CENTRO INTERNACIONAL DE ARREGLO DE DIFERENCIAS RELATIVAS A INVERSIONES

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

Contra

REPÚBLICA DE PERÚ
Demandada

(Caso N° ARB/19/28)

AUDIENCIA SOBRE LA JURISDICCIÓN Y EL FONDO
VERSIÓN FLOOR

Día 1
Lunes 7 de marzo de 2022
Videollamada Zoom

COMPOSICIÓN DEL TRIBUNAL ARBITRAL:
Sr. ALBERT JAN VAN DEN BERG, Presidente
Sr. GUIDO SANTIAGO TAWIL, Coárbitro
Sr. RAÚL E. VINUESA, Coárbitro

SECRETARIA DEL TRIBUNAL ARBITRAL:
Sra. ANA CONOVER
Sr. FEDERICO SALON-KAJGANICH

ASITENTE DEL TRIBUNAL ARBITRAL:
Sra. EMILY HAY

ESTENOTIPISTAS:
Leandro Iezzi, TP-TC
Virgilio Dante Rinaldi, TP-TC
D-R Esteno
Colombres 566
Ciudad Autónoma de Buenos Aires,
República Argentina
(1218ABD)
info@dresteno.com.ar
www.dresteno.com.ar
(5411) 4957-0083

En representación de las demandantes:

Kenneth B. Reisenfeld (BakerHostetler LLP)
Mark A. Cymrot (BakerHostetler LLP)
Gonzalo S. Zeballos (BakerHostetler LLP)
Marco Molina (BakerHostetler LLP)
Analía González (BakerHostetler LLP)
Carlos Ramos-Mrosovsky (BakerHostetler LLP)
James J. East, Jr. (BakerHostetler LLP)
Nahila Cortés (BakerHostetler LLP)
Diego Zúñiga (BakerHostetler LLP)
Michael Jacobson (Latam Hydro LLC)
Jeffrey M. Lepon (Latam Hydro LLC)
Andrés Bartrina (Latam Hydro LLC)
Licy Benzaquén (CH Mamacocha S.R.L.)
Stefan Sillen (Testigo)
Eduardo Benavides (Perito)
María Teresa Quiñones Alayza (Perito)
Pablo Ferreyros (Perito)
Mylene Jayme (Perito)
Andrea Cardani (Perito)
Santiago Dellepiane (Perito)

Julián Honowitz (Perito)
Peter Somi (Perito)
José Picos (Perito)
Matías Galarza (Perito)
Tom Beyer (TrialGraphix)

En representación de la demandada:
Paolo Di Rosa (Arnold & Porter)
Patricio Grané Labat (Arnold & Porter)
Amy Endicott (Arnold & Porter)
Álvaro Nistal (Arnold & Porter)
Claudia Taveras Alam (Arnold & Porter)
Cristina Arizmendi (Arnold & Porter)
Natalia Giraldo Carrillo (Arnold & Porter)
Julia Calderón Carcedo (Arnold & Porter)
Andrés Álvarez Calderón (Arnold & Porter)
Gabriela Guillén (Arnold & Porter)
Emily Betancourt (Arnold & Porter)
Hugo Forno Flórez (Garrigues)
Melissa Núñez Santti (Garrigues)
Kevin Villanueva (Garrigues)
Tomas Leonard (TZL Global)
Vanessa Rivas Plata Saldarriaga (Presidenta de la Comisión Especial)
Enrique Jesús Cabrera Gómez (Abogado de la Secretaria Técnica de la Comisión Especial)

Mónica Guerrero Acevedo (Abogada de la Secretaria Técnica de la Comisión Especial)
Mijail Cienfuegos Falcón (Abogado de la Secretaria Técnica de la Comisión Especial)
Érika Tuesta Vela (Abogada de la Secretaria Técnica de la Comisión Especial)
Giancarlo Coello Gadea (Abogado de la Dirección General de Electricidad del Ministerio de Energía y Minas)
Miguel Alemán Urteaga (Director de Negociaciones Económicas Internacionales del Ministerio de Relaciones Exteriores)
Giovanna Gómez Valdivia (Subdirectora de Organismos Económicos y Financieros Internacionales del Ministerio de Relaciones Exteriores)
Evelyn Vargas Soto (Especialista Legal de la Dirección de Negociaciones Económicas Internacionales del Ministerio de Relaciones Exteriores)

Francisco Ísmodes Mezzano (Testigo)
Ricardo Ampuero Llerena (Testigo)
Carlos Monteza (Perito)
Claudio Lava Cavassa (Perito)
David Vidal Panduro (Perito)
Matthew Shopp (Perito)
Kiran Sequeira (Perito)
Paul Baez (Perito)
Sydney Stein (Perito)
Abigail Alpert (Perito)

Partes fuera de la disputa:

Nicole Thornton (Departamento de Estado, Estados Unidos de América)

Lisa Grosh (Departamento de Estado, Estados Unidos de América)

John Daley (Departamento de Estado, Estados Unidos de América)

Margaret Sedgewick (Departamento de Estado, Estados Unidos de América)

Catherine Gibson (USTR, Estados Unidos de América)

Patrick Childress (USTR, Estados Unidos de América)

ÍNDICE

(9.04 am EST, Monday, 7 March 2022)

Housekeeping and procedural matters

THE PRESIDENT: I invite first Mr Reisenfeld, for the Claimants, is there any procedural matter you would like to raise?

MR REISENFELD: No, Mr President. We are ready to proceed.

THE PRESIDENT: Mr Grané?

MR GRANÉ: Nothing from Peru's side, thank you.

THE PRESIDENT: Thank you. I acknowledge we have received the slides from the Claimants for the opening and, Mr Reisenfeld, you may proceed with your team with the opening statements. You have two times 75 minutes.

Claimants' Opening Statements

by Mr Reisenfeld

MR REISENFELD: Thank you very much. Mr President, members of the Tribunal, distinguished counsel, on behalf of Claimants CHM and Latam Hydro and our entire Baker Hostetler team, we thank the Tribunal for its

diligence in reviewing the extensive submissions presented from the parties over the past two years.

During this morning's opening and throughout this hearing, we hope to personalise the tragic story of diligent US investors who relied upon express inducements and guarantees of the Republic of Peru, only to find its Mamacocha Project become the victim of regional political opposition and, ultimately, the central government's reversal of long-standing understandings of the parties, based upon the US-Peru Trade Promotion Agreement, the RER Promotion Law, the RER Contract and Peruvian Constitutional Administrative and Civil Law, all of which protect the investors from unfair and inequitable treatment and guaranteed transparent and consistent government decision-making.

At the outset I would like to stress what is only hinted at in the submissions. Everybody believed in the Mamacocha Project. Its

sponsors, Mr Michael Jacobson and Mr Gary Bengier, former eBay executives who had devoted the last two decades to combatting global warming, they believed in this project. The world-class team that they put together consisting of more than 150 years of experience in the renewable energy sector, they believed in this project. DEG and Innergex, the development bank and hydropower company that spent hundreds of thousands of dollars in diligence for the opportunity to partner with Claimants, they believed in this project.

The people of Ayo, who lived a few kilometres away from the project site and who petitioned the regional government of Arequipa to leave the project alone because its existence would have unlocked demonstrable economic potential and bettered their lives, they believed in the project.

The regional environmental authority in Arequipa, ARMA, who vetted the project on numerous occasions and who stood by the

environmental permits they issued even in the face of immense political opposition, it believed in this project.

And the central government, led by Peru's Ministry of Energy and Mines (MINEM), who awarded an RER contract to the project in 2013 issued two definitive concessions to the project and who held the project harmless from government interference for nearly five years, it, too, believed in the project, at least until it pivoted in December 2018, six years after the project had begun.

Had everything gone according to plan, we would be celebrating the project's second anniversary of commercial operation. But things didn't go according to plan. On March 14, 2017, regional politicians in Arequipa commenced a strike suit against the project to annul its environmental permits, and this action of the region's top politicians, the governor and council members, quickly spawned other "Me too" regional government obstruction

that drove away the project's financiers and investors, subjected their lawyer to criminal charges, and became an unexpected tug of war between the regional government and the Mamacocha Project.

For the next 21 months Claimants did everything they could to save the project. They fought for and obtained four suspensions of the project's work schedule, buying time for the special commission that represented Peru in international disputes to rein in the unfounded actions of the regional government and achieve a political resolution.

These efforts ultimately succeeded, and the existential threat posed by the RGA lawsuit was abated. All that was left for the project to get on track and succeed was for MINEM to issue time extensions to compensate for the time that the regional government's opposition had robbed from the project's work schedule and payment terms.

Throughout the period of negotiations with

the Special Commission and its entire course of dealings since the beginning of the project, MINEM gave Claimants every confidence that it would issue these essential compensatory extensions of time. After all, MINEM had extended the project on two earlier occasions to compensate for government delays and interferences, thereby establishing a contractual precedent and course of dealing confirming the understanding of all parties that Claimants would be held harmless from such government delays and interferences.

As this slide demonstrates [3] Claimants invested heavily in reliance on the contract extensions, including Addenda 1 and 2, and four additional extensions issued during the direct negotiations period. All were designed to extend the time deadlines in the RER Contract in order to hold Claimants harmless from the impacts of the government's various delays and interferences. And as shown in this chart, Claimants invested heavily in reasonable

reliance on all six contract Addenda.

And when, in November 11, 2018, MINEM again announced its legal position that extensions were necessary under the legal framework underlying the RER promotion, as well as the TPA, Claimants continued investing. But less than six weeks later, in December of 2018, to the surprise of all, MINEM flip-flopped, reversing its long-held position that a contractor who had been diligent would be held harmless from the damage caused by government delays and interventions.

In December 2018, Peru announced for the very first time in the five-year history of the RER Contract that Claimants had assumed "all risks" related to the Mamacocha Project, including the risk that the State and its instrumentalities could interfere with the concessionaire's contract performance with impunity.

When MINEM executed this pivot, the Mamacocha Project had run out of time. It was

impossible to build and abruptly came to an unceremonious end.

In my presentation of the facts I'll try to cover the key parts of this wholly avoidable, tragic story. But before I do I want to show you what is on the screen. This afternoon you undoubtedly will hear from Peru's lawyers that the RGA lawsuit was well founded and was a reasonable exercise of the regional government's power to block projects in the region that had issues with their environmental permits. But here is what the record actually shows. The lawyer who signed the lawsuit at the top left admitted just a few months later that she actually had recommended against its filing because it was unfounded. She believed it exposed Peru to reputational and economic harm and recommended that the regional governor investigate the regional politicians who forced her to file it.

One of those politicians, Mr Edy Medina in the bottom right, was caught on audio telling

his supporters that the environmental allegations in this suit were so silly and really wrong that his supporters should avoid talking about them in public. The region's top environmental government official, Mr Sanz at the bottom left, said in a press interview soon after the lawsuit's filing that he had not seen any technical study that supported the regional government's unfounded claims about the project, and that the regional government should just leave the project alone. And the administrative lawyer that Peru hired to opine on the RGA lawsuit's allegations (at the top right of that screen) confirmed to the state in a confidential legal memorandum that Peru produced in this arbitration, that the lawsuit was filed outside the statute of limitations, it lacked factual support, and advanced legal theories that were highly unlikely to succeed. We are all here today because of this government measure and nothing Peru would tell you this afternoon or throughout this hearing

will change the fact as accepted by each of these Peruvian government agents that the RGA lawsuit and the government resolutions authorising its commencement were completely and utterly arbitrary.

Following my factual overview my colleague, Ms Analia Gonzalez, will demonstrate that none of Peru's jurisdictional objections will undermine this Tribunal's jurisdiction to render judgment on all claims propounded by Claimants in this case. My colleague, Mr Carlos Ramos, will then explain that this is a classic case of sovereign promises made and sovereign promises broken, resulting in compensable liability under the TPA and customary international law for all injuries sustained.

My colleague, Mr Marco Molina, will then explain this is a simple contract case. Peru's interferences and reversals constituted material and compensable breaches of the RER promotion law, Peruvian constitution, RER

contract including its six modifications, and Peruvian law.

Finally my colleague, Mr Gonzalo Zeballos, will explain the legal basis and support for Claimants' request for full compensation for their claims.

By the end of this presentation and hearing we expect to establish that the Tribunal can choose from six equally viable legal pathways to find for Claimants in this case. But, first, I will address the facts and as seen in this overview chronology, our story can be told in three chapters which are depicted along the bottom axis.

The first chapter is the inducement and investment phase, and I'll talk about that in a moment. The second chapter is the interference and measures chapter, which encompasses five of the seven measures at issue. The third chapter is the litigation phase, which was started without warning when the central government effected its pivot in what proved to be the

final blow to the project. Here is the same overview in a narrative version.

I will first turn to the inducement phase. From 2012 to March of 2017 Claimants carefully evaluated the inducements offered by the government utilising leading global renewable energy experts, engineers and environmental expert.

The inducements were both legal and financial. In April 2006 the US and Peru had signed the TPA which entered into force in February of 2009. Peru and the US agreed to "ensure a predictable, legal and commercial framework for business and investment".

In 2008 Peru passed the RER Law which created the promotion programme. But for the TPA and the RER promotion Claimants would not have considered investing in Peru's RER sector. Notably, the RER Law preamble explains that the RER Law was intended to facilitate implementation of the TPA including its promotion of private investment.

The RER Law declared the development of new electric generation through the use of renewable energy resources of national interest and public necessity. The Law was designed to promote investments in small renewable energy projects to wean electricity generators off reliance on fossil fuels and protect the environment thereby.

The RER Law sought to achieve this objective by eliminating any barrier or obstacle for the development of RER projects and creating a legal framework that "encouraged" and "incentivised" these investments, and the financial incentives embodied in the RER Law and the RER Contract were quite significant and it was intended to and did attract foreign investors. It provided a guaranteed revenue stream for up to 20 years, the purpose of which was to allow the concessionaire to be able to get a non recourse loan to pay for construction. It provided assistance from the agency in charge of promotion, MINEM, during

the permitting phase of the project. It provided a right to adjudicate disputes valued at more than $20 million before ICSID in Washington DC, and it provided protections afforded by the TPA and all other applicable laws, including Peru's constitutional, administrative and civil laws.

Early in the project, from 2014 to 2016, these promises were put to the test when government entities delayed the permitting phase of the project by more than three years, which made it impossible for the project to meet its contract deadlines, which could have subjected it to potential penalties and the possibility of losing its RER Contract. But Peru followed through by issuing compensatory extensions that extended the work schedule under the contract and reaffirmed its obligation under the TPA and the underlying Peruvian legal framework to hold the project harmless from government delays and interferences. This is addendum 1, which

acknowledges that the concessionaire had been diligent, but the government had made it impossible to achieve financial closing for the project. Therefore, it provided compensatory extension of the work schedule.

This is addendum 2, which not only extended the work schedule but also extended the milestone deadline for Commercial Operation Start-up, otherwise described as COS.

Based upon these incentives, Claimants invested more than $20 million [slide 14] including internationally renowned engineering and design [slide 15] numerous environmental studies from international domestic environmental experts to ensure the project complied not only with the Peruvian environmental regulations, but also the more stringent environmental standards set forth in the Ecuador Principles, to which Claimants voluntarily committed.

Claimants invested over $360,000 in social initiatives, including the presence of 30

persons in offices in the villages surrounding the project, Ayo and Andagua, as well as in Lima and the City of Arequipa.

Claimants also invested in retaining expert legal advice from one of the top energy law firms in Peru. Its managing partner, , has more than 25 years advising Peruvian energy projects and has received the highest legal rankings from Chambers and Legal 500 in the field of Peruvian electricity law and regulations. In one of the most malicious measures, Peru tarnished his pristine reputation and sidelined him from helping with the project by pursuing a baseless criminal investigation against him.

Claimants also invested in much more prolonged permitting efforts than were provided under the Peruvian administrative law and the promotion programme. Claimants' delay expert, Mr John McTyre of HKA, studied these delays and concluded that Peru was exclusively responsible for all of the delays except for two days.

Peru has not presented any independent delay expert opinion to contest Mr McTyre's views.

The high point of the project was upon issuance of addendum 2 on January 3, 2017. And as you see from this slide [19] it kicked off a flurry of activity on the project, including a term sheet with Innergex and advanced negotiations with DEG. Innergex DEG and Innergex each expected to reach financial close soon after March 2017, and the parties targeted July 1, 2017 as the date when construction would begin. In his expert report, Dr Whalen, who is a noted project finance expert, having been the head of structured investments at leading development banks as well as leading commercial banks, opined that "it is my opinion that CHM was highly likely to have successfully executed project financing arrangements with DEG to enable it to fund the project in accordance with the RER Contract milestone schedule".

I want to turn to chapter 2, which is the

interference stage and the beginning of the measures. The first measure is the RGA lawsuit. No measure was more impactful. The RGA baselessly claimed in their lawsuit that the project's environmental permits were illegal because they purportedly were issued under procedures for projects that had a "minimal environmental impact", but the RGA contended the project would have a "significant environmental impact". And the RGA alleged other procedural irregularities relating to ARMA's issuance of the permits. These allegations were wholly baseless. Indeed, if you look at this slide, if you look below the line, every independent environmental expert who studied the project's expected environmental impact concluded that it would not be significant, and if you look above the line, every government official other than the RGA agreed. The RGA never conducted technical analysis to study the environmental -- the project's environmental impact; their

allegations were wholly made up out of whole cloth with the effect of sinking the project. And to underscore this point, as we've mentioned, the lead politician behind the lawsuit was caught on tape telling his supporters that the allegations were "silly" and "really wrong" and they "shouldn't talk about them". As already mentioned a couple months after the lawsuit Mr Sanz, the top environmental official in the regional government, said that there was no reason to oppose the project and he had not seen any report that supported the allegations in the RGA lawsuit.

The RGA's allegations were also debunked in real time. For example, the RGA lawsuit alleged that the local otter species would have been wiped out by this project. So eight independent otter experts from around the world, after an inspection of the project by some of them, issued a letter on November 17, 2017 confirming that the RGA's allegations were

baseless. As stated, the construction phase would have had no permanent disturbance to the lagoon fauna, and once in operation the hydroelectric plant will have no impact on the otter population.

The RGA's allegations about procedural irregularities were also discredited by Peru during the relevant period. The RGA alleged that the environmental classification and permits were approved by an ARMA sub office that had no authority to issue them, but just days after filing the lawsuit the RGA officials responsible for the lawsuit acknowledged in an interview that the same sub office may have issued environmental permits for more than 100 other projects, and the RGA never challenged any of those permits. Mamacocha was their only target.

The RGA's allegations about procedural irregularities were also tested in real time by Dr Moron, an administrative law expert hired by Peru to assess the RGA lawsuit's merits. In

December of 2017 he issued what we refer to as the Morón report holding that the procedural irregularities raised by the lawsuit were either unfounded or could not in any event be held against a private party that acted in good faith.

Significantly, the only procedural irregularity that Dr Moron found was that the RGA itself had brought its challenge after the statute of limitations had expired, rendering the lawsuit likely to fail. The issuance of the Morón report was such an emphatic refutation of the lawsuit that the RGA ordered the lawsuit's immediate dismissal, which occurred in less than a month.

In this arbitration, Peru's lawyers argue that this dismissal was merely done for good faith reasons, but the documents tell the different story, and this is the story that Peru's lawyers do not want you to hear. On December 14, 2017 the Special Commission sent a copy of the Morón report to the RGA governor

along with a cover letter that summarises the report's conclusions and relays the following: The RGA lawsuit could "harm ... the State's reputation" and cause the State to pay Claimants an award of at least $15 million, if not "substantially more", in an ICSID case.

The RGA itself would be financially responsible for "all costs and payments necessary to comply with the respective arbitration award, conciliation memorandum, or direct negotiation agreement".

Four days later the Arequipa regional governor, Ms Osorio, told the Regional Council that the Special Commission warned her that the RGA lawsuit was "highly unlikely to succeed" and exposed the RGA to substantial economic liability.

The governor then asked the Regional Council to grant her authority to withdraw the lawsuit by executive order "to safeguard the interests of the regional government of Arequipa and the State".

The Regional Council sent her that resolution the very next day. And the next document is one of the most powerful in this arbitration.

On December 21, 2017, the lawyer who had actually filed the RGA lawsuit wrote to the governor to tell her the following. First, she noted that she "had already pointed out" to the governor, presumably prior to the lawsuit's filing, that the lawsuit's likelihood of success "would be minimal" but her concerns had been ignored.

She then said she agreed with the Morón report's conclusions and believed it was highly likely that the RGA would be made to pay millions to CHM. Thus, the lawsuit had to be dismissed because it was "harmful to the public interest".

Third, she recommends that the governor should force the Regional Council to "provide support for and defend the validity" of the findings in the Regional Council report "which

it has not done thus far". And finally, and most strikingly, the Regional Attorney General recommends that the governor investigate the Regional Council members responsible for the lawsuit, as shown at the bottom of the excerpt.

And I want to note that the following words are in all caps and bolded in the original document. "SUCH EVASIVE POSITION SHOULD BE ASSESSED BY YOUR OFFICE IN DUE COURSE".

About a week later the governor signed an executive order dismissing the lawsuit, and during a press interview when she described why she had taken that position, she said the decision was necessary because the lawsuit was a time bomb and if it was not defused, it could require the RGA to pay 80 million soles and "could also carry criminal charges for causing economic damages to the State".

The governor also confirmed that the Ministry of Finance had "suggested to her" that the RGA should withdraw its lawsuit because it violated the investment protections under the

TPA. Even though the allegations in the lawsuit were completely baseless and it was ultimately withdrawn, its impact on the project cannot be overstated. The fact that the same government that had authorised and presided over the project was now actively trying to destroy it cast a black storm cloud over the project that scared away DEG, Innergex and any hope Claimants had to achieve the fast approaching financial closing milestone.

The timeline on the screen proves there was a causal link between filing of the RGA lawsuit and the withdrawal of support by the same backers who were ready to sign the deal in early March of 2017. The lawsuit had an implosive effect starting with the project sponsors who on March 25 and 26 called it a "showstopper" and a "snag". Innergex itself ended the negotiations on March 30 and April 28 and said it was no longer interested at all on May 23.

And this was followed, most startlingly, by

Mr Bengier, one of the co sponsors, confirming in June that he would no longer be putting in new investment money. All of that was a result of the RGA lawsuit.

Dr Whalen rendered the following unrebutted opinions in his expert report. He said in his opinion, no project finance lender would have reasonably proceeded with the financing after the filing of the lawsuit. Next slide [34].

The RGA's lawsuit impact is also confirmed by MINEM and the Special Commission's agreements to suspend the project from April 21, 2017 through September 30th of 2018, to permit intergovernment negotiations to take place to remove this obstacle.

The ministerial resolution that was issued to announce the suspension expressly explains that the purpose of suspending CHM's obligations was to "prevent the negative consequences against the assets" of CHM "from becoming worse".

In short, the RGA lawsuit is a paradigmatic

example of governmental interference in an infrastructure project. In this case it dealt a fatal blow, from which the project never recovered.

I'd like to turn to the second and fifth measures, the sham criminal investigation. The RGA's public attacks on the project spawned other copycat regional government measures against the project. The Arequipa environmental prosecutor, or AEP, commenced a criminal investigation project on March 24, 2017, a mere ten days after the RGA lawsuit was filed, and it's based on the exact same baseless allegations.

For about a year this investigation had little to no traction, and when the RGA dismissed its lawsuit in December 2017, the AEP should have followed suit and dismissed the criminal investigation. But on February 2, 2018, the prosecutor publicly announced it would formalise and continue its investigation. The AEP announced that the project's lead

energy lawyer, , was being investigated for "fraudulently collaborating" with ARMA officials in securing the environmental permits.

The case against is a total sham and a condemnable abuse of authority and the prosecutor's four-year pursuit of him, without even a specification of charges, violates due process. He is accused of criminally conspiring with ARMA officials to have issued fraudulent environmental permits, and what is the AEP's evidence to support this very serious accusation? Nothing.

After four years of investigation, all the prosecutor can show is that igned a winning request for reconsideration of the project's environmental classification. That's it. There is no evidence of any fraudulent collaboration.

In fact, the first time met the ARMA officials, with whom he allegedly collaborated, was during the virtual hearing in

the criminal proceeding, years after he allegedly colluded with them.

To make matters worse, and as a classic example of other due process deficiencies in this investigation, the criminal statute the AEP is relying upon to prosecute did not even exist at the time of the alleged wrongdoing. In other words, it is being applied retroactively against him.

The criminal proceeding, however unfounded, cast a reputational shadow over the project, which was of keen concern to the development institution DEG, among others, and sidelined from assisting the project any further. And most tragically this baseless proceeding has permanently tarnished 's career. He introduced a witness statement in this proceeding, which we commend for your attention. That is his final word on the criminal investigation measures because he was not asked to be cross-examined in this proceeding, so his witness statement is it.

I'd like to turn to the third and fourth measures, which were the AAA's arbitrary denial of the last remaining permit. The regulatory roller coaster inflicted by the AAA, which is the regional government water authority, further obstructed progress on the project. The dates and pattern of the AAA's obstruction track nearly completely the timing of the RGA's lawsuit commencement and withdrawal. First, on May 16, 2017, two months after the RGA lawsuit was filed, the AAA denied, for no legitimate reason, CHM's application for an essential water usage permit.

The AAA's sole task was to look at the schematics provided and confirm which structures were to be built within the marginal strip, a process that should have taken hours, not months, and which should have resulted in a prompt issuance of a permit.

On June 2, 2017, CHM appealed to the central water authority and obtained its support. The AAA then reversed its denial and issued the

civil works authorisation. But to the Claimants' dismay they issued a defective permit. So from July 17 through January 18, the AAA refused to fix the defective permit despite CHM's repeated requests which was de facto re-establishing its initial denial.

In December 2017 an administrative law tribunal ordered the AAA to reissue this permit without defects.

Finally, in January of 2018, the AAA finally issued the correct permit. It is not coincidental, in our view, that the AAA granted the civil works authorisation only after Governor Osorio ordered withdrawal of the RGA lawsuit in late December 2017. Each of the AAA's measures were arbitrary on their face, and they ensured the project could not advance because without this key permit in hand, neither DEG nor any financial institution would disperse money for construction, as was confirmed by Dr Whalen and the contemporaneous evidentiary record.

And so I'd like to turn to the third chapter. This was including the sixth and seventh measures and the pivot in December 2018. Even though the regional government's measures had delayed the project for months, making it impossible for the project to complete its contract milestones, Claimants still had the reason to hope the project could be resuscitated when the RGA lawsuit was finally withdrawn in January of 2018. After all, Peru had a clear obligation to hold CHM harmless from government interferences, as was demonstrated by Addenda 1 and 2, as well as the suspension of Addenda 3 to 6, and by January 2018 MINEM had told the Claimants at in-person meetings that it believed it had an obligation to extend the contract term date to account for the nearly five years of government interferences to that date that had reduced the guaranteed revenue term from 20 years down to 15 years.

On February 1, 2018, the Claimants,

therefore, filed for a third extension of time, not only to the COS date, but also to the term date, and they filed a second notice of intent on March 8, 2018 requesting both of these extensions to restore the full 20-year guaranteed revenue period.

Before responding to these requests, MINEM sought an expert opinion from long time outside counsel, Estudio Echecopar, to confirm whether Peru had a legal obligation to grant Claimants' request and on April 5 and 17, 2018, Estudio Echecoparissued two reports, which we call the Echecoparreports, and they concluded that MINEM had a legal obligation to extend both of these dates because Peru was responsible for the delays.

These reports also recommended that Peru should amend its regulations to make it crystal clear to all government officials that these extensions were necessary to conform with the RER Law.

Months later, in November of 2018, MINEM

adopted its outside counsel's recommendation and pre-published a draft Supreme Decree that made it clear that the extensions to both the work schedule and the term date were necessary to account for government interference. The statement of reasons that Peru published with the Supreme Decree made clear, just as the prior contract Addenda had and just as Echecoparhad made clear, that these extensions were completely consistent with the RER Law. But less than six weeks later, in December 2018, Peru pivoted and repudiated its legal obligations under the contract Addenda, the RER Law, and the TPA as follows.

On December 20th, Peru told Claimants it was abandoning the proposed Supreme Decree. On December 27 MINEM filed the Lima Arbitration in a bad faith effort to annul Addenda 1 and 2. In circumvention of this ICSID Tribunal's jurisdiction and an abusive effort at forum shopping, MINEM filed a dispute that was plainly valued over $20 million before the Lima

Chamber in direct violation of clause 11.3(a) of the RER Contract, as the Lima Arbitration Tribunal ultimately held in denying jurisdiction.

Third, on December 31st, MINEM formally denied the Third Extension Request marking the first time that Peru adopted its new litigation position in which -- their view -- "all risks" related to the project, including the risk of government interference, were to be borne by the concessionaire.

With MINEM's denial of the third extension the fatal blow, first landed with the RGA lawsuit, was completed, and only the corpse of the project remained as of December 31, 2018.

I want to mention very briefly that Claimants have more than met their burden of proof. This case is unique because Claimants' proof arises from more than 20 contemporaneous documents drafted by Peruvian government officials, expressly acknowledging the State's responsibility. These admissions are self-

evident and too numerous to go through during this presentation, but we include them all in one slide so that the Tribunal may revisit them throughout the hearing.

In addition to the Claimants' overwhelming documentary evidence, Claimants' claims are also supported by extensive fact witness testimony, only two of whom Peru has decided to cross-examine, as well as authoritative expert reports, only three of whom Peru has decided to cross-examine. The slide [46] on the screen identifies the balance of the witnesses and experts who you will not hear from during this hearing, including notably Professor Rudolph Schreuer who supports all of Claimants' positions.

We encourage the Tribunal to reference this slide and their underlying witness statements and expert reports when reviewing the claims and defences in this case. By contrast with Claimants' reliance upon direct documentary proof Peru relies on few, if any,

contemporaneous documents, as shown by their core bundle, which principally consists of legal authorities, not factual documents.

To be clear, Peru principally relies upon theories, speculation, and after the fact legal arguments, not actual facts or evidence to support its defences.

I will conclude my portion of this opening by mentioning briefly three red herring defences that Peru raises in an attempt to break the chain of causation.

First the Amparo, which did not cause the project to fail. My colleague, Mr Zeballos, will explain in great detail about the Amparo. Peru relies on this decision, however, in an effort to distract the Tribunal from Peru's bad faith and economic opportunism. He will explain the irrelevancy of the Amparo decisions to any issue before the Tribunal.

I'll just mention two aspects. First, while the Amparo decisions were decided well after the project had ended, the existence of a

working plant would have played a role in the Amparo court's deliberation. One factor in the Arequipa Regional Court's analysis was consideration of the impact of the Amparo on the project. Because the project was already done, it was killed by the measures, it was not in operation, and hence, the employment, contribution to renewable energy future and the community support, which would have been there had the project not been killed by the measures, were not taken into account by the court.

There is every reason to believe that had the project been in operation in 2020 and 2021, the court, in balancing the respective interests of impacts, would have determined that the Amparo should not issue.

Second, in direct contrast to Peru's lawyers in this arbitration, Peru's lawyers in both Amparo proceedings stated clearly on the record that the Amparo decisions were "completely illegal" and contrary to Peruvian procedures

because they were not supported by any technical reports.

In response to Peru's contention in this arbitration that Claimants' financial strategy was overly risky and prevented financial close, we cite Dr Whalen's unrebutted expert opinion, which totally disclaims Peru's attempt to say that the project would not have succeeded because its financing strategy was too complex or uncertain. His unconditional conclusions speak for themselves.

And finally, in response to Peru's unsupported contention that CHM could not have finished the project by March 14, 2020, even if the regional government measures had not begun on March 14, 2017, we direct the Tribunal to Exhibit C-111, which is a handwritten time schedule depicting the definitive schedule for commencing construction on July 1, 2017 and completing the COS on August 29, 2019, more than six months before the COS deadline of March 14, 2020.

This illustration was drafted by a CHM engineer after consultations with the contractor GCZ in March of 2017, immediately before the RGA debacle obstructed further progress on the project. Like the other red herrings covered in our papers, Peru's supposition that the project could not be done on time is mere lawyers' speculation. It is not based on documentary evidence or expert testimony.

Thank you for the kind attention of the distinguished Tribunal. I would like now to introduce Ms Analia Gonzalez, who will address Peru's jurisdictional objections.

THE PRESIDENT: Thank you. Ms Gonzalez, please proceed.

by Ms Gonzalez

SEÑORA GONZÁLEZ: Muchísimas gracias, señor presidente, miembros del Tribunal. Es un placer dirigirme a ustedes esta mañana en nombre de las demandantes Latam Hydro y CHM.

Voy a tratar en mi presentación los temas de

jurisdicción en este caso.

La presentación va a estar organizada de la siguiente forma. En primer lugar, mencionaré las tres categorías de las reclamaciones presentadas por las demandantes seguidas de breves comentarios sobre la carga de la prueba; luego, me referiré a la jurisdicción del Tribunal para conocer de las reclamaciones…

THE PRESIDENT: -- because (a) the court reporters and (b) the interpreters have a difficulty. If you go 50 per cent of your usual speed -- I know it's difficult, but please do it.

SEÑORA GONZÁLEZ: Me referiré a la jurisdicción del Tribunal para conocer las reclamaciones bajo el tratado, incluyendo nuestras defensas a las objeciones a la jurisdicción formuladas por Perú; finalmente, abordaré la jurisdicción del Tribunal para conocer las reclamaciones contractuales referentes a los incumplimientos del Contrato RER cometidas por Perú.

Las demandantes plantearon tres categorías de reclamaciones.

Siguiente slide.

Primero, Latam Hydro plantea reclamaciones bajo el tratado por los incumplimientos de las obligaciones que corresponde a Perú, de conformidad con la sección "A" del tratado; segundo, Latam Hydro plantea reclamaciones bajo el tratado en representación de CHM por violaciones a un acuerdo de inversión cometidas por Perú; tercero, CHM plantea reclamaciones en su propio nombre bajo la cláusula 11.3(a) del Contrato RER y el derecho peruano.

El Tribunal tiene jurisdicción para conocer de las tres categorías de reclamaciones.

Siguiente slide. Me referiré muy brevemente y como cuestión preliminar a la carga de la prueba. Perú se ha empeñado en insistir con que la carga de demostrar la jurisdicción del Tribunal recae sobre las demandantes. Nosotros rechazamos ese planteamiento.

Siguiente slide, por favor. Tal como lo han

determinado de manera uniforme la Corte Internacional de Justicia y diversos tribunales, la carga de la prueba no constituye un concepto útil a los efectos del tema de la jurisdicción, que es fundamentalmente una cuestión jurídica. En la medida en que se cuestionen hechos que hacen a la jurisdicción, resultan de aplicación las reglas habituales.

Siguiente slide. La carga de la prueba recae en la parte que afirma un hecho, sea ella la parte demandante o la demandada.

Siguiente slide, por favor. Siguiente slide. Disculpen. Disculpen. Dos slides para atrás. Gracias.

La carga de la prueba recae gracias en la parte que afirma un hecho, sea ella la parte demandante o la demandada. Primero, pesa sobre la parte demandante la carga de demostrar que se encuentran reunidos los requisitos fácticos previos para la jurisdicción y, entonces, se trasladará a la demandada la carga de demostrar los hechos en los que se basan las objeciones

que haya formulado. Perú tiene la carga de demostrar los hechos que afirma en respaldo de sus objeciones a la jurisdicción. Y en lo que se refiere a las cuestiones jurídicas, le corresponde al Tribunal resolver con independencia de la carga de la prueba de cualquiera de las partes.

Dicho esto, el Tribunal tiene jurisdicción para conocer de las tres clases de reclamaciones sin importar qué criterio o carga pudiera aplicarse en teoría. Y ello es así por las razones que voy a tratar a continuación.

Voy a referirme a las objeciones de Perú a la jurisdicción del Tribunal para (conocer) a las reclamaciones planteadas por las demandantes bajo el tratado.

Siguiente slide. Siguiente slide, por favor. Siguiente slide. Siguiente slide.

Perú, primero, acusa a los demandantes de incumplir el requisito de renuncia en virtud del artículo 10.18.2(b) del tratado porque las demandantes han alegado que las medidas

alegadas por Perú importaron un incumplimiento, tanto de las obligaciones contractuales como de sus obligaciones en virtud del tratado. En otras palabras, Perú alega que podemos plantear en este Tribunal solamente reclamaciones por el tratado o solamente reclamaciones contractuales en este arbitraje específico.

La queja de Perú es que al plantear tanto reclamaciones en virtud del Tratado, como reclamaciones ante este Tribunal respecto a las mismas medidas subyacentes, CHM supuestamente violó la cláusula de renuncia. Ello no es correcto y no es la función que cumplan los requisitos como los previstos en el artículo 10.18.

El artículo 10.18.2(b) protege al Estado demandado de tener que litigar reclamaciones superpuestas ante distintos tribunales respecto de las mismas medidas. Brinda protección contra el riesgo de una doble indemnización y de que se generen resultados incompatibles.

Esta interpretación queda respaldada por los

años de práctica de los tribunales que han interpretado el objeto y fin de las cláusulas de renuncia similares al artículo 10.18.2(b)

Siguiente slide, por favor.

Por ejemplo, el Tribunal interviniente en Renco contra Perú determinó que el objeto y fin del requisito de la renuncia presentaba tres aspectos: evitar la tramitación de múltiples procedimientos en distintos foros; minimizar el riesgo de que se produzca una doble indemnización y evitar que se generen conclusiones fácticas y jurídicas incongruentes.

Aquí no sucede nada de eso. En el caso que nos ocupa hoy, no hay múltiples procedimientos en trámite ante foros distintos, sino un procedimiento unificado. No existe un doble -- la doble indemnización, dado que la decisión en la materia de responsabilidad y el cálculo de los daños están en manos de un único Tribunal. Por el mismo motivo, no hay riesgo alguno que se emitan decisiones incongruentes.

Para resumir, la jurisprudencia es coherente sobre este punto. Tan coherente es que, de hecho, hasta la presentación de los Estados Unidos en carácter de parte no contendiente no puede evitar coincidir como puede apreciarse en la diapositiva.

Siguiente slide, por favor.

El requisito de la renuncia no excluye al planteamiento concurrente de reclamaciones bajo el tratado y reclamaciones contractuales con arreglo al artículo 10.16.1 ante un único Tribunal, siempre que estén salvadas cuestiones tales como una posible doble indemnización y conclusiones incongruentes.

De hecho, la única fuente para el argumento de Perú sobre el particular es un dictamen emitido por el profesor Reisman en el caso Pac Rim contra El Salvador.

Siguiente slide, por favor.

Perú omite mencionar que el Tribunal de Pac Rim rechazó el dictamen del profesor Reisman a favor de la postura de las demandantes y del

profesor Schreuer. Pero tampoco aborda las demás fuentes citadas en el dictamen del profesor Schreuer ni ofrece ninguna fuente jurisprudencial en sustento de la teoría que propone.

En suma, en este preciso momento Perú está gozando de las protecciones que ofrece el artículo 10.18. No se le ha sometido a reclamaciones múltiples o posiblemente incongruentes ante foros distintos. Todas las reclamaciones que planteamos están consolidadas ante ustedes en este proceso.

Para resumir, el artículo 10.18 no supone un obstáculo para que planteemos reclamaciones contractuales junto a reclamaciones bajo el tratado, y por esas razones corresponde rechazar la objeción de la renuncia formulada por Perú.

Siguiente slide, por favor.

Como segunda objeción a la jurisdicción bajo el tratado, Perú insiste en que las reclamaciones relativas a la investigación

penal y las posteriores acusaciones penales contra el abogado principal de CHM,

son inadmisibles en virtud del artículo 10.16.2 del tratado por no habérselos incluido en la tercera notificación de intención de las demandantes.

Vamos a ver qué pasó.

Las demandantes plantearon su notificación de intención -- perdón, el 28 de mayo de 2019. La única información que disponía CHM en aquel momento era simplemente un anuncio de la Fiscalía ambiental de que el fiscal iba a iniciar una investigación contra el

.

Esto significa que cuando se presentó la notificación de intención, a las demandantes no les resultaba posible apreciar plenamente las consecuencias o el impacto perjudicial de este inicio de la investigación penal. Para el momento en que se presentó la solicitud de arbitraje, la cual, de hecho, fue acompañada de las renuncias de CHM y Latam Hydro requeridas

por el tratado el 30 de agosto de 2019, o sea, 94 días después de la notificación de intención, había quedado claro que la investigación penal contra el era otro paso del gobierno regional de Arequipa para frustrar el proyecto, y por ello lo planteamos en ese momento.

Hay dos puntos que es necesario destacar. La notificación le brindaba abundante información a Perú respecto de a qué se refería esta diferencia y, además, el tratado no contiene elemento alguno que justifique lo que parece ser el argumento de Perú: que una vez presentada por las demandantes, la notificación de la controversia de alguna forma queda congelada la jurisdicción del Tribunal, lo que libera a Perú para de alguna manera cometer incumplimientos adicionales sin riesgo alguno de que se les responsabilice bajo el tratado. Sostenemos que ello constituiría una invitación a cometer nuevos ilícitos y no puede ser el resultado correcto. Y, de hecho, no lo es.

Siguiente diapositiva, por favor.

El artículo 46 del Convenio CIADI y la regla 40 de las Reglas de Arbitraje del CIADI contemplan las reclamaciones incidentales o adicionales. Por definición, son reclamaciones incidentales o adicionales aquellas que no fueron notificadas o planteadas al inicio del proceso. De hecho, los tribunales internacionales han permitido de forma rutinaria que los inversionistas planteen reclamaciones adicionales a aquellas que figuran en la notificación inicial de la controversia en aquellos casos en que constituyen una extensión fáctica del caso y guardan relación con la misma controversia.

Por ello resulta desconcertante que en la dúplica Perú invoque el caso Kappes contra Guatemala, dado que el Tribunal que intervino en aquel caso permitió el planteamiento de reclamaciones adicionales con posterioridad a la notificación de intención. El Tribunal de Kappes concluyó que la referencia del DR CAFTA

al Convenio CIADI, a las reglas del CIADI, significaba que contemplaba reclamaciones incidentales o adicionales, independientemente de que se los hubiera o no presentado en la notificación de intención.

Siguiente slide, por favor.

El Tribunal de Kappes también fue claro en cuanto a que permitir nuevas reclamaciones cuando se las añadió en el primer momento posible en el proceso arbitral en la notificación de arbitraje por lo que se inicia el propio proceso, y poco después del nuevo hecho por el que se reclama, no conlleva un verdadero perjuicio.

Todo esto tiene mucho sentido. La realidad es que las controversias no son estáticas y así lo reconocen las reglas. En consecuencia, no es necesario que la notificación de intención sea exhaustiva, completa o detallada. Muy a menudo eso sencillamente no resulta posible.

Siguiente slide, por favor.

Todo lo que se necesita es un grado

razonable de especificidad que permita la adecuada identificación de la naturaleza de la controversia, y Perú no puede alegar que no la hubo en este caso.

Siguiente slide, por favor. Y siguiente slide, por favor.

THE INTERPRETER: Could you please go a little bit slower? That would be really, really helpful. Thank you very much.

(Pausa.)

SEÑORA GONZÁLEZ: De todas formas, las reclamaciones en evolución relacionadas con la investigación penal y la posterior formalización de las acusaciones penales no modifican el carácter general del caso y son claramente una extensión fáctica del mismo relacionada con la misma controversia y, por lo tanto, el Tribunal debe rechazar la objeción referente a la notificación y espera.

Me voy a referir ahora a la tercera objeción jurisdiccional planteada por Perú.

Perú aduce que el Contrato RER no constituye

un acuerdo de inversión según se define en el artículo 10.28 del tratado, que tienen en pantalla. El argumento de Perú de que el Contrato RER no encaja en la definición de acuerdo de inversión obrante en el artículo 10.28 del tratado no es convincente. La definición de acuerdo de inversión es amplia y cubre derechos respecto: a) los recursos naturales, b) para proveer servicios al público, como generación o distribución de energía; y c) para realizar proyectos de infraestructura.

Esta definición amplia va luego seguida de ejemplos ilustrativos, precedida de la expresión "tales como", lo que indica que los ejemplos específicos no eran exhaustivos. No hay ningún tipo de respaldo legal para el intento de la demandada de limitar el alcance de la definición de acuerdo de inversión, de modo tal de excluir contratos que, al igual que el que aquí tenemos, están concebidos para autorizar inversiones en los sectores de

recursos naturales, servicios públicos e infraestructura.

Siguiente diapositiva, por favor.

Solo con fijarse en el título del Contrato RER, así como en la definición del contrato que consta en la cláusula 1.4.12 del contrato, está claro que el Contrato RER encaja en la definición de acuerdo de inversión.

El suministro de energía renovable constituye un claro objetivo de este contrato y, de hecho, como lo explica el profesor Schreuer, el Contrato RER también califica como un acuerdo de inversión bajo el numeral a) del artículo 10.28 del tratado, dado que es un acuerdo con respecto a recursos naturales y bajo el numeral c) del artículo 10.28 del tratado, dado que es un acuerdo para realizar proyectos de infraestructura.

La infundada objeción de Perú se basa en su restringida interpretación de que por sí mismo el Contrato RER no le confería a CHM ningún derecho definitivo para la generación o la

distribución de energía. Esto es incorrecto como cuestión de hecho y de todas formas es irrelevante. Al Contrato RER se lo debe interpretar en el contexto del conjunto de autorizaciones y permisos necesarios para producir electricidad y finalmente suministrársela al público.

En virtud del Contrato RER, CHM debía obtener varios permisos, incluida una concesión. Y el hecho de que el Contrato RER no fuera el único instrumento relevante y que CHM debiera obtener una concesión definitiva y otros permisos, no priva a dicho contrato de su carácter de acuerdo de inversión. Es perfectamente normal que una inversión esté sujeta a diversos instrumentos y es típico que una inversión esté regida por una serie de acuerdos y disposiciones legales.

Siguiente diapositiva, por favor.

Como lo determinó el Tribunal en el caso Içkale contra Turkmenistán, el Tribunal no entiende apropiado considerar individualmente

cada uno de los contratos celebrados por la demandante a la hora de determinar si la demandante ha realizado una inversión en Turkmenistán. Forman parte de un todo.

El argumento de Perú, en el sentido de que ya se habían realizado algunas actividades de inversión antes de firmar el Contrato RER y que las demandantes no podrían haberse apoyado en dicho contrato para realizar esas actividades, tampoco es convincente.

Siguiente diapositiva, por favor.

Sobre la base del principio de la unidad de la inversión, un proyecto de inversión a gran escala debe considerarse como un todo integrado y a las actividades que se realizan en una etapa temprana no se las puede disociar de las actividades posteriores. Cabe destacar que Perú no ofrece una respuesta a este argumento ni a las fuentes jurisprudenciales citadas por el profesor Schreuer. Además, las demandantes realizaron una parte importantísima de su inversión después de suscrito el Contrato RER.

Por consiguiente, Perú no puede separar las actividades de inversión, que habían tenido lugar antes de que se celebrara el Contrato RER, de los elementos posteriores de la inversión y alegar que, al realizar esas actividades, las demandantes no se apoyaron en el Contrato RER. Corresponde considerar que la inversión constituye una unidad de la cual el Contrato RER, que era un acuerdo de inversión, era una parte esencial. Por lo tanto, el Tribunal también debe rechazar la objeción del Perú, de que el Contrato RER no constituye un acuerdo de inversión.

Siguiente diapositiva, por favor.

Me voy a referir a la cuarta objeción planteada por Perú.

Las partes no coinciden en cuanto a si hay o no un acuerdo de tratar a CHM como un nacional del otro Estado contratante a los efectos del cumplimiento del artículo 25(2)(b) del Convenio del CIADI, ni respecto de la forma de dicho acuerdo.

Siguiente diapositiva, por favor.

La opinión legal del profesor Schreuer resumió la extensa y coherente práctica de los tribunales del CIADI respecto de la existencia de un acuerdo de tratar a la sociedad local como nacional de otro Estado contratante. Perú no tiene respuesta frente a las congruentes fuentes jurisprudenciales que tratan a la cláusula del CIADI incluida en un acuerdo con una empresa local sujeta a control extranjero como un acuerdo implícito de tratar a esa empresa como un nacional extranjero.

Perú insiste con que, a los efectos del artículo 25(2)(b) del Convenio del CIADI, no basta con un acuerdo implícito y que el reconocimiento tendría que ser manifestado expresamente. Perú no presenta fuentes jurisprudenciales que respalden este argumento. El único caso que invoca, Cable TV contra San Cristóbal, no respalda su postura. La cita que presenta Perú está sacada de contexto y según se la transcribe, transmite una impresión

engañosa. En Cable TV la demandada no era parte de un acuerdo de consentimiento al CIADI con la demandante. Por ende, era imposible inferir un acuerdo de tratar a la sociedad local como un nacional extranjero a los efectos del convenio.

Siguiente diapositiva, por favor.

Los tribunales arbitrales han concluido que el acuerdo entre el Estado receptor y el inversionista, exigido por el artículo 25(2)(b), puede constar en un contrato entre el Estado receptor y el inversionista, y se ha aceptado que la admisión o la inclusión de una cláusula del CIADI en un contrato con la sociedad local conlleva un acuerdo de tratar a la sociedad local como un nacional extranjero.

Perú busca eludir las consecuencias de la cláusula de arbitraje ante el CIADI incluida en el Contrato RER y para ello señala una oración incluida en el contrato, que dispone que: "Si la sociedad concesionaria no incumple con el no cumple con el requisito para acudir al CIADI, esta controversia estará sujeta a las

reglas a que se refiere el literal b) del presente numeral". Y el literal b) es el que se refiere al arbitraje local en Perú.

No está claro por qué esta cláusula menoscabaría el consentimiento -- el acuerdo de consentimiento en el arbitraje entre Perú y CHM y la resultante aceptación de CHM como nacional extranjero. La cláusula citada simplemente se refiere a una situación en la que no se aplica la cláusula del CIADI; por ejemplo, si CHM deja de estar sujeta a control extranjero. Cuando como ocurre en el presente caso, la sociedad local reúne el requisito para recurrir al CIADI, la cláusula del CIADI incluida en el Contrato RER surte plenos efectos y también lo hace, por ende, el acuerdo resultante de tratar a CHM como nacional extranjero.

La existencia de otros contratos que contienen cláusulas del CIADI, en que se reconocía expresamente a la parte contratante como nacional extranjero, es irrelevante. El hecho de que otros contratos sean más

explícitos no neutraliza la práctica considerada de diversos tribunales del CIADI, en el sentido de que una cláusula del CIADI incluida en un contrato con una sociedad sujeta a control extranjero, implica su reconocimiento como nacional de otro Estado contratante.

Perú no explica cuál sería el sentido de la cláusula del CIADI incluida en el Contrato RER si dicha cláusula no expresa el acuerdo del Perú para tratar a CHM como nacional extranjero. Si Perú no aceptó tratar a CHM como nacional extranjero cuando firmó el contrato que contenía la cláusula del CIADI, es ineludible que la conclusión es ineludible la conclusión de que engañó a CHM al contraer una obligación que Perú consideraba inválida. Y así Perú está invocando su propia mala fe.

No corresponde permitir que Perú invoque su propia conducta ilegal o falta de ética y, por lo tanto, esta objeción también debe ser rechazada.

La quinta objeción a la jurisdicción que

formula Perú consiste en que los proyectos aguas en los proyectos río arriba no son inversiones protegidas en virtud del tratado y el Convenio CIADI, dado que según Perú son actividades previas a la inversión y no formaban parte integrante de la inversión completa.

Como explica el profesor Schreuer en su informe siguiente diapositiva, por favor, la práctica en materia de unidad de la inversión demuestra que los tribunales han aceptado una variedad de activos y actividades que se combinaban para formar una inversión. Por ejemplo, en Bear Creek Mining contra Perú, la demandante adujo que los derechos de las demandantes y sus actividades no habían llegado a convertirse en una inversión dado que aún no se contaba con los permisos necesarios. La demandante identificó los varios pasos y actividades que realizó e invocó la unidad de la inversión, y el Tribunal siguió el criterio de la demandante y determinó que había habido

una inversión a los efectos del TLC entre Canadá y Perú.

En este caso, las demandantes conceptualizaron su inversión en Perú como un proyecto integrado por el proyecto Mamacocha y los proyectos río arriba, que se desarrollarían en distintas etapas, y así es como se lo presentaron a posibles inversionistas. Los proyectos río arriba fueron parte integrante de la inversión general de las demandantes y corresponde examinar la inversión como un todo.

Siguiente diapositiva, por favor.

Finalmente, me voy a referir a la jurisdicción del Tribunal para entender en las reclamaciones de CHM por los incumplimientos del Contrato RER cometido por Perú.

La cláusula 11.3.a del Contrato RER autoriza expresamente a CHM a plantear reclamaciones bajo las Reglas de Arbitraje del CIADI en aquellos casos en que la cuantía controvertida supere los 20 millones.

Perú no se ha opuesto a la jurisdicción del

Tribunal para entender en las reclamaciones de CHM por los incumplimientos del contrato RER cometidos por Perú, y ello se debe a que con seguridad no hay objeciones válidas a la jurisdicción del Tribunal en virtud del Contrato RER. Hay tres razones por las que el Tribunal del CIADI tiene jurisdicción para conocer en las reclamaciones contractuales por el incumplimiento del Contrato RER.

Primero, no está en discusión que los incumplimientos contractuales cometidos por Perú son de carácter no técnicos y, por lo tanto, resulta de aplicación la cláusula 11.3 del Contrato RER.

Segundo, el literal a) del Contrato RER resulta de aplicación porque la cuantía de la controversia supera los 20 millones. Mi colega Gonzalo Zeballos se va a referir al monto controvertido por los daños sufridos por las demandantes.

Tercero, como dije anteriormente, la inclusión de una cláusula CIADI en el Contrato

RER constituye un acuerdo implícito de tratar a la sociedad local como nacional de otro Estado contratante a los efectos del artículo 25(2)(b) del Convenio CIADI.

Con esto, señor presidente, miembros del Tribunal, doy por terminada mi presentación. Le correspondería ahora al señor Carlos Ramos, pero entiendo que probablemente, salvo que el Tribunal tenga preguntas, iríamos a un break. Muchísimas gracias.

THE PRESIDENT: Ms Gonzalez, that completes your presentation on the jurisdiction?

SEÑORA GONZÁLEZ: Sí, señor presidente, esto completa la presentación en jurisdicción. Ahora yo le pasaría la palabra, con su permiso, al señor Carlos Ramos, que va a tratar...

THE PRESIDENT: Now we will go on to have recess, because your first 75 minutes are over, actually a little bit more. 15 minutes recess.

SEÑORA GONZÁLEZ: Perfecto. Muchas gracias, señor presidente.

(Pausa para el café.)

THE PRESIDENT: Ramos, I understand you will do the next bit of the opening statement?

MR RAMOS-MROSOVSKY: Yes, Mr President.

THE PRESIDENT: Please proceed.

by Mr Ramos-Mrosovsky

MR RAMOS-MROSOVSKY: Thank you, Mr President, and thank you, members of the Tribunal, and also my thanks to my colleague, Ms Gonzalez. With your permission, I would like to turn to what we consider the key legal issues for the merits arising under the Treaty. In doing so, I propose to follow the following road map for my presentation.

First, I'd like to address Peru's breaches of its obligation to accord fair and equitable treatment to US investments under article 10.5 of the treaty. Second, I'll address Peru's unlawful expropriation of Claimants' investment in breach of article 10.7. Third, I'll address the more favourable standards of treatment available to Claimants by operation of the most favoured nation clause in article 10.4.

I'll turn first to the fair and equitable treatment, or FET obligation, at article 10.5 which you should see on the next slide.

As you know, the parties have debated the meaning of this language at great length. In our papers (next slide, please) as in Professor Schreuer's expert report, Claimants have demonstrated the convergence of the international minimum standard with the so-called autonomous FET standard and, further, that international tribunals established pursuant to international investment treaties have consistently interpreted fair and equitable treatment to encompass, among other things, the protection of an investor's legitimate expectations together with the State's duties of transparency and good faith.

Next slide, please. Here is just a reference to a summary of our position on the content of the FET. And I would note, moving to the next slide, that at least prior to this arbitration, Peruvian government officials

appear to have understood their FET obligation under this same treaty in the same way to believe it meant what we said it means, and you can see here a reference to the investor's basic expectations in the Sosa Report which you see on the slide.

Now, once it is accepted that the FET standard protects an investor's legitimate expectations, we submit this ought to be an open and shut case. Based on the RER Contract, the overall Peruvian legal framework, and the treaty, the Claimants had legitimate expectations that Peru at all levels of the state would interpret the contract and its own law in a reasonable way and, more specifically, that it would interpret its obligations in respect of the RER Contract in a consistent manner so as not to penalise the investor for delays Peru knew to be attributable to Peru's own conduct or to penalise the investor for its prior reliance on Peru's expressed interpretations.

We've included on the next three slides a summary of what we maintain the Claimants' legitimate expectations were. Next slide please. We have here legitimate expectations relating to the contract, to regulatory treatment and on the next slide the rule of law itself. That's included for your reference and I don't propose to march through them all now.

Little wonder, we say then, that Peru has made such an effort to change the subject and to raise doctrinal arguments about the nature of the FET clause in an effort to get away from the Claimants' legitimate expectations. Now, to be very clear, members of the Tribunal, we stand by both our account of the content of the FET standard and of the central importance of investor-state awards in determining its content as a matter of customary international law. Having said that, I don't propose to spend much time on this scholastic dispute this morning, and that isn't because we recede from our position in any way but it's because, in

our view, resolving the debate that Peru seeks to open about the relationship between FET and the minimum standard is almost certainly unnecessary to your decision of this case.

And that's because the parties are much more closely aligned as to the nature, the practical nature, of the FET standard than the scale and tone of their submissions might suggest. We submit that where the parties can agree on a standard, or at least where the parties' positions overlap as to part of a standard, the Tribunal's task should be that much easier.

So in that spirit I would direct the Tribunal's attention -- next slide, please -- to paragraph 605 of Peru's Rejoinder.

Here Peru accepts the content of the minimum standard of treatment according to customary international law, including fair and equitable treatment as described in Waste Management II v Mexico, and the relevant language from Waste Management II appears on the slide.

To be sure, members of the Tribunal, this is

not the formulation of the FET standard that we have argued for or that we believe reflects the most correct position under the current understanding of customary international law. Nevertheless, in accepting this Waste Management II standard, Peru has made what we believe are some decisive concessions. Next slide, please.

First, Peru accepts that arbitrary, administrative or judicial action breaches the international minimum standard. Second, Peru accepts that a lack of transparency in an administrative process implicates the FET standard. And, third, Peru accepts that an investor's reasonable reliance on representations made by a host state is relevant to whether there has been a breach of the FET standard, and that last concession brings us most of the way towards interpreting the FET clause to protect the investor's legitimate or, to recall the language of the Sosa Report we showed you, basic expectations,

and that was a 2016 contemporaneous document from Perú.

At any rate, the Waste Management II standard that Peru accepts, that conduct which is arbitrary, grossly unfair, unjust or idiosyncratic, breaches article 10.5 is, we submit, almost certainly broad enough to allow the Tribunal to find liability on the facts of this case without having to wade too deeply into doctrinal debates.

Now Peru, to be clear, has not ventured a definition of what "unjust" or "unfair" means and those terms are, we think, for your definition, light of the facts.

But if we go to the next slide, Peru has accepted a definition of "arbitrary", and this is drawn from Cargill v Mexico. For a proposition to be arbitrary the relevant measures must go beyond a merely inconsistent or questionable application of administrative or legal policy or procedure so as to constitute unexpected and shocking repudiation

of the policy's very purpose and goals. Repudiation is a narrower standard than we have argued is the correct one. Peru embraced it for that reason.

But, again, we think it is sufficient on the facts of this case to support liability here, especially in the context of Peru's sudden pivot, the pivot Mr Reisenfeld described to you, away from what had been a consistent and repeatedly affirmed interpretation of this law.

Keeping in mind the standards accepted by Peru, I would now like to turn to some of the measures at issue, all of which I remind the Tribunal ought to be considered within the RER framework. That, as Mr Reisenfeld described, made time of the essence.

If we go to the next slide, we can see the contemporaneous statements from Peruvian officials regarding the regional government of Arequipa lawsuit. These characterisations, we submit, easily rise to the level of admissions that what was being done was arbitrary, grossly

unfair, unjust or idiosyncratic. Mr Reisenfeld went through this with you; I've put it on the screen for your reference, but again, the key point here is that the characterisation of the provincial government's action easily meets the standard that Peru has accepted and, further, that the provincial government officials -- next slide, please -- recognise that their conduct, the provincial government's lawsuit, could trigger Peru's state liability under international law. On the next slide for your reference we have the operative principles from ILC article 4 of the state's liability for the conduct of a territorial unit.

That wasn't, of course, Peru's only breach of article 10.5. Next slide, please. The Arequipa prosecutor's targeting of for the supposed crime of successfully applying for reconsideration of environmental permit was based on the same core wrongful accusations as the RGA lawsuit. As for the merits of those accusations I think it

speaks volumes that Peru has not attempted to present evidence of 's criminality here and has actually declined the opportunity to cross-examine him here today -- this week.

This was not just an attack on a respected professional but also on his client, the investor, and most specifically on the project's ability to obtain financing. Like the RGA's baseless lawsuit, the Arequipa authority's persecution of damaged the project by putting it under a cloud that made it unbankable.

Similarly, the regulatory permitting roller coaster to which the project was subjected -- next slide, please -- again, at the hands of the Arequipa authorities, further delayed the project in the face of the RER Contract's formidable deadlines. The sequence of events that Mr Reisenfeld described for you -- and here we have the roller coaster again for you, a delay, wrongful denial, an appeal to central authorities followed by the grant of a

defective permit, an additional round of appeals followed by the grant of an unusable permit, all in parallel with the ongoing meritless lawsuit against the project and the attacks on were just the sort of arbitrary, idiosyncratic and non-transparent conduct, a roller coaster, that tribunals have found to breach the FET standard in past cases and that should incur Peru's liability for FET here.

But the worst, members of the Tribunal, is still to come. Crucially, and as Mr Reisenfeld explained to you earlier this morning, when Claimants had faced permitting delays in the past, Peru had modified the RER Contract, taken administrative action to modify the RER Contract, to take those delays caused by the regional authorities into account. Thereby -- next slide, please -- inducing the Claimants to continue investing. And here you see the amounts invested with the various extensions and addenda showing the continued inducement.

When the Claimants, therefore, first faced the RGA lawsuit and criminal investigation, Peru had in fact briefly modified the terms of the contract, encouraging them to continue to invest. So despite the difficulties the project faced at the provincial level Peruvian national authorities had until late 2018 consistently recognised and consistently communicated to Claimants that Peruvian law required them to grant extensions to account for delays for which the State was responsible -- next slide, please -- and we've tabulated them for you here.

By late 2018 Peru's conduct appeared to be in keeping with that practice. MINEM had published a supposed Supreme Decree, which was supported by a statement of reasons that, among other things, acknowledged Peru's obligation to extend the completion deadline for RER projects to account for delays attributable to the State if for no other reason.

So Peru's subsequent refusal to grant a

third extension was certainly a pivot, certainly a surprise. It was, in fact, a disavowal of four years of consistent legal interpretation and administrative inducements relied upon by the Claimants. This abrupt change was arbitrary by any measure, and likewise incurred liability under article 10.5.

Why the sudden change? Next slide, please.

Peru has claimed in its papers, of course, that it recognised at long last the need to comply with the law that it had seemingly so long misinterpreted that the scales, so to speak, fell from the eyes of the regulators in Lima, who suddenly realised that the RER Contract made the Claimants effectively liable for the State's own conduct, and that they had no choice but to pursue this interpretation wherever it led, even into a breach of Peru's international obligations to a US investor.

An alternative explanation may be perhaps found in the formal public comment of Peru's energy regulator concerning the proposed

Supreme Decree, which as you can see here on the slide, argued that it was in Peru's economic interest to let RER projects die in light of changes in the energy markets.

Strictly speaking, these questions of motive aren't necessary for liability and the Tribunal may judge which explanation is the more reliable, but what the record unmistakably shows, to recall the Cargill standard that Peru accepts, is an unexpected shocking repudiation of a prior policy, and Peru is liable under article 10.5 for that reason as well.

Now, having said that, members of the Tribunal, and recalling that I've largely made an argument in the alternative here -- alternative to our primary position concerning the centrality of legitimate expectations to the FET obligation, which we stand by and refer you to our papers for -- I will, with your permission, turn next to the question of expropriation. Next slide, please.

Here the relevant treaty language is found

at article 10.7. This is a straightforward expropriation provision. It explicitly recognizes, however, that Peru may be held liable for an indirect expropriation or for conduct equivalent to expropriation when the four requirements for a lawful taking under the TPA, the treaty, are not met. This, if we look at annexe 10-B of the treaty on the next slide, is confirmed but even -- it may be liability for an expropriation even if there is no formal transfer of title or outright seizure. The question is the economic impact we see in 3(a)(i), the economic impact of the measures taken.

If we go to the next slide, which is a leading case for this, Peru's destruction of the project's economic viability, whether through the RGA lawsuit or its other measures, made it impossible to finance the heart of the expropriation, and we've shown you a timeline on the next slide of how this happened, how the RGA lawsuit suffocated the project's ability to

get any financing.

If the story ended there, members of the Tribunal, that would be enough to find Peru liable for an expropriation under the article 10.7. But, as we've seen, Peru's central government had until that time acted in recognition of its State responsibility for the conduct of the provincial governments towards a protected foreign investor, and it had done so repeatedly -- next slide -- while acknowledging, and here's our Christmas tree slide again in red and green, while acknowledging an obligation to do so in the series of contract modifications that you see.

So in March of 2017 Claimants would have reasonably understood or perceived the difficulties facing the project as difficulties chiefly with the provincial government in Arequipa, and would still have looked to the central authorities for a potential remedy. And we've seen that the central government at first began to act in accordance with that past

practice, including by formulating the Supreme Decree that I showed you the comments on some time ago. Had Peruvian authorities at a central government level continued down that path, they would have cured the breach of article 10.7, in which the Arequipa authorities had otherwise implicated the State. But Peru pursued a different course.

In December 2018 the central government chose to ratify, to join in the regional government's expropriatory measures, and it did so in two ways.

First, contrary to its prior practice, by refusing to grant the Third Extension Request to the completion deadline, making it impossible to complete the project in time, and, secondly, by launching arbitrations in Lima in breach of its commitment to arbitrate before ICSID and in an effort to annul its own previous regulatory action which had recognised and been premised on an obligation to extend the project's completion date when delays in

that completion were attributable to the State.

So by these actions the national authorities reaffirmed, doubled down, on the breach of article 10.7 for which Peru had otherwise been liable since March of 2017 and which they might otherwise have cured.

Simply put, Peru's governmental measures had first blocked the project from accessing financing and then pushed it over the cliff of a completion deadline that Peru wrongfully refused to extend.

If we go to the next slide we have here the criteria for a lawful expropriation. Certainly we maintain that this expropriation was unlawful. There was no public purpose served by derailing a renewable energy project that had all the positive consequences for the Peruvian economy that we've set out in our papers and Mr Reisenfeld described. There was certainly no compensation paid and there was no due process. To the contrary, Peru first brought a meritless lawsuit and then violated

its until then consistent interpretation of its own law to deny the third extension that could have cured the original expropriatory breach by the provincial authorities.

So we maintain that Peru's breaches of both articles 10.5 and 10.7 of the treaty call for full reparation as a matter of public international law to be calculated as of the time of the RGA lawsuit in March of 2017, as Mr Zeballos will explain in due course.

But if I might turn briefly, members of the Tribunal, to the third topic that I'd like to discuss with you this morning, that would be the operation of the most favoured nation clause at article 10.4 and what it means for the Claimants' treaty claims.

As its text makes clear, article 10.4 obliges Peru to accord US investors treatment no less favourable than it would accord investors from a third state. Article 10.4, accordingly, allows a protected investor to invoke the benefit of superior substantive

protections extended to third state investors under other Peruvian treaties. Here specifically that means -- next slide, please -- that the Claimants may variously invoke the protections of a permitting clause found at article 3.2 of the Peru-Paraguay Bilateral Investment Treaty of 1994 as well as of the so-called umbrella clauses -- next slide, please -- found in at least three other Peruvian Bilateral Investment Treaties, those with Thailand, United Kingdom and the Netherlands.

The Tribunal will have seen some rather elaborate arguments advanced in Peru's Rejoinder to the effect that the MFN clause and the Treaty cannot be applied in this way. All of these arguments are wrong, and I will try to briefly explain why.

Next slide, please.

First, with respect to Peru's argument that we must first identify an investor in "like circumstances" in order to benefit from a treaty's MFN clause, the answer is that we have

but that what counts as a "like circumstance" is contextual.

So if this were a claim about how a rival hydropower project owned by investors from a third country had somehow received preferential treatment from the Arequipa authorities, we would have to identify a hydropower project backed by a Ruritanian investor and show that it received better treatment. In that sense of course an MFN clause can apply as an anti discrimination clause.

But MFN clauses do more than that. For the purposes of importing a standard of protection from another Peruvian investment treaty pursuant to article 10.4, the relevant circumstance, the relevant like circumstance, is being a treaty protected investor at all, because every Paraguayan investor benefits from the permitting clause in the Paraguay treaty just as every UK or Netherlands or Thai investor in Peru benefits from the umbrella clause in their country's treaty.

The fundamental point which Peru tries to argue against or pushes back on is that granting of a standard protection in an investment treaty is a form of treatment in itself. As for the argument that the MFN clause allows a protected investor to import only counterpart provisions from another treaty, this also fails, and it's notable that the US couldn't bring itself to endorse this position in the United States as a non disputing party submission. Or if we accept that the MFN clause allows a most favoured nation investor to invoke the protection of superior standards of treatment from treaties of third countries insisting that it can only invoke counterpart provisions serves no purpose, and that's a reading we submit that can't be squared with the principle that the treaty must be read so that its provisions be effective. If the treaty contains an MFN clause, it should be interpreted to operate as one.

That brings me -- next slide -- to Peru's insistence, the final argument raised for the first time in the Rejoinder, that it reserved the right to accord better treatment under prior bilateral investment treaties that preceded the TPA with the United States, notwithstanding article 10.4. We would say, members of the Tribunal, that to reserve a right is exactly that. It is explicitly not to exercise. As you can see on the slide, this issue has arisen before international investment tribunals in Plama, Yukos, a number of cases under the ECT, the Energy Charter Treaty, have repeatedly held that where a state reserves the right to deny a benefit under a treaty it must affirmatively exercise that reserved right and be seen to do so before a dispute arises, not in rejoinder. Otherwise, the benefit stands undenied. We submit that's the case here, that it's far too late for Peru to try to invoke this reservation once the arbitration is under way.

And of course this isn't a case where Peru can claim any ignorance as to the presence of the investment or the investor. Peru was in a contractual relationship with the Claimant investor from the start. It knew that the provisions of the TPA applied and knew that the RER Contract explicitly contemplated ICSID arbitration. So we maintain that Claimant's MFN derived permitting and umbrella clause claims are properly before you. I'd like to touch very briefly on what they mean, if we can go to the next slide.

First, very briefly with regard to the permitting clause incorporated from the Paraguay treaty, article 3(2) of the Paraguay treaty elevates Peru's duty to timely grant permits that are properly owed under its internal law and necessary for the development of protected foreign investment to the level of a public international law obligation. We certainly don't maintain, as was suggested in the Rejoinder, that this article obliges Peru

to grant any permit the investor wants but permits that are properly owed to be issued correctly.

Under this provision -- and I'd point you also to clause 4.3 of the RER Contract, its function is very similar -- Peru would be obliged, we say, to provide technical, commercial or administrative assistance in obtaining those permits.

Now, it's certain that Peru's failures in respect of permitting could also be breaches of its FET obligations, but the permitting clause made available to you as investors by operation of the MFN clause in the treaty means that Peru's wrongful permitting conduct also constitutes an independent international law breach in itself for which full reparation is owing, regardless of what position you would ultimately adopt as to the scope of the FET standard.

If I could go to the next slide, the umbrella clauses incorporated by operation of

the MFN clause mean that Peru's obligations under the RER Contract are now international law obligations whose breaches must be treated as breaches of the treaty. Liability on that basis of course tracks our contractual claim and so I will leave the details of Peru's contractual breaches to my colleague, Mr Molina, who, barring any questions, I'd be happy to turn the presentation over to now.

THE PRESIDENT: Mr Ramos, maybe we have to wait for a few minutes because I understand my colleague, Professor Tawil, has a power cut.

MR RAMOS-MROSOVSKY: I'm very sorry. I did not realise that.

THE PRESIDENT: He asked us to please continue, he says, "I will join back shortly", but I think we need a Tribunal of three.

[Pause]

MR TAWIL: I'm sorry, Albert Jan. I'm here.

THE PRESIDENT: That's all right. You've missed only a minute. I've assured Mr Ramos that you would review that minute on the video.

All right. Then let's move on to Mr Molina, RER Contract.

MR MOLINA: Thank you, Mr President. Is Mr Tawil's image frozen? It seems to be frozen from my perspective, and I think he just dropped again.

(Technical discussion off the written record)

THE PRESIDENT: Mr Molina, you may resume. Simply for the time, Ana, please correct me if I'm wrong, 27 minutes were used for the second round?

THE SECRETARY: I stopped the clock at 1103. I have a total time of 1 hour 41 minutes.

THE PRESIDENT: Mr Molina, please proceed.

by Mr Molina

MR MOLINA: Thank you Mr President, members of the Tribunal.

This is a simple contract case. Peru, the grantor -- next slide, please -- committed to pay guaranteed revenue for the first 20 years that the project was in commercial operation.

To get to commercial operation CHM had to complete a series of milestones in its work schedule including the commercial operation milestone. If it was late, it could owe millions, and if it failed to achieve the commercial operation milestone, it could have its contract terminated and its $5 million bond executed.

Needless to say, under the contract time was of the essence, but the time that Peru took from the project did not and could not count against CHM. The parties made this point fundamentally clear through two addenda that the parties duly executed and which are referred to here as Addenda 1 and 2. These addenda extended the commercial operation deadline of December 31, 2018 to March 14, 2020 based on the premise that CHM must be held harmless from government interference, and when the regional government attacked the project through the RGA lawsuit, Peru agreed through Addenda 3-6, as you can see on the screen, to

hold CHM harmless once again from that interference by suspending the work schedule by 528 days, with the intent that this time would be restored once the suspension was lifted. But when CHM sought these extensions in its Third Extension Request Peru rejected them reneging on its obligation to hold CHM harmless from government interference. This reversal, as we have spoken to you about today, we call the pivot because it marked the first time in the five-year history of the contract that Peru took the position that CHM had assumed all risks, including the risk of government interference.

Now, as you can see during the first five years of the contract, as you can see on the left, Peru's lawyers made clear time and time again that CHM had never assumed this risk because such an allocation would infringe the public interest or would be contrary to the good faith principle under Peruvian law. But after this pivot, as you can see from the right

part of the screen, Peru's lawyers stated the complete opposite.

Now, underscoring the arbitrariness of this pivot, the same government lawyer who authored the Sosa Report on the left in October 2016 which held that it would be an unreasonable allocation of risk to have CHM assume the risk of government interference, that same lawyer authored the denial of the Third Extension Request in 2018, which said that this risk was "part of the contractual and business risk assumed by CHM".

Now, Peru's pivot is based on its new interpretation of clauses 8.4 and 1.4.22. Before the addenda, these clauses provided that the commercial operation had to be completed on December 31, 2018 and that the term for guaranteed revenue would end on December 31, 2036. These clauses also provided that these dates could not be extended "for any reason".

Now, the way that Peru interprets these clauses in this case is as follows. First,

Peru argues that for any reason literally means for "any" reason, including causes attributable to Peru.

Second, Peru argues that this interpretation must mean that Peru can interfere with the contract with impunity.

And, third, Peru argues that the terms contained in Addenda 1 and 2 which expressly provided that CHM had to be held harmless from government interference should be ignored because they were "administrative errors" that violated these clauses on the screen.

Claimants and their Peruvian legal experts, Professors Maria Teresa Quiñones and Eduardo Benavides, reject these arguments. But we submit that this Tribunal does not have to decide if Peru is right because it cannot be disputed that CHM reasonably relied upon Peru's interpretations as set out in the addenda when investing under this contract as shown here.

So even if these addenda are a result of a comedy of errors, as Peru argues in this

arbitration, the fact remains that Peru wrongfully induced CHM to invest millions of dollars and has to pay damages to CHM under the contract.

By the way, if Peru really believed that these addenda were just a bunch of errors, it should have obtained an arbitral award to nullify them. Peru did not do that when it denied the Third Extension Request, and even though it had an opportunity to bring such a challenge in this particular arbitration, Peru has chosen not to bring such a challenge here. This is all just theatre.

The Tribunal is wondering how a contract born out of a promotional regime could allocate the risk of government interference to the party whose investments it is trying to induce? The short answer is it never did. Here I'm going to demonstrate that the contract addenda that Peru wants you to ignore are not errors but rather simply an affirmation of the basic notion found in the original contract language,

the applicable legal principles, and the relevant legislative history that if Peru interfered with the Mamacocha Project it owed CHM contract damages.

The original contract made clear that CHM would not assume the risks that were under the exclusive control of its counterparty, Peru.

For example, with respect to permitting clause 3.2 required CHM to "manage and comply" with permitting requirements, but it did not require CHM to obtain the permits since that would have allocated to CHM the risk that permitting authorities would delay the permits or not issue them at all for arbitrary reasons. This conclusion is also clear from clause 4.3, which required Peru's legal representative under the contract, MINEM, to assist CHM in obtaining these permits that had been unduly delayed by permitting authorities, once again proving CHM never assumed the risk that Peru would interfere with the contract.

Now, the original contract also included

clauses that made clear that Peru's performance under the contract would always conform with the applicable laws, as you can see from the screen. So what are the applicable laws? The contract defines them as "all binding laws and core precedents that comprise the internal laws of Peru".

These clauses are important because they confirm the parties' intent to incorporate all legal protections that private parties have in administrative contracts such as the contract here. One such set of protections is found in the Civil Code. As confirmed by Professor Eduardo Benavides the Civil Code is the only set of Peru's internal laws that governs the interpretation of contracts. As seen here, the Civil Code incorporates protections that prevent any interpretation that CHM somehow assumed the risk of government interference. As you can see, we have article 1362 that requires that the parties entering a contract act in good faith. They have principles under

articles 1314 and 1317 that provide that when a party acts with the required diligence, it cannot be faulted for its non-performance, and we have the principle under article 1328 that a contract cannot be interpreted in a way that would immunise a party's breach.

Now, the contract also incorporates legal protections found in Peru's political constitution. These include the principles that Peru cannot act arbitrarily or unfairly as interpreted by the constitutional tribunal and confirmed by Professor Maria Teresa Quiñones. You also have the principle under article 70 that Peru cannot expropriate without compensation, and the principle under article 103 that Peru cannot abuse the rights of private parties.

Now, these constitutional principles are fleshed out in another set of Peruvian laws called the General Law on Administrative Procedures. This law provides that Peru cannot "act against its own acts" and that Peru should

"provide private parties or their representatives with true, complete, and reliable information regarding each proceeding under its responsibility so that private parties accurately understand at all times the relevant requirements, procedures, estimated duration and possible results". These laws also provide that Peru must act "in line with the private parties' legitimate expectations".

As confirmed by our experts, the principles we just covered support our interpretation that for any reason did not allocate the risk of government interference to CHM.

Peru does not really even dispute this point. Instead Peru conveniently argues in this arbitration that the principles that we've just covered don't apply here because according to Peru, they conflict with the legal framework that Peru supposedly implemented when it amended the RER regulations in July 2013. So let's talk about those amendments.

It is undisputed, for starters, that the

"for any reason" language in the contract that we saw earlier came from these regulatory amendments in July 2013. As you can see on the left side of the screen this is the statement of reasons that Peru published to explain what these amendments meant and it provides that the experience gathered from the first two auctions made Peru aware that changes were necessary to reduce uncertainties of private parties and to ensure that investors realise their investment returns on these projects. On the right you can see that Peru's fact witness, Mr Jaime Mendoza, testified that the experience mentioned in the statement of reasons was actually referring to delays in the early projects that were caused by the concessionaires. These were concessionaires who were trying to flip their projects rather than move them forward. Mr Mendoza testifies, as you can see, that Peru enacted the July 2013 amendments to "correct this situation".

Now, it is our position that this document,

this statement of reasons, and Mr Mendoza's testimony confirm that Peru's interpretation of "for any reason" is wrong. Peru was not trying to allocate all risks to concessionaires, including the risk of government interference. Indeed, there's nothing in the statement of reasons that says so. And Peru never even cites to that document, even though it's the official public document that explains what these amendments mean. Instead, as confirmed by Peru's focus at the time on the -- and also, as confirmed by Peru's focus at the time on the interest of private investors, it's clear from the statement of reasons that these amendments were trying to prevent concessionaires from delaying their own projects, because Peru actually wanted the projects to go forward in July 2013. That's what this legislative history is confirming.

By the way, that's not just our position. When MINEM asked its outside counsel, Estudio Echecopar, in April 2018 if it could interpret

these amendments as having allocated all risks to concessionaires, Estudio Echecopar said no, because it was fundamentally understood that a regulation cannot be interpreted in a way that distorts the law it is trying to implement.

And that's what would happen here, since any interpretation of the RER regulations as having allocated all risks to investors would clearly distort the RER Law, which seeks to induce the investor's investments. As Echecopar concludes, such interpretation would be unconstitutional.

Ironically, Echecopar, as you can see in the bottom part of this slide, Echecopar recommends that MINEM should amend the "for any reason" language in the regulations to prevent MINEM's officials from adopting this unconstitutional interpretation. I say "ironically" because MINEM ultimately adopted this unconstitutional interpretation when it denied the Third Extension Request, and because this is exactly the interpretation that Peru wants the Tribunal

to adopt in this case.

Peru has no answer for this other than to say Echecopar just got this one wrong, where, as you can see on the screen, the RER Law plainly states that the legal framework underlying the regime must incentivise and encourage investments and must eliminate and remove any barriers or obstacles that stand in the way of these investments.

Nothing in the law allows Peru to allocate all risks to CHM. It's for this reason, by the way, that in their papers, and presumably throughout this hearing, Peru's lawyers will not focus on the RER Law. They want the Tribunal to interpret the RER regulations in a vacuum, but they have to be interpreted consistent with the law. And this law is telling MINEM to protect private parties from risk, not to allocate more risk to them.

Next slide, please.

Again, that's not just our position. It is shared by our independent finance expert, Dr

Whalen, who confirms that no rational investor would invest in such a regime. It's also confirmed again by EstudioEchecopar, which said in its reports "that such an interpretation, the one that Peru is espousing today, would undoubtedly discourage investments in RER projects".

Now it is because of these reasons that the parties under the contract agreed, time and time again, prior to Peru's pivot, to hold CHM harmless from government interference. For example, in addendum 1, the parties recognised that delays attributable to Peru had "made it impossible for CHM to achieve financial closing".

Applying the legal principle found under article 1314 of the Civil Code, which we covered earlier, the parties agreed that "The conclusion must be reached that said events of noncompliance do not fall within the scope of the concessionaire's liability".

A couple years later, when more government

interference occurred, Peru issued the Sosa Report. As shown earlier this report held that allocating the risk of government interference to CHM would be an unreasonable allocation of risk and that the only way this could happen is if it was "clear and unambiguous" in the contract that CHM had assumed this risk and, as you can see from this slide, the report confirms that this "clear and unambiguous" disclosure had "not occurred in this case".

Now, if you go to the next slide [slide 138] a few months later Peru adopted the legal analysis of the Sosa Report and issued a second set of extensions under addendum 2. This addendum is very significant to this case because it confirms that the "for any reason" text under clause 8.4 must be understood as excluding the scope of responsibility -- as excluding from the scope of responsibility of CHM delays that were caused by Peru. It is for this reason that Peru wants you to ignore this addendum because it confirms that Peru's denial

of the Third Extension Request was a sure fire breach of the contract.

When the regional government attacked the project, the parties agreed the addendum 3 to suspend CHM's obligations under the work schedule, and this again was extended on three separate occasions via addenda 4 through 6, again showing the parties' intent to hold CHM harmless from government interference.

The addenda never extended the term date under clause 1.4.22, but Peru knew it had a legal obligation to do so. This is clear, as you can see from the screen, from, again, the Echecopar reports which as seen here provide that the good faith principle which is applicable to these contracts provides that Peru must extend the term date when Peru is responsible for the delays. And as you can see at the bottom of the slide, the Echecopar reports advise Peru that this has to be done through an addendum to the contract.

Now, Claimants and their Peruvian legal

experts agree with the Echecopar reports, but for the purposes of this arbitration it does not matter if the parties could have extended this term. What ultimately matters is that Peru could not unilaterally reduce the term without having to pay CHM damages for this reduction. Nothing in clause 1.4.22 or any other clause in the contract absolves Peru of this obligation.

Otherwise, you would have the absurd result, pictured here, where after CHM achieves commercial operation, Peru starts interfering with the operation of the project, for years, reducing the term from 20 to 15 years, to 10 years, even all the way down to 0 years in order to get out of having to pay CHM guaranteed revenue. This interpretation must be rejected for all the reasons which we have discussed today.

We have demonstrated that the contract language, its applicable laws, and the contract's legislative history require Peru to

hold CHM harmless from government interference. It is our position that the Tribunal can decide every claim and every defence under the contract on this singular issue. For your reference this slide contains all the claims that we advance under the contract in this arbitration.

But if we go to the first claim this is the main obligation, we believe, of the grantor under the contract to ensure that CHM would receive guaranteed revenue for the first 20 years that the project was in commercial operation. This is required by clauses 1.4.26 and also 6.3.3 and 6.3.4.

Now, here the project never reached commercial operation because Peru terminated the contract as a matter of law when it made it impossible for CHM to complete the work schedule. Now, Peru should have extended these deadlines to cure the regional government attacks, that led to the suspensions, and Peru should have extended the term date to account

for all historical interferences to the project. Next slide.

Had it done that, CHM would have had a guaranteed revenue term of 20 years minus the delays for which it was responsible. We know from the record that CHM was only responsible for two days of delays over the entire history of the project, so that means that Peru should have granted the Third Extension Request and extended the relevant date such that CHM should have had 19 years, 11 months and 29 days of a guaranteed revenue concession term, but instead, as we discussed, Peru denied in its entirety the Third Extension Request and failed to issue any extensions, and for that reason that denial was a material breach of the contract.

Now, Peru's denial of the Third Extension Request was also a material breach of the suspension agreement incorporated under addendum 3 and again extended three separate times through addenda 4-6. As can be seen--

this agreement unambiguously provides that the parties agreed to suspend CHM's obligations under the work schedule that had been previously modified by addenda 1 and 2. At the time of this addendum the regional government had waged an all-out attack on the project and because CHM never assumed the risk of government interference Peru agreed to pause CHM's obligations under the work schedule to give the parties a chance to resolve these attacks.

The plan was always to restore the suspended time back to the work schedule some time in the future after the attacks were resolved and after the parties knew exactly how much time to add back to the work schedule.

Now, Peru denies all of this and instead advances the unfounded interpretation that these suspensions did not suspend CHM's obligations under the work schedule and instead only suspended Peru's supervision of these obligations.

But as you can see from the screen, this agreement clearly suspends CHM's obligations under the work schedules. The word "obligations" is literally in the agreement, and there is no mention whatsoever about Peru's supervision of that schedule. Peru just makes this up out of whole cloth.

Now, Peru also argues that the parties never intended to restore the suspended time to the work schedule and that when the suspensions were lifted the plan was always for CHM to continue complying with the milestone deadlines that preceded the suspensions. This argument makes no sense because the whole point of the suspension was to pause the work schedule because CHM could not complete its milestones amid these regional government attacks, as is clear from the contemporaneous record and specifically from the first notice of intent that you see on the screen.

As you can see, this document is filed in June 2017 and it makes crystal clear that

because of the attacks that were happening at that time, CHM was unable to complete the first milestone or any of the milestones under the work schedule. So any suspension that did not result in the extension of the work schedule milestones would have been useless to CHM and would have effectively resulted in the reduction of CHM's term to complete the work schedule. Had that been the case, Claimants would have just filed the arbitration that they were noticing in this very document.

Now, we know that wasn't the case because MINEM, again Peru's representative under the contract, told Claimants just a week before the suspension agreement that a contract suspension is the same as a contract extension, as you can see on the screen.

Specifically MINEM said that when a contract suspension is agreed to, the suspended time "should be, in due course, added to the current work schedule and a new commercial operation date should be scheduled beyond March 2020".

That's exactly our position in this case. And, by the way, MINEM continues to take this position. In a December 2019 pleading in the Lima Arbitration MINEM and its delay expert both confirmed that the 528-day suspension period should have been restored to the work schedule. Again, that's exactly our position on this case.

Now, Peru has no answer for the fact that MINEM, the party who negotiated and drafted the suspension agreement, has repeatedly confirmed that CHM should have received an extension that restored the suspended time to the work schedule. Instead, Peru would have the Tribunal believe that its lawyers and legal experts in this case know best about what MINEM intended when it drafted that agreement than MINEM itself.

Peru's position on this point is entirely without good faith.

Speaking of good faith, because CHM did not assume the risk of government interference, we

know it didn't assume the risk that Peru would act contrary to the principle of good faith, which again requires Peru to act honestly, fairly and consistently. We've covered these principles earlier and Mr Reisenfeld has already discussed some of the measures that violate this principle, but I want to focus right now on the Lima Arbitration because we believe it is a perfect illustration of Peru's lack of good faith during the relevant period.

We say this in part because the Tribunal in the arbitration in Lima has already held that Peru's pursuit of that arbitration was a bad faith attempt at forum shopping. It says so in the award.

We also say this because Peru filed that arbitration while the parties were in a standstill agreement where at Peru's suggestion Claimants agreed not to pursue their arbitration until April 2019 with the understanding that they were going to continue negotiating a resolution and that this would

give the parties enough time to be able to negotiate that resolution in good faith. But, as Claimants later found out, Peru was just buying itself time to file the Lima Arbitration and to get a head start on the international arbitration that Claimants had already noticed and would undoubtedly pursue once they learned of Peru's pivot. This is exactly the type of behaviour prohibited by the principle of good faith.

If Peru wanted to test its allocation theory by annulling addendum 1 and 2, for example, it had to bring that dispute to ICSID in Washington DC in front of a neutral international panel. This obligation is conferred by clause 11.3(a) as seen on the screen. Peru breached this obligation when it tried to annul addenda 1 and 2 in an arbitration in Lima. Now, because that dispute clearly threatened the project's existence it could have easily been valued at more than $20 million, which is the jurisdictional threshold

amount that you see on this clause.

Now, Peru argued that it didn't violate this clause because its claims could not be valued financially because they were declaratory in nature, but if we go to the next slide [152] as you can see here, on Christmas Eve in 2020 the Tribunal in Lima rejected that interpretation as lacking good faith because it allowed forum shopping. It was "nonsensical" -- their word -- from an efficiency perspective and it relegated ICSID to "a mere enforcement tribunal".

The Tribunal then threw out the case and directed Peru to bring these challenges to addenda 1 and 2 in this particular arbitration in front of this particular Tribunal. But, as mentioned before, Peru chose not to bring those challenges, even though it had a chance to do so, which we believe underscores the arbitrariness of both the Lima Arbitration and Peru's litigation positions concerning addenda 1 and 2.

Now, because its breaches under the contract are clear on their face, Peru attempts to limit its liability by arguing that it was never the grantor under the contract and that instead the grantor was always MINEM. The appeal to this argument is self-evident. If only MINEM is the grantor then Peru cannot be held responsible under the contract for the numerous bad acts of regional government entities.

But the contract is clear that Peru was the grantor and MINEM was only its representative. If you go to the next slide, this is stated in the chapeau where the parties introduced themselves, this is stated in the letter to the notary when the contract was signed, and this is stated in the sixth contract addenda that Peru wants you to ignore.

And, by the way, the definition of "ministry" in clause 1.4.31 of the contract expressly provide that MINEM was merely signing the contract on behalf of the State.

Now we also know that MINEM cannot be the

grantor because the contract would make no sense if that was the case. As discussed before, the main obligation of the grantor under the contract is to ensure that CHM receives guaranteed revenue. Peru's lawyers even called this the principal obligation for the grantor under the contract, which they attribute to MINEM who they say is the grantor. But as can be seen from the contract language, this obligation is not delegated to MINEM; it's delegated to OSINERGMIN. Now, this delegation makes complete sense if the State is the grantor, since the State can bind all government entities, but these clauses make no sense if MINEM is the grantor because MINEM is not involved in the process in any way, as confirmed in the Second Expert Report of Professor Maria Teresa Quiñones. It is undisputed in this arbitration that MINEM cannot bind OSINERGMIN or any other government entity. By the way, Peru has absolutely no answer for this.

Finally, in this hearing you'll hear Peru's lawyers and experts refer to four arbitral awards issued by tribunals in Lima that concern claims from other RER projects and that supposedly support Peru's contracts arguments in this case. But, as our legal experts confirm, these awards are not helpful for Peru. Importantly, none of these awards contain contract addenda where the parties expressly held that the concessionaires should be held harmless from government interference. This fact alone is dispositive because this contract is materially different than those at issue in those awards, and because even if the extensions at issue here were somehow illegal (as Peru contends) Peru is still liable for having misled CHM for more than five years about the meaning of its own laws. Peru cannot get around this fact, and these awards are just an attempt to distract you from it.

Now, there are other material differences. The cases I see on the screen concern different

claims, different facts, and different remedies. But the key point is that none of those awards held that Peru could interfere under the contract with impunity. To the contrary, those awards support the basic notion that we have discussed today, which is that the concessionaires never assumed the risk that the government would make it impossible for them to perform, and if that happened, as happened in our case but not in any of those other cases, Peru should be held liable under the contract and Peruvian law.

So unless the Tribunal has any questions, I will turn this presentation to my colleague, Mr Gonzalo Zeballos, to discuss the quantum-related issues in this arbitration.

THE PRESIDENT: Thank you, Mr Molina.

by Mr Zeballos

Señor Zeballos, tiene la palabra.

MR ZEBALLOS: Good morning, Mr President, members of the Tribunal.

Before we get into the issue of quantum, I'd

like to spend a few minutes on causation. As my colleagues have already explained, there's a crystal clear causal nexus between Peru's unlawful measures and the destruction of the Mamacocha Project.

This dispute involves a contract whose profitability was based on future income streams, 20 years of which were subject to a sovereign guarantee defined by the RER Contract, and the project was expected to operate for another 20 years beyond that. Peru doesn't dispute this, nor does it dispute that the measures destroyed those income streams.

Peru's primary defence is premised on the notion that you should ignore the harm it caused by the measures because of a single supervening and subsequent fact, the Amparo decision of February 4, 2021, which Peru says would have destroyed the project anyway.

Now, this is an important detail, the notion that it would have destroyed the project anyway. Peru concedes with its argument that

the unlawful measures did indeed destroy any hope of timely achieving COS and deprived the project of the totality of its commercial value. As such there's no real dispute about causation here, at least as regards the impact of the measures.

Peru's causation defence is that the Amparo was just as bad, not that the measures didn't cause harm. But even if we were to assume for the sake of argument -- and it's a significant assumption -- that the result of the Amparo proceeding was somehow inevitable, even though Peruvian officials repeatedly said that the Amparo proceeding was meritless, Peru's argument still fails. Next slide.

As you can see on this timeline, the measures began in March of 2017. By the end of 2018, the project's value was definitively destroyed. Next slide.

The Amparo ruling doesn't happen until 2021, years after the project was already dead. Next slide.

ILC Article 31, Commentary 13, clearly acknowledges that there are cases where an injury can be allocated to one of several concurrently operating causes, but this is not that case. There is no concurrent cause. By the time the Amparo ruling came down, the project had been dead for years.

In any event, Commentary 13 goes on to say that unless some part of the injury can be shown to be severable the State remains responsible for the consequences of its wrongful act. Peru hasn't even attempted to show that the effects of the Amparo, even if they were relevant, are severable from the cumulative effects of the measures.

Peru also ignores an even more important principle that's fatal for its argument which is that as a matter of international law Peru's duty of full reparation arose automatically, that's to say immediately, upon its breach of the treaty.

Next slide.

Peru's obligation to compensate Claimants arose automatically with the filing of the RGA lawsuit on March 14, 2017 and that's the valuation date from which, in accordance with the principles of ILC Article 31, the quantum of full reparation must be calculated. That's consistent with the principle that the compensation awarded is to restore the injured party to the position it would have been in in the action if the action that caused the harm hadn't occurred. Which brings us to the legal standard for compensation.

Here there are two legal bases that give rise to a duty to remediate harm to the Claimants, namely breach of the TPA, the remedies for which are determined by reference to public international law or breach of the RER Contract, the remedies for which are determined by reference to Peruvian law. In this particular case, though, things are greatly simplified because the quantum of compensation under international and Peruvian

law is the same.

Next slide.

Starting with the treaty breaches the applicable standard of Compensation under customary international law was articulated by the Permanent Court of International Justice in the Chorzow Factory case, and is codified in ILC Article 31's duty of reparation. Next slide.

Chorzow Factory's instruction to wipe out the consequences of the breach is firmly rooted in investor-state jurisprudence. It's also consistent with the expectation damages standard common to virtually every jurisdiction's contracts law jurisprudence which is to place the injured party in the position it would in all probability have been in but for the breach. This is commonly referred to as the but-for standard.

Importantly, Chorzow Factory establishes the compensatory standard not just for cases of unlawful expropriation but for all other treaty

breaches as well. Next slide.

Tribunals applying the but-for standard articulated in Chorzow Factory have consistently determined full compensation to comprise the fair market value of the investment but for the Respondent State's unlawful conduct. ILC Article 36 Commentaries 21 and 22 similarly support that principle.

Chorzow Factory further commands us to define the hypothetical world which would in all probability have existed as of that valuation date, and in the absence of the State's illegal conduct to determine the fair market value. Following these principles, in order for a fair market value valuation to be undertaken, we have to examine the Mamacocha Project as it existed as of the valuation date and then consider its fair market value in the but-for world that would hypothetically but probably have existed but for Peru's unlawful measures.

This hypothetical world includes only the

foreseeable and expected course of events, those events that in all probability would have been expected to occur factoring out the consequences of the breach. Subsequent actual events can't be part of that but-for scenario as of the valuation date unless they were expected to occur, and this is because unexpected events can't form part of the information that an arm's length purchaser would have considered in paying fair market value as of the valuation date in the but-for scenario.

Let's turn to the methodology for conducting a fair market valuation.

Where, as here, sufficient data exists to determine lost profits to a reasonable certainty, Tribunals haven't hesitated to find the discounted cash flow method to be an appropriate means to determine the fair market value of the investment. Next slide.

Here the parties had a long-term commercial contract with sovereign guarantees for price

and volume that guaranteed a stable and easily determinable stream of future income for the next 20 years. Next slide.

The parties also had access to extensive studies prepared by several independent third parties, all of which were prepared prior to the measures and all of which confirm the viability of the project, its known risks and its expected dates of completion. These third-party studies demonstrate that the project was on track to succeed.

Crucially, for determining fair market value, this was the contemporary view of the market on the valuation date, as embodied by Innergex and DEG, each of which spent considerable sums of their own money independently conducting due diligence and, in the case of Innergex, making an offer for an equity stake in the project that reflected its belief that the project had significant value.

So there's every reason to believe that the many third-party analyses of the project,

together with the clearly defined parameters of the RER Contract, provide a sufficient basis to conduct an accurate assessment of the project's fair market value using the DCF method. Significantly, Peru doesn't dispute this and concurs that the discounted cash flow method provides the proper basis for determining the fair market value of the Mamacocha Project. Next slide.

Moving to principles of compensation under Peruvian law, the basic premise which is shared in virtually all civil and common law jurisdictions is the principle of full compensation. The essence of full compensation is -- and this will sound familiar -- to return the injured party as close as possible to the position they would have been in absent the breach. Again, to apply this standard of compensation, we must look to the but-for scenario, to the hypothetical but-for world that would in all probability have existed had Peru's breaches not occurred, and then we have

to compare that but-for world to the real world where the breach did occur.

Under Peruvian law, as under customary international law, the difference in value between the two scenarios is the quantum of compensation owed by the Respondent State. Here again, there shouldn't be any dispute as to the appropriate methodology to calculate damages under Peruvian law. Peru conceded in the Lima Arbitration that Claimants' use of the DCF method was an appropriate way to quantify potential damages arising from Peru's breach of the RER Contract, which the Lima Tribunal accepted for the purpose of finding that it should cede jurisdiction over this dispute to this Tribunal. Having previously conceded that point, Peru should be bound by it here. Next slide.

To calculate the project's fair market value but for Peru's unlawful measures, Claimants have retained Messrs Santiago Dellepiane and Andrea Cardani, of the Berkeley Research Group,

to conduct an independent analysis of the project's fair market value on the valuation date. They've used the DCF methodology I just described, and based on their analysis as set forth in their Second Expert Report, Peru owes Claimants compensation in the amount of $45.62 million, whether under international or Peruvian law. I'll let Messrs Dellepiane and Cardani present their analysis in greater detail to you next week. For now, I'll return in more detail to Peru's primary defence, which is that the measures couldn't have caused harm to Claimants because the project was already doomed by the Amparo.

As I've already noted, Chorzow Factory has been consistently interpreted to require assessment of fair market value in a world where the measures haven't taken place, the but-for world, not the real world. Next slide.

Peru fixes upon the Amparo decision to draw attention away from the but-for world. They do this to try to pull this dispute into the real

world. The state of affairs as of the date the measures began, the valuation date, defines the parameters of the but-for world, and on that date no one -- not CHM, not Innergex, not DEG, and not even MINEM -- thought that the Amparo posed a threat to the project. The evidentiary record is clear that but for the measures, the project was, in all probability, going to move forward with Innergex and DEG -- and I say "in all probability" deliberately because that's the standard to which Claimants are held, not absolute certainty.

To be sure, in the but-for world, the world as it existed in March 14, 2017, the Amparo was a known risk, but it was one that was discounted to virtually zero by all of the relevant parties in this case, including by potential arm's length investors in the project and Peru itself. And, of course, it must be noted that we cannot know whether the outcome of the Amparo would have been different if the unlawful measures had never happened. Next

slide.

The Corte Superior de Justicia de Arequipa expressly noted that it did not conduct an analysis relating to the consequences of its decisions because the project was never executed. In other words, the measures impacted that court's decision. In any event, neither the reasoning nor the outcome of the Amparo matters. What does matter for our purposes is the impact the existing Amparo proceedings had on the price that an arm's length purchaser would have paid for the project on the valuation date and in the absence of the measures. In fact, we can measure that impact because we have such an offer, the Innergex offer. On the valuation date, Innergex knew about the Amparo. It had known about it since at least October of 2016. It didn't know about the measures. The Amparo was a risk, therefore, already included in Innergex's offer, and we know that impact was negligible. That's why Peru insists on moving

the valuation date away from the date of the onset of the measures to the date of the award so that, under Peru's logic, the result of the Amparo must be taken into account.

Peru also wants to shift the valuation date forward so that it can claim that the 2018 distressed asset offers from Innergex and Glenfarne are but-for offers, even though they're clearly actual world offers impacted by the measures. Now, Peru insists --

THE PRESIDENT: Mr Zeballos, you have five minutes left.

MR ZEBALLOS: OK.

Now Peru insists that there are awards, including Chorzow Factory itself, that valued the destroyed investment as of the date of the award. Peru is right that such awards exist but, as members of the Tribunal already know, in those cases where Tribunals have shifted the valuation date from the date of the breach to the date of the award, they've done so not to avoid the principle of full reparation but to

uphold it.

In ADC v Hungary, for example, next slide, the Tribunal shifted the valuation date to the date of the award in order to allow the investor to enjoy subsequent gains in the value of the investment post measures. Tribunals that have shifted the valuation date have done so to uphold another principle as well which is that no state shall derive a benefit from its own wrongdoing, as would be the case if a subsequent increase of value of an expropriated investment were to be retained by the state as a prize for its breach of international law. And the reverse of that holds true here where the value of the investment decreases following the illegal act. The appropriate valuation date is the date of that act. To adopt a later valuation date that Peru demands would grant it a windfall allowing it to escape the duty to make full reparation that arose automatically upon the start of the unlawful measures.

Peru hedges its reliance on the Amparo with

a fallback argument that the project would never have been built on time anyway. To support this speculative argument Peru cherry picks worst case scenarios from construction timetables and other assorted risks.

But what Peru is arguing here is that the Tribunal should, in the face of actual knowledge that the measures destroyed the project, excuse Peru's intentionally wrongful conduct under the treaty, its bad faith breach of contract, and its unlawful conduct under Peruvian law because of the possibility that the project might not have succeeded anyway. The basic facts of this case belie this approach. Peru granted CHM the concessions it did because they believed the project would succeed.

Tribunals have successfully recognised that states don't grant concessions they expect to fail or demand significant foreign investments in projects that aren't expected to be profitable.

Respondents granted multiple extensions to the project and sought to have the RGA lawsuit removed because they thought the project would succeed. If they thought otherwise, why would those extensions have been granted? And those extensions, Claimants didn't seek them because they couldn't get the project built on time. They at all times thought the project could be built within the projected time frames. They only asked for adjustments to the deadlines to account for delays attributable to Peru. CHM was desperate to start working on the project. In fact, the record is clear that when Claimants first invoked the TPA, they did so to get the project moving, to give Peru a chance to do the right thing precisely because Claimants wanted to finish the project, not abandon it.

Claimants did it because they, like their potential partners, Innergex, their financiers, DEG, their engineers, GCZ, and even their counterparty, Respondents, believed in the

project. Next slide.

Make no mistake. The project didn't die because it wasn't feasible; it died because Peru no longer wanted it. Peru thought that the risk of cancelling the contracts would be economically expedient in light of the money it stood to save given a precipitous and unexpected decrease in spot prices, not to mention the $55 million worth of performance bonds Peru stood to collect. Next slide.

Finally, Peru argues that the but-for fair market value of the project under its supposedly corrected DCF analysis is negligible. A mere $3.4 million, as shown on this slide. I'll let Claimants' experts speak to the technical infirmities of Peru's argument, but I'll note here that the market again rejects Peru's theory.

Neither Innergex nor DEG had, as of March 14, 2017, discounted the value of the Mamacocha Project to a negligible figure like $3.4 million. No. In fact, Innergex and DEG valued

the project in excess of $25 million here. And not to be forgotten here, so too had Latam Hydro's investors, Mike Jacobson and Gary Bengier, neither of whom was foolish enough to invest in a project with a value of less than half the money they'd already invested to date.

Neither the Claimants nor Innergex nor DEG had any interest whatsoever in propping up an already failed project, which is what the Tribunal would have to believe if it were to accept a valuation of just $3.4 million.

This is especially so in light of Peru's own experts' conclusion that Latam Hydro invested more than $20 million into the project. No one would have invested $20 million and continued to invest if they believed the project to be worth anything less than at least that amount, much less several orders of magnitude less. Next slide.

To support its $3.4 million but-for fair market valuation Peru points to the Innergex offer. Now, Innergex's offer explicitly states

that it considers Latam Hydro's sunk costs, as of February 2017, of $7.63 million to constitute a 30 per cent equity stake in the project, as shown in this and the next two slides.

Rather than do the simple math of dividing $7.63 million by 30 per cent to derive the value of a 100 percent stake, Versant says no, the value of the project is only what Latam Hydro has invested as of the valuation date. But Innergex doesn't value the project only at what's invested. Their offer is quite different. They say that what's invested is worth 30 per cent and that they're willing to pay an additional $17.8 million to get that remaining 70 per cent equity stake.

By contrast, Versant takes the $7.63 million invested by Latam Hydro and uses it to do an investment value analysis, and then does it incorrectly. They say you should only look at what they call the pre-money value based on dollars invested as of the valuation date.

It's like a piggy bank, they say. And then they go on to say that value only increases on a dollar-for-dollar basis until the investment is complete.

In addition to the fact that no one invests in a piggy bank, there are at least three problems with this approach. First, Versant's analysis of the Innergex offer is not a fair market value analysis. It's a sunk cost analysis in a bad disguise. Next slide.

Versant acknowledges that sunk cost is not a substitute for fair market value. This is because it's a reliance methodology that doesn't take into account "the impact up or down of such expenditures on the market value of an investment from the perspective of a willing buyer/willing seller".

Their words from their first report. Second (next slide) Versant wants you to treat the Mamacocha Project like a piggy bank -- again, their words -- as illustrated from this example from their First Report. Versant says that the

project's piggy bank had only $7.63 million in it, but Versant's piggy bank doesn't generate hydroelectric power. It doesn't have a sovereign guarantee for price and volume of the electricity it generates. Versant's piggy bank wasn't expected to lead to other revenue-producing piggy banks that would be built upstream, and it certainly -- next slide -- doesn't take into account the impact up or down of the expenditures on the market value of the investment from the perspective of a willing buyer or a willing seller. And finally, third, Versant ignores the fact that if you want to do a sunk cost analysis you have to do it once the investment is complete because it's a measure of what you actually spend on a project in the real world. This is exactly what Versant did in its own sunk cost analysis based on amounts actually spent.

In any event, Versant's whole approach is wrong because the Innergex offer wasn't a sunk cost analysis. Why would it be? Innergex was

looking to buy a 70 per cent stake. They wanted to know how much it was going to cost them. How did they get there?

Innergex determined that a $7.63 million investment was worth a 30 per cent stake in the Mamacocha Project, and then they did the math. They divided 7.63 by 30 per cent and derived the amount they would have to pay to acquire their 70 per cent stake. $17.8 million. To this was added a $1.5 million development premium.

This is what Innergex was willing to pay, and this is what Latam Hydro is willing to accept in an arm's length transaction. 7.63 million plus 17.8 million plus a $1.5 million development fee -- development premium equals $26.93 million. Now let's see how this stacks up against BRG's but-for fair market analysis and Versant's but-for fair market analysis. Next slide.

In conclusion, as of the valuation date and notwithstanding the existence of the Amparo and

the known construction and other risks, three sophisticated commercial entities were committed to investing in the project as originally conceived in the belief that it would succeed and that they would get a return on their investment.

Claimants don't argue that the project faced no risks or that the project was guaranteed to succeed. Nor do they need to. The discounted cash flow analysis prepared by Claimants' experts not only acknowledges the risks inherent in a project but in fact builds them into its analysis. This is the whole point of the discount in the discount rate. That rate takes into account a broad range of risks including construction risks, market risks and even country risks. The simple truth is that as of the valuation date, in the face of all the evidence cited by Peru, including the Amparo, the construction challenges, et cetera, all of the key players -- and that includes Peru -- believed that the project was more

likely to succeed than not. And this is because it was. Next slide.

The Claimants here seek damages under the but-for scenario of $45.62 million. This quantum, which represents the project's but-for fair market value, using the DCF methodology, plus an offset for actual costs incurred in developing and later trying to save the project plus certainly additional costs and expenses and reasonable pre-judgment interest is, as Claimants' experts will explain, conservative and it enjoys strong support from the contemporary Innergex offer.

Claimants are entitled to be compensated accordingly for Peru's economic opportunism and its bad faith destruction of the Mamacocha Project.

Thank you for your attention.

THE PRESIDENT: Thank you for your presentation. This concludes also the opening statement by the Claimants. I note that there's seven minutes more than there was set

aside for the opening statement so the Respondent will also have seven minutes more for its opening statement.

We have now, on the programme, 15 minutes questions by the Tribunal. I look to my colleagues. First, Professor Tawil. Do you have any questions for the Claimants?

MR TAWIL: Not at this time, Mr President. Thanks.

THE PRESIDENT: Professor Vinuesa?

MR VINUESA: No, I have no questions.

THE PRESIDENT: I have no questions either at this time, although I have questions but I would like first to hear the Respondent. I think that was also the idea of my colleagues.

Then we have a recess of 45 minutes. That is until 7 CET.

(Pausa para el almuerzo.)

SESIÓN DE LA TARDE

ALEGATO DE APERTURA DE LA DEMANDADA

THE SECRETARY: The interpreters and court reporters will be grateful if the parties could pause -- if the speaker is speaking in Spanish and English, if they could please make a pause to allow the interpreter to change the outgoing language channel. That will be all, Mr President. Thank you.

THE PRESIDENT: Thank you. Mr Grané, for the Respondent? You will start.

MR GRANÉ: Yes, we are ready to start and my colleague, Mr Di Rosa, will start Peru's opening statement.

by Mr di Rosa

MR DI ROSA: Thank you, Mr President and distinguished members of the Tribunal. During our presentation today on behalf of the Republic of Peru you will hear from four different Arnold & Porter attorneys. I will start by providing an introduction emphasising certain key facts and background issues, and I

will then yield the floor to my colleague, Alvaro Nistal, to address the jurisdictional issues.

After that Patricio Grané Labat will discuss the merits, and finally our partner, Amy Endicott, will focus on damages issues.

We'll begin with some brief observations on the RER regime. In general, power generation companies in Peru are connected to the grid which is known there as the National Interconnected Electric System, and they compete in the electric spot market. In the spot market generation companies are subject, of course, to the price fluctuations produced by the supply and demand of electricity.

In 2008 in an effort to promote the use of renewable energies to protect the environment and also to provide Peruvian citizens with clean energy, Peru enacted the RER Law. To implement that Law Peru also promulgated the RER regulations. And, by the way, we will use the term "RER regime" to refer collectively to

not only the RER Law and regulations but also the various RER instruments such as the auction bidding rules and the RER Contracts themselves.

To promote investment in renewable energy, the RER regime established a series of incentives for RER generators. The main incentive was the guarantee of a fixed tariff or "feed-in tariff" throughout the 20 years of duration of the RER contracts. In today's presentations we'll just refer to this tariff as "the tariff".

This tariff was designed to insulate the RER generation companies from the price fluctuations in the spot market. The Claimants' efforts to obtain the tariff constitutes one of the central aspects of the present dispute.

Another incentive that the RER regime provided was to grant RER generators preferential treatment over non renewable power generators with respect to priority of connection to the grid. The RER regulations

established that the tariff would be awarded to RER generators by means of auctions. These auctions are directed by the regulatory entity, which is the Supervisory Agency for Investment in Energy and Mining, or OSINERGMIN.

Prior to each RER auction, OSINERGMIN publishes the (En español) "Bases Consolidadas", which we will call today the "bidding rules", and those are the terms and conditions that govern the award of tariffs in each auction.

The bidding rules include, as an attachment, the relevant RER Contract and those rules are then incorporated into each RER Contract as an integral part of the contract. To understand the obligations and risks undertaken by generators in the RER regime, it's important to understand how these auctions work. First of all, it's important to understand that each RER project is designed entirely by the bidder with no involvement whatsoever of any state agency or entity. Consequently neither the Ministry

of Energy and Mines, the MINEM, nor any other government authority participates at any stage in the design of a given RER project, nor does it opine on the proposed location of the project, nor does it evaluate the context or the impact or the viability of the project. All of that is part of the assessment that's carried out exclusively by the bidder itself. The bidders then submit their bids, and that's the first time the government becomes aware of the various proposed projects. A committee composed of officials from OSINERGMIN and MINEM then opens the envelopes containing the bidders' proposals and sorts the different projects in order of price offered, that is on the basis of the tariff amount that was proposed by each bidder.

The bids are then selected successively from lowest to highest price until MINEM covers the full amount of the energy that was targeted for that particular auction. This means that the sole basis of competition between the bidders

in these auctions is the tariff proposed by each bidder.

Another essential point that I want to address is that the RER Contracts, including the one that was signed by CH Mamacocha, or CHM, are not concession contracts for the generation of electricity. Now, the title of the RER Contracts lends itself to confusion because it contains in it the phrase "concession contract".

However, the "concession" that an RER contract makes to the successful bidders consists simply of the special incentives that I just mentioned, especially the tariff.

However, the RER Contracts themselves -- and I do want to be very clear about this -- the RER Contracts themselves do not grant the right to generate electricity. Rather, the right to generate is obtained through a different concession, which is called the "concesión definitiva", or "final concession". These final concessions are the subject of an

entirely separate contract. For example, CHM's final concession contract for power generation, which was later annulled by a court, is in the record at Exhibit R-0002.

As we can see on the screen, CHM's RER Contract itself makes express reference in article 3.2 to this separate final concession, and so does clause 1.4.1 of the bidding rules. The provisions that you see on the screen have two important aspects. The first is that the RER Contract explicitly imposed on CHM the obligation to obtain separately the final concession. And, second, the bidding rules provision, which as I mentioned was an integral part of the RER Contract, explicitly imposed on CHM the exclusive responsibility to obtain the relevant permits.

To clarify the distinction between the RER Contracts and the final concessions, maybe it's helpful to point out that while it is possible to generate electricity with a final concession but no RER Contract, it is not possible to

generate electricity with an RER Contract but no final concession. In the former case the generator simply doesn't get the tariff and becomes subject to the vagaries of the spot market.

Let me turn now briefly to the subject of the RER auctions. Following enactment of the RER Law and regulations, the Peruvian government began to hold auctions for the award of RER projects and the signing of RER Contracts. To date there's been four of these auctions, in 2009, 2011, 2013 and 2015. After the first of those two auctions the MINEM noticed that several bid winners were not developing their projects on time and in some instances were delaying by five years or longer the commissioning of their hydroelectric plants for commercial operation. Other bid winners were simply waiting to sell their projects to third parties before construction got started.

These delays were frustrating the objectives of the RER regime, so to deal with that, prior

to the third auction, which is the auction that CHM participated in, the state amended the RER regulations. Now, you've seen the relevant provisions of the RER regulations, the bidding rules, and the RER Contract many times in the pleadings, and my colleague, Mr Grané Labat, will address them in some detail later today, so rather than delve into each of the specific provisions at this time, I'll just limit myself to highlighting some of the key features of the amended RER regime.

Importantly, the amendments that were established by Supreme Decree No 24 created two new milestones for the commercial operations start-up, or COS. One of them was the date of real commercial operations start-up, what appears on the screen as "Real COS", and as the term itself indicates that was the real deadline. However, to accommodate delays in these projects, including delays in the granting of permits, the RER regulation established a separate earlier COS date, which

was the "Reference COS" date.

The reference COS date was an aspirational deadline by which ideally the investor's plant would start operations. The RER regulations required that the deadline for the real COS could be no more than two years after the deadline for the reference COS, and that two-year period was established precisely as a float period or cushion to account for the inevitable delays in these type of projects, and to avoid the uncertainties that had been caused in the first two auctions by leaving the handling of delays in the hands of the parties to the RER Contract.

In other words, the whole concept of the reference COS was created precisely to avoid the types of extensions that the Claimants here were demanding from the MINEM. The regulations established also two important additional requirements: First, a strict prohibition on any change for any reason whatsoever to the termination date of the RER Contracts, and,

second, a requirement that the contract termination date could be no more than 20 years after the reference COS.

Perhaps it would help to clarify the distinction between the reference COS and the real COS by discussing briefly the implications of missing those milestones. For example, if an investor missed the reference COS, so long as it didn't also miss the real COS the only implication was that the investor would not have the benefit of the tariff for the full contractual period of 20 years. In other words, for every day the investor exceeded the reference COS it enjoyed one fewer day of the fixed tariff.

Conversely, however, if an investor missed the real COS, then by the terms of the contract the contract would terminate automatically and the government would be entitled to call the performance bond.

The upshot of all of this is that the dates of these three milestones were intertwined in

such a way that none of them could be postponed. That means that starting with the RER Contracts that were awarded in the third auction, those three dates could not be extended beyond the deadlines that were specified in each RER Contract. The bidding rules for the third auction established December 31, 2016 as the date for the reference COS. That meant that the deadline for the real COS was two years later on December 31, 2018, and the contract termination date was 20 years later, or December 31, 2036, and those were in fact the three dates that were included in CHM's RER Contract.

Now, long before signing that RER Contract, the Claimants were well aware that under the applicable norms, it would be impossible for them to extend the real COS and the contract termination date, and this issue of the immutability or not of the three dates is one of the central issues in this arbitration since the Claimants are alleging that Peru violated

the treaty and the contract by not granting them extensions for those key milestones.

Claimants this morning said Peru argues that the phrase "for any reason" means literally for any reason, and yes, that's exactly what we are arguing, and that's because, as my colleagues will show you, that's exactly what the RER Contract expressly said and that's exactly what the RER regulations expressly said, and that's exactly what the third auction bidding rules expressly said, and that's exactly what Claimants' own sworn declarations at the time expressly said.

The plain meaning of the plain text of a contractual provision is always the No 1 rule of interpretation, and I would venture to say in any legal system. It's unclear, therefore, why Claimants find perplexing Peru's position. If anything, what's perplexing is the fact that Claimants find that perplexing.

More generally Claimants' position appears to be based on four fundamental theses. First,

that not only MINEM but all of Peru's state entities at all levels -- national, regional, municipal -- assumed contractual obligations under the RER Contract, including the obligation to grant all necessary permits within a specified period of time.

Second, that notwithstanding the plain text of the RER regulations, of the bidding rules, and of the RER Contract, the deadlines for the real COS and termination of the contract could, after all, be extended.

Their third thesis is that it was certain acts and omissions of the Peruvian State that rendered it impossible for CHM to meet the real COS date.

And the fourth thesis is that the Peruvian State acted in bad faith with political motivations for the very purpose of destroying the project.

As my colleague, Mr Grané, will explain, none of the alleged actions or omissions by Peru that Claimants invoke constitutes any

breach of the treaty or of the contract or of Peruvian law.

Let me turn now briefly to the issue of the permits. As we just saw, the RER Contract imposed on CHM the exclusive responsibility to obtain relevant permits and enabling instruments, both for the final concession and for installation and start-up of the project.

In the end, Claimants failed to comply with that obligation, in particular with respect to two fundamental permits, the environmental permits and the final concession, and just a few brief comments on these permits.

After conducting the relevant evaluation, the regional environmental authority concluded that the Mamacocha Project would have a significant impact on the environment, so they classified it as a Category III project initially. That meant that the Claimants were required to present a detailed environmental impact assessment, or EIA.

And, as Claimants noted in their memorial,

the approval of EIAs could take up to approximately 345 calendar days. So roughly a year, right? However, the Claimants didn't want to wait that long so they demanded that the relevant authorities reclassify their project as one of slight or minimal environmental impact, which would make it a Category I project.

Category I projects did not require an EIA but, rather, an environmental impact declaration, or "DIA", and this is important because the DIA was a much simpler document than the EIA, and as Claimants noted in the memorial the approval of a DIA could take as little as 30 business days.

So ultimately the Claimants did manage to persuade the authorities to reclassify their project from Category III to Category 1, and that allowed, in turn, CHM to prepare and present a DIA instead of the more complex and time consuming EIA, and in that way to obtain their environmental permits in a shorter period

of time.

After getting these environmental permits, the Claimants then used those permits to obtain, in March 2016, the final concession, in other words the actual generation concession.

In September 2016, the Claimants' environmental permits were challenged in an Amparo proceeding initiated by a private Peruvian citizen. The Peruvian courts ultimately granted the Amparo request, concluding that CHM's environmental permits and final concession had been obtained illegally and that the project had been incorrectly reclassified as a Category I project. As we can see on the screen, that conclusion was expressly articulated in the Amparo ruling issued by the constitutional court of Arequipa on January 30, 2020.

This Amparo ruling was then confirmed on February 4, 2021 by the Superior Court of Arequipa and a desperation Amparo motion that was filed by Claimants challenging those

rulings was, in turn, dismissed on July 5th of 2021. What all of that means is that the decision of the Peruvian courts declaring the nullity ab initio of CHM's environmental permits and of the final concession that was obtained with those permits is now final and definitive.

This Amparo ruling would have prevented CHM from reaching the real COS, and would have derailed the Claimants' project even if none of the challenge measures had ever happened.

One critical point in this regard, Mr President and members of the Tribunal, is that in this arbitration the Claimants are not challenging either the Amparo ruling or the judicial proceedings that yielded that judgment.

That concludes our introductory observations. Mr President, members of the Tribunal, I now yield the floor to my colleague, Alvaro Nistal, to address the jurisdictional issues.

THE PRESIDENT: Thank you, Mr Di Rosa. Mr Nistal?

by Mr Nistal.

SEÑOR NISTRAL: Señor presidente, miembros del Tribunal: voy a exponer en castellano, aunque por una cuestión de consistencia las láminas estarán en inglés.

El Perú mantiene las cinco objeciones jurisdiccionales que ha presentado en este caso y que identificamos en la filmina en pantalla. Por limitaciones de tiempo, en estos alegatos discutiremos solo dos de esas objeciones.

En primer lugar, demostraremos que el Tribunal carece de jurisdicción ratione voluntatis para decidir las reclamaciones sobre la investigación penal de la Fiscalía Ambiental de Arequipa. Ello se debe a que las demandantes no incluyeron esas reclamaciones en su tercera notificación de intención, incumpliendo así el requisito de notificación contenido en el artículo 10.16.2 del Tratado.

Me referiré a esa tercera notificación

simplemente como "la notificación de intención".

En segundo lugar, demostraremos que el Tribunal carece de jurisdicción ratione materiae sobre el Contrato RER porque ese contrato no es un acuerdo de inversión bajo el artículo 10.28 del Tratado.

El Perú ha decidido centrarse en estas objeciones jurisdiccionales porque ilustran adecuadamente que los argumentos de las demandantes en este caso son contrarios tanto al texto del tratado como a la naturaleza y al tenor del Contrato RER.

Como pueden ver, las demandantes admiten que no incluyeron las reclamaciones sobre la investigación penal en su notificación de intención. Sin embargo, intentan excusar esa omisión alegando que el requisito de notificación no es una condición jurisdiccional y no requería que su notificación de intención fuese completa o exhaustiva, sino que bastaba con que identificase la controversia general

existente entre las partes.

Como pueden apreciar, es indudable que estos argumentos son contrarios a las reglas de interpretación codificadas en el artículo 31 de la Convención de Viena sobre el Derecho de los Tratados. Los términos del requisito de notificación son claros: las demandantes tenían la obligación de entregar al Perú, por lo menos 90 días antes de iniciar el presente procedimiento, una notificación escrita que incluyese información detallada acerca de cada reclamación que pretendían someter a arbitraje.

Como se puede apreciar, así lo confirmó recientemente el Tribunal en Kappes contra Guatemala, al analizar una cláusula idéntica al requisito de notificación. Ese tribunal también explicó que el requisito de notificación persigue objetivos que son tan legítimos como esenciales. Esos objetivos incluyen brindarle al Estado anfitrión la posibilidad de llegar a una solución amistosa con la demandante sobre cada una de sus reclamaciones y, de esa manera,

evitar que se inicie el arbitraje. También incluyen permitirle al Estado anfitrión entender las implicaciones de todas las reclamaciones de la demandante y darle tiempo suficiente para ejercer adecuadamente su derecho de defensa.

Evidentemente, una notificación de intención que omite reclamaciones no permite cumplir ninguno de estos objetivos.

Como muestra la filmina, los Estados Unidos de América han confirmado en este procedimiento el carácter vinculante y jurisdiccional del requisito de notificación, así como los objetivos que persigue. Por lo tanto, todas las partes del tratado están plenamente de acuerdo sobre estos puntos y el artículo 31.3 de la Convención de Viena requiere que se tome en cuenta dicho acuerdo al interpretar el requisito de notificación.

Por lo demás, contrariamente a lo que argumentaron las demandantes hoy, el escrito presentado por los Estados Unidos en este caso

también confirmó los argumentos del Perú sobre otras disposiciones del tratado, inclusive en relación con el requisito de renuncia.

Como manifestó el Tribunal en Renco I contra Perú, un acuerdo de arbitraje solo es válido bajo el tratado cuando la demandante ha sometido a arbitraje sus reclamaciones de conformidad con los requisitos del capítulo 10.b de dicho instrumento. Es indiscutible que el requisito de notificación se encuentra en ese capítulo del tratado. Por lo tanto, las reclamaciones sobre la investigación penal no fueron sometidas con arreglo al capítulo 10.b del tratado. No se conformó un acuerdo de arbitraje válido sobre esas reclamaciones, y el Tribunal carece de jurisdicción ratione voluntatis sobre las mismas.

Las demandantes alegan que el artículo 10.16.4 del tratado requiere que el Tribunal admita sus reclamaciones sobre la investigación penal e ignore su violación del requisito de notificación. Como el Perú explicó en los

párrafos 504 a 517 de su dúplica, y como pueden ver en la filmina, ningún término de ese artículo deroga el requisito de notificación o establece regla alguna sobre la admisión de reclamaciones. El artículo se limita a determinar la fecha en la que una reclamación se considerará sometida a arbitraje. Esa fecha permite al Tribunal evaluar si la reclamación cumple con los requisitos temporales impuestos en otros artículos del tratado.

La interpretación de las demandantes no solo es contraria a los términos del artículo 10.16.4, sino que también vacía de contenido el requisito de notificación. Por el contrario, la interpretación del Perú se ajusta al texto del tratado y a todos los objetivos de todos los artículos del capítulo 10.b del tratado.

Esta mañana escucharon a las demandantes intentando excusar la omisión de las reclamaciones sobre la investigación penal de múltiples maneras. Alegaron que cuando presentaron su notificación de intención –cito–

: "La única información que disponía CHM era que el fiscal iba a iniciar una investigación". Fin de cita.

También alegaron que cuando presentaron su notificación de intención aún estaban analizando el impacto de esa investigación. Asimismo, las demandantes se han intentado excusar en el hecho de que la acusación fiscal contra el e formalizó después de que las demandantes presentasen su notificación de intención, pero ninguna de estas excusas puede prosperar.

Como puede verse en la pantalla, las demandantes han admitido abiertamente que apreciaron toda la magnitud del supuesto impacto de la investigación penal en enero de 2019, es decir, cuatro meses antes de presentar su notificación de intención. Además, las propias demandantes han admitido que la decisión de formalizar la acusación fiscal se tomó casi un mes antes de que presentasen su notificación de intención. Y, en cualquier

caso, la formalización de la acusación fiscal en octubre de 2019 no puede haber sido la base de las reclamaciones sobre la investigación penal, puesto que las demandantes incluyeron esas reclamaciones en su solicitud de arbitraje dos meses antes de la acusación fiscal. Es más: las demandantes basaron sus reclamaciones en hechos que tuvieron lugar en marzo de 2017 y febrero de 2018.

Y, señor presidente, miembros del Tribunal, si revisan las diapositivas 35, 36, 159 que las demandantes usaron hoy en esta audiencia, verán que siguen basando sus reclamaciones sobre la investigación penal exclusivamente en hechos que tuvieron lugar mucho antes de la formalización de la acusación fiscal y de la notificación de intención.

Por último, contrariamente a lo que argumentan las demandantes, las reclamaciones sobre la investigación penal son independientes y distintas de las incluidas en la notificación de intención. Como refleja la filmina, esas

reclamaciones se basan en hechos que ni siquiera se mencionaron en la notificación de intención, forman la base de alegaciones sobre violaciones independientes del tratado y han incluso dado lugar a solicitudes de reparación autónomas que conciernen exclusivamente la investigación penal de la Fiscalía de Arequipa.

En resumen, el requisito de notificación es una condición jurisdiccional de carácter vinculante. Conforme a ese requisito, las demandantes tenían la obligación de especificar en su notificación de intención las cuestiones de hecho y de derecho, la reparación solicitada y otros detalles relativos a las reclamaciones sobre la investigación penal.

Pese a tener todos los elementos necesarios para honrar esa obligación, las demandantes ni siquiera mencionaron esas reclamaciones en su notificación de intención. Por lo tanto, no cumplieron con el requisito de notificación y el Tribunal carece de jurisdicción ratione voluntatis para decidir las reclamaciones sobre

la investigación penal.

Pasamos ahora a la segunda objeción jurisdiccional que vamos a discutir hoy.

El primer párrafo del artículo 10.16 del tratado establece que una demandante "puede someter a arbitraje una reclamación en la que se alegue . . . que el demandado ha violado . . . un acuerdo de inversión". Sobre esa base, las demandantes han presentado una serie de reclamaciones alegando que el Perú violó el Contrato RER, pero el Tribunal carece de jurisdicción para decidir esas reclamaciones, pues el Contrato RER no es un "acuerdo de inversión" bajo el tratado.

Como puede apreciarse, el chapeau de la definición de "acuerdo de inversión" contenida en el artículo 10.28 del tratado requiere que la inversión que suscribió el acuerdo se haya basado en dicho acuerdo para establecer o adquirir otra "inversión cubierta diferente al acuerdo . . . en sí mismo". Ese chapeau también requiere que el acuerdo de inversión otorgue

derechos a la inversión cubierta para llevar a cabo alguna de las actividades descritas en los numerales A, B y C que ven en pantalla.

El Contrato RER no cumple ninguno de estos dos requisitos: en primer lugar, las demandantes no han probado que CHM se haya basado en el Contrato RER para establecer o adquirir otra inversión que esté cubierta por el tratado y sea diferente al propio Contrato RER. Las demandantes alegan que se basaron en el Contrato RER para establecer CHM, pero la información en la filmina demuestra que ello es sencillamente imposible. En efecto, la empresa Hidroeléctrica Laguna Azul, que es la predecesora de CHM, fue constituida en noviembre de 2012, más de un año antes de la firma del Contrato RER en febrero de 2014, e incluso más de nueve meses antes de la publicación de las bases de la tercera subasta, en agosto de 2013. Evidentemente, Hidroeléctrica Laguna Azul no pudo haberse constituido sobre la base del contrato cuando

ni siquiera se conocían los términos de ese contrato y tampoco se sabía si se adjudicaría a esa empresa el derecho a suscribirlo.

Además, como refleja la siguiente filmina, la inversión cubierta que suscribe el acuerdo de inversión debe basarse en ese acuerdo para establecer o adquirir otra inversión cubierta por el tratado. En este caso, ello requería que CHM concluyese el Contrato RER para establecer otra inversión cubierta por el tratado. Sin embargo, la interpretación de las demandantes llevaría a la tautológica conclusión de que CHM es, a la vez, la inversión cubierta que concluyó el Contrato RER, y la inversión creada por la propia CHM sobre la base de ese contrato.

Las demandantes también alegan vagamente que algunas actividades, permisos y estudios, se llevaron a cabo después de la ejecución del Contrato RER, pero no han probado que dichos permisos, estudios y actividades se adquirieron o establecieron sobre la base del Contrato RER

ni que constituyen a título propio e individual inversiones cubiertas bajo el artículo 10.28 del tratado. De hecho, el único ejemplo concreto que mencionan es la concesión definitiva, pero esa concesión no puede constituir una inversión cubierta, entre otros motivos, porque ha sido anulada por ser contraria al ordenamiento jurídico peruano.

En segundo lugar, por sí mismo, el Contrato RER no otorgó a CHM ninguno de los derechos descritos en los apartados A, B y C de la definición de "acuerdo de inversión". Como acaba de explicar el señor Di Rosa, el Contrato RER simplemente otorgaba a CHM una tarifa preferencial por la electricidad que inyectase en el SEIN, pero como muestra la filmina, el derecho a beneficiarse de esa tarifa estaba sujeto a que CHM, primero, obtuviese permisos y una concesión definitiva que le habilitasen a generar y suministrar electricidad.

En efecto, conforme al artículo 3° de la ley de concesiones eléctricas, el título

habilitante que otorgaba el derecho a generar la energía que habría de producirse mediante el proyecto y la posibilidad de venderla era la concesión definitiva.

La siguiente filmina muestra que el Contrato RER también confirmaba que, por sí solo, no otorgaba derechos para la generación, venta o transmisión de energía eléctrica, para la utilización de recursos hidráulicos o para la construcción de infraestructuras destinadas a dichos fines. En ese sentido, la cláusula 1.3 del Contrato RER establecía expresamente que la suscripción de ese contrato no eliminaba ni afectaba la obligación de CHM de cumplir con los requisitos para obtener la concesión definitiva.

De igual manera, como pueden ver en la pantalla, los testigos y expertos de las demandantes han confirmado que una empresa no tiene derecho a generar y suministrar energía si solo ha suscrito un Contrato RER, pero no cuenta con una concesión definitiva. Es decir,

como las propias demandantes han admitido, sin las concesiones y permisos habilitantes, el Contrato RER no tenía ningún valor, precisamente porque no otorgaba a CHM el derecho a generar, suministrar o vender energía eléctrica.

Finalmente, como pueden apreciar el último párrafo del artículo 10.16.1 requiere que tanto la materia de las reclamaciones como los daños reclamados por las supuestas violaciones del Contrato RER se relacionen directamente con la inversión cubierta que fue establecida con base en el Contrato RER, pero las demandantes no han demostrado tal cosa en ninguno de sus escritos. Los daños que reclaman abarcan la totalidad de las supuestas inversiones realizadas en el proyecto Mamacocha. Y como acabamos de explicar, no todas esas supuestas inversiones pueden haberse basado en el Contrato RER, entre otros motivos, porque una parte significativa de ellas se realizó antes de la existencia de dicho contrato.

En conclusión, el Tribunal carece de jurisdicción sobre las reclamaciones presentadas por las demandantes bajo el tratado acerca de las supuestas violaciones del Contrato RER.

Señor presidente, miembros del Tribunal: gracias por su atención. Con su venia, le doy la palabra al señor Grané Labat.

(Pausa.)

THE PRESIDENT: Thank you, Mr Nistal.

Mr Grané, please proceed.

by Mr Grané

MR GRANÉ: Yes. Thank you. In the next 90 minutes or so I will address the key facts and the complete lack of merits of Claimants' case in respect of each of the measures that they challenge in this arbitration, and I stress at the outset that I will not even attempt to cover all the facts and the arguments raised by Claimants, as that would be impossible.

Claimants have alleged over 60 breaches in connection with seven measures, but even if it

was possible to cover all of this it would be unnecessary, considering that Peru has addressed and rebutted in extensive and detailed written submissions each of Claimants' arguments.

Peru recognizes that its submissions in this case are unfortunately quite lengthy, and we wish it were not so, but the length of our submissions was an inevitable result of the litigation tactics adopted by Claimants in this arbitration.

In addition to taking a scattershot approach, hoping that something -- anything -- hits the mark, their arguments are frequently based on distortion of the facts and fanciful narrative, and that continued in their presentation today, sometimes in egregious ways.

For example, Claimants asserted today that Peru, and I quote, "concedes that the measures destroyed the value of the investments" and on the back of this that "there's no real dispute

about causation as regards the impact of the measures", and you'll find this in page 97 of the transcript.

Claimants also asserted -- and so many times that I lost count -- that Peru argues that its interpretation of the RER Contract must mean that "Peru can interfere with the contract with impunity". This is on page 74. These are just two of dozens of examples, and these and countless other distortions by Claimants have forced Peru to go through the facts and the contemporaneous documents in painstaking detail to correct the inaccuracies as well as the baseless and false assertions of Claimants.

And despite this fog of misinformation, ultimately their case comes down to a blatant attempt to blame Peru for Claimants' own breaches of the RER Contract and Peruvian law. It is Claimants' violation of Peruvian law that culminated in the loss of their final concession. As Peru has demonstrated and will recall again during this hearing Claimants'

attempt to shift the blame to Peru is desperate and hopeless and is based on a gross disregard of basic notions of public law, the RER regime, the RER Contract. And for the sake of simplicity I will refer to the RER Contract simply as "the contract".

In the first part of my presentation I will first recall some key facts about the Mamacocha Project and its status of 14 March 2017. And why that date? It is the date that the RGA lawsuit was filed, which is the measure that Claimants argue completely destroyed their investment. I will also address the issue of Claimants' attempt to circumvent environmental norms, which led to the loss of the final concession and consequently rendered the contract valueless, both in the actual and the but-for scenario. In the second part of my presentation I will address Claimants' claims.

Nevertheless because it is simply impossible to respond to more than 60 alleged breaches in the time available, no conclusion or adverse

inference should be drawn from the fact that I will not address certain of Claimants' claims.

The Mamacocha Project was to be a 20-megawatt hydroelectric project comprised of two interrelated parts. First, a run-of-the-river hydroelectric generation plant and, second, a 65-kilometre transmission line connecting the generation plant to the national grid. Claimants chose to build their project in the Mamacocha Lagoon located in the Ayo district in Arequipa. It is the largest fresh water lagoon in the world and is considered to be a natural marvel and renowned for its biodiversity, a site which leading experts relied upon by Claimants characterised as an exceptional habitat that deserved special attention in conservation plans based on the precautionary principle, and there's a video on the record, R-187, showing the lagoon and its biodiversity.

Claimants allege but failed to demonstrate that by early 2017 they were on track to meet the contractual deadline for the start of

commercial operations in accordance with the contract. That is fanciful. As of 14 March 2017, the date of the earliest measure considered by Claimants to constitute a breach, the Mamacocha Project had not begun construction, had yet to secure financing, and was facing challenges to its environmental permits filed by third parties that would ultimately lead to their annulment and the loss of the final concession.

Based on the status of the project at that time, Mamacocha would not have been able to comply with the contract and would have lost the tariff even in the absence of the challenged measures. My colleague, Amy Endicott, will address the issue of construction and financing in her presentation.

I will turn now to the issue of the environmental permits because, try as they may, Claimants cannot deny that their conduct in relation to such permits was the real cause of the project's demise. It is undisputed that

Mamacocha bears the obligation to design the project and obtain all the necessary permits, including final concession, and all the necessary permits for the construction of the electricity generation plant and its commercial operations start-up, which Claimants have abbreviated as COS and which we refer to in our pleadings as the POC, or POC, in Spanish.

Several clauses of the contract which you have on your screen impose the obligation on Mamacocha to obtain and maintain the final concession.

Without that, Mamacocha could not benefit from the tariff. This is uncontroversial and it's admitted by Claimants. In their own words, which I quote from Reply, paragraph 381, the "RER Contract without the underlying concession would be valueless".

The facts show that Claimants never held a valid final concession because in the end it was declared void ab initio by the Amparo ruling mentioned by Mr Di Rosa.

Claimants' insistence on taking shortcuts to circumvent the environmental regulations led to community opposition, the filing of several administrative and judicial challenges by private individuals, and ultimately to the annulment of the final concession.

As the Tribunal may recall, when Mamacocha requested environmental permit for its generation plant, the regional environmental authority, the AAA, determined that the project caused significant impacts to the environment. Accordingly, on 11 October 2013, Mamacocha was required to conduct a detailed environmental impact study and to prepare a community participation plan.

That study alone would have required nearly a year, as Mr Di Rosa mentioned, but Claimants had no patience for that. Instead, they wanted to be subject to a less demanding and rigorous requirement consisting of merely a sworn statement, or the DIA.

Claimants make no secret of this. As Mr Di

Rosa mentioned, Claimants admit that the lesser requirement, the DIA, consists of the sworn environmental impact study, which would have required, according to them, a mere 30 business days.

You see this on your screen from Memorial, paragraph 42. Claimants therefore fought to reverse the original and correct decision by the competent authority and succeeded. They did so through means that were later found to be irregular and which led to the criminal proceedings that Claimants so bitterly complain about. Based on their submissions Claimants secured their desired reclassification for the generation plant.

With that lesser classification in their pocket, Mamacocha requested an environmental permit for the project's transmission line, the second component of their project. By severing the generation plant from the transmission line, Claimant was able to obtain a low environmental impact classification for both

components of the same project.

Claimants and their local counsel may have congratulated themselves at the time for having obtained that result and thereby cut the project's schedule by nearly a year, but they later came to regret that. Claimants' expediency in obtaining environmental permits drew the attention of environmentalists, including an individual by the last name of Begazo, who in early August 2016 filed judicial challenges to Mamacocha's environmental permits in three different fora. The main challenge took the form of a constitutional Amparo request, which was filed on 13 September 2016. That is six months before the regional government of Arequipa filed a separate legal challenge on nearly identical grounds. Mr Begazo's actions ultimately resulted in a judicial declaration of the nullity ab initio of the environmental permits and the final concession, without which Claimants could not claim the tariff under the contract.

On 30 January 2020, the constitutional court of Arequipa found that the Mamacocha had impermissibly submitted for approval the two components of the Mamacocha project, that is the generation plant on the one hand and the transmission line on the other hand, as if they were independent from each other. Such conduct by Mamacocha prevented a proper consideration of the potential environmental impact of that project as a whole in violation of environmental regulations. Accordingly, the constitutional court declared that the environmental permits and the concession for the generation plant and transmission line were null and void ab initio.

The Amparo ruling was challenged by Claimants but their appeal was dismissed on 4 February 2021. The ruling has been confirmed -- the Amparo ruling has been confirmed by two courts and is final, binding, and constitutes res judicata. Subsequently Claimants attempted to reverse the ruling in a roundabout way by

submitting another Amparo requested against the Amparo ruling, so an Amparo against an Amparo, but that, too, was rejected on 5 July 2021.

With its Rejoinder Peru submitted evidence of these failed attempts by Claimants to reverse the Amparo ruling because Claimants withheld this information from the Tribunal. The Amparo ruling is fatal to Claimants' claims for at least two reasons.

First, it confirms that two of the measures that Claimants complain about in this arbitration were, in fact, legitimate and sound under Peruvian law. One of those measures is the RGA lawsuit which Claimants argue destroyed their investment, and the other is the criminal indictment and prosecution of those responsible for having issued the environmental permits in violation of the environmental norms.

The second reason why it's fatal is that the Amparo ruling is the annulment of the final concession. It led to the annulment of that prerequisite under the contract. And it is

important to recall that, under the Peruvian legal system, this declaration of nullity by the constitutional court has a retroactive legal effect going back to the date of the administrative act that has been declared null and void. This isn't controversial and has been recognised even by both of Claimants' experts, as you can see on your screen, both Ms Quiñones and Mr Benavides.

All of the above, which is largely uncontested by Claimants, means that even in the but-for scenario, that is absent each and every one of the challenged measures, Claimants would not have been able to obtain the tariff under the contract because they lacked the final concession that is an obligation and an essential precondition under the contract.

Mr President, members of the Tribunal, Claimants attempted to conceal the Amparo ruling from you. They made no mention whatsoever, none, to that court decision in their memorial. It was Peru who first brought

the Amparo ruling to your attention in its countermemorial. Forced to confront this devastating fact, Claimants did what they have done throughout this arbitration, they tried to brush it away with the back of their hand, minimizing and distorting its significance, and Claimants attempt to dismiss the Amparo ruling by referring to it, and I quote, "a nuisance suit" and "nothing more than background noise". "A nuisance suit" and "nothing more than background noise". You find this in Reply in paragraphs 291 and 104.

This is how Claimants treat a final and binding ruling from a constitutional court, challenged and upheld by another court, enforcing environmental laws in Peru that were well-known to Claimants and which they deliberately try to circumvent. That attitude by Claimants is not limited to the Amparo ruling. Rather, it epitomises their attitude towards Peruvian laws and regulations, particularly the RER regime and environmental

law which Claimants evidently regard as mere nuisance, nothing more than background noise to them, to be ignored or drowned through baseless assertions and hyperbolic accusations against Peru and its government officials. But the applicable law and the facts cannot be ignored. The treaty parties agree that the treaty requires an investor to demonstrate proximate causation and must prove that an alleged impairment would not have occurred in the absence of the State act.

In this case the alleged impairment is the automatic termination of the contract resulting from Claimants' failure to meet its terms. That impairment would have occurred and has in fact occurred in the absence of the challenged measures. It was the result of the judicial ruling in the Amparo proceeding which, as we have seen, was commenced by a third party before any of the challenged measures were adopted. That judicial ruling, as I've mentioned, is final and is not subject to any

claim in this arbitration.

Now, this would suffice to dismiss the entirety of Claimants' claims. Nevertheless, in what remains of my presentation, I will briefly address each of the measures challenged by Claimants.

Claimants allege that Peru made it impossible for Mamacocha to achieve financial closing or advance the project as a result of the following seven measures, which can be collapsed into five.

First, a legal challenge filed before Peruvian courts by the regional government of Arequipa on 14 March 2017 against the validity of the Mamacocha Project's environmental permits. This is the so-called RGA lawsuit.

Second, the initiation of a criminal investigation regarding potential irregularities in the issuance of those environmental permits, and the indictment of Mamacocha's outside counsel, along with several public officials, in connection with the

issuance of such permits.

Third, errors and alleged delays related to the issuance of the civil works authorisation.

Fourth, the denial of Claimants' third request to extend certain dates under the contract beyond what was permissible by the RER regulations and the bidding rules.

And, fifth, the exercise of MINEM's contractual rights to submit to arbitration a dispute under the contract which led to the so-called Lima Arbitration.

Claimants allege that such measures violated the treaty, the contract and Peruvian law, but as Peru has demonstrated throughout this pleading, Claimants' account of the relevant facts on which they base their claims are divorced from reality, but it is not only the facts that Claimants distort. Claimants are also wrong on the law, and it is to the legal standards that I now turn.

Claimants claim that through these measures Peru expropriated Claimants' investment, failed

to accord the minimum standard of treatment required by customary international law, and accorded more favourable treatment to other foreign investors.

As is too often the case in investment arbitration investors pay little or no heed to public international law, and instead treat investment treaties as if they were no-risk insurance policies. And Claimants here are no exception.

As Peru has shown, and the United States confirmed in its non-disputing parties' submission, Claimants applied the wrong legal standards. And since I have mentioned the US submission I will pause to briefly refer to Claimants' comments to that submission.

Now, Claimants embrace the US interpretation of the treaty in respect of the very few and discrete legal interpretations by Claimants that were not completely debunked by the United States. However, in respect of the vast majority of treaty interpretations offered by

the United States in its submission, Claimants quickly changed tack and dismissed the treaty interpretations of the US Department of State as not worthy of consideration, arguing that, and I quote, "non-disputing party submissions are not authoritative interpretations of treaties".

Claimants' arguments are not only disingenuous; they are also wrong as a matter of public international law. As the Tribunal knows under article 31.3 of the Vienna Convention, the interpreter of a treaty shall take into account, and I quote, "any subsequent agreement between the parties to the treaty regarding the interpretation of the treaty and any subsequent practice".

And you have that provision on your screen.

The International Law Commission has confirmed that in establishing whether there has been a subsequent agreement, the question is one of substance rather than form. The International Law Commission also established

that official statements made in the course of a legal dispute constitute subsequent practice.

Here the treaty parties have confirmed in formal written documents the meaning of certain provisions of the treaty, and they have manifested a common or shared interpretation of such provisions. Whether understood as a subsequent agreement or as a subsequent practice within the meaning of article 31 of the Vienna Convention, the treaty parties' joint interpretation is an unequivocal manifestation of their will and intention as the sole parties to the treaty.

The treaty parties' agreed interpretation is authoritative and must be taken into account and should be given deference, all in accordance with the Vienna Convention which, of course, as you know, constitutes customary international law.

Peru refers the Tribunal to its submission of 8 December 2021 where it explained all of the above in more detail, as well as the

interpretation by the US that confirms the interpretation of Peru.

Now, one last observation about the US submission, and this is another basic mistake by Claimants. They make much of the fact, in their usual overstated tones, that the US did not refer to the Amparo ruling in that submission, the non-disputing party submission. But that of course overlooks the fact that, under the treaty, non-disputing party submissions must be limited to issues of treaty interpretation and not to the facts of the case. Claimants seem to ignore this.

I will now turn to the legal standards for each of the treaty claims, but I do so mindful that each of the Tribunal members are leading experts of investment law and that Peru has set out the applicable legal standards in quite some detail in its written submissions, but if we spend time on the legal standards it is because they are of critical importance and because Claimants have largely ignored, mis-

stated or misapplied such standards.

As to expropriation, Claimants present two expropriation theories. Their main theory is that Mamacocha Project was indirectly expropriated through three measures: The RGA lawsuit, the denial of the Third Extension Request, and the Lima Arbitration. As an alternative, Claimants allege that all seven challenged measures constitute a creeping expropriation.

Now, the analysis of Claimants' expropriation claims must be made in accordance with annexe 10-B of the treaty. Claimants seem to agree that only acts carried out in the State's capacity as a sovereign authority are capable of giving rise to State responsibility under article 10.7, and I refer you to Reply paragraph 605.

However, it is undeniable that two of the five challenged measures were adopted by MINEM in its capacity as a contracting party to the contract, and I am referring to the denial of

the Third Extension Request and the filing of the Lima Arbitration.

The main point of this agreement between the parties in connection with this standard refers to the economic impact of the measures. To show that there has been an expropriation, Claimants must prove that the value of their investments was radically affected by the alleged measures to such an extent as to constitute a taking.

Substantial deprivation of the investment's economic value is not enough. This view is shared by United States and supported by numerous arbitral tribunals cited by Peru in its pleadings, and includes Burlington Resources and Tza Yap Shum?, as well as Isolux.

Claimants, however, did not show that Peru's actions destroyed the economic value of their investment. Once again, I refer to what we heard today in Claimants' presentation suggesting that Peru somehow has agreed that all of those measures had a harmful effect on

the investment. Peru has said no such thing. The value of Claimants' investment was contingent on Claimants meeting the conditions under the contract, including having the final concession and meeting the real COS deadline. It is undisputed that Claimants did not meet that deadline, and as I have explained the legal challenge that was filed in September 2016 by Mr Begazo led to the annulment of the project's final concession, thus rendering the contract valueless.

Finally, the parties agree that creeping expropriation results from a composite act which is defined by article 15 of the Articles of State Responsibility. In its commentary to article 15 the International Law Commission explains that the series of actions or omissions that comprise such an act must be interconnected and constitute a pattern. Claimants have not shown that the four governmental entities responsible for the challenged measures acted concertedly or that

their measures were interconnected or part of a pattern that would constitute a composite act or creeping expropriation.

Claimants also have not shown that each step that forms the part of an alleged process that led to the expropriation had an adverse effect on the investment.

Article 10.5 of the treaty promises covered investment treatment including fair and equitable treatment in accordance with customary international law. Claimants have advanced over two dozen claims under five alleged components of the article 10.5 minimum standard of treatment, including legitimate expectations, without even bothering to meet their burden of proving the content of customary international law. And it is their burden.

In other words, Claimants never even attempted to demonstrate that the alleged components are part of customary international law. And as the Cargill Tribunal rightly

noted, if the Claimant does not meet its burden establishing the content of customary international law "it is not the place of the Tribunal to assume this task".

I do not see Mr Tawil on the screen. I'm going to pause and make sure that he's still with us.

THE PRESIDENT: I have the speaker on my screen.

MR GRANÉ: I checked the participant list and I don't see Mr Tawil, so perhaps he has dropped off again. Shall we pause, Mr President?

THE PRESIDENT: Absolutely.

(Pausa.)

MR TAWIL: I'm here.

THE PRESIDENT: OK. Guido, you were one minute absent. Do you want Mr Grané to repeat what he has --

MR TAWIL: No, not necessary. I will follow with the transcript. My apologies.

THE PRESIDENT: OK.

Fine. Mr Grané, continue your presentation.

MR GRANÉ: Thank you.

Now, even though Claimants, not Peru, bear the burden of proof of demonstrating the content of customary international law, in its submissions Peru showed that legitimate expectations, transparency, and good faith are not components of the minimum standard of treatment under customary international law.

And here I will refer to something that we heard again from Claimants' presentation today. They said that this discussion of the content of the minimum standard of treatment is a scholastic dispute, a doctrinal argument, and they suggested that somehow the parties were in agreement about the content of the minimum standard of treatment because of the fact that we have relied on Waste Management, which I will now address. This is not a mere difference of opinion amongst scholars or doctrinal arguments. They have relied on legitimate expectations, and legitimate

expectations are not part of the minimum standard of treatment under customary international law.

The United States' submission confirmed that the treaty parties share a common understanding that such concepts, the ones that I have mentioned -- legitimate expectations, transparency and good faith -- are not component elements of fair and equitable treatment under customary international law which give rise to independent host state obligations.

The Tribunal, therefore, should reject all of Claimants' claims that are based on their theories of legitimate expectations, transparency and good faith.

Now, proving any violation of the minimum standard of treatment under customary international law is subject to a high threshold. Under the standard articulated by Waste Management II, which several other Tribunals including Mesa Power and RDC v

Guatemala have noted correctly identifies the content of the customary international law minimum standard of treatment, Claimants must prove that the measures in question are "arbitrary, grossly unfair, unjust or idiosyncratic, discriminatory . . . or involve a lack of due process leading to an outcome which offends judicial propriety".

Now, claimants did cite this in their presentation today, but they didn't refer to the concept of arbitrariness, for instance, on which they rely so much.

As this Tribunal well knows, the standard of arbitrariness under the minimum standard of treatment was articulated by the ICJ in the famous ELSI judgment. In that case the ICJ explained:

"Arbitrariness is not so much something opposed to a rule of law as something opposed to the rule of law. It is a wilful disregard of due process of law, an act which shocks or at least surprises a sense of judicial

propriety".

None of the measures challenged by Claimants in this arbitration meet that standard. Not even remotely. Claimants have not mentioned either in their submissions or in their presentation today anything about ELSI. Instead they rely on Cargill. Peru had relied on that case in their countermemorial and Claimants in their Reply in paragraph 447 responded saying that "articulation of FET under customary international law, including Cargill [they said] is completely out of step with modern jurisprudence on this topic".

Now, Peru takes note of that Claimants' about face on this issue.

Claimants also fail in their attempt to import substantive protections from other treaties relying on the MFN clause. To advance a relevant claim Claimants must identify treatment that Peru, in fact, ordered -- I'm sorry, accorded to a similar situated third-party investor or investment. The mere

existence of clauses in other Peruvian treaties is insufficient to show such treatment. Claimants attempt to import certain substantive provisions through the MFN clause, and that ignores the express text of the clause which refers to actual treatment, not abstract standards, and such interpretation of the scope of the MFN clause is confirmed by the United States and also by arbitral jurisprudence in regards to language analogous to that of the treaty. And since Claimants have not identified any comparator, despite what they say today -- but they said it without any specificity -- their MFN claim must fail.

In addition to their claims under the treaty Claimants have raised a series of contractual claims, the majority of which are based on alleged breaches of principles of civil and administrative law, namely good faith, actos propios and confianza legítima.

Since the Tribunal will hear from the legal experts on Peruvian, civil, and administrative

law later this week, including from Mr Carlos Monteza and Mr Claudio Lava, we will not address such principles in this presentation. On your screen you have a slide that provides a reference to Peru's written submission and the expert reports where those principles are discussed.

Mr President, I am about to start discussing contract --

THE PRESIDENT: I was about to say the same thing. So a 15-minute recess?

MR GRANÉ: Yes, sir.

THE PRESIDENT: That will be CET 20.35.

THE SECRETARY: Mr President, before we break for 15 minutes, I have a message for Mr Grané from the interpreters and court reporters. They are alerting me that his audio intermittently cuts out and the interpreters can hear background noise from Mr Grané's end. They kindly ask you for the rest of the hearing if you could please use either a different internet connection or microphone, whichever

source is causing the audio issues, and they mentioned this in particular given that the quality of your sound feed is distracting to interpreters and may prevent them from fully hearing you and interpreting everything Mr Grané says.

Thank you.

THE PRESIDENT: Mr Grané, I think that is caused by use of iPods.

MR GRANÉ: It is not my iPods. I can take them off and switch to an external microphone. The issue is caused by the fact that some of the platforms that I have opened, including the FTI website, is causing my hard drive to kick in. There's nothing I can do about that. I cannot turn off the hard drive. I can try to close some windows, and I will work on that, but it is beyond I think my control.

THE PRESIDENT: OK. Ana, can you take this up with FTI?

THE SECRETARY: Yes.

THE PRESIDENT: All right. 15 minutes

recess. Thank you.

(Short break from 20.20 CET to 20.40 CET)

THE PRESIDENT: Mr Grané, please continue.

MR GRANÉ: Thank you very much. And if there are issues with the audio, please do let me know and we will try to do something. As you can see, I'm not using my earPods any longer, although I don't think that was the issue, but let's see if we can continue without any issues with the audio.

I was about to, Mr President and members of the Tribunal, start discussing some of the contract claims, and I was noting that in addition to the dozens of claims under the treaty, Claimants make a series of claims also under the contract but, as Peru has demonstrated, none of them have any foundation on the text or the spirit of the contract.

And Claimants' essential argument in this arbitration, which underpins several of its treaty and contract claims, is that Peru violated its legal obligation because it failed

to grant all the necessary permits to Mamacocha in time for Claimants to obtain their financing and achieve the COS by the deadline established under the RER regulations and the contract.

And Claimants base this argument on clause 4.3 of the contract, which now you have on your screen, or you will in a second. Here it is. And, as you can see, that provision contemplates the possibility that competent authorities will not grant all the necessary permits in a timely manner and, should that occur, Mamacocha may request the assistance, and the assistance here as you can see the text in Spanish is "coadyuvará" and will assist Mamacocha if it so requests.

But there are some conditions to that request which the experts have discussed, so I will not go into that. Again, if and when Mamacocha requests that assistance, then MINEM shall provide it. That is the extent of the contractual obligation that MINEM undertook under this clause 4.3.

It is the plain language of this provision, and it's very difficult not to consider that this is clear contractual language. But claimants argue this constitutes a contractual obligation by MINEM adopted on its own behalf and on behalf of every single competent and state organ in Peru that Mamacocha would receive all the necessary permits, concessions and similar rights in a timely manner, so MINEM undertaking a contractual obligation on behalf of every single entity of the Peruvian State. That is not what the clause says or what MINEM agreed to.

MINEM did not guarantee that the investor would obtain the final concession or any other permit in a timely manner, or at all. Instead, MINEM only committed to coadyuvar, assist the investor in obtaining the necessary permits, if they were not granted in a timely manner, and even then only under certain conditions. This is not an obligation to guarantee a result.

This contractual clause is important and

yet, like many of the other clauses, it has been twisted and rewritten by Claimant to the point that it no longer means what it says. Claimants essentially asked this Tribunal to substitute the word "assist", coadyuvar, and insert the word "guarantee" into clause 4.3 and on that basis conclude that MINEM and indeed every single state organ at all levels undertook the contractual obligation to grant all the necessary permits and to do so in a timeframe that suited Claimants' project financing schedule. No objective and reasonable person can read that clause and agree with Claimants' interpretation and conclusions.

As you will hear from experts Lava and Monteza later this week, MINEM never could have agreed to guarantee that all necessary permits and the final concession would be granted as that would have manifestly exceeded its powers and thus be contrary to Peruvian law, including the constitutional principles of autonomy and

separation of powers.

I'll go into more detail about the contractual clauses in this next segment of my presentation because now I will address the first and main measure challenged by Claimants but then I will address the other measures. That first main measure is the RGA lawsuit.

Now, remember, this is what Claimants said in their presentation today was the most impactful measure in this arbitration. Those were their words.

They also said that this impact on the project by the RGA lawsuit cannot be overstated.

Well, it can be overstated and, in fact, Claimants have done precisely that throughout this arbitration and again today. They have overstated the impact of the RGA lawsuit. They allege that this lawsuit, which was filed in March 2017, made it impossible for Mamacocha to achieve the financial closing or advance the project. Contrary to Claimants' argument, the

RGA lawsuit did not destroy the project or breach any of Peru's obligations. The RGA lawsuit was filed by the regional government of Arequipa to challenge before Peruvian courts the validity of the environmental permits granted to the project's generation plant and transmission line, after Claimants fought to reverse the original environmental classification of the project, as I discussed at the beginning of my presentation.

Claimants argue that the decision by the local authorities of Arequipa to file that legal challenge before an independent judicial court breached Peru's obligations to provide the minimum standard of treatment. According to Claimants, the RGA lawsuit lacked good faith, was arbitrary, lacked transparency, was discriminatory and violated Claimants' legitimate expectations.

All of these allegations are baseless, contradicted by the evidence, and do not meet the applicable legal standards.

As I explained earlier in the presentation when discussing the Amparo ruling, the regional environmental authority, ARMA, had initially classified the project as Category III, which meant that Claimants had to submit the detailed environmental impact study, or "EIA".

I believe, Mr President, that someone is speaking in the background.

THE PRESIDENT: Yes. I think Mr Reisenfeld, according to my screen, but he is now muted again. You can continue.

MR GRANÉ: OK. Thank you.

As I was saying, Claimants did not want to invest the time and costs that such assessment or study entailed and therefore challenged that initial classification, and they pushed to have the project reclassified as one that would have negligible or very limited environmental impact such that it would require merely an environmental impact statement or the sworn statement.

This move by Claimants was obviously

designed to shortcut the process and circumvent the environmental protections or the regulations. It is a little surprising, therefore, that environmentalists, concerned about the impact that the project would have on the Mamacocha Lagoon and the protected species took notice and filed various legal challenges starting in August 2016 and including the Amparo request filed by Mr Begazo in September 2016 that I referred to earlier.

Now, the regional government of Arequipa also took notice and, based on the same legal basis as the Amparo request, filed a legal challenge before a different court. It was not the constitutional court; the proceeding that the RGA lawsuit pursued was a contencioso administrativo.

Now, Claimants have admitted that the RGA lawsuit and Mr Begazo's Amparo request were nearly identical, and you'll see this on the screen. It's Reply, paragraph 301.

Now, whereas the RGA lawsuit was withdrawn,

the Amparo, as we've seen, was granted. Indeed on 30 January 2020 the constitutional court of Arequipa annulled the environmental permits and the final concession, R-0017 of the exhibits, and on 4 February 2021 the Arequipa appellate court confirmed the constitutional court's decision. This is C-295.

Now, those court rulings demonstrate that Claimants' claims against the RGA lawsuit are completely and utterly baseless because they show that the RGA lawsuit not only had a legitimate basis but was, in fact, correct. And that, in turn, confirms that the RGA lawsuit is not contrary to the minimum standard of treatment.

And recalling that standard articulated by Waste Management II, which now we see Claimants accept but also by GAMI and by Mesa Power and by RDC and many other Tribunals, no objective person could conclude in the light of these established facts that the RGA lawsuit was, and I quote, "arbitrary, grossly unfair, unjust or

idiosyncratic or involved an utter lack of due process so as to offend judicial propriety", to use the words of Waste Management.

Also, Claimants cannot dismiss the Amparo as "nuisance suit" or "background noise" or as a "red herring", as we heard this morning, and at the same time argue that the RGA lawsuit was devastating and destroyed its investment, as they had nearly identical basis, as Claimants admit. This is one of the many inconsistencies in Claimants' arguments. And the above would suffice to dismiss Claimants' claims concerning the RGA lawsuit, but since Claimants insist on distorting the evidence concerning that lawsuit, including the Special Commission's good faith effort to find an amicable solution to the concerns expressed by Claimants when that lawsuit was filed, I will make a few more observations about Claimants' case concerning that measure.

According to Claimants, the Moron report concluded that the RGA lawsuit was meritless to

the point that an inference of bad faith on the part of the regional government of Arequipa could be drawn. This is what they say in the Reply, paragraph 523. This is false.

To recall, the Moron report was commissioned by the Special Commission in the context of the amicable consultations with Claimants, the so-called trato directo in Spanish. Claimants have spun and distorted that report, and they did so again this morning, and more so the communication from the Special Commission whereby it shared that report with the regional government of Arequipa. For instance, Claimants completely omit from their submissions to this Tribunal Mr Moron's discussion of several grounds that would lead to the annulment of the environmental permits, grounds that were later the basis for some of the constitutional court's Amparo ruling. This was explained by Peru in our Rejoinder, including in paragraphs 171 to 181.

Claimants today also emphasise that Mr Moron

concluded that the lawsuit was filed after the applicable statute of limitations had expired, but Claimants self-servingly omit, including in their presentation today, the fact that Mr Moron acknowledged that the statute of limitations had been recently amended and noted the reasoning of the regional government for believing that the lawsuit was not time barred.

Mr Moron concluded that he disagreed with the reasoning of the regional government, noting that in his opinion it would be "difficult", is the word that he used, for such reasoning to be adopted by the court. This is in Exhibit R-140 on pages 18 and 19.

That assessment by Mr Moron of the regional government's interpretation of the statute of limitations hardly constitutes conduct that is manifestly arbitrary, so unjust and surprising as to be unacceptable from the international perspective, to use the words of the Glamis Gold Tribunal. It was simply a disagreement about the effects that the change in the rules

could have on the admissibility of that claim. He said that it was difficult and that he didn't agree. That does not meet the standard of arbitrariness under Glamis or under RDC or under Waste Management or under Cargill or under any of the decisions that have interpreted the content of the minimum standard of treatment.

Claimants have also argued that based on the Moron report the Special Commission acknowledged that the RGA lawsuit was meritless and put pressure on the RGA or the regional government to withdraw the lawsuit immediately. That, too, is false and can be confirmed on the basis of the plain text in the Special Commission's letter that communicated Mr Moron's conclusions to the regional government of Arequipa. That's exhibit R-131, an excerpt of which you have on your screen.

The Special Commission expressly clarified that the report -- and I will switch to Spanish (En español) "No implica la existencia o

aceptación por parte del Estado peruano de algún tipo de vulneración al Tratado ni de los reclamos alegados por las empresas." And yet Claimants used this to say that this constitutes an admission by Peru of responsibility under international law. The Tribunal will hear this week from Mr Ricardo Ampuero, the former president of the Commission, who has categorically denied in his witness statements that the Special Commission ever acknowledged, as Claimants falsely assert, that the RGA lawsuit was meritless and thus instructed the regional government to withdraw the lawsuit immediately.

Claimants argue that the RGA lawsuit was also discriminatory because it specifically targeted the Mamacocha Project. This is part of their conspiracy theory. Political motivation. Claimants did not substantiate that claim. In fact, they did not even identify a relevant company that would be in like circumstances which had received a

different treatment, thus ignoring and failing to meet the applicable legal standard. That, too, would be enough for that claim to be dismissed and fail. But Claimants also argue that the RGA lawsuit frustrated their legitimate expectations -- and again we heard this today -- even though, mind you, and I insist, that legitimate expectations is not a component of the minimum standard of treatment. And, again, this has been held by several tribunals, including Mesa Power and even the ICJ in the recent judgment in Bolivia v Chile, which if I recall correctly is from October 2018. But they brush that aside. It's part of their scholastic dispute/doctrinal arguments. The content of customary international law has to be brushed aside and you have to assume that legitimate expectations are a component of customary international law.

But even under the autonomous standard of FET Claimants could not have held any legitimate expectation that the environmental

permits would not be subject to the legal challenge of any kind, including by the regional government of Arequipa.

In fact, Claimants' own expert, Ms Quiñones, expressly acknowledges that, and I quote again in Spanish -- and this is from her First Report in paragraph 191 (En español): "Toda autoridad administrativa no solo tiene el derecho, sino el deber de accionar en el supuesto que existan vicios que afecten la validez de un acto administrativo que comprometa el interés público".

But despite that, despite that this was a legitimate exercise of this legality control that any government, any state organ, can and should exercise, Claimant continues their attack of the RGA lawsuit. They argue that it was so devastating, and I quote from the Memorial, paragraph 372, the RGA lawsuit was so devastating and on its own substantially deprived the Mamacocha Project of its economic value. However, the filing of the RGA lawsuit

had no impact whatsoever on the value of the Claimants' investment, and therefore was not expropriatory, despite everything that we heard today from Claimants about how this was supposedly a show stopper, ignoring, of course, the Amparo proceeding that had been submitted six months earlier, which had a nearly identical basis and which, by the way, was noticed by these potential investors, as we will discuss later on.

Now, Claimants today tried to suggest that no one cared about the Amparo decision. Nobody knew that it existed. Well, that's not true, and there are documents on the record that show that not to be true.

But going back to the regional government, it exercised its right to ask the court to review the legality of the environmental permits.

Claimants have not disputed the fact that such permits remained valid even after the RGA lawsuit was filed. They were never suspended.

Therefore they cannot argue that the mere filing of the RGA lawsuit prevented or hindered the progress of the Mamacocha Project and had an impact on the project's value, unless of course they knew that they were going to lose that lawsuit. But instead what Claimants argue is that the RGA lawsuit, the mere filing of the RGA lawsuit affected its efforts to secure financing. That does not even begin to meet the standard of expropriation under the treaty. But in any event, members of the Tribunal, I ask you to pause and consider the implications of Claimants' thesis.

If you accept their argument, it means that a regional government would be precluded from asking an independent court to determine whether environmental legislation has been respected, because under Claimants' argument, if that access to the courts happens to give pause to potential financiers, then the State would be liable under international law to compensate the investor for a project that, if

developed, might have breached the environmental regulations.

The RGA lawsuit also fails to meet the standard of expropriation because the alleged deprivation was not permanent. The RGA lawsuit was filed in March 2017 and withdrawn in December of that same year. It lasted approximately nine months. That is by any measure an ephemeral measure. Not permanent. And permanence, as the Tribunal knows and we have indicated in our pleadings, is a requirement for a measure to be deemed expropriatory.

Two of the other measures challenged by Claimants which we will subsume into one consist of the criminal investigation conducted by the environmental prosecutor of Arequipa over the irregularities in the issuance of the environmental permits of the Mamacocha Project. This is what they refer to today as the "sham" criminal investigation.

Now, those investigations, therefore, had

the same factual premise as the Amparo ruling and the RGA lawsuit that we have just discussed. Please be aware that in this -- well, I think they have referred to without this warning and therefore I will not pause here. I wanted to indicate that I will be referring to so that it would ease the redaction process of the transcript, but it seems that we are not bracing that warning.

So the investigations that were open in response to the complaint filed by private individuals on 8 March 2017 is what led to these criminal investigations.

And after conducting a thorough investigation, the environmental prosecutor officially charged six government officials under article 3.14 of the Peruvian Criminal Code for illegally granting rights that caused environmental harm.

Now, those rights consisted in the issuance of the environmental permits under the lowest

possible classification of environmental impact of the projects, again generation plant and transmission line. The prosecutor also charged Mamacocha's outside counsel, as a secondary accomplice.

Claimants argue that the investigation and prosecution of breached the treaty, the contract and Peruvian law, but, like other arguments, this one too lacks any and all legal merit.

As you can see on your screen, article 314 of the Peruvian Criminal Code criminalises the illegal granting of rights in violation of environmental laws, and contrary to Claimants' allegations the environmental prosecutor had sufficient grounds to initiate the investigation. The criminal investigation was launched because the required threshold of evidence had been met, the evidence that gave rise to the concerns that proved well-founded, a fact confirmed by two separate courts.

One was Juzgado de Investigación

Preparatoria, the court that oversaw the investigation and authorised the indictment of , and the second was the Amparo request and the evidence adduced therein showing that the environmental permits were in fact issued illegally and under irregular circumstances.

Now, contrary to Claimants' simplistic and superficial arguments, is not being charged for, and I quote, the mere signing of the reconsideration motion. is being prosecuted for knowingly submitting documents that did not meet the legal requirements with the aim of obtaining the environmental permits in violation of the applicable legal regulations.

As can be seen from the slide, a secondary accomplice under article 25 of the Criminal Code is anyone who knowingly contributes to the commission of the illegal act, in this case the granting of the rights in violation of environmental norms.

, the prosecutor argues, conduct falls within that scope of article 25. has pled his innocence and formally requested that the charges be dismissed, arguing that the mere signing of petitions could not constitute a crime, the same arguments that Claimants are making here. The criminal court rejected 's motion.

The same court also rejected 's claim that he was being prosecuted for violating a criminal statute that did not exist at the time that the alleged crime was committed, an argument that we've heard from Claimants today. All these documents, members of the Tribunal, are in the record and of course can and should be consulted, and you can read for yourselves the reasoning and the basis for the charges that are before the criminal court.

Lastly, the allegation that the environmental prosecutor deprived

of his right and opportunity to be heard is also baseless, and I refer the Tribunal to exhibits R-115, 116, 117, 118, 120, which are all motions and petitions filed by with the Peruvian courts, and also to exhibit R-114, a decision from the criminal court expressly rejecting 's allegations that his right to mount a defence had been violated.

In sum, even if Claimants' claims related to the criminal investigation and prosecution of were within this Tribunal's jurisdiction, which they are not, as Mr Nistal has explained, they would fail on all of these facts.

Claimants should not be allowed to weaponise the treaty to preclude Peru from applying its environmental and criminal laws. The treaty is not a shield or an exemption from prosecution. has had and will continue to have his day in court. He will be heard. His due process rights will be respected, and the

court, the independent court, will issue its decision. But the treaty cannot be invoked again as a shield to shield anyone from prosecution.

I turn now to measures 4 and 5, civil works authorisation. Claimants claim that Peru breached its obligation to provide the minimum standard of treatment due to delays in obtaining the civil works authorisation from the regional water authority, which is the AAA that we have been referring to, the Autoridad Administrativa del Agua.

Peru has demonstrated that any delay in the issuance of the works authorisation was the result of Claimants' own delays, as well as a legal challenge by private third parties before the National Water Tribunal, which is an administrative tribunal. Peru has also demonstrated that, in any event, those delays were not the cause of Claimants' inability to meet the COS.

To recall, Mamacocha filed its civil works

request on 29 November 2016, but that request contained errors and required correction. Mamacocha was given ten days to submit those correction, but instead it asked for a suspension of the proceeding, which was granted. It was not until 24 April 2017 that Mamacocha submitted a new technical report accompanying its request.

In all, it took Claimants five months to correct the errors in their original request. But this was the first delay.

The second delay was caused by a legal challenge filed by several third parties before an administrative tribunal questioning the validity of the civil works authorisation that the AAA had issued. As a result of that challenge, the AAA was legally required to send the entire administrative record to that Tribunal. As soon as the file had been returned to the AAA and the very next day after the legal challenge by those third parties had been dismissed by the administrative tribunal,

the AAA reissued the civil works authorisation.

Claimants have not rebutted any of the above. In fact, in Claimants' presentation this morning they omitted any reference to these two delays. Their arguments in the Reply and again this morning ignore the evidence adduced by Peru in its pleadings. We even said that -- we pointed this out in the Rejoinder and still today they ignore the evidence. Instead, they resort to their usual conspiracy theories and baseless assertions of political motivation and interference.

But in the interests of time I will not go over the evidence that demonstrates that the timing of the civil works authorisation is not what caused Mamacocha's failure to meet the real COS. Instead, I respectfully refer the Tribunal to our written submissions on this issue.

In conclusion, the evidence on the record demonstrates that the conduct of the AAA did not violate the minimum standard of treatment.

Nothing in the conduct of that regulatory authority could be described as grossly unfair, unjust or idiosyncratic, or involved an utter lack of due process so as to offend judicial propriety, to use the words again of Waste Management II.

And neither is that conduct arbitrary under the international law standard as defined by the ICJ of arbitrariness.

I will now address the last two measures, which are the rejection of Mamacocha's Third Extension Request and the Lima Arbitration, and I take these two measures together because they have a common denominator, and namely that is that the three critical dates of which you've heard so much are, pursuant to the RER regulations, the bidding rules and the contract, the fact that those dates could not be modified.

As you know, and they are on the screen again, those are the dates, these three critical dates of COS and the contract

termination date.

The next slide which you now have on your screen is a table which collects the provision of the RER regulations, the bidding rules and the RER Contract that define these three critical dates. As explained in the witness statements of former Minister of Energy and Mines, Francisco Ismodes, and legal expert Carlos Monteza, both of whom will appear before you later this week, the RER regulations and the terms of the first and second auctions were specifically modified to provide for the immutability of these three critical dates.

And this change was prompted by the severe delays of up to ten years of 13 projects that were awarded RER Contracts in the first and second auction in 2009 and 2011.

The power plants of these projects had not been built -- I'm sorry.

The power plants of two of these projects had not been built as of July 2020, so delays of 11 and 12 years. This background is

discussed by legal expert Monteza and this background was also addressed in today's presentation by Claimants, trying to distinguish somehow and say well, the problems that were faced by the first and the second auction are not the problems that really, you know, were caused in this case in the third or even in the fourth auction.

Again, those attempts to distinguish that background from the current situation do not change the content of the RER regulations, the bidding terms and the contract, which we will now discuss, because these three legally binding instruments that I have mentioned left no doubt whatsoever about the immutability of these dates, as well as the legal consequences of failing to meet them.

If the investor fails to meet the real COS for any reason whatsoever, the phrase that has been discussed extensively in this arbitration, including force majeure, the contract will be automatically terminated and the MINEM will

execute the performance bond provided by the investor.

The Arbitral Tribunal in Electro Zaña interpreted and applied the RER regulations, the bidding rules and identical contractual clauses, and confirmed that the failure by the investor to meet the real COS for any reason led to the automatic termination of the contract, and you have excerpts of that award on your screen.

The investors were fully aware of these risks and obligations under the RER Contracts. Not only were they spelled out in unequivocal terms in the contracts, but they were also set forth in the bidding rules. The Tribunal in Santa Lorenza emphasised that the investors were fully aware of the consequences of not meeting the real COS for any reason and knowingly agreed to those terms when they entered into the RER Contract.

And if the potential investors had any doubt about such terms they had the opportunity to

submit clarification requests or even suggestions to modify the terms, and one such suggestion concerned the consequence of an investor not reaching the hard deadline imposed by the real COS, even in the case of force majeure.

And in response to that suggestion, MINEM confirmed that, if for any reason whatsoever, including reasons beyond the control of the investor, that is force majeure, the investor failed to meet the hard deadline under the contract, it would forego the benefit of the tariff and the contract would be automatically terminated.

All the investors, including Claimants, submitted sworn statements alongside their tenders expressly acknowledging such terms and the conditions of the tender process.

Claimants also submitted a sworn statement expressly acknowledging that the contract termination date could not be modified for any reason, not even force majeure, and you have

that on the screen.

These rules and critical dates were not unique to the Claimants or their contract. They applied to all participants in the third auction. Therefore, Claimants undertook the same risks and obligations as the rest of the concessionaires of the Third Auction, and following the Third Auction and the Fourth Auction 27 RER Contracts have been signed. To date 11 RER projects are in operation with RER Contracts, and 16 RER Contracts have been terminated because the investor breached the terms of the contracts, mostly the obligation to meet the COS in the agreed dates. This is not a situation that is unique to Mamacocha.

In this arbitration Claimants ask you to disregard all of the above. They ask you not to pay any heed to the facts, context, RER regulations, bidding rules and the key contractual provisions. In fact Claimants, who rely on English translations in this arbitration, did not even bother to translate

the RER regulations or the bidding rules or their sworn statements. Perhaps they don't want you to focus on them, or perhaps they consider them background noise.

Claimants also ask you to disregard not one, not two, but all three of the awards rendered by arbitral tribunals that have interpreted the RER regulations, the bidding rules and the contract provisions of the Third Auction. Those awards are Santa Lorenzo, RL-98, Electro Zaña, RL-95, and EGE Colca, RL-250. They have all rejected the same arguments made by Claimants in this arbitration concerning the critical dates and have confirmed both the immutability of such dates as well as the automatic termination of the RER Contracts resulting from the investors' failure to meet the real COS.

And there's a fourth award, in Conhidro CLC-103, which reached the same conclusion but in relation to the Fourth rather than the Third Auction. Claimants today attempted to

distinguish those cases from the present case but failed. They relied on the addenda which I will discuss in a minute as a distinguishing factor, and under false premise of government interference which does not exist.

Now, their superficial attempt to brush those awards under the carpet must fail. Now, mind you, we have raised the issue of these awards, including Electro Zaña, and Claimants attempted to distinguish that award from the present case in their Reply. We again addressed that issue, extensively we would say, in the Rejoinder, and still today they're not able to really explain why this Tribunal should ignore the interpretation of the four local arbitral tribunals that have looked at the same rules and reached the same conclusion that Peru is asking you to reach in this case as to the immutability of those critical dates and the fact that for any cause, if those dates are not reached, the tariff is lost, the contract is terminated automatically.

Given this RER regime the contract provisions and precedent of these four local arbitrations, the MINEM was justified in rejecting Claimants' Third Extension Request. That request was filed on 1 February 2018 and consisted on extending the real COS until 28 February 2021. It also requested that the Ministry extend the contract termination by more than four years, until 28 February 2040.

Claimants argue that the rejection of the request violates the minimum standard of treatment under customary international law because it was allegedly arbitrary.

Claimants have not demonstrated, and cannot demonstrate, that the rejection of their request to modify the real COS and the termination date of the contract amounts to -- and again I quote -- "a wilful disregard of due process of law, an act which shocks or at least surprises a sense of judicial propriety", which is the standard of arbitrariness again adopted by the International Court of Justice in ELSI,

and endorsed by numerous investment tribunals.

Nor was it grossly unfair or unjust or idiosyncratic, discriminatory or involved a lack of due process leading to an outcome which offends judicial propriety. As Peru has demonstrated, the RER regulations and bidding rules not only justified the MINEM's rejection of the request; but in fact left no possibility for any other outcome. The awards of the arbitral tribunals that are in the record confirm that the three critical dates could not be modified.

For example, the award in Electro Zaña confirmed that the State is legally precluded from modifying or extending the real COS or the contract termination date.

That Tribunal also confirmed that the investor bore the risk of any circumstance that could have an impact on the work schedule. Any circumstance.

Claimants knew all of this, of course, including the fact that the contract

termination date was December 2036 and could not be modified for any reason whatsoever. As we have seen, they submitted a sworn statement expressly recognising that fact. It is disingenuous for them to now argue that MINEM is somehow legally obligated to grant their request to change that date from 2036 to 2040. Even their local counsel, Mr Roberto Santiváñez, warned Claimants of the immutability of the contract termination date as early as August 2013, before Claimants entered into the contract, as you can see from exhibit R-153 that you have on your screen.

The rejection of Claimants' request to extend the termination date could not have come as a surprise, nor was it a reversal of policy, as Claimants allege. Indeed, on 6 October 2016, less than one year and a half before the Third Extension Request, the MINEM had rejected a similar request by Claimants, and this is Resolution 559 which you now have on your screen, which is C-009, where the MINEM

reiterated a position of the inability to change those dates, and you can see that on your screen.

But most of Claimants' arguments against the Ministry's rejection of the Third Extension Request are based on earlier extensions, and specifically the July 2015 extension approved, which is addendum 1, which is exhibit C-0008, and six months later, in December 2016, MINEM granted Claimants' request for an extension of approximately 13 months for the financial closing and an extension of nearly 15 months for the other milestones of the work schedule including the COS, which was extended until 14 March 2020, and that is addendum 2, C-0009.

Claimants argue that addenda 1 and 2 create the expectation that the MINEM would approve the Third Extension Request including the extension of the termination date by more than four years. Peru has demonstrated why any such expectation by Claimants was not legitimate, and again, leaving aside the fact that

legitimate expectations are not a component of the minimum standard of treatment as confirmed by various Tribunals including Professor Crawford, Charles Brower, Toby Landau, Gabrielle Kaufmann-Kohler, despite the fact that it's not a requirement, the expectation that the MINEM would keep granting extension of the COS is not reasonable and less so when such extensions would be contrary to the RER regulations, the bidding rules, and the contract.

In any event, MINEM never agreed to extend the contract termination date either through addenda 1, 2, or in any other way. In fact, MINEM had already rejected an earlier request from Claimants to extend the contract termination date. The fact is that, as Peru has explained in this arbitration, addenda 1 and 2 should not have been granted to begin with, for all the reasons we have explained concerning the immutability of the three critical dates. Those extensions to the COS

were contrary to the RER regulations and the bidding rules, and Claimants of course had good cause to know this.

Claimants argue that the only reasonable -- and I quote -- "the only reasonable inference that can be drawn is that the denial of the Third Extension Request was part of Peru's bad faith campaign to reverse its prior policies and terminate the Mamacocha Project" -- again, Claimants relying on baseless conspiracy theories imputing bad faith to the State.

Even if the principle of good faith were part of MST, an act would be contrary to such principle if it constitutes, in the words of Waste Management, "a deliberate conspiracy", "a conscious combination of various agencies of government without justification to defeat the purpose of an investment agreement". This is paragraph 138 of Waste Management.

Claimants have adduced no evidence that would establish the existence of a deliberate conspiracy to defeat the purpose of the

contract. If anything MINEM's mistake consisted of being flexible, of bending over backwards to try to help Mamacocha reach the COS and, in fact, went too far in doing so when it wrongly adopted addenda 1 and 2. But having realised its mistake MINEM was entirely justified in taking appropriate steps to not only not grant the third request and commit the same mistake, but also to annul addenda 1 and 2, hence the Lima Arbitration, which I will address shortly.

Rejection of the third extension did not violate actos propios or the principle of confianza legítima, which is something that also the Claimants rely on to argue that there's been a breach as a result of the rejection of that third request. But Peru, including through expert testimony, has rebutted Claimants' arguments that rely on the doctrine and principle of confianza legítima and actos propios.

Those arguments are based on the same

premise, which is that states are infallible and cannot correct earlier good faith mistakes that they've made.

Claimants in their presentation today relied quite heavily on the Echecopar opinion. This is exhibit C-235. And in so doing Claimants have completely ignored the rebuttal arguments submitted by Peru, including in paragraphs 142 to 157 of its Rejoinder, which exposed the overstated and misplaced reliance of Claimants on that opinion, and we respectfully refer the Tribunal to our submissions on that issue.

Claimants also claim that the rejection of the Third Extension Request is part of an indirect and creeping expropriation but, as I noted at the outset, the rejection of the Third Extension Request was adopted by the MINEM acting in its capacity as a contracting party, and as such that conduct cannot give rise to a claim of expropriation.

Now, Claimants cannot seriously argue that the rejection of a request to modify the terms

of a contract, especially when such modification would be contrary to the legal regime and is thus precluded by law, can constitute an expropriation of a contractual right. By Claimants' rationale, a state would be obliged to accept any and all contract modifications, even ones that alter the fundamental terms of the contract. Once again Claimants argue that it's the combination of the three measures that constitute a breach of the expropriation provision but, as I have mentioned, as a composite act it has to be interconnected. It has to constitute a pattern.

Again, this is the commentary from the International Law Commission to article 15 of the Articles of State Responsibility which are public international law -- customary international law, and, of course, Claimants have not met this test of interconnectedness.

Finally, in about three minutes, Mr President, members of the Tribunal, I will

address the Lima Arbitration, and then I will conclude.

As you know, on 27 December 2018 MINEM initiated an arbitration at the Lima Chamber of Commerce pursuant to clause 11.3(b) of the Contract seeking the annulment of addenda number 1 and 2. Again, this is the so-called Lima Arbitration.

As I explained a few minutes ago, addenda 1 and 2 granted certain extensions, and as Peru has demonstrated in this arbitration and at least four other Arbitral Tribunals have confirmed, such extensions are contrary to the RER regulations and the bidding rules. Accordingly, they never should have been granted.

But states, again like companies and individuals, are not infallible, and as the AES v Hungary Tribunal noted, and I quote, the standard is not "one of perfection".

When MINEM realised that the addenda was contrary to the RER regulations and the bidding

rules, it did the responsible thing. It exercised its right under the contract to seek the annulment of addenda 1 and 2 through arbitration.

Now, on 24 December 2020 the domestic Tribunal issued an award on jurisdiction declaring that it lacked jurisdiction to resolve MINEM's claims because it deemed that the issue had to be resolved through international rather than local arbitration because of the issue of the amount being claimed, and we heard Claimants' counsel refer to this issue in their presentation today, that threshold being $20 million. Because MINEM was seeking a declaratory judgment it submitted to the Arbitral Tribunal that, not being able to quantify that, it was proper to seek redress through local arbitration.

Now, the Arbitral Tribunal did not issue any decision with respect to the merits of the dispute and, contrary to what Claimants' counsel suggested in his presentation this

morning, the Tribunal did not say that it was bad faith for MINEM to have recourse to local arbitration. It disagreed with the contention that it was a dispute that could be quantified at less than 20 million, but it did not say that it constituted bad faith.

Now, Claimants argue that MINEM's exercise of its contractual right to submit to arbitration the dispute concerning the prior extensions constitute expropriation, were arbitrary, violated their legitimate expectations, lacked transparency and good faith and constituted forum shopping. They also argue good faith, actos propios, confianza legítima -- the full menu.

The Tribunal will recall that in its pleadings Peru rebutted each of Claimants' claims. Peru demonstrated, among other things, that the Lima Arbitration did not constitute expropriation because MINEM initiated the Lima Arbitration in its capacity as a contracting party. It was not exercising sovereign powers.

And the same is true/applies for the claims of MST.

In addition, and leaving aside the fact that Claimants base their claims on incorrect legal standards of MST, Claimants have failed to substantiate any other claims under the MST obligation. For instance, Claimants have failed to demonstrate that having recourse to arbitration to annul the addenda was arbitrary. How can they seriously argue that given the content of the RER regulations, the bidding rules, the contract, both of which form the basis of the relief sought by the MINEM in the local arbitration?

In fact, the local arbitrations that Peru has identified and Claimants have either ignored or tried to dismiss as unjustified or incorrect, confirm without exception the correctness of the arguments made by MINEM in the Lima arbitration. The substantive arguments.

It is manifest that MINEM's conduct does not

even come close to meeting the high threshold that may render a state conduct arbitrary under either the autonomous FET standard (not applicable in this case) or the minimum standard of treatment. Initiating the Lima Arbitration cannot be described by any objective person as a wilful disregard of due process of law, an act which shocks or at least surprises a sense of judicial propriety. Also by initiating that arbitration, MINEM was not acting contrary to the rule of law but in fact was enforcing the rule of law by seeking to annul the addenda that was contrary to the RER regulations and never should have been issued.

And with this I conclude. With their claims against the Lima Arbitration Claimants have once again displayed arrogance, and in this case a double standard. They lambast Peru for exercising the same contractual right that they themselves have exercised by bringing this arbitration. Indeed, Claimants invoked clause 11.3 of the contract, except that they brought

an international arbitration, whereas MINEM brought a local arbitration under the same clause 7. In other words, in Claimants' view they, the foreign investor, are perfectly entitled to have recourse to arbitration but when the host state seeks to do likewise they're acting arbitrarily in bad faith and in all sorts of other nefarious ways. Such double standards are the reasons why investment arbitration is so widely criticised.

Members of the Tribunal, Peru has demonstrated in this arbitration that none of the measures challenged by Claimants breach the treaty, the contract or Peruvian law. There is therefore no need to engage in a discussion about quantum but nevertheless, for the sake of completeness and with your indulgence, my colleague, Ms Endicott, will now address you on this issue.

THE PRESIDENT: Thank you, Mr Grané. Ms Endicott?

MS ENDICOTT: Hello.

THE PRESIDENT: Before you start you suffer from the same trauma as I have suffered my whole professional life which is when I was in a conference I had always to address the issue of enforcement, under the New York Convention, and that meant I was always the last speaker of the conference, and of course my distinguished colleagues at the dias always wanted to show what they all knew about arbitration agreement, arbitral procedure, so I was always the last one and I had to always fix it in a couple of minutes.

Now, Ms Endicott, I don't know how many minutes are left or how many slides you have. I think you have, including the bonus minutes, some 20 minutes left, if I'm correct. Ana, please correct me.

THE SECRETARY: 26 minutes, if we count the additional 7 minutes that were given to Claimants.

THE PRESIDENT: Ms Endicott, you have 26 minutes. Please use them wisely, but slowly.

MS ENDICOTT: I will do so, Mr President. Thank you.

by Ms Endicott.

MS ENDICOTT: So, as Mr Grané kindly introduced me, my name is Amy Endicott and this afternoon I'd like to explain to you why Claimants have failed to demonstrate their entitlement to any of the compensation that they're requesting in this arbitration.

To recover damages Claimants would have to show that, but for the impugned measures, the Mamacocha Project would have succeeded. They can't carry that burden. As detailed by Mr Grané, Claimants' project failed not because of the impugned ventures but due to their own misguided attempts to shortcut environmental reviews in early 2014.

Claimants' tactics prompted the Amparo proceeding, which was a successful legal challenge to the validity of those permits initiated in 2016 by a private citizen. Neither that lawsuit nor the subsequent

decision by the Peruvian courts invalidating the permits, what we're calling the Amparo ruling, is alleged as a breach.

Claimants cannot show that the measures that they do allege as breaches were the proximate cause of their damages. Claimants argue that a legal action challenging their key permits would have been "fatal" to achieving their scheduled financial close. In making that argument Claimants were referring to the March 2017 RGA lawsuit, but they recognise that the 2016 Amparo requests raised a nearly identical challenge.

Therefore, in insisting that a challenge to their permits precluded their scheduled financial close, they've unwittingly admitted that the 2016 Amparo request destroyed the value of the project months before the RGA lawsuit was filed.

Now, counsel for Claimants this morning wrongly claimed that Peru does not dispute that the impugned measures caused Claimants' losses.

That's incorrect. As detailed in Peru's pleadings, even in the absence of the RGA lawsuit, the project would have failed because Claimants cannot show that they would have been able to meet the conditions precedent set by their potential financial partners in time, secure financing on the basis of an aggressive 26-month construction schedule, or achieve timely commercial operations, what we're calling COS.

Even assuming that Claimants could have achieved their scheduled financial closing and started commercial operations absent the challenged measures, the 30 January 2020 Amparo ruling would have rendered their whole operation inviable.

As a result, even if Claimants could prove a breach -- which they can't -- they are not entitled to any compensation. If despite the foregoing you, the Tribunal, were to reach the issue of valuation, you have to disregard the unrealistic figure put forward by Claimants and

their experts, which is more than three times what any willing buyer was offering to pay.

Now, each of Claimants' claims under international and Peruvian law requires Claimants to show that the impugned actions by the State caused the damages that Claimants allege. Claimants present a simplified view of causation. They suggest that to receive compensation they need only show some cause and some effect and some causal link between the two.

But as noted in comment 10 to article 31 of the Articles on State Responsibility, causality in fact is a necessary but not sufficient condition for reparation.

Consequently, as explained by the Tribunal in Lemire v Ukraine, the causation inquiry requires a claimant to prove that the impugned measure was the direct cause of the damages alleged, to the exclusion of other events, including Claimants' own actions.

The Lemire Tribunal explained that the

proximate logical chain is broken where the harm would have arisen regardless of the impugned measures due to some other intervening cause.

As recognised in Lauder v Czech Republic the existence of an intervening cause for loss precludes liability.

In its Non-disputing Party submission the United States also recognised the requirement of proximate cause. It articulated the standard as requiring the Claimant to show that the loss it experienced would "not have occurred" in the absence of the impugned measures.

Claimants have failed to make this showing. Even in the absence of the impugned measures, Claimants' investment would not have succeeded. The premise of Claimants' causation argument is that the impugned measures prevented Claimants from securing financing required to commence construction and meet the required commercial operation deadline, COS. But the record shows

that even in the absence of the impugned measures, Claimants would have been unable to obtain the necessary financing on schedule or to achieve COS.

Claimants assert that the causal link between the impugned measures and the alleged loss of their investment "has everything to do with the required progression of milestones under the contract".

These milestones included financial closing which Claimants and their potential financial partners had scheduled for May 2017. Now, Claimants characterise this milestone at paragraph 4 of their memorial as a "critical milestone before shovels could hit the ground on the Mamacocha Project".

These milestones also included the start-up of commercial operations, COS, which addendum number 2 had extended to 14 March 2020. Claimants allege that measures that prevented them from achieving scheduled financial closing caused the loss of their investment because

they rendered it impossible to achieve timely start-up of commercial operations. In other words, Claimants tacitly admit that any event that prevented them from achieving their scheduled financial closing would have prevented them from achieving timely start-up of commercial operation, COS, and would have rendered their project worthless.

As we will discuss, the problem for Claimants is that even in the absence of the impugned measures, there were many other obstacles to the scheduled financial closing that similarly would have frustrated their project.

Claimants repeatedly assert they would have achieved financial closing in May 2017 but claim, at Reply 960, that the RGA lawsuit "froze all financial negotiations because it challenged the underlying permits".

On this basis Claimants contend at memorial paragraph 5, that with the commencement -- the commencement -- of the RGA lawsuit on 14 March

2017, the viability of the Mamacocha Project was "immediately threatened", and at paragraph 284 they assert that "just the threat of this potential outcome was sufficient" on its own to destroy the project. That's Claimants' submission.

Claimants' own expert on project finance similarly opined that this type of shadow on the underlying fundamental premise would be viewed as a "fatal blow to the project". Counsel for Claimant earlier showed you paragraph 7.5.1 of his opinion where he opined on the fact that he did not think financing was likely under these circumstances, but they omitted the part of that quotation that discusses the effect of such a challenge where Mr Whalen said, "The uncertainty of whether the Mamacocha Project would be able to achieve fully effective key permits" would have deterred -- close quote -- would have deterred a project finance lender from financing the project after March 2017, that is the filing

date of the RGA lawsuit.

This is important, that this harm was alleged to start with the commencement or just the mere filing of that lawsuit, because a year -- excuse me, a half a year before the RGA filed suit, in September 2016, Mr Begazo Lopez had challenged the permits before the Peruvian courts filing his Amparo request. Claimants conceded that his suit challenged the "same permits" as the RGA lawsuit on "nearly identical grounds".

It follows that if the initiation of the RGA lawsuit could have been enough to destroy Claimants' project, then the Amparo request did so months earlier and constitutes an intervening cause of Claimants' damages. The RGA lawsuit could not have harmed the investment because, to borrow Claimants' colourful language, it took place after the "death knell" was sounded by the Amparo request.

Claimants today contended that its investors

were aware of and unconcerned by the Amparo request, but as you will see in the course of this hearing the record does not support that claim. Even if the Amparo requests weren't fatal to Claimants' causation arguments, Claimants own actions would have prevented them from reaching their scheduled financial closing. It's undisputed that financial closing is defined as the date all conditions for disbursement of loan funds are met. While they argue that but for Peru's actions they were "on track" to achieve financial closing by May 2017 -- that's at Memorial paragraph 99 -- the record tells a different story.

Claimants' plan to secure their debt financing from German development bank DEG, exhibit C-162 here on the screen, includes DEG's list of conditions for disbursement of the loan, and it's worth a read.

Among these conditions was a requirement to "extend the PPA". That's Claimants' term for the RER Contract. Notably, for disbursement,

Claimants had to have not only applied for the extension but actually received it. Exhibit R-164 on the screen, the timetable agreed between Claimants, DEG, Innergex and GCZ revealed that the term "PPA extension" here refers to not only seeking an extension of the commercial operation start-up date, COS, but also to the term of the contract. Despite knowing that this condition was a condition precedent to their scheduled May 2017 financial closing, Claimants didn't apply for such an extension until February 2018. Given that they had not made the application prior to May 2017, Claimants clearly had no intention of closing the loan by that date.

Claimants' failure to satisfy this condition, the PPA extension, is just one of many instances of Claimants' delay over executing the steps necessary to meet the scheduled financial closing. These other failures are detailed in paragraphs 1270 to 1272 of Peru's rejoinder, and, heeding the

President's words, I won't get into all of them.

Now, Claimants' work schedule was similarly problematic to their ability to achieve their scheduled financial closing. That work schedule included only 26 months between start of construction and commercial operation, COS. The schedule was prepared by contractor GCZ as part of a competitive bid. The Claimants have admitted that this schedule did not include "safety margins".

And contemporaneous documents show that timeline was already slipping before construction was even scheduled to begin. On the other hand, DEG's technical adviser, Hatch Engineering, estimated that 33 months was a more realistic construction timeline.

While Claimants have criticised Hatch's 33 month estimate as overly conservative, they've conceded that Hatch was world-renowned for its technical work. Importantly, unlike GCZ, Hatch was not bidding for the work but instead

engaged as a technical adviser by DEG to give a reasonable estimate of the construction schedule.

Regardless of how quickly Claimants believe they could complete the project, they've presented no evidence that DEG or Innergex would have accepted the risk of investing in the project if the schedule did not allow at least 33 months for construction.

To the contrary, e-mails with Innergex, its proposed financial partner, from 2018 show that Claimants' financial partners were operating on the understanding that the project schedule would allow 33 months for construction.

So the key question, then, is not whether this 26-month timetable was sufficient for construction, but whether the lenders would have agreed to take on the risk of proceeding on the basis of such an ambitious timetable. Because Claimants can't show that they would have obtained financing for the schedule, they cannot show that they would have achieved their

May 2017 financial closing, even in the absence of the challenged measures.

Finally, even if they could achieve scheduled financial closing, Claimants can't show that they would have achieved timely start-up of commercial operations. They can't show they would have met COS. Pursuant to the RER Contract, Claimants were required to commence commercial operation by 31 December 2018. Addendum No 2 purported to extend that date to 14 March 2020.

Claimants maintain that they would have started construction by 1 July 2017, a dubious claim, as Peru has explained in its Rejoinder, leaving just 32 months to achieve COS.

Claimants do not dispute that they wouldn't have met the original COS, but they argue that their 26-month schedule left ample time to achieve the Addendum No 2 COS date. However, Claimants themselves admit, at Memorial paragraph 7, that their range of 26 to 30 months is a "minimum". Under their schedule

they had a buffer of just six weeks to cover any delays.

Essentially Claimants are asking you to conclude that they would have completed construction of a complicated hydroelectric plant in the minimum possible amount of time, and to assume that any delays that arose could be dispensed with in just six weeks. This is not plausible.

Hatch Engineering specified that the geologic challenges made 33 months a likely scenario, a likely schedule, not a "worst case" scenario, which is what counsel for Claimants told you this morning, and that's at Transcript, page 110.

Hatch noted 36 months was a possibility and Claimants' consultant Norconsult Engineering even forecasted an actual worst case scenario of 37 months. The reality is that even if Peru had taken none of the impugned measures, Claimants would not have been able to achieve commercial operations by even the extended

Addendum No 2 COS. This is not a "red herring" issue, as Claimants' counsel argued earlier, but a terminal problem for their project.

Even in March 2017, when they created this hand-drawn schedule Claimants' counsel showed you, they knew they did not have enough time to ensure they could meet COS. This is why already in late January 2017, even before any of the alleged breaches arose, Claimants were already pushing to extend the COS date and the term of the RER Contract.

Turning now to quantum, if the Tribunal were to find that Claimant had established a proximate causal link, you would then be required to assess what the value of Claimants' investment would have been absent the breaches. As I'll explain, with your indulgence, that value would be zero.

Claimants' counsel today urged you to disregard any facts after their valuation date unless they were "expected to occur". But that's not the standard. As recognised in

Amoco v Asia, while foreseeability is relevant to causation, it is an inappropriate test for quantum. Ex post information impacting the performance of an investment in the but-for scenario must be taken into account in valuation, or, as the Burlington majority explained, considering this information brings the valuation "closer to reality".

In its Non-disputing Party submission, the US also recognised that ex post information may reduce or eliminate damages.

Even in Claimants' but-for scenario the Amparo ruling issued on 30 January 2020 would have invalidated the RER Contract and retroactively nullified Claimants' keystone environmental permit. Without these permits the project, even if constructed, would not have been able to operate. Accordingly, the project would have had no value, even in Claimants' counterfactual scenario, and Claimants cannot recover damages.

Claimants admit that without the concession

the RER Contract had no value, and Claimants assert that the loss of the RER Contract would destroy the project. While Claimants' counsel presented a new argument today that the outcome of the proceeding, the Amparo proceeding, might have been different if the project had been running, this wishful thinking does not change the fact the Amparo ruling is not challenged as a breach and its invalidation of the definitive concession would have rendered the Mamacocha Project worthless.

THE PRESIDENT: Ms Endicott, you are now in the seven-minute period.

MS ENDICOTT: Thank you. I hope that I won't have to keep you much longer.

THE PRESIDENT: No, it's not the question that it is not interesting; it's a question simply that both sides have agreed to a certain amount of time, so I have to police the time. That's my job here. Please proceed. Still seven minutes left.

MS ENDICOTT: Thank you. So let's talk for

a moment, then, about Claimants' valuation. Claimants have presented a valuation that's more than three times what any willing buyer would have paid and does not represent the fair market value of their project on Claimants' valuation date, which is 14 March 2017. It is common ground between the experts that fair market value is the price at which a willing buyer would acquire an asset and at which a willing seller would then exit.

Claimants received an offer from just such a willing buyer in February 2017. That is before the RGA lawsuit. Pursuant to the terms of the offer, Innergex recognised the value of Claimants' existing shares in the company as 8.8 million and agreed to invest 17.8 million in cash in exchange for new shares if, and only if, due diligence conducted over 60 days confirmed that value assumption.

If so, Innergex would execute the contract and contribute the cash in exchange for new shares to be issued on signing. The combined

value of the pre-existing shares and the cash contributed by Innergex for the new shares would then be 27.5 million, the post money value.

In its presentation Claimants' counsel misrepresented the terms of this deal asserting that Innergex would "pay" for "the remaining 70 per cent equity stake". But Innergex wasn't "paying" for Claimants' existing shares; it was investing cash in the project in exchange for the issuance of new shares.

And Innergex did not make that investment until after the March 14, 2017 valuation date. Therefore the company was not worth the $27 million until after that cash was contributed. That means, for the purpose of valuing the investment at the valuation date, the pre-money value is the appropriate measurement.

Now, in 2018 it's worth noting Claimants restarted efforts to fund the project. They went so far as to offer 100 percent of their stake to Innergex for 7 million. They received

offers back from Glenfarne and Innergex between 8 and 7.4 million, and they ultimately countered at 8.1 million in December 2018. These values are consistent with Versant's DCF of 7.5 million which, by the way, Claimants' counsel repeatedly misrepresented as 3.04 million.

But one thing that's important to note is that when these offers were made the only ongoing alleged breach was the criminal investigation. As you can see on this slide, there's a window in which the other breaches had been resolved or ceased, and the later breaches, alleged breaches, had not yet commenced. Claimants have submitted no evidence the criminal investigation raised any questions or concerns from its lender before 2019, so this time period approximates the situation at the valuation date, and offers made at this time are instructive.

As you can see, Claimants' DCF is more than three times what Claimants as willing sellers

offered and what Innergex and Glenfarne as willing buyers would have paid.

Now, I'll let Versant explain how this DCF has to be adjusted in their presentation next week but, as you can see, once that adjustment is applied, even BRG's DCF drops down to the appropriate range of 7.5 million in line with the offers that were on the table and more reflective of the fair market value of Claimants' investment.

Finally, it's worth noting that Claimant seeks to further inflate its damages by adding ancillary claims and proposing an unrealistic interest rate, and Peru's submissions have addressed the myriad flaws in those claims.

So, in conclusion, it's Claimants' own malfeasance rather than any action by the state that caused the losses Claimants now seek to recover, and it's Claimants malfeasance that triggered the Amparo ruling which wiped out the value of Claimants' investment even in the counterfactual scenario they posit.

This concludes Peru's opening statement. Thank you for your attention, and we welcome any questions that the Tribunal may have.

THE PRESIDENT: Thank you, Ms Endicott. Thank you also to your team. Let's see if my colleagues, this time Professor Vinuesa, any questions?

MR VINUESA: Not now. I will reserve my questions for later.

THE PRESIDENT: Professor Tawil, any questions?

MR TAWIL: Not at this stage, Albert Jan, thanks.

THE PRESIDENT: I have also questions but not at this stage. I want to see how it develops with the witnesses, and maybe at the end of the week we'll pose further questions.

All right. Are there any matters of a procedural nature that the parties would like to raise? Mr Reisenfeld?

MR REISENFELD: We have no matters at the moment.

THE PRESIDENT: Mr Grané, have you any?

MR GRANÉ: No, Mr President. Not at this moment. Thank you.

THE PRESIDENT: That concludes today, and we start tomorrow with the examination of Mr Jacobson at three o'clock CET. I wish you all a good day and good evening.

(Es la hora 16:03 EST)

CERTIFICADO DEL ESTENOTIPISTA DEL TRIBUNAL

Quien suscribe, Leandro Iezzi, Taquígrafo Parlamentario, estenógrafo del Tribunal, dejo constancia por el presente de que las actuaciones precedentes fueron registradas estenográficamente por mí y luego transcriptas mediante transcripción asistida por computadora bajo mi dirección y supervisión y que la transcripción precedente es un registro fiel y exacto de las actuaciones.

Asimismo dejo constancia de que no soy asesor letrado, empleado ni estoy vinculado a ninguna de las partes involucradas en este procedimiento, como tampoco tengo intereses financieros o de otro tipo en el resultado de la diferencia planteada entre las partes.

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Leandro Iezzi, Taquígrafo Parlamentario
D-R Esteno