbitration award, win or lose, whoever wins or
loses, is minimized. And we believe that the
Hague is one such seat. The Hague has a, a, an
arbitration act that is over 175 years old. It
was enacted back in 1838. That act has been
amended rigorously and thoughtfully over the
years, including in just the past two years by
the Netherlands legislature. The Dutch courts
similarly have a long and good history of
restraining themselves from getting involved
unduly and unnecessarily in ongoing
international arbitration procedures and they
have a similarly long history of enforcing and
respecting international arbitration awards. We
see this, for example, in the Yukos v. Russia
case where a Russian court annulled an
international arbitration decision. And
notwithstanding that purported annulment, the
courts in, in the Netherlands enforced the award.
So we believe that selecting the Hague as the
seat of arbitration will provide the parties in
the confidence with, or the parties and, and the
tribunal with as much confidence as we, as we
can have that these proceedings will have some relevance and will render an enforceable award. 

Now, to the contrary, Colombia's international arbitration act is only 9 months old. It was enacted back in October of 2012. And I have three points to make in this regard. The act itself contains provisions of concern. It's based on the model UNCITRAL law, but, but it deviates from the law in certain respects that I'll, I'll mention. It is untested, completely untested in that court's judiciary and that judiciary has historically shown hostility towards international arbitrations, particularly when the state is involved. So I'll go through each point briefly. While the act does adopt the UNCITRAL model arbitration law, a variation from that law is found in Article 891.1, which provides that the Colombian courts may refuse to enforce an interim award or a final award if such an award is contrary to the internal public policy of Colombia. Yeah, the, the internal public policy of Colombia. Not, not contrary to international public policy, which would be, which would be one thing. But to the internal public policy of Colombia, so that opens a, a
significant doorway for these proceedings to be jeopardized by an enforcement action or set aside action for the seat to be Colombia.

Second, as I mentioned, Colombia's courts have no track record. They have no precedent that we can rely upon in evaluating how those courts are going to interpret the, the new act that was enacted nine months ago. And, finally, and, and perhaps most importantly, as I mentioned, it's been reported that the Colombian courts historically have shown hostility towards international arbitration. It's very unlikely that those old trends and thoughts are going to change overnight as a result of this law being enacted. It will take time and we should not be a front-runner in attempting to develop Colombia's laws on interpreting its own, its own act. It's completely unnecessary. An example of these reports is found in a, a May 2011 joint publication, Mr. President, and members of the tribunal by the United States Embassy in Bogota, joined by the Counsel of American Enterprises, as well as the Colombian American Chamber of Commerce. And the document, the report, is entitled An Overview of Arbitration in Colombia.
for U.S. Companies. And it states, for example, at Page 17, "Case law and intervention by public surveillance or oversight authorities has created hostility towards arbitration between state entities and private parties." It goes on to say, "High courts and judicial organs lack knowledge of international arbitration process and trends." Then it goes on to say, "Case law has generated legal uncertainty for arbitration awards, said Page 20 of that report." And, and the reason for this uncertainty, according to the report, is that there is a widespread application of constitutionally authorized complaints against arbitrations. And that may be relevant with this carve out for vacating an international arbitration award on the grounds of Colombia's own internal public policy. So on this point, the claimants feel that the, the arbitral process and the tribunals award will be jeopardized unnecessarily if Colombia is selected as the seat. And for that reason, we respectfully request that the Hague, which has a strong track record in all of the other features I mentioned earlier, should be the seat for this arbitration. On the issue of convenience and
travel, this is a significant case. Obviously, convenience and travel costs are relevant, but they are not so relevant that they should cause a, a, a poor decision on the ultimate arbitration process or the ultimate award. And I'll note that over 100 flights, over 130 airlines, fly to the Hague from the United States every day and counsel for the parties are in the United States and there are quite a few flights from London and Canada and even China to get to the Hague. So while that's a, sort of a side point, I did want to note that getting to and from the Hague is not an undue burden.

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

MR. KEHOE: I think so, too.

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

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

MR. MOSER: [Interposing] Right.

MR. KEHOE: --of 8.1.

MR. MOSER: Let's leave--

MR. KEHOE: [Interposing] Yeah.

MR. MOSER: --the Washington D.C.
option and other options perhaps for the moment
and first invite Mr. Hamilton to address us on
'Bogota and the, the issue with the Hague.

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

MR. MOSER: [Interposing] Right.

MR. HAMILTON: --of the handout. And
the, the first thing that I want to comment on
is that we live in a multipolar world with
multiple and diverse interests in investment
arbitration procedure and, in particular, in
cases of this nature where there are many
affected citizens and legal issues. It is
incumbent upon the tribunal to take into account
the multipolar nature of the universe in which
this arbitration is playing out. A failure to
do so, in my view, only falls into the hands of
those parties in groups that make broad
complaints against investment arbitration. And
I'll expand on that a little bit as I go into
further detail. With respect to the place of
arbitration as it relates to law and with
respect to the convenience and logistics factors
that Mr. Kehoe commented on. As a starting
point, I direct your attention to slide 4 and the UNCITRAL notes on organizing arbitral proceedings, which lay out a series of factors that should be taken into account in determining the place of arbitration where there's a lack of agreement. And those factors include the law and arbitral procedure, ratification of treaties, unenforcement of awards. But also convenience, cost of support services, and proximity of evidence. It's important to keep these factors in mind with the particularities of this case. I turn to slide 5. Now, in this case, Renco, a US party with a US treaty case, rejects a place of arbitration in the United States or any place in the western hemisphere. As a matter of fact, when we inquired if any place was acceptable other than the Hague, we were told only maybe Paris. Now, in this day and age after decades of efforts around the world, and certainly in Latin America and in Peru, to promote the development of arbitration, it cannot be the case that the only acceptable place to hold an arbitration of this nature is the Hague, either legally or practically. It cannot be the place in this multipolar world that we live in. And
this is not only about what is convenient for
international lawyers or international companies,
there are many different factors involved. And
I would also say with respect to the scenario of
seats in the Americas that Latin America has
proven itself particular jurisdictions,
including Colombia, which recently held, hosted
a large conference of International Bar
Association specifically because of its
recognized role as a seat of arbitration,
including for international arbitrations. It
cannot be the case that there's no such thing as
an acceptable seat of arbitration in Latin
America. It's simply incompatible with the
reality of today's arbitral practice. And I
would say it also is that kind of thinking that
leads some countries, particularly countries
such as Ecuador or Bolivia or other countries,
to, to try to create entirely different systems
of arbitration. In other words, if the existing
system of arbitration is unwilling to view the
world as multipolar, it has a negative effect on
the entire system. And so as a starting point,
we think that it is important to, to, to take
those factors into account. It simply cannot be
the case that we only have to go to the Hague. There is other good options. Now, looking at the particularities of those options, I turn your attention to slide 6. Now, as a starting point, we've all ready heard about the Hague. We're all familiar with it. It has definitive disadvantages with respect to convenience, logistics, proximity of evidence, and certainly of cost. Which may, may be less of a concern for claimant, but it certainly is a concern for respondent to be practical here. One thing that we haven't done is propose perhaps the most obvious option, which is this arbitration could be held in Lima. As a matter of fact, the Methanex tribunal found specifically that neutrality, meaning the case not be held in the location of the host state, was, was not a key factor. Lima is one of the most pro-arbitration cities in the world. Not only with a 1995 arbitration law, but then with a new, another law based on the model arbitration act from 2008. And it's a very pro-arbitration environment with a state that has proven itself over more than two decades to be very committed to arbitration. And this was a case that involves the impact of
the operation of the lor-, Oroya facility on
hundreds and hundreds or thousands of Peruvian
citizens. This is a critical matter with
respect to social development and investment in
Peru. We have not proposed that, other than it
may be in some casual banter among counsel,
assuming that that would not be comfortable to,
to claimant. And so we have suggested as an
alternative, while also inviting claimant to
make any proposal of a seat in Latin America,
are the Americas, Bogota. Which is not only a,
a very well established seat of arbitration with
one of the best arbitral institutions and
arbitral facilities, the Camara de Comercio de
Bogota, which hosted recently the IBA conference
that I mentioned. But, also, in fact, has a
good record with respect to court attitudes
towards arbitration. There is an ICSID
institutional arrangement between the ministry
in authority and the Camara de Comercio de
Bogota. We have had hearings, including video
conference participation, out of Bogota before.
The proximity of the evidence to the evidence in
Peru is close. It's equidistant between Renco's
headquarters in New York and Lima. And, and so
there are many strengths with respect to Bogota. As a matter of fact, Mr. Kehoe himself published an article that touched on Colombia arbitration and identified the respect for arbitration under the Colombia constitution and legal mechanisms.

MR. MOSER: That's a reference?

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

MR. MOSER: May 11.

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

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

MR. HAMILTON: Yes.

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

MR. HAMILTON: Yes, sorry. I, I meant the article that he cited. I apologize. I, I, I would, you, you asked me to hold off on referencing Washington D.C. Do you want me to--
MR. MOSER: [Interposing] Well, let's just--

MR. HAMILTON: --continue to hold?

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

MR. HAMILTON: [Interposing] Okay.

MR. MOSER: We've heard about the Hague.

We've heard about Bogota.

MR. HAMILTON: Okay.

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

MR. KEHOE: [Interposing] I have one comment for the record. It, I have one, maybe two comments for the record. The first one I have to make, which is that under no circumstances would claimant accept Ecuador as the seat of the arbitration. But beyond that, my comments will be few. I, I did not hear--I heard Mr. Hamilton say that it's, it's, it's the claimants, it sounds as though he's saying it's the claimant's obligation to propose seats in Latin America and we don't see it that way. We have proposed the Hague. Respondents have proposed Bogota. Washington D.C. seems to be at
issue, which we'll move to. But that's where
the ball is lying in the field. I don't think
`it's appropriate to open it up to a debate about
which countries across the entire world might be
appropriate seats. So I'm prepared to move to
the second point--

MR. MOSER: [Interposing] All right.
MR. KEHOE: --unless you'd like to hear
more on the first.

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

MR. LANDAU: I, I'd just like to go
back to, if I may, with the respondent, slide 6.
The, the four factors are highlighted there in
line with the UNCITRAL notes, but it seems to me
that it may be an important crossover on this
issue with Paragraph 8.2 of the draft order.
Because three of the four factors, that is
convenience, logistics, and evidence, would
ordinarily be addressed by a discretion on the
part of the tribunal to have hearings elsewhere
than the seat. And at the moment, the position
that the respondent seems to be taking in 8.2 is
that that's not an option sub-, absent an
agreement between the parties. So my, my three
of the four factors actually would be addressed.
I know we're taking it slightly out of order.
'But might three of the four factors be addressed
if, indeed, there was a, the normal course,
which is we agree upon a legal seat with the
discretion in terms of location of hearings in
order to address any issues with respect to
those three factors.

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

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

MR. FORTIER: Yes. One question, if I
may, for, I guess, it's, it's, it's for Mr.
Kehoe. I heard Mr. Hamilton say that the
claimant was not amendable to any venue not in
South America, in the Americas. Did I hear you
`well?

MR. KEHOE: Yeah.

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

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

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

MR. LANDAU: Yes.

MR. FORTIER: Correct? I'm sorry.

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

MR. MOSER: Yeah.

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

MR. MOSER: Well, since we're moving in
that direction, shall we just do that?

MR. KEHOE: Yeah.

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

MR. KEHOE: Okay. And it--

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

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

MR. MOSER: Speak to us.

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

MR. MOSER: Yes.

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

MR. MOSER: ICSID.

MR. KEHOE: And I hadn't mentioned this in my initial presentation, because the ICSID rules do not govern here, so I didn't think it was particularly relevant. But let me respond to Mr. Hamilton by pointing out that the new act that Colombia has enacted, some people have taken issue with the fact that, "Interestingly
the statute indicates that its provisions on recognition enforcement apply without prejudice to any multilateral or bilateral treating, treaty, but does not expressly provide for enforcement of an ICSID award as if it were a final judgment of a Colombian court in accordance with the ICSID convention. This issue is likely to come up in the future as Colombia is a party to the ICSID convention and a number of international investment treaties with investor-state resolution provided for in the ICSID arbitration." So the, whatever the institutional arrangement is between Bogota and ICSID, we still have a shadow and a cloud over this new act and how the courts of Bogota might interpret those provisions. And unless there's any question with that, I'll move on to Washington D.C.

MR. MOSER: I thank you. Mr., Mr. Landau, any question? Mr. Fortier, any further—all right.

MR. HAMILTON: May I—

MR. MOSER: [Interposing] Sir?

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

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

MR. MOSER: [Interposing] Please.

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

MR. MOSER: [Interposing] Please.

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

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

MR. KEHOE: Washington D.C. The, the concern of uncertainty with, there are two
concerns with uncertainty. The first, obviously, is the, the proceedings themselves. And as I mentioned, the second is with enforcement. Our concern with Washington D.C. relates to the second prong of uncertainty and that arises from a recent case out of the District of Columbia circuit court captioned Argentina v. BG Group PLC. The tribunal is probably aware of it. The citation in the US Court system is 665 F3d 1363, DC Circuit, January 2012. And we can obviously provide copies if the tribunal wishes. That case calls into question what we thought before that case was relatively strong, stable law on an arbitrators authority to decide its own jurisdiction. In that case, there was an arbitration proceeding that arose from an investor state dispute in Argentina and the district court upheld, recognized, and enforced the award in favor of the claimant and on appeal, the circuit court reversed the district court and vacated the award. And, and the, very briefly, the substance of the case was that the treaty required the claimant to go to Argentina's courts for a period of 18 months, litigate the, the dispute in Argentine courts
for a period of 18 months. And if the court didn't rule within that time or if the case couldn't be resolved within that time, then you could resort to international arbitration. In this case, according to the published reports and opinion and award and court opinion, the Argentine government shut down the courts to these types of claims. And the tribunal concluded that as a result of that act, the, the investor, the claimant, was not required to spend 18 months in, in the closed Argentine courts, because it couldn't. So it took up the case, decided the jurisdiction and the merits issues, and issued its award. The circuit court of appeals concluded that the, the tribunal was wrong. That it had no authority to make that decision. The tribunal had gone through the Vienna Convention. It rejected a number of other arguments, but concluded, excuse me, that the closure of the courts was the dispositive fact that, that enabled them to hear the case. Now, this case has been accepted by the United States Supreme Court on certiorari and we don't know where it's going to go. And similar to the, to the, to the Bogota point, claimant feels, and
we feel that the parties in the tribunal should agree that what we're trying to do in this exercise is avoid uncertainty and avoid the cost and expense of arbitrating this for, for the next few years, potentially be sidetracked with ancillary litigation, which a court in DC may, may require. Now, we have had some success in enforcing international arbitration awards in DC. I was personally involved in one recently. We were pleased with what the judge wrote. He wrote a well-reasoned decision. We don't think it will be appealed. If it's appealed, we'll hope for the best. And, and we, we would, we would hope that the Supreme Court will get this one right, but we, again, we would rather not be a test case. We'd rather not be BG 2 should that, should the, the tribunal chose Washington DC as a scene. So that, that case is really the main reason that we object to Washington DC.

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

MR. HAMILTON: Yes, thank you. And I, again, refer you generally to the table on Page 6. Respondent is open to the designation of
Washington as the place of arbitration. And respondent, also based on discussions overnight, is open to the possibility and would suggest Miami as another alternate place of arbitration in the United States, including given that it's in a different circuit of the Courts of Appeals than Washington DC, which is raising the concern of, of claimant. It seems that from Claimant's point of view, the sky is falling in every place except the Hague. And that it's claimant's way or the highway. I think that one of the more noteworthy comments from claimant is that they would not accept a seat of arbitration in, in Quito, in Ecuador, nor have we proposed it. But I think that probably experience arbitrating opposite certain states that conduct themselves very differently than the Republic of Peru may have traumatized claimant over time or their counsel. Which I, I can understand. But, again, it simply cannot be the place that there's only one place in the world where the sun shines on arbitration. It's simply not legally or practically a, a reasonable point-of-view. And, and Peru objects to that approach. With respect to the particular issue as to Washington, the
BG-Argentina case is, is a very notorious issue related to the 18 month requirement under Argentine bilateral investment treaties. I think probably virtually everybody in the room has, has dealt with this issue in somehow, in some way. We have. I know that our counterparts have. And it's an issue that goes specifically to the issue of when consent to arbitrate has been perfected in effect. It's an issue that arises specifically by the choice to go to UNCITRAL arbitration instead of, for example, electing to go to ICSID arbitration. That is the reason why the court in Washington was in a position to make the ruling that it did and claimant chose to come to, to, to this case as an UNCITRAL case. That, that decision is an outlier. It's subject to certiorari of the US Supreme Court. It's a very particular issue. There's been no suggestion showing our indication or implication that there's any reason to have a particular fear about an obstruction of strategy by this particular respondent. Its record is entirely to the contrary. And, as I mentioned, we also offer as yet another compromise the possibility of
designating Miami as a place of arbitration as a balance of all of the relevant factors, including legal certainty as well as convenience factors. Subject, of course, also, to the possibility of still using a Latin American location for certain hearings.

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

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

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

MR. KEHOE: We're hearing--I see. We're hearing this for the first time and, and I, I would like to correct that a perception that it's, it's our way or the highway. That's not the way this has played out. We, we have been presented un-, until a minute ago with Bogota and possibly Washington. Until just now, I didn't even realize that Washington was a firm proposal by Peru. It was something Peru would consider. We had proposed, we had discussed possibly Miami. I mean, possibly Paris. Geneva is, is, is a reasonable seat. So it, but we didn't discuss that. It is not as though a
number of places across the world had been proposed to claimants and that we had rejected them. We, we had both presented our two choices and, and that's where we, that's where we are right now. I'm hearing about Miami for the first time. When, when Washington DC was first proposed, I didn't really understand it. I explained, well, let me, let me think about this. It's a surprise. It's an American company and it didn't take me long to, to, to stumble upon the BG case or remember the BG case. And so what, you know, what is it about Miami? I don't know. But why are we working so hard to avoid a neutral setting in Europe that neither party is a citizen of in the Hague, which is proven for all of the reasons I won't repeat now. Why, why, why would we take risks in places? I don't know what the Supreme Court is going to say. If the Supreme Court upholds what Mr. Hamilton graciously described as an outlier case, if it is not an outlier after the Supreme Court rules, well, then in Miami we're going to be stuck with that ruling, obviously. Because the Supreme Court governs all jurisdictions in the United States. So we would recommend that we just keep
put this seat in the Hague and, and, and, and, and move on. Unless there is a reason, and I haven't heard it today, that the Hague is an inappropriate location. And Mr. Landau made a very good point. I mean, we're, we're proposing, claimants are proposing that the tribunal have as much flexibility as it would like in setting a place for the hearing, even for the final hearing on the merits and the issue of location and logistics can be handled that way. It's a very good point.

MR. MOSER: All right. Mr. Landau?

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

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

MR. LANDAU: [Interposing] Right.

MR. KEHOE: --forum.
MR. LANDAU: You mentioned Paris twice I think so far.

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

MR. LANDAU: I see.

MR. MOSER: Mr. Hamilton, any thoughts?

MR. HAMILTON: It hasn't been fully vetted through the, through the client process and so I'm unable to comment further on Paris. I don't exclude the possibility that we could be open to Paris as a, as a place of arbitration. I think that, again, it's far from respondents position that we should be looking for a non-neutral seat. It's our view that there are many diverse options for a seat of arbitration that are neutral, reliable, and practical all at the same time. And not that there's only one or two or now maybe three places in the world conceivably that could be acceptable. And to the contrary, what we've been trying to do through this process is, is raise and look for options in the western hemisphere, because we think it's certainly in today's world absurd to
think that there's nowhere in the western hemisphere to hold an international arbitration or investment arbitration of this nature. And it's also our position that, that holding such a case in Latin America would be important and that there are reliable seats of arbitration. But in any event, going back to the options of Washington DC or Miami, Miami is yet another effort that we're making overnight, taking into account the concern that there's been about the BG case. We, again, consider that to be a very narrow and specific case and one could go through different jurisdictions around the world and, and pull out a case here or case there to, to raise issues of concern. But we think that there are multiple options, all of which might be acceptable and we've tried to put a variety of options on the table here.

MR. FORTIER: How about another one? On the, on, on the issue of western hemisphere, perhaps we could throw out Toronto, Vancouver, as possibilities. What would be an initial reaction to something like that, Mr. Kehoe?

MR. KEHOE: My initial reaction, with all due respect, Mr. President, is that we would
have to look into it. We, we would be open to it. Our goal is to find a place that reduces the risk--

MR. MOSER: [Interposing] Yes, yes.

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

MR. MOSER: [Interposing] Right.

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

MR. MOSER: Fair enough. Mr. Hamilton?

MR. HAMILTON: Just speaking--

MR. MOSER: [Interposing] Conceptually.

MR. HAMILTON: --speaking purely conceptually, it, it may be a possibility. We had not explored it, frankly, in part due to the nationality of the arbitrators and just keeping things neutral. And, also, frankly, as a practical matter, given the role of, of the centers, the administering authority, we thought that that gave some credence in practicality to the possibility of Washington as the place of
arbitration for a lot of practical reasons.

MR. MOSER: All right.

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

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

MR. KEHOE: --follow up on this.

MR. MOSER: Yes.

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

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

MR. KEHOE: Yeah.

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

MR. KEHOE: Thank you.

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

MR. LANDAU: Short lived arbitration.

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

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

MR. MOSER: [Interposing] Yes.

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

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

MR. MOSER: Please, Mr. Kehoe.

MR. KEHOE: There is not--let me back
up. It, it, yeah. The, the, the issue that we
take with respondent's proposal, I, I'm reading
`it again, because this, this language has gone
through a few iterations--

MR. MOSER: [Interposing] Yes.

MR. KEHOE: --and I just want to make
sure I had my thoughts correct before I comment.
I'll just focus on the very last version that
we're looking at right here. So respondent
proposed that the tribunal may meet at any
location it considers appropriate for
deliberations, good. We're fine with that.
Hearings may only be held at a location other
than the place of arbitration upon agreement of
the parties. And, and claimants would, would
rather not limit the arbitral tribunals
authority in this fashion. In, in our
experience, the tribunal will work tirelessly to
have the parties agree on, on procedural issues
as we're doing right now, obviously, with the
scene. And even some, maybe some substantive
issues. And we have confidence that this
tribunal will, will do the same with respect to
the hearing locations. And we would prefer to
have the tribunal have the authority and the
power to have the last word on it to the extent that the parties just simply refuse to agree on a hearing location. And, and that's really the, the, the, the crux of our disagreement on this point. Peru would rather have the parties need to agree on a place other than the seat and we would rather have the tribunal afford it a little bit more flexibility on that point. At the end of the day, if it's probably not a major issue, but that's our position.

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

MR. KEHOE: [Interposing] Right.

MR. MOSER: --begins with the tribunal may meet at any location it considers appropriate for deliberations. Either first sentence of respondent's bracketed language. And then it goes on with the sentence above from claimants bracketed language unless otherwise agreed by the parties. So, in other words, claimants bracketed language is the second part of 18.2 of the UNCITRAL rules. The first sentence in respondent's bracketed language is part of 18.2 in the UNCITRAL rules. And what's
different is the last bit, hearings may only be held at a location other than the place of arbitration upon agreement of the parties.

MR. KEHOE: Right.

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

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

MR. LANDAU: That's always after consultation.

MR. HAMILTON: Excuse me?

MR. LANDAU: In other words, after consultation.

MR. HAMILTON: After consultation. And the rationale, as with other issues that we've discussed already, is that the, the fact is that for a sovereign, we are, as counsel and Mr.
Valderrama as President of the Commission for the Defense of the State, is accountable not to a general counsel or a company, but rather to the Peruvian state, to multiple ministries and there are multiple interested parties. And so the opportunity to comment on an issue such as where would the hearing on the Aroya case be held, that's material to respondent. And so that's the reason why we would put a greater emphasis on an effort of the parties to reach agreement or a decision of the tribunal based on consultation, which I think is a, a, it, it, it may be implied that the tribunal would consult with the parties, but we would prefer to make it--

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

MR. KEHOE: Yes. We have no objection to adding at the end of our proposal in the bracketed language in 8.2, after consultation with the parties. If, if, if I'm understanding things correctly. But we, we prefer to simply follow the, the normal course in, in UNCITRAL arbitrations and allow the tribunal to make this
decision after consulting with the parties. If, if consulting with the parties is the hang up there, we absolutely agree to add that in. We, we would expect that to occur, of course.

MR. MOSER: All right.

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

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

MR. HAMILTON: Yeah. We would distinguish--

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

MR. HAMILTON: --you can deliberate in the seashells if you so choose. But with
respect to the hearing, consultation with the parties would be necessary.

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

MR. KEHOE: I think we may--

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

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

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

MR. HAMILTON: That's correct.

MR. MOSER: Thank you. Mr. Kehoe?

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

MR. MOSER: Very good.

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

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

MR. KEHOE: Not from claimants.

MR. MOSER: Any submissions?

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

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

MR. KEHOE: Yes.

[Pause]

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

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

MR. MOSER: Yes.

MR. KEHOE: Should we decide now the date on which you would like the parties written
follow up on--

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

MR. KEOHE: [Interposing] Okay.

MR. MOSER: --if we could please.

MR. KEOHE: Okay.

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

MR. KEOHE: Okay.

MR. MOSER: All right. Thank you.

MR. KEOHE: Thank you.

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

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

MR. MOSER: Mm-hmm.
MR. KEHOE: And the, the, the big issue with Section 9.3 and .4 is whether, is, is, is, is the burden of providing what we feel is unnecessary translations. And the reason I say that is that the tribunal all speak English. Claimants, lead counsel all speak English. Mr. Valderrama speaks English. Mr. Sadlowski speaks English. And some of us don't speak Spanish. And the, the issue really comes into, into light with the submissions of the memorials. Because we obviously agree that if a party is submitting a witness statement, I'm focusing on 9.3 now, the main documents. The party is submitting a witness statement or an expert report in the Spanish language, that it's incumbent upon that party, obviously, to provide English translations, so that the full tribunal can read and understand the document. It is not necessary for a document, a, a, a, a witness statement that's originally written in English or an expert report that's originally written in English and certainly not a memorial or a counter memorial or a reply memorial that's originally written in English to be translated into Spanish if it, it is by the party who is
submitting the English language version. When you consider that Peru has selected English speaking counsel and has appointed an English speaking arbitrator, it is just a, it is here a burden, an unnecessary burden, on the parties to be submitting simultaneous Spanish translations, which, which to a large degree will, will never be looked at. It also may cause unnecessary fights over translation, really irrelevant translation, if somebody submits a, a memorial, drafts a memorial that could be, you know the size of memorials, significant documents to then translate them into Spanish to be read by who knows who. Because the original English will govern when it's drafted that way and everybody speaks English. It's just, it's just an extraordinary and unnecessary burden. If Peru wishes to translate a memorial that's written in English by both its counsel and claimant's counsel, then certainly Peru can do that. But it's not fair to put that burden on, on Renco and raise these issues in, in the procedural order. As to the supporting documents, we originally had agreement that the supporting documents could be submitted in English without
need for a Spanish translation. But be-,
because we couldn't reach agreement on, on the
main documents, Peru went, because we, we
reconsidered our position on the main documents.
Peru then reconsidered its position on the, on
the supporting documents. And so now we have a
situation where supporting documents need, all
need to be translated into Spanish even there,
even though they were originally in English and
I think that was just because we were proposing
the more practical approach for 9.3. So that's
how, that's where we are on 9.3 and 9.4.

MR. MOSER: All right. Very good.
Thank you. Mr. Hamilton, please?

MR. HAMILTON: Thank you, Mr. President.
And I direct your attention to slide number 7.
I have a few preliminary comments and then I'm
going to be assisted by my colleagues from Lima.
And the first comment that I have is that
claimant says that it's a burden, and
unnecessary, to translate documents into Spanish.
In terms of sovereign practice, some states
would avoid compromise of any type on this issue.
Peru, at the outset, sought a pragmatic
compromise approach with respect to this issue.
and still does. But I think one thing should be clear. If it's Renco's view of the world that 'there's only one or two, maybe three places to hold an arbitration, and their view of the telescope is that everything is in English and anything else is a burden and unnecessary, that might tell us a lot about their approach to doing business in Peru. Renco or the people in this room are not the only people involved in this proceeding or with interest in this proceeding. I mentioned earlier that we live in a multipolar world. We also live in a world in which there are diverse interests in investment arbitration, and particularly a case of this nature involving the social and human impact of a case such as this. So there are a series of interested players. And as a practical matter, due process and equal treatment and the right of respondent to respond requires a more bilingual approach. So there is an agreement of the parties that the procedural language of arbitration shall be English and Spanish, but claimants new proposal effectively converts this to an English arbitration. And anything involving Spanish is just a burden that Peru
should have to bear itself. It really is a matter of due process that there must be use of the Spanish language. There's no other pragmatic way to look at it. I'm surprised, frankly, that this is such a complication for claimant. The underlying documents, the treaty, is in both languages. The underlying documents largely are in Spanish. Laws in Spanish. The initial filings in this case by both parties were filed in both languages. Witnesses and experts will require Spanish. The official language of Peru is Spanish. The state representatives use Spanish. And critically the transparency obligations under the applicable treaty mean that there are interested parties that may choose to review the materials of this case in Spanish as well as in English, including the many effected Peruvian citizens who have an interest in what's going on in this proceeding. And we will come further to transparency later, but all of these pieces are tied together. And, finally, there's really no prejudice to claimant. It's an inconvenience for multi-national corporation to arrange for some translations? Not that much given the scope of what we're
dealing with here. I'd like to invite just very brief comments by my colleagues from Lima. First, Maria Carmen Tovar of Estudio Echecopar and then Carlos Valderrama of the Ministry of Economy and Finance. And we'll try to keep it brief, but we would like to hear from them on this critical issue.

MR. MOSER: Thank you.

MS. MARIA DEL CARMEN TOVAR GIL: Good afternoon. Well, I want to share just three very simple ideas that support the importance of having a real bilingual process for the Republic of Peru. First of all, as you might be aware, the investment of the claimant was done in Peru. And specifically in a small town in the mountains of Peru. The name of this town is La Oroya. The story that you will hear in the process happened in Peru and happened in Spanish. The relevant facts will take us back to 1996. And in this 17 years, different officers and people of Peru and people of La Oroya have been dramatically been involved in this story. It is important to have the right to receive and to transmit to them the entire story told by an investor in the language of our country. The
second idea to have in mind is that investment
and economic activities of investor has been
made under the laws and regulations of Peru.
Those laws and regulations, as the tribunal can
guess, were fought and were written in Spanish.
We shall read and hear the claimant and his
witnesses and experts not only in English, but
in Spanish. And to have the correct
understanding of the legal position that is
important to be con-, contemplated by the
tribunal. Finally, it is not fair that the
claimant avoids delivering to the respondent a
translation of the main documents of the
proceeding. As Mr. Valderrama will explain, the
case involves several and different
administrative bodies of the Republic of Peru.
And to answer to the investor claim, we will
have to work with dozens of officers, experts,
and witnesses in Spanish. So I leave Mr.
Valderrama to close his comment on the
importance we find to have a real bilingual
process for the Republic of Peru.

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

MR. CARLOS JOSE VALDERRAMA: Thank you
very much. [Speaking in Spanish] I'm going to
I speak in English for everybody. The Republic of Peru takes seriously the importance of foreign investment develops the economy while reasonably expecting investors to follow the rules and laws of our country. Peru has the most traded over two decades consistent, consistent economic and legal policy facilitating investment. Peru is very active on the international scene of investment protection and conflict resolution practices developing during the years a very comprehensive and responsive scheme of rules and practices for investment disputes as well as reflected in international treaties and investment contracts. In order to efficiently attend controversies arising from, from investment treaties and contracts, the Republic of Peru has created a commission integrated by the Ministry of Economy, Ministry of Foreign Affairs, Ministry of Justice, Ministry of Trade and Commerce, the investment promoting agency, in this case, the Ministry of Energy and Mine, among, among other entities. To coordinate its fair participation and defense before tribu-, international tribunals, that necessary requires Spanish to allow the
representative and other government officials to understand, act, and cooperate through this arbitration process. As chair of the commission and representative of the Republic of Peru, before this high tribunal, it is also my intention to reaffirm our commitment. Although being aware of the high burden of discussing publicly such an important matter as this, again, I will like to reaffirm our commitment with transparency. Transparency agreed by an FTA with the US and owed to the people of both nations. Therefore, transparency is in English and in Spanish, the Peruvian official language.

Thank you.

MR. MOSER: Thank you, sir.

MR. HAMILTON: In short, we think that the necessity of Spanish, of Spanish language is critical. It's, it's, it's obvious the fact that there are participants in, in the immediate proceeding, either members of the tribunal or counsel that are fluent in English is not the, the end of the story, not even for me. I dream in Spanish, not in English. And would not be sitting here if I wasn't fluent in Spanish. And clearly there are many participants within the
Peruvian state who require the use of Spanish. And there are many externalities to this case that make it incumbent upon the proceedings to be sufficiently open and transparent in both languages. And, really, at the end of the day, there's no prejudice to claimant, particularly given that what we have suggested is not a rigid and inflexible approach, but rather a practical approach. And we have specified that main documents of the case, pleadings, witness statements, expert reports are submitted in one language with a translation a week later. That supporting documents are submitted with relevant parts translated. International legal authorities do not require translation. And, also, routine correspondence of the case would be conducted in English, because we think that in terms of the day to day coordination and also the transparency factors, this is a practical approach. Now, we've tried to lay out a, a, a practical approach. We could take a, a, a completely rigid approach, as many states do, and say everything that occurs can only happen in, in both languages. Day to day we've tried to find a balance that takes into account all of
the different factors and all of the different players who are involved. Thank you.

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

MR. KEHOE: [Interposing] Just briefly. Counsel for the, counsel for the respondent stated, stated that our proposal effectively converts this into an English arbitration and, and that's simply not true. There will be a significant portion of this arbitration that is done in the Spanish language. And where necessary, where helpful, where appropriate, they will be translated into English. It is not helpful, it's not appropriate, and it's not a due process issue to translate English legal documents into Spanish, so that people in the country can read them. I think that, that the issue here is being exaggerated a bit. If Peru would like to translate the English, the memorials that will be written in English for this tribunal, they certainly can do that. But to make it part of the process and to put that burden on, on Renco is, is more of a cost and a practicality issue
than it is a due process issue.

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

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

MR. MOSER: No. All right.

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

MR. HAMILTON: I, I'm sorry. I, I'll keep this very brief. I just only want to say we repeatedly hear about the great burden on Renco. It certainly would be the only legitimate expectation that an investor investing in the Republic of Peru could have that they would need to potentially provide documents in Spanish in the course of a proceeding of this type. It's just been made very clear the burden on the state internally, just in order to communicate, coordinate, and do business in the official language of the country with respect to a case of this magnitude and importance and social impact that it has. And so, again, the repeated discussion of burden on Renco, the reason that we're, we're hearing this is because the way that claimant operates
principally is by one law firm dealing with a couple of people down the street in New York City. That is not the entirety of people involved in this matter. There are many different participants in this matter, both within the state and beyond, witnesses, experts, and interested parties that will have an expectation through transparency to have access to information. Thank you.

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

MR. KEHOE: I'd just like to correct the record. We have a little bit more going on in this case than that which happens in New York City, including down in Peru, in litigations and the like. But I would note, again, under Section 9.4, that Peru did not have a problem with having exhibits, legal authorities, and annexes submitted in English only until, until we, we ask that essentially memorials need not be submitted in, in Spanish as well, since we're going to be drafting them in English. So I, I mentioned that for the tribunals consideration if it's, when it's considering 9.3 and 9.4 together.
MR. MOSER: Yes. All right. Mr. Kehoe, could I now invite you to have a look at your proposal under 9.3 and tell us how it then fits into 11?

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

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

MR. KEHOE: Okay. So on the relevant filing date, the party will submit an ele-, by electronic e-mail an electronic version of the main document. Now, we're saying in one of the procedural languages with an English translation where the party elects to file in English. And, and what we're getting at here is that we're not requiring documents to be, or requesting that documents be filed in English only, obviously. If a party has a witness or an expert that speaks Spanish, the, the, the bilingual proceedings enable and allow that person to su-, prepare and submit a Spanish original governing witness statement or expert report.
MR. MOSER: Right. Now, that's as per 9.3?

MR. KEHOE: Correct.

MR. MOSER: Submitted in English or Spanish.

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

MR. MOSER: [Interposing] Yes.

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

MR. MOSER: Then an English translation comes.

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

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

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

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

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

MR. MOSER: Okay.

MR. KEHOE: Thank you, yes.

MR. MOSER: But take a look at 11.1.

MR. KEHOE: Yes.

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

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

MR. MOSER: There's a bit of confusion—

MR. KEHOE: [Interposing] There is.

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

MR. KEHOE: It's a very good point.

Our, our, and I think this was just a function of us going back and forth. Claimants proposal is that the English translation would come a week later.

MR. MOSER: Okay. So you're both, I mean, that's common ground it appears now that you have these initial filing and then you have the supplemental filing, is that, is that correct? And the translation comes seven days later with a supplemental filing.
MR. HAMILTON: Right. It's our view that the main documents are submitted on the filing date in either language.

MR. MOSER: Correct.

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

MR. MOSER: [Interposing] Right.

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

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

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

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

MR. KEHOE: That's right.

MR. MOSER: But that's a bit
inconsistent with 11.2.

MR. KEHOE: You're right. And, and

' that's a mistake. We are--

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

MR. KEHOE: You are--that would be out.

If, if--

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

MR. KEHOE: With an English translation, yes.

MR. MOSER: Okay.

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

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

MR. MOSER: Please, sir.

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

MR. MOSER: Okay.

MR. FORTIER: Natali? Got it.

MR. MOSER: Very good. All right.
Well, that makes life a bit simpler I think.

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

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

MR. MOSER: [Interposing] Right.

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

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

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

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

MR. HAMILTON: The only further comment
I would make is that there was a lot of back and
forth, obviously, on all procedural issues. And
it's, it's respondents position based on
extensive discussions of the multi-sectorial
commission that's involved on this issue that,
that the main documents need to be translated
and the supporting documents need to be
translated with respect to the relevant parts
thereof. This is necessary to the ability of
individuals within the government as well as
witnesses and experts who principally speak in
Spanish. For instance, we just heard from my
colleagues in Spani-, in English, but I assure
you that they prefer and do read in, in, in
Spanish. And they represent many other people
back in Lima who would not typically be reading
in English, and that includes supporting
documents as well. So we, we, we, honestly, we
consider this such an obvious issue and, and
basic due process issue that, that we would
appreciate even if in the coffee break claimant
could find a, a, a more interactive approach on
this issue. But in any event, we think we've
made Peru's position quite clear.

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

MR. KEHOE: Before we got to coffee
break. One, one question, a practical question from, from my client. Which is in the, in the event of a translation of a legal document, let's say the memorial, from English to Spanish, which document will control? Obviously, we all understand that documents that are corporate documents that are written in a certain language will control, that that language will control. And a witness statement written in Spanish, the Spanish will control and the translation will have to take a second seat. And, similarly, if a witness statement is written in English originally and a translation company makes a mistake, then we'll fix that. But for the memorial, we, we would need to know which of those two languages is going to control in the event of a dispute over translation and who would decide that dispute with a tribunal that doesn't all speak Spanish.

MR. MOSER: Any suggestions from your side?

MR. KEHOE: Yeah. 9.3 and 9.4. I, I would propose, although I'm going to be criticized for it, because there seems to be some suggestion that it's, it's, it's sort of a
one, one way street when this has actually been pretty, I thought, productive compromise. But I would suggest that if, if, that the English will control. The, if the tribunal is inclined to allow or to require translations of the memorial, since both parties are probably going to write the memorial in English, I would propose that English control and that any Spanish translation not control.

MR. MOSER: Mr. Hamilton?

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

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

MR. KEHOE: Thank you.

MR. HAMILTON: Yes.
MR. MOSER: Very good. Thank you, sir.

[END First_Session_-_Audio_Recording_-_Part_1.mp3]

[START First_Session_-_Audio_Recording_-_Part_2.mp3]

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

Now, during the break, the parties had said that they would have a word about a couple of the matters that were left on the table unresolved. And Mr. Kehoe, anything to report? Any white smoke or--?

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

MR. MOSER: Very good. Cardinal Hamilton?

[Laughter]

MR. HAMILTON: Thank you very much, and thank you to our counterparts for our productive discussions. So, I direct your attention to page number eight and draft sections 9.3 and 9.4, with respect to the procedural language. And the parties have agreed as follows -- I would also like to thank the representatives of Peru
for their collaboration in finding a compromise here.

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

And the one other change would be in Section B regarding supporting documents. Here
we would introduce the following change.

Exhibits, legal authorities and annexes, together the supporting documents, may be submitted in any language. There is always the chance that there could be something other than English or Spanish. Provided that any document submitted, in a language other than English, will be translated into English for the convenience of the tribunal, with respect to the relevant parts thereof. Or we could put that language earlier in the sentence and say relevant parts thereof -- provided that relevant parts thereof shall be translated into English for the convenience of the tribunal, noting that -- and then we could continue the last two lines -- the tribunal may require a fuller or a complete translation.

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

So, in short, subsection A stays the same. Subsection B is revised as I just set forth. And subsection C, as it exists, would be
omitted and in its place would be the language regarding the governing language of the pleadings and the other documents.

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

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

MR. MOSER: Right. Right.

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

MR. KEHOE: [Interposing] Correct.

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

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

MR. KEHOE: Yes.

MR. MOSER: Okay. Very good. Now, I'll come back, in a moment, if I could, to a request to you, with respect to the place of arbitration. And then I'll pick up again on
this particular point, that we have just been discussing, under 9.3. I guess this will be 9.3, this what now picks up from 9.3 and four.

MR. KEHOE: That's right.

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

MR. KEHOE: Thank you.

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

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

MR. MOSER: Mm hmm.

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

MR. HAMILTON: [Interposing] Right.
MR. MOSER: Mm hmm.

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

MR. HAMILTON: And we agree with that.

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

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

MR. FORTIER: [Interposing] You better.

MR. KEHOE: -it is a -- it is the normal practice, in our experience, in UNCITRAL arbitrations, in all arbitrations, obviously we would copy the secretary at ICSID on all communications. UNCITRAL Rule 17.4 implies -- it may not say it directly, but it certainly
implies that direct communications, with the tribunal, is expected. It says, "All communications, with the tribunal, by any party, shall be communicated by that party, to all other parties." And we just don't see a reason, a practical reason, to filter and delay any potential communications with the tribunal through -- through the secretary, for practical reasons. Just delay things unnecessarily.

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

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

MR. MOSER: Very good. Ms. Menaker?

MS. MENAKER: Thank you. When Peru agreed to have ICSID act as the administering authority, it was its expectation that it would serve the role that it does in the types of arbitrations when it does administer. And one of the functions that it typically undertakes, which we have found to be particularly useful, is to guide the correspondence, and between and among the parties and the tribunal. And you know I would indicated that Peru is not advocating a very extreme position whereby all
communications, even between and among counsel, have to go through the secretariat.

So, for instance, when we were filing a memorial, we would directly copy opposing counsel. So, there is no threat of having any sort of prejudicial delay, you know if ICSID would, for some reason, be otherwise unavailable. But just insofar as communications with the tribunal, we think that it imposes a certain order on the proceedings that is beneficial for both -- really both parties, and the tribunal. We have found that ICSID does act very -- in a timely manner, is very attentive when the ICSID secretary is out at another hearing or otherwise out of pocket, there is always somebody, in her place, that is appointed which serves us well. And quite frankly, we think it imposes a certain decorum on the proceedings. It -- it declutters, sometimes some excess or unnecessary correspondence, and I think makes the proceeding run smoothly. And of course, we also avoid and you know I don't mean say anything negatively, the email miscommunication over the address. I mean that happens to everybody. So, no one will. No, that's what I'm saying; it happens to
everybody. But -- and that's -- you know
certainly we do that too, but it just takes
another layer out of that. And, you know
leaving the communication to go through ICSID.
I think it just makes it smoother. It makes the
proceeding operate better, and like I said, it
declutters some of the back and forth
communications.

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

MR. KEHOE: Just briefly, Ms. Menaker
said that when Peru agreed to ICSID, it has an
expectation that somehow the ICSID rules or
procedures would act as some sort of overlay or
umbrella, to these proceedings. That was not
our understanding at all. That certainly was
never communication to the Claimant. We
certainly have had good experiences with ICSID,
but ICSID was actually Peru's proposal. We were
proposing a PCA originally. And we agreed to
ICSID. But had we been told, at the time, that
ICSID rules, which Claimant could have chosen
under the treat, and opted not to, would somehow
influence this UNCITRAL proceeding, we may very
well not have agreed to ICSID acting as the
Secretariat. So, we would rather, not only for practical purposes, especially with the Chairman who is in a time zone, for -- for rules purposes, we would rather follow the UNCITRAL Rules and not being a procedure deviating from them and moving into ICSID's rules.

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

MR. KEHOE: Just note that in UNCITRAL
proceedings that I am involved in right now, that is not the process. We -- we copy the tribunal and the tribunal feels free, just as this President has, when necessary, to communicate with the parties. This would eliminate that ability. That's what we object to. We don't intend to clutter the tribunal with internal correspondence or anything of the sort.

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

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

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

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

MR. MOSER: Mr. Hamilton, anything? Ms. Menaker?
MR. HAMILTON: Nothing further.


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

Anything there?

MR. KEHOE: Not from the Claimant.

MR. HAMILTON: No.

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

MALE VOICE: [Interposing] It was.

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

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

MR. MOSER: Very good, thank you.

Seconded by?

MR. HAMILTON: So agreed.

MR. MOSER: Excellent, very good, sir.

So ordered. Let's move on, if we could, to page 13. I see nothing there, for my part. Mr.
Kehoe or Mr. Hamilton?

MR. KEHOE: Nothing from Claimant.

MR. HAMILTON: No.

MR. MOSER: All right. Fourteen?

MR. KEHOE: Nothing from Claimant.

MR. HAMILTON: - - .

MR. MOSER: Thank you. And fifteen?

Now, there is an issue arising under 16.2.

MALE VOICE: Big issue here.

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

MS. MENAKER: Certainly. What we have proposed is keeping in mind that in international arbitration, the parties will be submitting witness statements and expert reports to serve principally as the direct testimony of those witnesses and experts. And the parties will each have an opportunity, prior to the hearing, to designate or to call certain of the other parties' witnesses and experts, to appear for cross examination. That while Claimant then proposes that if no one may appear, to testify, if they are not called for cross. We have proposed that if the other party calls fewer
than two of the counter -- the opposing party's witnesses or experts, that that party may itself call two of its own witnesses, up to two of its own witnesses, or up to two of its own experts, to testify briefly in direct examination.

And we believe this is useful because we have seen, in some circumstances, for whatever reason, some parties choose not to call the other party's witnesses or experts, for cross, and it leads to a very unbalanced hearing. Where the tribunal is listening to one party's experts and witnesses, for nearly or the entirety of the case. And that does leave an unbalanced impression in the tribunal's mind, keeping in mind of course that of course you have the written direct testimony. But just as a practical matter, sitting in a room, day after day, listening to witnesses, experts, seeing them face to face, that leaves an impression in your minds, and we think that it would be unfair, to the other party, not to at least have the ability to bring in a couple -- we are not asking, you know for this to be unlimited, but a couple of the witnesses and experts of its own party, so that the tribunal could then see those
witnesses and experts, in person, could be
reminded, briefly, of the conclusions that they
`testify to, and would have the opportunity, if
it so chose, to ask those witnesses and experts
some questions.

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

MS. MENAKER: Yes, it would.

MR. MOSER: Okay, thank you very much.

Mr. Kehoe?

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

MR. MOSER: [Interposing] All right.

Mr. Burnett please?

MR. KEHOE: -part of the argument.

MR. BURNETT: As I understand the
proposal, if Claimant calls one or zero of a
fact or expert witness, of Respondent, for cross
examination, they can then put on two witnesses
that they choose, to testify in some way. And
this is, just in my experience, not in accordance
with arbitral practice. Certainly, the tribunal,
if the tribunal wishes to hear from an expert, or a fact witness, that we have chosen not to cross examine, they obviously can do so. And it is really the party's choice as to how they want to handle and present their case. And what this invites is really to call witnesses up, and frankly I doubt that this is ever going to coalesce into reality, but it invites them to put witnesses on who will just basically get up and vouch for their testimony that has already been before the tribunal. So,--

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

THE HONORABLE MR. FORTIER: [Interposing] Except that the--

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

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

MR. MOSER: Or 45.
MALE VOICE: No, no, I'm looking at the Respondent's--

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

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

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

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

MS. MENAKER: They are related.

MR. MOSER: She confirmed it was related.

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

MR. KEHOE: Okay.

MS. MENAKER: And so, yes, you would be reiterating your primary conclusions, perhaps responding to something that, you know came up before hand, but essentially reiterating. But
again, I think, and just to make one point of clarification, I think in the example you gave, you said if you had called one of our witnesses, we would then be able to call two. No, we would be able to call one. If you called zero, we would call two. If you called one, we would have the option of calling yet another one.

THE HONORABLE MR. FORTIER:

Respectively up to--

MALE VOICE: [Interposing] Yes.

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

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

MS. MENAKER: Yes.

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

MS. MENAKER: Yes.

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

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

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

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

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

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

MR. MOSER: [Interposing] Right.

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

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

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

MR. KEHOE: Yes.

MR. MOSER: Yes?

MR. KEHOE: Yes.

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

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

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

MR. HAMILTON: Right.

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

MR. KEHOE: Yes.

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

MR. KEHOE: Or both.

MR. MOSER: Or both, correct.

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

MR. MOSER: All right. Well,--

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

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

MR. KEHOE: I think we may make some
progress if we can just have a second to speak.

MR. MOSER: Please.

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

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

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

MR. MOSER: I'll allow 16.4.1.

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

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

MR. KEOH: Yes. I'm sorry, Mr. President, yes, that is correct.

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

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

MR. KEOH: Yes, agreed.

MR. MOSER: Thank you very much. Then 18.2 goes out. And numbers are changed accordingly. All right, that then brings us,
ladies and gentlemen, to page 17 where we have again a difference of opinion under C and -- C, `18.4.c, and perhaps we can invite Claimant to address us first on this, and then Respondent?

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

MR. MOSER: All right, thank you.

Respondents?

MS. MENAKER: What Respondent proposes is that Claimant -- Claimant's witnesses would testify first, after opening of course. Then Respondent's witnesses and then the experts would testify and this is not -- we discussed
this, but I don't think the language is particularly clear. What we were envisioning is that they would be grouped by subject. So, we don't obviously know what experts will be called, at this point, but for instance if both parties have an environmental law expert, if both parties have a Peruvian law expert, if both parties have, I don't know an expert, Quantum is now bifurcated, but if it were Quantum, that the Claimant's expert on environmental law would testify followed by Respondent's expert on environmental law. Then Claimant's expert on Peruvian law, followed by Respondent's expert on Peruvian law, etcetera. And we have found that this is just a very practical and beneficial way to organize the testimony of the witnesses, especially in a case of this scope. You will see that we have -- the parties have both proposed that the hearing be one week with one week in reserve. So, there is a possibility, subject of course to the tribunal's comments on this, that this could be as long as a two week hearing. And it is very disjointive to have -- hear from all witnesses and experts -- imagine you hear an environmental expert on Wednesday
and then you don't hear the other side's expert responding to that same material, until a week later. I think it is much easier, for the tribunal, to hear the experts back to back like that. And quite frankly, it is easier for counsel as well, for counsel prepping during the hearing. You are dealing with doing directs and crosses at the same time. You are keeping the subject matter together, and I think it -- it keeps the story unfolding over a -- in a logical manner, that I think helps everybody follow what is going on and ask good questions. So, that's why we proposed it this way.

MR. MOSER: All right. Well, thank you. Mr. Burnett?

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

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

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

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

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

MR. MOSER: -add that in?

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

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

MS. MENAKER: Sure.

MR. MOSER: Okay. I don't note anything else on page 17. I can stand to be corrected. Anything further? If not, let's move to 18 and here again we have something -- a
difference of opinion under 21.2. Now, this
deals with the sending of updates.

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

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

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

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

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

   MR. MOSER: Yes, sir.

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

   MR. MOSER: [Interposing] Mm hmm.

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

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

MR. KEHOE: Oh good.

MR. MOSER: This s what I understood.

MR. KEHOE: Oh good.

MR. MOSER: Ms. Menaker?

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

MR. MOSER: Yes.

MS. MENAKER: Not the -- witnesses.

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

MS. MENAKER: Yes.

MR. KEHOE: Okay, thank you.

MR. KEHOE: I didn't understand that.

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

MS. MENAKER: That's correct.

MR. KEHOE: Thank you. I apologize.

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

Principle basis for it or--?

MR. KEHOE: Not really.

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

MR. MOSER: What do you think?

MR. HAMILTON: Yeah, that's fine.

MR. KEHOE: We agree.

MR. HAMILTON: We can agree with them.

MR. MOSER: You can live with--

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

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

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

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

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

MR. HAMILTON: Yes.

MR. MOSER: All right.

MR. BURNETT: And I would like to note,
we are going to get to the issue of scheduling
and document production--

MR. MOSER: [Interposing] We are indeed.

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

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

MR. BURNETT: [Interposing] Thank you.

MR. MOSER: -and well noted.

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

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

MR. MOSER: Right. Maybe we better
stick with the agreement we have now, six and
three, and move on, shall we?

   MR. KEHOE: Yes.

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

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

   And the intention, of this section, I
think is to do two things. One is to confirm
and give effect to what the treaty says,
including with respect to publication of
documents, open hearings, etcetera, including
the safe guarding of protected information. And also to specify some of the ways that that will occur, from a logistical standpoint. Part of the aim that we have, with this section, is so that anyone who may ever consult this order, which will be made publicly available, will see and understand that there is a commitment to transparency. There is a commitment to giving effect to the language of the tribunal. And that it will be consolidated, in one place, what the concept here is, with respect to transparency. Given, as I have emphasized, the diverse interested parties in this matter, which -- which at any given point, during the proceeding, either side, or members of the tribunal, may appreciate or be frustrated with, but it is simply a fact that there are diverse interested parties and players, not only Renco, not only the Peruvian state, and its -- its various parts, but Peruvian citizens, the U.S. Government, nongovernmental organizations, creditor companies, and participants in -- in other proceedings including other litigation proceedings, and also participants in a human rights proceeding before the Inter American
Commission of Human Rights, who consider
themselves to be affected by this matter.

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

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

MR. MOSER: All right, thank you.

Claimant?

MR. KEHOE: Yes. Mr. President, the --
as an initial matter, I will note that the transparency of these proceedings is governed by Article 10.21 of the Trade Promotion Agreement. Whereas the amicus submissions are governed by 10.20. There are two different issues that are being conflated, and frankly that is the reason that we originally objected to what was proposed to us, as transparency, because it was presented as transparency and amicus submissions, and they are different. And that has been fixed.

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

MR. MOSER: Any further response, Mr.
Hamilton?

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

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

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

MR. KEHOE: Yes.

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

MR. KEHOE: Yes.

MR. HAMILTON: Okay, we agree.

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

MALE VOICE: Yes.

MALE VOICE: That's correct.

MR. KEHOE: Well, that has been our
position. There has been a lot of paraphrasing
of the treaty and -- and counsel cooperated and
agreed that we are just going to read Article
10.21, which applies to transparency, and that
will be it. That's all. It's not amicus,
that's a different issue.
MR. MOSER: All right, thank you very much. So, that's then resolves as well? Yes?

'Now, can we -- we're all right there, yes?

MR. KEHOE: Yes.

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

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

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

MR. KEHOE: Okay.

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

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

MR. MOSER: No, no, sorry.

MR. KEHOE: The -- the major -- there are two major issues with the procedural schedule. And I comment my colleague across the table for -- and his team, for, you know the
work that we have done in arriving at this ultimate schedule. There was a lot of compromise by both sides. Where we could not compromise are on two important issues.

MR. MOSER: Mm hmm.

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

At the very beginning of the case, however, Plaintiff will file its memorial on liability, and if -- if Respondent has any arguments or -- or objections, based on Article 10.20.4 of the treaty, which is, by its terms and according to the implementing bill, in the United States Congress, is similar to what we have in the United States, which is called a
Motion to Dismiss for Failure to State a Claim upon which relief can be granted. In this case, it is an application to dismiss a claim if an award cannot be rendered on that claim, under Article 26 of the treaty. And that is a simple application. It assumes all the facts to be true, and it is a legal determination by the tribunal, on the issue of whether a claim is -- is justiceable, or just frivolous. And that does not include jurisdictional objections.

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

So, it is our position, that in this very preliminary initial phase, right after Claimants submit their memorial, that the Respondents cannot advance jurisdictional objections. That is consistent with the treaty
language, but it is not as much consistent with the treaty language because they could advance jurisdictional objections if we all agreed to it, but it is consistent with the schedule that we have all agreed to, which is that jurisdictional objections will be handled in a subsequent phase where the Respondent will brief liability and jurisdiction.

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

The other very big issue, is the one at the bottom of the page, where the Claimant proposed that the document production phase occur simultaneously while the Claimants are
preparing their memorial on liability and
jurisdiction, the reply memorial. And
originally, the amicus submissions were lumped
in there too, which is essentially causing the --
the Claimants and its lawyers to be fighting
wars on all fronts -- document issues, amici and
we moved amici to the back, for that reason.

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

And I put down my marker earlier, to
note that we have not fought the timeframes on
this arbitration very strenuously. Five months,
six months for the initial submission and the
like, and the one place where Peru seems to be
interested in expediting the schedule is the one
place where we have our backs up against the
wall, writing a reply memorial -- translating it
'now, by the way, and also responding to document
requests. We had proposed, initially, to have a
document phase at the very outset of the case,
to have two document phases, because we do
believe that the document production, in this
case, is going to be very important. We no
longer control the site, the -- facility. We
have no access to the documents there. We
believe Peru has a lot of documents that we
don't have. But to facilitate cooperation, we --
- we sacrificed that initial document production
phase, to try to reach a compromise schedule.
But to have us preparing our reply, at the same
time that we are receiving rolling production of
documents, is completely unfair and as the
Claimants, we are prepared to have this
arbitration prolonged, by the period of time
that the document production occurs, such that
our reply begins to run right after the last
documents are produced. It is not a, in my
opinion, a very onerous request. And if ever
there were a -- we discussed Due Process a
little bit earlier, this is one of them. Two
weeks to get a reply memorial done in this case is -- is unfair. Those are the two big points, on the schedule, from our perspective. Thank you.

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

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

With respect to the timeframes, I direct your attention to slide number nine, which just focuses in, sort of cuts out some of the clutter, from the longer schedule. And at the outset, of our discussion today, I emphasized that Peru has always been and remains a fair and due process oriented participant in
international arbitration and certainly any suggestion to the contrary is ill founded. To the contrary, we would say that were we simply to agree to Renco's proposal that we would be agreeing to unequal treatment, which we are unable to do. But let's take a look, practically speaking, with what we are dealing with, if you look at slide nine there.

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

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

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

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

MALE VOICE: [Interposing] Slowly --
slowly.

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

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

MR. HAMILTON: Yes.

MALE VOICE: Yeah.

MR. HAMILTON: Twenty-six weeks for the
counter memorial, with respect to Claimant's
reply, we are open to some kind of limited
compromise, taking into account their concern
that -- that they would be prejudiced, but we
cannot agree, to 38 weeks or anywhere close to
`it. It's simply a gross imbalance,
notwithstanding the document production phase.
And then on--

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

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

MALE VOICE: Twenty-two weeks from?

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

MR. MOSER: Let's stop there for the
moment, and--
MR. HAMILTON: [Interposing] Okay.

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

MR. KEHOE: Yes.

MR. MOSER: We have something on the table.

MR. KEHOE: Yes.

MR. MOSER: What is the reaction, gentlemen?

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

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

MR. KEHOE: Yeah.

MR. MOSER: The bottom of it.

MR. KEHOE: We are. And so with Respondent's rejoinder, Renco is proposing 12 weeks. I would propose that a better compromise is that Renco agrees that Peru will have 20 weeks to refile its rejoinder, if Peru agrees that Renco can have 20 weeks that it needs, from the end of document production, to submit its reply. The -- the document dispute issue is a significant one. It is, in my experience, commonplace that very important documents come
in near the end of a document production phase. A rolling production of documents that are non-controversial and that are called for, does not solve this problem. Themes and arguments are developed around sometimes -- oftentimes, especially with states, documents that are held to the very end. And it is -- it is just unfair, from a Due Process perspective, to put us in the position where we have to get a reply in, in such a short period of time after potentially critical documents come rolling in at the end.

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

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

MR. KEHOE: That's right. Mr. President, this issue is so important to us,
that we would compromise on all of these dates. We would agree to Peru's 26 weeks from the first session. We would agree to both, you know, 26 weeks for both sides on the counter memorial.

MR. MOSER: Right.

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

MR. MOSER: Right.

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

MR. MOSER: I see.

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

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

MR. MOSER: Mm hmm.

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

MR. MOSER: Mm hmm.

MR. HAMILTON: As they have requested?

MR. MOSER: Mm hmm.

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

MR. MOSER: Mm hmm. Mr. Kehoe?

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

MALE VOICE: This is like a bazaar.

MR. MOSER: I was going to say this is
very familiar territory to me, being in the markets in Shanghai.

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

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

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

MR. KEHOE: Last and final.

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

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

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

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

MR. KEHOE: Sure.

MR. MOSER: Let's proceed then.

MR. HAMILTON: Thank you.

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

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

MR. MOSER: Yes.

MS. MENAKER: Thank you. So, as you can see here, the parties have built in, you know this, the possibility of this extra phase.
We don't, at this point, know whether Respondent will be raising such an objection, and we have timeframes built in here. So, we would alert the tribunal, and then those times would come.

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

What we have said, and have always said is that we have a right, under the treaty, to bring a preliminary objection pursuant to this article. And when you look at the article, first of all, I should say if we decide not to bring that, then of course we may bring jurisdictional objections in our counter memorial. If we decide to utilize that article, the article also makes clear that we don't waive our right to bring any other types of
jurisdictional objections. So, there may be other jurisdictional objections brought later.

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

So, you see here, it says that without prejudice to a tribunal's authority to address other objections, as a preliminary question, such as an objection that a dispute is not within the tribunal's competence, a tribunal shall address and decide, as a preliminary question, any objection by the Respondent that as a matter of law, a claim submitted is not a claim for which an award in favor of the Claimant may be made, under the treaty. Now, if the tribunal lacks jurisdiction, or a claim is inadmissible, then as a matter of law, the claim
is not one for which an award in favor of the
Claimant may be made. So, I think just pursuant
to the clear ordinary meaning, of the article,
if there is a jurisdictional defect, in the
claim, then ipso facto the claim is not one for
which an award may be made, as a matter of law.
So, it fits within the plain terms of the
treaty's language.

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

But the important thing here is that by
virtue of this subparagraph, it makes it clear
that the scope of a 10.20.4 objection has to
encompass certain jurisdictional objections.
Because by stating that the Respondent does not waive any objection, as to competence, merely because it did not raise an objection, as to competence, right the necessary corollary has to be that the Respondent may raise an objection as to competence under the section. Otherwise you would not need that language saying that you don't waive it. Right, so that's really a necessary corollary, and makes very clear that certain objections, as to jurisdiction, fit within this article.

Now, the purpose of the article, the objective of the article, is to allow claims that would fail as a matter of law, to be dispensed with quickly, without going through having the time and the cost of a full blown evidentiary hearing. And that's also why, when I say jurisdictional objections, it's only certain types of jurisdictional objections. And so certain jurisdictional objections, as you are aware, would require the tribunal to make determinations, factual determinations. And those types would not be brought under this article. Because if you look further, at 10.20.4c, which is on slide 13, it says in
deciding an objection, under this paragraph, you have to assume to be true all of the Claimant's factual allegations. So, if there are disputed factual allegations, that are integral to a jurisdictional determination, that type of objection would not be made. But certainly there are other types of jurisdictional objections that may be made, on the basis of the allegations, in the party's claim, when there are no disputed facts. And those types may very well be brought.

And I think also this is a very clearly seen when you look at the Kafka Decision in RDC versus Guatemala, the railroad development case versus Guatemala. In that case, the Respondent raised certain preliminary objections under 10.25, which is the expedited procedure. And you can see this is in slide 12. And they raised jurisdictional objections, under that provision. And the tribunal issued its first decision on jurisdiction. Then what Respondent did, they raised this -- I should mention -- before the Claimant filed its memorial. They had a phase on that. Then the Claimant filed its memorial. And then the Respondent raised an
objection to jurisdiction under 10.20.4. And the merits were suspended and they had another phase addressing these objections. And you can see here, that's what it says in paragraph six of the Decision, that they raised their Notice of Intent to raise preliminary objections under 10.20.4.

And there, when you look at that Decision, let's see if -- the tribunal actually issued a second Decision on jurisdiction. The jurisdictional objections raised by the Respondent, in that case, under 10.20.4, there were three. They were all clearly jurisdictional in nature. One was a lack of jurisdiction because the acts predated the entry to enforce of the treaty. One was a lack of jurisdiction because of an alleged lack of a covered investment. And the other was because the claims at issue were subject to local proceedings. And you can also see, on slide 14, what the tribunal did there is it addressed these as issues of jurisdiction, but it assumed the facts as pled as true, as it needs to do under 10.20. And that shows how these types of objections are dealt with, under this provision.
So, again, we are not seeking to do what Guatemala did in that case, which is to have two jurisdictional phases, that were bifurcated, because they used the expedited procedure first, then Claimant filed its memorial, then it had another jurisdictional phase, then it filed its counter memorial. So, we are not seeking to do that. We are seeking to have the opportunity to have one phase, if we determine there are objections that fall within the confines of this article. But we just want to make clear that our view as to the scope of that article, that that does encompass some jurisdictional objections. And that would not preclude us, of course, from raising other types of jurisdictional objections, if we had any, with our counter memorial.

MR. MOSER: All right.

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

MR. MOSER: Yes. Yes. We said that,
those are your brackets there.

MR. HAMILTON: Yes.

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

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

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

MS. MENAKER: What I should have said
is we are not seeking to have a separate phase,
two separate jurisdictional phases, bifurcation, in other words. But it is always the case, and the treaty makes very clear, that you are not precluded from raising additional objections — preliminary objections, even if they go to jurisdiction, because the scope of 10.20.4 is itself so limited.

THE HONORABLE MR. FORTIER: Yes.

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

THE HONORABLE MR. FORTIER: This would be dealt with——

MS. MENAKER: [Interposing] It would be dealt with,——

THE HONORABLE MR. FORTIER: —with the
merits?

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

THE HONORABLE MR. FORTIER: With liability?

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

THE HONORABLE MR. FORTIER: I understand.

MR. MOSER: Clear enough?

THE HONORABLE MR. FORTIER: Thank you.

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

MR. KEHOE: Yes, Mr. President, we -- we don't disagree with much of what Ms. Menaker has said, as far as interpreting the treaty. We agree that a party could bring a jurisdictional objection, together with a 10.20.4 objection. As Ms. Menaker just said, the scope of 10.20.4 is very -- is so limited. It is focused on failure to state a claim. So, we are now bringing jurisdictional objections into this initial phase. We didn't understand this. We have asked, a lot, and this is the first time we
have really gotten a very good and detailed explanation. We would never agree to this overall schedule, and we do not agree to this overall schedule, if jurisdictional arguments are going to be included in an initial submission that is designed to -- to focus only on failure to state a claim.

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

So, we object -- we agree that the treaty would allow such a process, of hearing jurisdiction and failure to state a claim at the same time. And if that -- if Peru would like to do it that way, we can go back to the drawing
board. We are very concerned with both the timing of this, a very short period of time to deal with jurisdictional issues, and also two bites at the apple. The issue of facts is irrelevant here. The facts are assumed to be true, based on our Statement of Claim, for a 10.20.4. Whether the facts are true or not, is irrelevant for the 10.20.4 application.

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

MR. LANDAU: Can I ask a question?

MR. MOSER: Yes, Mr. Landau.

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

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

MR. LANDAU: In mandatory terms.

MR. MOSER: Yes.

MR. LANDAU: It seems to be, it is without prejudice, under here 10.20.4, without prejudice to a tribunal authority, to do what it ordinarily may choose to do, without prejudice to that. It seems to give a right to a Respondent, to raise this kind of objection. And if -- if -- so, if the Respondent has that right, then looking further at that, what the process is, it then says that the tribunal -- such an objection shall be submitted as soon as possible, with a timeframe. So, in no event -- no event later than the date the tribunal fixes for the Respondent to submit its counter
memorial. So, if that right is then exercised, under B it says the tribunal shall suspend any proceedings on the merits and establish a schedule. So, what is the room for maneuvering actually?

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

MR. LANDAU: Right.

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

MR. MOSER: Hence your bracket, right?

MR. KEHOE: Yes.

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

MS. MENAKER: Yes, because although Claimant began by saying that he agrees with much of what we stated, including with respect to the scope, of 10.20.4, I mean his comments now are somewhat contradictory. Because then he
is saying, well, I don't disagree that it's mandatory, that you need to bifurcate this preliminary phase, with respect to 10.20.4, but not with respect to jurisdictional arguments. But as we just discussed, some types of jurisdictional objections do fall within 10.20.4.

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

MS. MENAKER: Okay.

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

MS. MENAKER: Well, that's -- that is the issue that I just spoke about, and I think that I have clearly shown that the language of the article itself contemplates certain types of jurisdictional objections. Subparagraph D certainly makes clear that objections as to the tribunal's competence, which includes jurisdictional objections, must be able to fall within 10.20 or otherwise you would never be able to have waived your right by not including them in your 10.20 application. And the RDC
versus Guatemala tribunal clearly thought that jurisdictional objections, for which there were no disputed facts, fell within 10.20.4 and they issued a second Decision on jurisdiction, under 10.20.4.

So, I think all of that makes clear, and that's why really it wasn't until last night that I understood the scope of their objection, on this part of the schedule, which is when those brackets were added. Because it was never our understanding that 10.20.4 was limited in with regard to the way he is saying that, or that we had in any way agreed not to raise the types of jurisdictional objections that fall within that article, under that article. So, we have agreed to do that and as part of the compromise, on the overall schedule, we agreed, like I said, later, not to seek bifurcation for other jurisdictional objections that we could have done had we wanted to wait until after they file the memorial and when we filed our counter memorial, included jurisdictional objections and sought bifurcation. And that is a very significant compromise. And we did that, you know, on the basis of the overall schedule. So,
I just, again I, you know don't -- I think that
the treaty is clear, as to its scope.

As far as our so called hiding the ball,
we are certainly under no obligation, at this
point in time, to preview any objection we may
or may not have. All we have is a Request for
Arbitration. That is about 20 pages. We
haven't seen their memorial. You know, all --
both the rules and the treaty certainly give us
the time to determine later. So, that -- that
really is not an issue, that they don't know the
-- the scope of the objection at the time. And-
-
MR. HAMILTON: [Interposing] And just
to underscore, it was a significant effort, on
Respondent's part, that we gave up what was in
the first version that went to the tribunal,
which was Article 10.20.4 plus reserving the
possibility that we may seek bifurcation.

MR. MOSER: Yes.

MR. HAMILTON: And that was a long and
extensive process that we went through, on our
end, with all relevant participants, to reach
the decision to abandon that possibility, which
we have done. And is reflected in the schedule.
And beyond that, it is not for us sitting here
today to try to rework what the treaty says as
`to this Article -- .

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

MR. MOSER: Mr. Fortier has a comment.

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

MR. KEHOE: It is either a
misunderstanding, sir, or -- I believe that's
right, because when I -- when I just heard
counsel say that this is a new issue that they
just heard of, we raised this issue on the very
first call, with this language. I said
jurisdic-- 10.b.20.4 is different than
jurisdiction. There was a colloquy. We kept
asking counsel or -- or the Claimant's counsel
to take out the bracketed language that was
causing the confusion, and that wasn't done. So,
at the end of the day, I think you are
absolutely right. I think that there is a fundamental misunderstanding between the parties, as to what 10.20.4 would be and if it includes jurisdictional objections, which it can, if we all agree to a process--

THE HONORABLE MR. FORTIER:

[Interposing] You concede that?

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

MR. MOSER: Mr. Landau wants to comment.

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

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

MR. MOSER: [Interposing] Other objections.

MR. KEHOE: -jurisdictional objections,
you may bring a 10.20.4 which is that as a matter of law a claim is not a claim for which an award in favor of the Claimant may be made under Article 10.26. When we turn to 10.26, it is caption awards, and it says where a tribunal makes a final award against a Respondent, the tribunal may award separately or in combination only monetary damages, and interest, and restitution. So, if we were asking for specific performance, a 10.4, 10.20.4 would be made. Failure to state a claim under 10.26, or not, but if we were, that would be a legitimate claim.

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

MR. MOSER: And your argument is that it is implied, in the language of the treaty, that you would have that right to bring that
jurisdictional objection, in any event?

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

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

    MS. MENAKER: So, if there was--

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

    MR. KEHOE: I absolutely do not accept it.

    MR. MOSER: You do not.

    MR. KEHOE: I don't believe the treaty says that. And the enabling legislation describes this 10.20.4 process, it says "in addition the chapter includes provisions similar to those used in U.S. Courts, to dispose quickly of claims a tribunal finds to be frivolous."
MS. MENAKER: Well, let me--

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

MS. MENAKER: Let me just throw something out. What if in your statement of claim, your request, you had written Renco, Inc., the Claimant, Renco Group, Inc. is incorporated under the laws of France. So, and everything else remained the same. And you brought this claim. Why could we not, pursuant to this language, bring a 10.20.4 objection, and say as a matter of law, this tribunal cannot enter an award in your favor. Now, also, isn't that a jurisdictional objection? Doesn't the tribunal lack jurisdiction over the claim because you are not an investor within the meaning of the treaty? Yes. So, it is a jurisdictional objection. It clearly falls under 10.20.4 and yet there are no disputed facts. Because the tribunal, in determining that -- that jurisdictional objection, is not going to inquire into your nationality. It's not as if you alleged that Renco was a U.S. national and we are bringing in, introducing evidence, and we want to show that they are not a U.S. national
or something like that. They are just looking at the face of your request and they would say "well, no we are assuming all of the allegations is true. And I think there, clearly it is a jurisdictional objection and it is clearly under 10.20.4.

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

MR. KEHOE: May I respond?

MR. MOSER: Please.

MR. KEHOE: I would disagree that in that scenario, which is not the case here, but I would disagree that in that scenario the allegation -- that would be a 10.20.4 dispute. That would be a jurisdictional dispute, period. I know the facts are assumed to be true, and if the tribunal was concerned with its jurisdiction, then it would have a jurisdictional phase. If we understood, when negotiating all of this, that competence and jurisdiction and significant issues were going to be encompassed in a very short time period, without us even knowing what they were, in contravention of what we think the
treaty says, we never would have agreed to this. And we don't think that jurisdiction fits within `10.20.4, even under the hypothetical.

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

MR. KEHOE: [Interposing] 10.20.4e?

MR. LANDAU: D--

[Crosstalk]

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

MR. KEHOE: I believe this was a -- a -- I would propose a belt and suspenders confirmation that a 10.20.4 application, which is designed to very quickly decide -- resolve frivolous claims, and which by admission of Peru is very narrow in scope, that someone wouldn't come in and argue that you had to make jurisdictional objections at that time. I think this is just to confirm that -- exactly that to the extent that anyone is confusing this with jurisdiction, please know this is not jurisdiction. You can make this application,
without worrying about any jurisdictional arguments. It is designed to focus on claims as set forth in the Notice of Arbitration; there is no reason for a memorial on the merits, to respond to a claim.

MR. LANDAU: I see.

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

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

MS. MENAKER: As to competence.

MR. KEHOE: As to competence, but--

MS. MENAKER: [Interposing] Because as to competence, right, it does not waive any objection as to competence because -- now read because it did not -- right? It says did or did not, but focus on the did not -- so a Respondent does not waive any objection as to competence
simply because it did not raise an objection under this paragraph. An objection as to competence under this paragraph, which means you can bring an objection, as to competence, under this paragraph, which is 10.20.4.

MR. MOSER: Can I just -- sorry.

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

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

MR. KEHOE: [Interposing] Their understanding.

MR. MOSER: Right. Right. Now, that we have it out on the table, how would you
change the timing?

    MR. KEHOE: I would--

  

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

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

    MR. MOSER: Right.

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

    MR. MOSER: Sure.

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

    MR. MOSER: Mm hmm.

    MR. KEHOE: If Peru insists on bringing jurisdictional objections, together with a
10.20.4 application, we would propose then that
they bring them all together at the same time,
and we will -- we will adjust this schedule to
accommodate that, and then we -- we increase it
and then we can reduce the amount of time needed
for briefing on liability, down below, where we
are at 26 weeks each, we should reduce that time
because we will have a jurisdictional
determination. We will still submit our
memorial on liability and jurisdiction. That
would stay the same. If Peru wishes to bring
jurisdictional objections, together with a
10.20.4 application, we would not object to that
and we would allow for a -- we would require
much more significant schedule. And we would
pick up with the rest of the schedule from --
that we would have to then develop a new
schedule for a hearing on the merits.

MR. MOSER: Right. Right.

MR. KEHOE: It's bifurcating the--

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

MR. HAMILTON: We wouldn't -- well, a
couple of comments. We would not see that as a
solution, although I have some comments
hopefully aimed at facilitating greater understanding. The first is that we have repeatedly heard that, you know, for us what triggered this was the bracketed language that came in yesterday.

MR. MOSER: Yes.

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

The second thing was the possibility of bifurcation. The further possibility, as would not be uncommon, that in a counter memorial, we would raise a jurisdictional objection and then
seek bifurcation. In other words, the first
draft that went to you, left -- we left open to
ourselves -- Peru left open to itself, to be
more precise, because these positions depend on
various consultations, the scenario of 10.20.4,
which obviously is a right that Peru has, and
the possibility of seeking bifurcation at the
time of the counter memorial, with respect to
other types of issues. We have abandoned that.
That was a long process that we have been
through over the past three weeks to get to that
point.

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

MR. MOSER: Facts, yeah.

MR. HAMILTON: And so, it certainly
wouldn't be appropriate to then say well, we
have to say any potential scenario. And so, the final comment I would make is that if we have this phase, which is a fairly expedited phase, in the scheme of things, it's not a one year phase or something like that, if Respondent, in its response, its answer to our submission, under Article 10.20.4, thinks that we have somehow gone outside the scope of 10.20.4 in a manner that is problematic or abusive, they certainly will say that in their brief. And then we will submit reply and rejoinder as to that and the tribunal will so -- so decide.

MS. MENAKER: And the only other--

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

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

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

MS. MENAKER: If I could just note one other problem that I see with the proposal that we would raise all jurisdictional arguments in this preliminary phase, other than what Mr.
Hamilton was just saying about discovery, is that I mean some jurisdictional arguments, by their very nature, are intertwined with the merits. And that's why, for some, even Respondents don't ever seek bifurcation, because they just don't think it would be efficient. And so, that just wouldn't make sense. We might not be in a position to do that. I don't know if we have any such objections, at this time, but certainly we couldn't waive our right to bring them later.

MR. MOSER: Okay, thank you.

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

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

MR. HAMILTON: -for consultations all around?

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

MR. KEHOE: Including on that timing issue?

MR. HAMILTON: Yes.

MR. KEHOE: Thank you.

[END First_Session__Audio_Recording__Part_2.mp3]
MR. KEHOE: We have nothing to report. We did, as always, have a cooperative and professional conversation about it, but we did not reach any -- any agreement. I think it's -- unless the tribunal has something to say, I think it's my turn to respond, to what we heard.

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

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

With respect to the -- the jurisdictional issue and when it should be
decided, and we don't have to go back and forth about where we got where we are, but Respondent proposes to file, even under this schedule, a counter memorial on liability, including any counter claims and or jurisdictional objections. That's in the sixth or seventh box. And then we will have document production, and then we will have briefing on liability and jurisdiction, with the Claimant's reply and the Respondent's rejoinder.

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

We have been given an example that
hypothetically, if Renco had claimed to be a French company, that that would be an appropriate issue to raise under 10.20.4, because Renco would not be an investor. We disagree with that. We think that is a quintessential jurisdictional argument, whether or not Renco is an investor. That should be handled in a jurisdictional phase.

It is inconceivable that we would respond and have a jurisdictional phase -- a preliminary jurisdictional phase, in the short time period on unknown jurisdictional arguments. The tribunal would be giving perhaps some type of advisory opinions or -- or rulings that would then dictate and inform and influence the actual jurisdictional phase. It is two bites at the apple, or at the very least it is -- it is -- how should I say this -- it is sort of pulling out the -- the tribunal, on jurisdictional issues. And if we were to try to object, at the outset, and say this is really not 10.20.4, this is jurisdiction, that would be a major issue that we -- we would then be fighting about in this very short time period and the entire schedule would be ruined.
You know, one proposal that one might argue is well, why doesn't Claimant -- why don't you just wait and see, if they are going to file jurisdictional objections. And we deal with it then. The reason for that is we have a procedural schedule, so that we can have some certainly in these proceedings. We all have other cases. We all have other things to do. And that will become the tail wagging the dog. If we are going to have this dispute, let's have it please now. Let us know whether you would like to have jurisdictional arguments up front, if you think it is required. And if so, let's redo the schedule. If you don't think that jurisdictional arguments are required, with a 10.20.4, and Peru does not wish to make all of them at the same time, because of this document production issue, then we propose to keep the schedule the way that it is.

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

MR. HAMILTON: Thank you, Mr. President and thank you to our colleagues for -- for our sidebar, during the break. It is our view, first of all, that the parties have made
significant progress through a great investment
of time, to get to the overall schedule that we
have, including the compromises by each side,
including as I have emphasized Respondent's
decision to -- as one phrase was used, in the
internal deliberations, cave in, as to
preserving the possibility of seeking a full
blown bifurcation on jurisdiction, apart from
10.20.4. We have abandoned that.

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

Beyond that, we are not going to either
A; agree to circumvent rights that Respondent
already has, set forth in the language of the
treaty, as to Article 10.20.4. That's obviously
not what we -- we would be in no position to do that, number one. Number two, with respect to the scope of what we would submit; it would be incumbent upon Respondent to say this is an Article 10.20.4 submission. This is what 10.20.4 means. This is the objection that we are raising in that context. They would respond to that. We have already accounted for a reply and rejoinder. And then the tribunal would have an opportunity to decide.

One thing, again, that we have made very clear, is that this is limited with respect to facts, as reflected in the schedule, by the document production coming later. And so, we are having difficulty seeing what -- what we could do to compromise, other than if they want more time for this somehow. Because we have the right that we have under the treaty, with respect to this phase. And we have tried to find an approach to make it -- we thought, you know we are the ones who proposed the reply and rejoinder thinking that that would be in the interest of both sides, to -- to make sure that the phase was fleshed out. And if, as in any phase, it happens, even in regular
jurisdictional phases, Respondent might raise something, and a tribunal might decide we are not deciding this. Or this doesn't fit within the scope of this phase or the like. And so you could so decide that, or defer, and that happens too. Or determine that it requires something that is not within that particular phase. We would not, obviously, be seeking to raise something that we don't think is within the scope of what the treaty provides.

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

MR. MOSER: All right. Anything further?

MR. KEHOE: Briefly.

MR. MOSER: Yes, Mr. Kehoe?

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

MR. MOSER: [Interposing] Yes.
MR. KEHOE: -treaty says. But they are arguing that document production is required before they are able to make a 10.20.4 submission.

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

MR. KEHOE: 10.20.4--

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

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

MR. HAMILTON: No.

MS. MENAKER: No.

MR. MOSER: You can say it out loud.

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


MALE VOICE: -arguments.

MS. MENAKER: Theoretically.

MR. KEHOE: But that -- that's my point.
(Crosstalk)

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

MR. KEHOE: Okay, thank you.

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

MR. KEHOE: Yeah, my understanding is that 10.20.4, as we have stated previously, is a question of law, for which the facts are assumed to be true. If that is the case, the current schedule is -- is acceptable to the Claimants, because it will be limited to questions that do not include jurisdictional objections. They will be limited to failure to state a claim upon which an award can be granted under 10.26. To the extent that the substantive cause of action or the request in our Notice of Arbitration, does not comport with 10.26, they will make that argument. That is a different issue altogether from jurisdictional objections. And to the extent that jurisdictional objections are going to be subsumed within 10.20.4, we would ask that all jurisdictional objections be addressed at the same time. If that requires document
production, even though a 10.20.4 is as a matter of law, but if jurisdiction is going to be "rolled in, then we are amenable to having some type of a jurisdictional bifurcation, after the document production or whatever. What we oppose is a piecemeal jurisdictional submission by the Respondent, beginning with 10.20.4.

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

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

MR. MOSER: Yes.

MR. HAMILTON: I just want to be clear, nothing that we say today means anything with respect to Article 10.20.4, except that we think it applies and it says what it says. We are not interested in using a calendar annex to include brackets, to characterize what it -- what it means. It states what it states, and we have provided a definitive phase to accommodate that and bring clarify for both sides, as to what that means. And we have described how, as a matter of Due Process, we would raise any such objection, within the scope of 10.20.4. We are
not interested through this of drawing boxes or
I think that there may be use of terminology
`that is trying to limit or change -- we are not
going to limit or change what we already have.
There is no basis for that.

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

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

MS. MENAKER: Sure. No, I didn't
intend to reiterate the arguments, other than to
say we have already said that we disagree with their characterization of 10.20.4. So, we are not going to agree to limit it in that nothing that could be characterized as jurisdictional could be made, as an objection, under that Article. Nor do we agree that we would have to make all of our jurisdictional objections at once, because 10.20.4 I mean d, expressly gives us the right not to do that. It says that we don't waive our right to do that. So, we are not agreeing to deviate from the treaty. And so, absent that agreement, I don't see how we can do anything other than what the treaty provides. And if their concern is that there was a misunderstanding between the parties, as to the scope of 10.20.4, and that they think that that phase deserves more time, then that is certainly something we can discuss. But I don't see otherwise the other options won't work, which is other than to put all -- agree to do all jurisdictional objections, you know afterwards or before or to limit the phase in some way. That we don't agree to. But if he wants to talk about timing, if you are concerned that it's too constricted, you know that is something we can
MR. KEHOE: All right. We are -- I take your signal and we are prepared to break whenever you are.

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

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

MR. MOSER: [Interposing] Yes. Yes.

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

MR. MOSER: Yes.

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

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

MR. MOSER: [Interposing] I see.

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

MR. MOSER: [Interposing] Okay.
MR. KEHOE: -from the end of -- 20
weeks from the end of document production, which
was important to us, and we are thankful, and we
have agreed to 26 weeks, so there is some
symmetry with the 26 all the way down.

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

MR. KEHOE: We sure do.

MR. MOSER: We sure do. All right.

Gentlemen, and ladies, where I think the
tribunal sees the day and the -- we have three
things in our basket. If we could perhaps
invite you to take a look at. The first one
where we didn't reach agreement at all is on the
issue of place of arbitration. You will
remember that comes under Section 8. The
tribunal's thinking, at this stage, is that what
we would like to do is to put both The Hague and
Bogota outside the box. And what we would do is
invite you please to focus on Paris or Geneva.
We would also like to say now, giving you an
indication, that with respect to the place of
actual hearings, and other meetings, subject
again to consulting with the parties and hearing
further from you, but in principle, noting the
concerns that have been raised, about convenience and so on and so forth, we would give you the indication now that the tribunal would be open to considering a venue somewhere in the Americas, for actually holding hearings. Although the legal place of the arbitration, as I say, we would ask you to please focus on either Paris or Geneva. Is that clear enough?

MR. KEHOE: Yes, thank you.

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

The third point, of course, is the last one in our basket, and that is what we have been discussing for the last hour plus. We would invite you please to try again, in view of everything that has been said, perhaps -- you can perhaps walk away and -- and get a bit of
space away from the discussion and reconsider. Try again to see if you can't reach agreement. 
`If you cannot, what we would like to do is to hear from you, let's say within the next seven days, in no more than five pages each, how you see these particular issues and in particular the 10.20.4 and - and/or jurisdiction issue, if I may characterize it as that. How you see that issue and to provide us with your own concrete proposal, for how we can best move forward. 
Your own concrete proposal about how we can best move forward, and that, of course, I am referring to the timetable. When I say your own concrete proposal, I mean the full timetable.

MR. KEHOE: Thank you.

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

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

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

MR. KEHOE: No, I don't think you
missed it. Just a clarification. So, with respect to the 10.20 sub four--

MR. MOSER: [Interposing] Yes?

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

MR. MOSER: [Interposing] Yes.

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

MR. MOSER: [Interposing] Yes.

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

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

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

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

MR. MOSER: [Interposing] Of course.

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

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

MR. MOSER: Well, that is entirely up
to you gentlemen.

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

MR. MOSER: Yes, I understand.

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

MR. MOSER: That seems fair.

MALE VOICE: Yeah, that does.

MR. MOSER: Mr. Fortier? Yeah?

THE HONORABLE MR. FORTIER: Yes, I agree.

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

MALE VOICE: And then, if necessary--

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

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

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

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

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

MR. MOSER: Yes.

MR. HAMILTON: Okay.

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

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

MR. MOSER: Mr. Kehoe?
MR. KEHOE: I'm fine with that.

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

MR. KEHOE: I do not object to that.

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

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

MR. MOSER: [Interposing] Yes?

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

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

MR. MOSER: [Interposing] First session?

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

MR. HAMILTON: [Interposing] Mr. Hamilton?
MR. KEHOE: -so we have some certainty on all this.

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

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

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

MR. MOSER: As opposed to--

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

(Crosstalk)

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

MR. HAMILTON: Okay. Agreed.

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

MR. KEHOE: At least a few.

THE HONORABLE MR. FORTIER: Not just the next seven days.
MR. KEHOE: Thank you, Mr. President.

We appreciate it.

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

MR. HAMILTON: Thank you.

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

MR. HAMILTON: Thank you very much.

Safe travels.

[END First_Session_-_Audio_RECORDING_-_Part_3.mp3]
CERTIFICATE

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Date: December 20, 2013
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<tr>
<th><strong>A</strong></th>
<th>41:22</th>
<th>adding 16:22</th>
<th>122:2</th>
<th>180:23</th>
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</thead>
<tbody>
<tr>
<td>abandon</td>
<td>access 73:8</td>
<td>56:20</td>
<td>advice 35:16</td>
<td>182:12,17</td>
</tr>
<tr>
<td>abandoned</td>
<td>124:10</td>
<td>addition 156:23</td>
<td>184:17,19</td>
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<td>ability</td>
<td>164:14</td>
<td>additional 144:4</td>
<td>185:18,23</td>
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<td>9:14</td>
<td>165:9</td>
<td>address 9:2</td>
<td>186:11</td>
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<td>21:5</td>
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<td>117:15,19</td>
<td>86:19</td>
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<td>121:13,16</td>
<td>125:17,18</td>
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<td>158:9</td>
<td>129:19</td>
<td>137:15,19</td>
<td>91:12</td>
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<td>133:3,6</td>
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<td>152:24</td>
<td>156:16,16</td>
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<td>34:24</td>
<td>172:17,18</td>
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<td>48:25</td>
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<td>159:3:170:1</td>
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<td>31:15</td>
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<td>126:2:126:2</td>
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<td>120:23:120:23</td>
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<td>44:20:44:20</td>
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<td>90:9:90:9:90:17</td>
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<td>38:1:116:13:38:1</td>
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DAVID FELDMAN WORLDWIDE, INC.
450 Seventh Avenue - Ste 500, New York, NY 10123  1.800.642.1099
jurisdiction
jurisdictional

Justice 68:19

jurisdictions 29:6 46:24
49:13

jurisdictional 120:17
121:10,24
122:3,5,13
136:22
137:1,2
138:4,25
139:18,19
139:20
140:5,7,19
141:11,14
142:3,6,14
142:16
143:16

jurisdiction 40:15 41:13
120:8,12,16
122:8 123:2
136:11
137:12,24
139:10
140:21
141:1,10,15
141:17,22
143:18,21
144:6
146:23
147:11,12
151:4
153:21
154:17
157:15
158:19,22
159:2,24,25
161:12
162:22
163:10
165:16
168:18
169:8,14
170:22
172:8 177:2
183:7

July 7:23
June 7:23

Justice 68:19

justifiable 121:9

Justice 68:19

Justice 68:19
<table>
<thead>
<tr>
<th>Word</th>
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DAVID FELDMAN WORLDWIDE, INC.
450 Seventh Avenue - Ste 500, New York, NY 10123  1.800.642.1099
<p>| -- | rest 118:12 | 75:1 76:8 | 155:25 | 133:4 | saying 15:20 |
| 160:10,24 | 78:2,25 | 162:9 | 163:19,19 | 90:25 |
| 166:5 | 79:2,8,9,15 | 164:19,21 | 164:19,21 |
| 169:2,16 | 83:6 86:4 | 167:10 | 167:10 |
| 172:23 | 86:13,13 | 168:12 | 168:12 |
| 177:7 | 89:10 93:1 | 173:18 | 173:18 |
| respondent's | 93:10,13 | 174:16 | 174:16 |
| 1:5,15 16:8 | 94:3 95:4 | 177:8 179:9 | 177:8 179:9 |
| 33:24 48:14 | 97:16 | 179:10 | 179:10 |
| 106:20 | 103:6,18 | 182:10 | 182:10 |
| 119:13 | 105:2,8,11 | 185:20 | 185:20 |
| 121:24 | 105:12,25 | 186:20 | 186:20 |
| 53:2 54:18 | 108:14 | 188:16 | 188:16 |
| 106:24 | 111:21,25 | 191:9 | 191:9 |
| 107:11,13 | 112:14,24 | 192:4 | 192:4 |
| 119:11,15 | 119:1,3,5 | 193:9 | 193:9 |
| 126:15 | 121:22 | 193:9 | 193:9 |
| 129:17 | 122:13 | 193:9 | 193:9 |
| 130:17 | 123:12 | 193:9 | 193:9 |
| 169:9,12 | 131:15,16 | 193:9 | 193:9 |
| 182:14 | 132:5,12 | 193:9 | 193:9 |
| 124:3 | 142:18 | 193:9 | 193:9 |
| response | 143:4 | 145:3,10,23 | 193:9 | 193:9 |
| 104:4 | 145:3,3,7 | 193:9 | 193:9 |
| responses | 149:1,11,17 | 193:9 | 193:9 |
| 143:6 | 150:24 | 193:9 | 193:9 |
| responsive | 153:16 | 193:9 | 193:9 |</p>
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