

BEFORE THE INTERNATIONAL CENTRE FOR SETTLEMENT OF  
INVESTMENT DISPUTES

ICSID Case No. ARB/21/29

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In the Matter of Arbitration Between:	:
	:
Kaloti Metals & Logistics, LLC,	:
	:
Claimant,	:
	:
and	:
	:
THE REPUBLIC OF PERÚ,	:
	:
Respondent.	:

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HEARING ON JURISDICTION AND THE MERITS

Monday, July 24, 2023

The World Bank Group  
1125 Connecticut Avenue, N.W.  
Conference Room C1-450  
Washington, D.C.

The Hearing in the above-entitled matter  
came on at 9:00 a.m. before:

PROF. DONALD McRAE  
President of the Tribunal

PROF. DR. JOSÉ CARLOS FERNÁNDEZ ROZAS  
Co-Arbitrator

PROF. DR. ROLF KNIEPER  
Co-Arbitrator

ALSO PRESENT:

MS. CATHERINE KETTLEWELL  
Secretary to the Tribunal

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MS. MONIQUE FERNÁNDEZ

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MR. RAMÓN AZPÚRUA  
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Founder

MS. ██████████████████  
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P R O C E E D I N G S

PRESIDENT McRAE: Good morning, everyone. I believe we are ready. So, if we could open the proceedings, this is the Hearing, for the record, in Kaloti Metals against the Republic of Perú, Case No. ARB 21/29.

I am Don McRae, Presiding Arbitrator. On my left is Dr. José Carlos Fernández Rozas, and on my right is the other arbitrator, Dr. Rolf Knieper. Further on, we have Catherine Kettlewell from ICSID.

We also have Interpreters and a Court Reporter in the back of the room.

Perhaps we could ask the Parties to introduce their teams, so we do have it on the record, and we will start with the Claimants.

MR. DÍAZ-CANDIA: Thank you, good morning, Mr. President. Hernando Díaz-Candia on behalf of WDA Legal. I am going to introduce the rest of the team. Please raise your hand when I mention you.

On behalf of Kaloti Metals we have [REDACTED], Ms. [REDACTED], the Director of Finance of the Company. To my right, I have my partner, Ramón

1 Azpúrua; further to the right my colleague, Gabriella  
2 Hormazabal; and further down the table, Mikel Del  
3 Valle and Sebastián Ordoñez also from WDA Legal; and  
4 further to their right are the Quantum Expert from  
5 Secretariat, Mr. Almir Smajlovic and his associate,  
6 Michael Moxley also from Secretariat.

7 PRESIDENT McCREA: Thank you very much.

8 And for the Respondent?

9 MR. GRANÉ LABAT: Thank you very much,  
10 Mr. President, good morning, Members of the Tribunal,  
11 distinguished colleagues. I am Patricio Grané Labat,  
12 counsel for Perú. I will introduce only the members  
13 of our team that will be speaking morning, and during  
14 the week other members of the team will be  
15 participating. You have the full List of Participants  
16 on your table.

17 To my right is Ms. Vanessa Rivas Plata, the  
18 President of the special commission that is  
19 responsible for representing Perú in all international  
20 investment arbitrations. To my left is my colleague,  
21 Álvaro Nistal, to his left my partner, Ms. Mélida  
22 Hodgson, and to her left Mr. Timothy Smyth.



1           PRESIDENT McRAE: We also have present the  
2 United States, and ask them to introduce themselves.

3           MR. BIGGE: Thank you, Mr. President. David  
4 Bigge, Chief of Investment Arbitration for the United  
5 States, and I'm here with my colleague Melinda  
6 Kuritzky.

7           PRESIDENT McRAE: Thank you very much. When  
8 you speak you'll be able to come forward and not have  
9 to move there.

10           We have a very organized schedule for us and  
11 I thank the Parties for agreeing so easily on the  
12 Schedule and on the items in the Procedural Order.  
13 One of few cases where we haven't had to have a  
14 procedural meeting, I must say, to resolve some of  
15 these issues, so that's a very good sign.

16           We start with any preliminary procedural  
17 matters. We don't have any from the perspective of  
18 the Tribunal.

19           But I would say, just as a reminder, that  
20 these proceedings are being interpreted into English  
21 and into Spanish, and so therefore those who are  
22 speaking are reminded that they are being interpreted,

1 and therefore to speak in a way that will facilitate  
2 the work of the Interpreters.

3 With that, are there any other issues that  
4 the Claimant wishes to raise?

5 MR. DÍAZ-CANDIA: No. Thank you very much,  
6 Mr. President.

7 PRESIDENT McRAE: Thank you.

8 And the Respondent?

9 MR. GRANÉ LABAT: Yes. Thank you  
10 Mr. President. We have two procedural issues to  
11 address. One is a minor housekeeping issue which  
12 relates to an exhibit on the Hearing Bundle, which is  
13 Exhibit C-30. This is the Transactions history of  
14 Kaloti. Perú had indicated during the proceeding that  
15 that exhibit, as originally submitted, was missing one  
16 page. We brought this to the attention of Claimant,  
17 and Claimant duly corrected the mistake, submitted a  
18 complete version of that C-30, but then when we  
19 received the exhibits from Claimant to upload to the  
20 Hearing Bundle, the original incomplete exhibit was  
21 provided, and that is what has been uploaded to the  
22 Hearing Bundle.

1           Now, the complication of having to  
2 distribute new USBs made it such that we would prefer  
3 to put this on the record. We do not anticipate  
4 having to refer to the missing page during the  
5 proceedings, so we could keep the incomplete version  
6 of the Hearing Bundle, but we did want to raise  
7 this--bring it to the attention of the Tribunal, both  
8 so that you're aware and also, in the unlikely event  
9 that we do have to refer to the missing page, in which  
10 case we will need to go back to the corrected version  
11 of C-30.

12           PRESIDENT McRAE: Thank you. Maybe Claimant  
13 has something to say on that, but your solution seems  
14 to me to be appropriate. That if it becomes an issue,  
15 we can come to it, rather than trying to deal with it  
16 now.

17           MR. DÍAZ-CANDIA: You asked us if Claimant  
18 has something to do say?

19           PRESIDENT McRAE: I was going to ask if you  
20 do have anything to say.

21           MR. DÍAZ-CANDIA: Yes, we do. Those  
22 exhibits were delivered to the representative of Perú

1 on July 7th. On July 10th, the Hearing Bundle was  
2 delivered to ICSID and the Tribunal. We regret that  
3 we were not made aware of this before. It's two  
4 letters from July 14th, July 10th. So, if there is  
5 any misinformation, which I cannot confirm, we regret  
6 it, and we agree that the complete exhibit, for sure,  
7 it's in the box at--the ICSID Box.

8 Thank you.

9 PRESIDENT McCREA: I take it there is no need  
10 to take the matter any further. I understand the  
11 position of both parties and if it becomes a matter,  
12 we will deal with it then.

13 You have another point?

14 MR. GRANÉ LABAT: The second issue,  
15 Mr. President, we received the presentation that  
16 Claimant intends to use during their opening  
17 statement, and obviously it's a long presentation, we  
18 have done a very quick preliminary check, and we have  
19 identified certain slides do not contain a reference  
20 to exhibits on the record. And, of course, P04  
21 requires that each demonstrative exhibit have the  
22 number of the exhibit to which it refers, and so, of

1 course, when we come to those slides, Perú reserves  
2 the right to bring to the attention of the Tribunal  
3 that those exhibits--we don't know whether they are on  
4 the record. We trust that they are, but we will have  
5 to check.

6           There is one exhibit, however, that it  
7 appears to us, that is not--or slide that contains  
8 information that is not on the record as far as we  
9 know, and that is Slide 152. And, of course, as the  
10 Tribunal knows, PO4 and PO1 do not allow Parties to  
11 refer to documents or evidence that is not on the  
12 record, and so we wanted to bring that to your  
13 attention so that we don't have to interrupt our  
14 colleagues during their presentation. But again, if  
15 we detect anything, I'm afraid that we will have to  
16 interrupt at that moment because there are no exhibit  
17 numbers for every single document that we see on the  
18 slide deck.

19           PRESIDENT McRAE: Thank you. Do you have a  
20 comment?

21           MR. DÍAZ-CANDIA: Yes.

22           Mr. President, we believe the only thing

1 that may not be on the record is something that is on  
2 the public domain, in that slide, 150-something that  
3 Mr. Grané has mentioned. Everything else is on the  
4 record. Procedural Order said that the exhibit has to  
5 be the demonstrative in order to refer during the  
6 presentation to where they are, but we certainly would  
7 appreciate either being told right now or after  
8 presentations and not to be interrupted, please.

9           PRESIDENT McRAE: Thank you. Again, you  
10 have no further comment. It seems to me the matter is  
11 on the record, and if it becomes an issue, we can deal  
12 with it at that time.

13           MR. GRANÉ LABAT: Mr. President, we just  
14 raised our objection. The fact that it's in the  
15 public domain does not authorize Claimant to refer to  
16 the documents. The PO is very clear. It's  
17 Paragraph 38 and 40, so we do object to using  
18 information that is not on the record. We also object  
19 to slides that do not contain an exhibit number. As I  
20 said, when we come to that, we may need to interrupt  
21 because that would be a breach of PO4 and PO1.

22           Thank you.

1           PRESIDENT McRAE: Thank you.

2           No further comment?

3           MR. DÍAZ-CANDIA: We could draw up the 155  
4 Slide for that reference. Again, we do not agree and  
5 accept to be interrupted during our presentation,  
6 please. I understand their point. They can make it  
7 after the presentation, and it will be on the record,  
8 but interrupting us would be a problem during the  
9 presentation, especially because we have limited time  
10 for it.

11           PRESIDENT McRAE: Mr. Grané, what is your  
12 response to that, if you have any? Are you prepared  
13 not to interrupt during the presentation and bring it  
14 to our attention afterwards?

15           MR. GRANÉ LABAT: As a courtesy, we're happy  
16 to do that, Mr. President, to ensure the smooth course  
17 of the presentation, but I think that we've made our  
18 position clear. If it's against the Procedural Order,  
19 we should be entitled to, at that moment, bring it to  
20 the attention of the Tribunal because the Tribunal  
21 should not be seeing information that's not on the  
22 record. But our position is clear, and we are in your

1 hands. As a courtesy, we will try not to interrupt.

2 PRESIDENT McRAE: Very well. Then, I think  
3 on that basis, we can proceed.

4 And I think that we're ready, then, to start  
5 with the Claimant's Opening Presentation.

6 MR. DÍAZ-CANDIA: May I move to the lectern?

7 PRESIDENT McRAE: Certainly, certainly.

8 Before you start, counsel, just--I  
9 appreciate your point about not wanting to be  
10 interrupted during the presentation. It may be that  
11 the Tribunal will have clarification questions for you  
12 in the course of your presentation. It won't be to  
13 interrupt but if things are not clear and need an  
14 immediate response, we may ask for that.

15 MR. DÍAZ-CANDIA: Yes, Mr. President,  
16 absolutely. And we're prepared for that. We're  
17 referring to interruptions from the representative of  
18 Perú.

19 PRESIDENT McRAE: Thank you.

20 OPENING STATEMENT BY COUNSEL FOR CLAIMANT

21 MR. DÍAZ-CANDIA: Again for the record, my  
22 name is Hernando Díaz-Candia, and together with the



1 rest of the WDA Legal team, we represent Kaloti Metals  
2 in this Arbitration.

3 As an introductory point, I would like to  
4 highlight that we are going to go over today the main  
5 points on the record and the main legal arguments but  
6 this will be without waiver of other arguments and  
7 points made in the respective memorials from Claimant  
8 to which we respectfully ask the Tribunal to take into  
9 account.

10 It is truly an honor for us to represent  
11 Kaloti Metals in this Arbitration, an arbitration  
12 that, to be transparent, has felt like an uphill  
13 battle too many times during the course of these  
14 proceedings. We have felt basically that we are in a  
15 fight, that we are David, and we're fighting Goliath.

16 We are a small firm, and we are against one  
17 of the most prestigious firms in the world, a repeat  
18 actor who will have the chance to appoint arbitrators  
19 in many more cases than us. Our client is a company  
20 that is insolvent due to the actions of Perú that has  
21 been crushed financially, and our opponent is a  
22 sovereign country with very deep pockets. They have

1 been recalcitrant in trying to obstruct us being here  
2 today, including by repeating the Requests for  
3 Security for costs about five times during the  
4 proceeding.

5           Against that background, all that we ask of  
6 the Tribunal is that you take into account the rule of  
7 law and that you let the rule of law prevail. In  
8 connection with the rule of law and legal  
9 argumentations, there is an old saying: When the  
10 facts are on your side, you pound on the facts. When  
11 the law is on your side, you pound on the law. And  
12 when none of those are on your side, you simply pound  
13 the table and fake outrage. And this is what the  
14 representatives from Perú has made essentially in this  
15 arbitration, bringing distractions and insults not  
16 only against our clients but against us as the  
17 representatives.

18           We have here, we have highlighted with  
19 reference to Perú's Rejoinder, all the mentions that  
20 show a lack of respect for Client and us as a  
21 presenter. They have called this the most "frivolous,  
22 distasteful, and abusive" claim they have ever faced

1 in their life. They have said that they had to  
2 correct Claimant's many errors and misrepresentations  
3 of the evidence. Our claims are meritless, frivolous  
4 and abusive, they say. And with respect to the  
5 lawyers, and implicitly against one of the most  
6 prestigious criminal-law professors in Perú, Mr. Caro,  
7 who you will hear from him on Thursday. They have  
8 said that our pleadings have been either deliberately  
9 or negligently made. So, they are accusing us of  
10 willful misconduct or negligence in this Arbitration.  
11 These are only distractions to fake outrage and keep  
12 the Tribunal away from the rule of law on which we ask  
13 you to focus. There are many more insults on the  
14 record. The Claims are grossly overestimated, are  
15 disingenuous, Kaloti Metals incurred in sordid  
16 practices they say, inaccuracies and fundamental  
17 errors, misrepresentations of Claimant's legal expert  
18 testimony, and others. For the benefit of time, I not  
19 going to go over all these insults and fake outrage  
20 but they are here for you, they are on the record on  
21 Perú's Counter-Memorial and they are here for you on  
22 the PowerPoint.

1           Against that backdrop, let me refer to the  
2 history of Kaloti Metals, in general and specifically  
3 in Perú.

4           Mr. ██████████ arrived in the United States  
5 in the early 1980s. He has always been an honest,  
6 hard-working individual. He has maintained a clean  
7 personal records, he has not been investigated,  
8 indicted, much less convicted of any crime anywhere in  
9 the world. His professional career with KML has been  
10 documented by highly-reputable newspapers in the state  
11 of Florida. His company established a track record  
12 from 2012 to 2018 in Perú, and that is confirmed by  
13 these exhibits on the record, and the Company had a  
14 record of financial strength and profitability from  
15 2012 to 2018 during several of those years the Company  
16 was cash-flow positive, and you can refer here not  
17 only to the statement from ██████████ but the Report  
18 from Secretariat that confirms the foregoing.

19           Before investing in Perú, ██████████  
20 conducted significant research. He did his due  
21 diligence in connection with the Peruvian gold market  
22 in general. He met with very prestigious law firms in

1 Perú, including the law firm of Muñiz, one of the most  
2 prestigious in the country. That is confirmed by [REDACTED]  
3 [REDACTED] Witness Statement. To his statement he also  
4 added a study of the market in Perú which backs his  
5 expectations about the Business Plan that he had for  
6 the country.

7 Kaloti Metals established a physical office  
8 in Perú within the facilities of Hermes, rented an  
9 apartment inside Perú, hired personnel inside Perú.  
10 That under-run operation lasted until 2018, and that  
11 has not been disputed or contested in these  
12 arbitrations.

13 Kaloti Metals had also a captive demand for  
14 its products. They had a captive demand from [REDACTED]  
15 [REDACTED] in Dubai for at least 45,000 kilos of gold  
16 per year only in connection with Perú. This is  
17 confirmed by a contemporaneous document that is on the  
18 record. The equity holders of Kaloti Metals even  
19 granted [REDACTED] permission to explore establishing  
20 a refinery operation in Lima. While that refinery, in  
21 and of itself, may not be an investment, it should be  
22 considered as part of the activities and the value of

1 Claimant's going-concern operation inside Perú.

2           The essence of this case as presented by  
3 Peruvian authorities--and I'm not referring to the  
4 pleadings in this Arbitration, but what  
5 contemporaneous documents and statements in those  
6 documents reflect. The case regards the seizure of  
7 Five Shipments of gold. The first four of those  
8 shipments, three of them were paid almost in full by  
9 Kaloti Metals, money exchanged hands in connection  
10 with Shipments Nos. 1, 2, and 4. And Shipment No. 3,  
11 the Seller did not receive money from Kaloti Metals  
12 yet. However, that Seller put in writing that that  
13 gold belonged to Kaloti Metals, was property of Kaloti  
14 Metals, not only according to us but from a  
15 contemporaneous document that is on the record from

16

17           Shipment No. 5 has not been paid yet by  
18 Kaloti Metals. It concerns ██████, the same company  
19 that delivered Shipment No. 4 for which Kaloti Metals  
20 paid. But in summary, of all these Five Shipments,  
21 there is only one on which the Seller contested the  
22 ownership and property of Kaloti Metals, only one.

1 And that is Shipment No. 5. And coincidentally, to  
2 this day, according to Peruvian courts, that shipment  
3 can be kept by [REDACTED]. They have put on the record a  
4 decision of 2022, a year after this Arbitration began,  
5 saying that this private company, the same company  
6 that is being investigated for money-laundering in  
7 connection with No. 4, can keep this gold.

8 Of course, post hoc they have said "we're  
9 still investigating," but the reality of the documents  
10 show that a court in Perú said that the Seller can  
11 keep this shipment, coincidentally the only where the  
12 property of Kaloti Metals was disputed by the Seller.  
13 That is the essence of this case and the alleged  
14 money-laundering, et cetera. Please take this  
15 backdrop into account when you are analyzing the rest  
16 of the documents in this case.

17 Shipment No. 5, no doubt, has a particular  
18 situation. Perú has alleged that Kaloti did not  
19 export this shipment, did not send it to the airport,  
20 based on a free-will decision. [REDACTED] is to blame  
21 for not exporting this shipment is what Perú has said  
22 in this Arbitration. The reality is that there is a

1 contemporaneous document dated March 2014 that very  
2 clearly said--and this was said by a person not  
3 related to Kaloti, not controlled by Kaloti. These  
4 are the words of that person that are transcribed on  
5 an official court document in Perú. That document  
6 says that Shipment No. 5 could not be exported due to  
7 an intervention from SUNAT. They have asked us to  
8 explain what an intervention is. We don't have the  
9 burden of explaining what the document says. All that  
10 the document says is that we could not export that  
11 shipment based on an intervention from SUNAT.

12           Also, it is very clear [REDACTED] knew that  
13 Shipment No. 4 had been immobilized at the time from  
14 that company. It would simply have been irresponsible  
15 for them to try to export Shipment No. 5. However,  
16 all the other documents--there are documents that  
17 confirm that this shipment at some point in time was  
18 actually delivered to Banco de la Nación and CONABI.  
19 This is what the document says. These are not only  
20 our arguments. But, in any case, Shipment No. 5, the  
21 only reason why it could not be exported and  
22 subsequently not paid yet by Kaloti Metals is because



1 of the actions and omissions of the Government of  
2 Perú. I want to make that very clear for the record.

3 Perú, then, again, continued with the fake  
4 outrage and the distractions they have thrown at the  
5 Tribunal to complicate a case that, in essence, should  
6 not be complicated. Has alleged, for instance, issues  
7 with other providers of gold to Kaloti, including  
8 companies called Darsahn, Minerales Rivero, Titanium,  
9 Bolivia--sellers in Bolivia and sellers in Ecuador.

10 This is in Perú's Rejoinder, even though we don't have  
11 the specific case here, you can confirm that this is  
12 on Perú's Rejoinder on the Merits.

13 However, no gold from those companies  
14 delivered to Kaloti Metals was ever investigated by  
15 the Government of Perú at all. The Tribunal cannot be  
16 put in a position to consider and, in a way,  
17 adjudicate the alleged problems with these shipments  
18 when no one in Perú alleged any problems in connection  
19 with those shipments, and Kaloti Metals was allowed to  
20 take possession of those shipments, and not only that,  
21 but to export all those shipments to the United States  
22 without any problem. There is no other investigation

1 regarding gold actually received by Kaloti Metals  
2 either from these four Suppliers of the Five Shipments  
3 or other gold supplied by these four companies to  
4 other Buyers in Perú and other exporters.

5           There is simply no investigation. These  
6 four companies are being investigated for  
7 money-laundering for very particular purposes, for the  
8 gold that they delivered to Kaloti between December of  
9 2013 and January of 2014. Kaloti Metals was able to  
10 operate in Perú legally until 2018. That is not in  
11 dispute on this record. The Company purchased gold in  
12 Perú and had an underground operation at least until  
13 2018. They mentioned that Kaloti is under an  
14 investigation, a different investigation that  
15 apparently has no discernible connection to these Five  
16 Shipments of gold. We do not know what that  
17 investigation in reality is all about. We have  
18 received no notice. We have received no letter and  
19 certainly no opportunity to defend Kaloti Metals from  
20 this separate, supervening investigation that makes no  
21 reference to these Five Shipments of gold. A sword of  
22 Damocles continues over Kaloti's head as of today in

1 connection with this investigation which has tarnished  
2 the reputation of Kaloti Metals and has prevented  
3 Kaloti Metals from accessing more gold in Perú.

4           There is simply--all of this is guilt by  
5 association. This is what they are trying to do.  
6 Saying that other people are bad, hence Kaloti should  
7 be bad.

8           There is even an element that we have been  
9 offended with and resent of what we perceive is  
10 Islamophobia. There is some file, a video on the  
11 record, specifically R-0025, that the Respondent put  
12 on the record. That video has no relationship  
13 whatsoever to the operations of Kaloti Metals, to the  
14 operations of [REDACTED], or the  
15 mechanisms to which Kaloti Dubai transported gold from  
16 Miami to Dubai. Perú did not make this video. This  
17 video was made by the BBC. But the only reason why  
18 this video is on the record is because the bad players  
19 in that video appeared to be of Middle Eastern origin  
20 and appearance, and they were bad actors that operated  
21 apparently, according to the video, in London, Paris,  
22 and Brussels, and the gold for some--apparently for

1 some reason ended up in Dubai. This is simply  
2 offensive. This is guilt by association. These  
3 practices have nothing to do with Kaloti Metals or  
4 even [REDACTED], who is not a party in this  
5 Arbitration, made.

6           Perú has thrown at us a number of strawman  
7 arguments, trying to distract from what Kaloti Metals  
8 has alleged and is posing before the Tribunal in this  
9 Arbitration. Kaloti Metals has not said that Perú  
10 could not regulate and police the gold market or even  
11 enact general regulations in connection with that  
12 market. We are not complaining about regulations. We  
13 are complaining about a physical invasion of Kaloti's  
14 property. We have not said that Perú did not have the  
15 authority to combat illegal money-laundering or  
16 illegal mining. Of course, it's great to hear about  
17 the environment and preoccupations with that industry,  
18 which, of course, is a spring to bring into the case  
19 alleged police powers of Perú.

20           Kaloti Metals has not said that it never  
21 expected to be investigated by Perú. What Kaloti  
22 Metals expected is that those investigations were

1 going to be conducted in accordance with the rule of  
2 law, in accordance with Peruvian law, and most  
3 importantly, in accordance with the provision of the  
4 Treaty between the United States and Perú, under which  
5 these investigations had to have or didn't have a  
6 reasonable length. They could even take physical  
7 possession of the gold temporarily for a limited  
8 period of time to conduct the investigations. Seven  
9 plus years of possession of these Five Shipments is  
10 simply not a reasonable time.

11 Kaloti is not questioning the beginning of  
12 the investigations. Kaloti has challenged the  
13 duration of those investigations due strictly to the  
14 actions and omissions of the Republic of Perú and no  
15 one else.

16 We have not alleged that we didn't know some  
17 facts relevant to this Arbitration and the Treaty  
18 breaches before April 30, 2018. We knew some of the  
19 facts of the breaches that we have alleged,  
20 crystallized, and occurred, all of them after  
21 April 30, 2018. What Kaloti Metals has alleged, in  
22 essence, is that Perú has unreasonably extended and

1 prolonged the temporary takings of KML's gold. That  
2 it inappropriately leaked investigations damaging the  
3 reputation of Kaloti, and hence, the ability of Kaloti  
4 to buy more gold at the levels that it did in 2013 in  
5 Perú and other countries. We have said that Perú  
6 ignored multiple requests made by Kaloti and by the  
7 Suppliers of this gold stating very clearly that the  
8 gold was the property of Kaloti Metals and that it  
9 should be hence returned to Kaloti Metals. All of  
10 this while the Investors were unfairly treated,  
11 inequitably treated, and discriminated by Perú. That  
12 is the core of the allegations of Claimant in this  
13 case.

14           Regarding money-laundering and illicit  
15 mining, which is a term that sounds beautiful,  
16 attractive, and they pretend that it can justify  
17 everything that Perú did to Kaloti Metals. What is  
18 being investigated in the four or five proceedings  
19 against these four companies is strictly and only  
20 asset or money-laundering. Some of the documents made  
21 reference that that illicit money-laundering or asset  
22 laundering had a connection to illegal mining.

1 Mr. Missiego himself, the Legal Expert for Perú, made  
2 very clear in his First Report that what is being  
3 investigated is money-laundering.

4 He also went to great length to say that  
5 money-laundering is an autonomous crime separate from  
6 illegal mining and illicit mining. Why? Probably  
7 they don't have the evidence to convict anyone of  
8 illegal mining or illicit origin of the gold. They  
9 have said that it is not even necessary to investigate  
10 illegal mining to come to a conclusion of  
11 asset-laundering. He conceded that illegal mining is  
12 not being investigated, even though some of the  
13 documents say that the crime being investigated of  
14 asset-laundering is or may be connected to illicit  
15 mining. This is what is being investigated by Perú in  
16 connection with these Five Shipments.

17 However, again, guilt by association,  
18 distraction, Perú has made the case about illegal  
19 mining and illicit mining. Here are all the times  
20 that they mentioned in their Rejoinder, they're in  
21 order, illegal mining or illicit origin of the gold.  
22 There are in total 51, I believe, mentions to illegal

1 mining and how Perú was, in theory, preoccupied with  
2 illicit mining or the illicit origin of this gold,  
3 which again is not what's being investigated in the  
4 proceedings.

5           There are a total, I believe, of 51  
6 references in the Rejoinder to illicit mining or  
7 illicit--illegal mining or illicit origin of the gold.  
8 They're on the record, and they're here for your  
9 convenience on the PowerPoint.

10           Perú can simply cannot be allowed to make  
11 post hoc justifications in this Arbitration. The  
12 Tribunal has to take into account what the  
13 contemporaneous documents say, and what authorities in  
14 Perú said contemporaneously, until November 30 of  
15 2018. They have taken the record of this  
16 investigation selectively to say there were many  
17 problems and even with what Kaloti should have done.  
18 They have placed aspirational obligations of what they  
19 believe should be the obligations of Kaloti Metals in  
20 connection with due diligence under Peruvian law.  
21 Those are not based on Peruvian law, and I will deal  
22 with that a bit later in the presentation.



1           Whatever a due diligence--a reasonable due  
2 diligence had to be, either under Peruvian law, which  
3 we denied, or otherwise, could not be expected to find  
4 what Perú has allegedly uncovered after seven years of  
5 investigation, and due diligence of the shipments of  
6 gold can last approximately three days, and you will  
7 hopefully hear that from one of the Witnesses. Kaloti  
8 investigated the Ultimate Beneficial Owners of those  
9 companies.

10           But again, Perú cannot be, with the benefit  
11 of hindsight, alleging problems that are not on the  
12 record.

13           They're simply trying to come up indirect  
14 inferences that they want to plant on the Tribunal's  
15 mind, to cast a cloud of doubt over our Claims. But  
16 if any inference has to be made by the Tribunal in  
17 this case, has to be against the Republic of Perú.  
18 Claimant tried desperately during the Redfern  
19 exchanges to present Perú with witnesses in this  
20 Arbitration. All that we ask of Perú during those  
21 exchanges is that they give us documents stating where  
22 we can locate and contact these persons that we

1 identified by name individually, and they were  
2 connected either to SUNAT, to the courts, or to the  
3 Fiscalía. We were not allowed to bring them here to  
4 the Arbitration. Why are they not before this  
5 Tribunal this week? Why are they not testifying about  
6 the true reasons, the instructions they received, and  
7 why Perú didn't return the gold to Kaloti after  
8 seven years?

9           We believe there are government officials  
10 from the Republic of Perú sitting to my right. I  
11 understand there are others attending the Hearing  
12 remotely from Lima. The question is: Why are they  
13 not here as a witness so we and the Tribunal could  
14 cross-examine them? What are they hiding?

15           It wasn't very neutral that a Respondent has  
16 presented a case without witnesses and obstructing or  
17 intention and efforts to present those witnesses to be  
18 cross-examined today. There are also documents that  
19 the Republic of Perú has not produced. That is a  
20 claim in the Reply Memorial Paragraphs 17 to 28, and  
21 all that we ask of the Tribunal and I'm not going to  
22 repeat this is to take into account that the

1 inferences sought by KML are reasonable, consistent  
2 with the facts on the record and logically related to  
3 the evidence withheld of Perú, and the Tribunal should  
4 please take record, which we ask respectfully about  
5 the lack of production by Perú and the consequences  
6 under the ICSID Arbitration Rule 34.3.

7 Another of the distractions that Perú has  
8 thrown at this case is corruption. They tried to  
9 suggest that Kaloti Metal was a bad actor, that it  
10 dealt with bad people in Dubai and with bad people in  
11 Perú, Ecuador, and Bolivia. That is not  
12 substantiated. That is not alleged by contemporaneous  
13 documents. If any of those players had problems, they  
14 were unrelated to Claimant, Kaloti Metals, and there  
15 was most certainly not related to these Five Shipments  
16 of gold that Perú took and has kept for an  
17 unreasonable period of time.

18 Kaloti Metals was left to operate in Perú by  
19 Peruvian authorities until 2018. Why would a company  
20 suspected of money-laundering be allowed to continue  
21 to do business in Perú and only be forced to leave  
22 Perú when the owner came to the contemporaneous

1 conclusion that the business was unviable, if that  
2 company is suspected of money-laundering?

3 Kaloti Metals exported all the gold to the  
4 United States, and it paid for all the gold from  
5 accounts in the United States that went into Peruvian  
6 banks, so Kaloti Metals had an interest in being  
7 diligent in connection with due diligence not only on  
8 the Suppliers but on these five shipments of gold.

9 Perú, on the other hand, is playing with  
10 corruption. The President of Perú who was in charge  
11 when these Five Shipments were immobilized by Perú,  
12 Mr. Ollanta Humala is now in jail for corruption. The  
13 last President of Perú, the immediate past  
14 Presidential of Perú, Mr. Pedro Castillo, is also in  
15 jail for suspicion on allegations of corruption in  
16 trying to control the judiciary. There are other  
17 Presidents of Perú that are also in jail for  
18 corruption, Mr. Kuczynski and others. So corruption  
19 is rampant in Perú. Kaloti Metals did not accede to  
20 that corruption, and maybe that's why this gold has  
21 not been returned.

22 Perú is a serial respondent and made a case

1 that they comply with the rule of law of their  
2 country. According to their own press reports, in  
3 Perú, they were the country, I believe, in 2020, where  
4 you hear any reference, the specific reference to the  
5 exhibit, the country most sued in investment  
6 arbitration by Claimants, by investors. Does that  
7 speak about a country that takes the rules of law  
8 seriously? Of course, the arbitrations and the filing  
9 of arbitration doesn't necessarily mean that Perú is  
10 going to lose this Arbitration, but it's an indication  
11 that the Tribunal should take into account as  
12 background.

13           And against all that, all that we ask of the  
14 Tribunal is again to focus on the record and the facts  
15 which I'm sorry to say I'm going to repeat multiple  
16 times, we're going to pound on the facts because the  
17 facts are on our side. This investigation has lasted  
18 more than eight years. This is admitted even by  
19 Mr. Missiego in his First Report. In his Second  
20 Report he tries to make argument--and we'll deal with  
21 it at the appropriate time--that seven years is  
22 perfectly common and natural for Perú in a criminal

1 investigation.

2           The truth is that no trial had been even  
3 commenced in those four or five investigations when  
4 this Arbitration was filed. There were Preliminary  
5 Investigations but no trial has even begun after all  
6 that time in these four shipments. Apparently last  
7 year there was some progress after this Arbitration  
8 was filed by Claimant in 2022.

9           Kaloti Metals, there is no document showing  
10 that Kaloti Metals is being investigated in connection  
11 with these Five Shipments. It's also undisputed that  
12 all the taking of the gold be the Immobilizations or  
13 Seizures (incautaciones) were meant to be temporary  
14 under Peruvian law. That is not under discussion,  
15 that is not disputed, that is accepted by both  
16 Parties, and especially by Mr. Missiego who is Perú's  
17 legal expert, independent expert, in this case.

18           There is also no discussion according to the  
19 documents. Perú has made contrary arguments but the  
20 documents leave no doubt that Kaloti Metals took  
21 physical possession over these Five Shipments. The  
22 first four shipments, according to the seizure orders

1 from courts--this is not something that we're saying  
2 out of thin air--were taken at the offices of Talma at  
3 the Lima airport. For that gold to be at the Offices  
4 of Talma, it was previously delivered to the Offices  
5 of Kaloti within Hermes. Kaloti hired a transporter  
6 of material, sent those four shipments to the airport  
7 while Kaloti was in control of those four shipments,  
8 and then at the airport, at Talma, they were taken  
9 initially by SUNAT, the four of them, and then  
10 transferred to--under seizure order issued by courts.

11 Shipment No. 5 was also delivered to Kaloti  
12 at Hermes. Kaloti had initial possession and control,  
13 physical control and possession over that shipment at  
14 the Offices of Kaloti within Hermes. it was there  
15 after the gold had been delivered to Kaloti that SUNAT  
16 made an intervention that prevented the export. Not  
17 anywhere else. Perú has alleged where that gold seems  
18 to be as of today, apparently something that we don't  
19 know, still at the Offices of Hermes, which Kaloti  
20 left when it left the country. But for sure, none of  
21 those five shipments are in the possession of Kaloti.  
22 It is undisputed that Kaloti, as of today and as of

1 the day when this Arbitration was begun, had no  
2 physical control of the gold because it was seized,  
3 and it was physically invaded by Perú.

4           Also, no bank account was unilaterally  
5 closed before Peruvian measures. They had said that  
6 Kaloti Metals was damaged by investigations in other  
7 countries and different people, including [REDACTED]  
8 [REDACTED] Dubai. None of those investigations and  
9 those unrelated facts all occurred before 2013. 2013  
10 was when Kaloti Metals achieved the highest volume of  
11 gold purchases in Perú.

12           However, bank accounts and as the witnesses  
13 have confirmed, also Sellers of gold in Perú and other  
14 countries ceased to deal and refused to deal with  
15 Kaloti, and the banks closed some of the accounts of  
16 Kaloti after, only after, the news of these very  
17 particular investigations, and no others were made  
18 public in the Peruvian press.

19           Speaking of those leaks, Perú has alleged  
20 that we have not proven the origin of those leaks.  
21 All that we ask the Tribunal to take into account is  
22 that during the Redfern exchanges, they resisted



1 production of some of the documents based on their  
2 confidentiality. Kaloti Metals was being prevented  
3 access to documents because of the confidentiality,  
4 regulations and laws in Perú. They made very clear  
5 reference, and all these laws are on the record to the  
6 law on public administration, Article 73 of the  
7 Criminal Procedure Code and Article 324 of the new  
8 Criminal Procedure Code. Mr. Missiego himself, in his  
9 two Reports, confirmed that those investigations are  
10 Confidential under Peruvian law. Kaloti Metals had  
11 absolutely no incentive, and certainly it did not  
12 disclose those investigations to the press. The  
13 companies being investigated, [REDACTED], [REDACTED], [REDACTED]  
14 [REDACTED], and [REDACTED] had no interest in leaking those  
15 investigations to the press. The physical files were  
16 controlled by Perú. All elements of the  
17 investigation, including the gold, was physically  
18 controlled by Perú. The only conclusion that can be  
19 reached is that these leaks are attributable to Perú,  
20 and there is a press article which is, I believe, what  
21 our colleagues are objecting to us using today, but  
22 saying that a press reporter learned of those leaks

1 from Sunat.

2           The conclusion is that the leaks are  
3 attributable to Perú, and that the leaks that you will  
4 hear from witnesses damaged Kaloti's reputation and  
5 ability to export more gold in Perú.

6           The alleged due diligence duties that  
7 Claimant had under Peruvian laws. In his Second  
8 Report, after seeing Claimant's first independent  
9 Legal Expert on Peruvian criminal law report, purports  
10 to say that Kaloti Metals was subject to all the laws  
11 as Peruvian nationals inside Perú. But all the laws  
12 issued in Perú and applicable within Perú have a  
13 definition of its Scope of Application. These laws  
14 regarding mining and due diligence were not applicable  
15 to a pastry shop in Arequipa. This was the companies  
16 had to do in connection with these laws which was the  
17 trading of gold and where that company was domiciled  
18 or not inside Perú. Kaloti Metals had a physical  
19 operation on the ground, and an investment inside  
20 Perú. But its main domicile was Miami in the United  
21 States.

22           Mr. Missiego then makes reference to

1 Article 1 of Law-Decree 1106 about money-laundering,  
2 and he says that money-laundering is a crime for a  
3 person who should know about the illicit origin of the  
4 gold. That is a crime under Peruvian law.

5           Think about this: Kaloti Metals took  
6 physical possession of the Five Shipments, made actual  
7 disbursement of payments through Peruvian banks in  
8 connection with three of those Five Shipments. That  
9 is undisputed.

10           However, Kaloti Metals also went to those  
11 courts and said "we own the gold, this gold is ours."  
12 However, Kaloti Metals was conveniently not made a  
13 party of the investigation, not indicted by  
14 money-laundering. How can that be? That is to say  
15 because, in accordance with Peruvian authorities and  
16 Peruvian law, Kaloti Metals did not have a burden  
17 to--of knowing about the illicit origin of the gold.  
18 Kaloti Metals did a due diligence and has never been  
19 investigated in Perú inclusively for lack of due  
20 diligence or money-laundering in Perú.

21           He then makes reference to Article 4 of the  
22 Peruvian General Law of Mining, and says that Kaloti

1 Metals should have verified the origin of the gold.  
2 Kaloti Metals did verify the origin of the gold, but  
3 what this law doesn't say is that we have to maintain  
4 very particular documents or specific documents. A  
5 verification can be made even orally. We did it  
6 through documents. But this is not an obligation that  
7 Peruvian law, the law cited by Mr. Missiego placed on  
8 Kaloti Metals in 2013 and 2014.

9           Our Legal Expert, in his First Report, said  
10 specifically that Law 27693 was not applicable to  
11 Kaloti. After seeing that, Mr. Missiego did not  
12 contest otherwise. He made reference only to Decree  
13 1106 and the General Mining Law which dates back from  
14 2016.

15           There was no legal standard imposed upon  
16 Kaloti Metals in connection with the Five Shipments.  
17 The law doesn't speak about mejor padre de familia o  
18 buen padre de familia (pater familia). The laws  
19 impose a legal standard on Kaloti Metals. All that is  
20 said, we have to verify the origin of the gold, and we  
21 did. We didn't have to have a Compliance Manual, and  
22 we didn't have to have an anti-money-laundering Manual

1 registered with Peruvian authorities. They don't  
2 contest that. Banks had to have that program  
3 registered with the authorities of Perú. Sellers and  
4 miners, they had an obligation to have those  
5 compliance programs in Perú. Money went through  
6 Peruvian banks and they never complained about these  
7 wires from Kaloti Metals. And again, under Peruvian  
8 law, Kaloti Metals, they don't have an obligation to  
9 have a Compliance Manual, or anti-money-laundering  
10 manual.

11           However, Claimant did have that program and  
12 did have that Manual, not because it was required  
13 under Peruvian law, but because it was in Claimant's  
14 best interest. Why? Because Claimant was domiciled  
15 in the United States. Claimant paid for the gold from  
16 the United States and exported all the gold to the  
17 United States. So, Claimant was concerned and  
18 complied with Anti-Money-Laundering and regulations in  
19 the United States. No one has claimed otherwise.  
20 Kaloti Metals operated from 2012 until 2018. There  
21 was some reference to apparently some Transactions et  
22 cetera, leaked to the press, they were never formally

1 investigations notified by Kaloti. Kaloti was allowed  
2 to operate with those accounts, with some accounts in  
3 the United States, not with the ones that were closed  
4 obviously until 2018. [REDACTED] is here, a reputable  
5 person that continued to do business in the United  
6 States, a jurisdiction that has, unlike Perú, serious  
7 regulations and serious enforcement about  
8 money-laundering and compliance.

9           We have on the record many documents showing  
10 that Kaloti Metals verified the origin of the gold.  
11 Perú, post hoc in this Arbitration, is saying that  
12 those documents were not sufficient. No Peruvian  
13 authority ever said that to Kaloti. No Peruvian  
14 authority and no contemporaneous document said that  
15 Kaloti failed to do due diligence.

16           And more importantly, after telling the  
17 courts that this was their gold and that we paid for  
18 it, no, Peruvian Court incriminated Kaloti Metals in  
19 money-laundering.

20           There are emails from Mr. [REDACTED] requesting  
21 information, there are files that contain the  
22 identifications of the Ultimate Beneficial Owners of

1 these companies. Kaloti Metals had a compliance  
2 program that was regularly audited as confirmed by  
3 these exhibits and [REDACTED] Witness Statements by  
4 a very prestigious law firm in Perú, Muñiz. He also  
5 said that it consulted accountants in Perú, and this  
6 was also audited by the law firm of Díaz Reus and by  
7 third compliance providers that have always found to  
8 be satisfactory. When one of those made  
9 recommendations which were requested by Kaloti Metals  
10 to improve the compliance program, that program was  
11 immediately improved and subject to those  
12 recommendations. None of those audits suggested that  
13 Kaloti Metals didn't comply with its own manuals,  
14 which, interestingly enough, Perú is trying to use and  
15 turn against Kaloti Metals. Why would Kaloti Metals  
16 have a compliance program, a Compliance Officer, and  
17 Anti-Money-Laundering Manual, to not comply with it.  
18 They pay for it, they prepare it, it doesn't make  
19 sense that they would ignore it, for the reasons that  
20 I said that this company was subject to the laws of  
21 the United States.

22 The documents on the record are clear. I'm

1 not going to go over them, each of them, but as you  
2 will see on the record there are sworn statements,  
3 declarations, invoices, waybills and many documents  
4 relating to the origin of these Five Shipments of  
5 gold. Perú then says that those documents are not  
6 trustworthy and other alleged programs post hoc.  
7 Nobody told Kaloti that this was ever insufficient  
8 before this Arbitration.

9           As you can see, there are invoices not only  
10 showing that Kaloti Metals had a contract, a specific  
11 contract for these Five Shipments of gold of which  
12 Kaloti Metals took control and possession, but there  
13 are laboratory analyses made of this particular gold.  
14 These are the invoices. This is a statement from a  
15 laboratory. Again, this is all on the record, and I  
16 apologize that the resolution on the screen is not  
17 ideal. So, I'm not going to stop over them. This is  
18 a declaration about the original gold and the  
19 packaging--and what the packages contained. This is a  
20 waybill of transportation of one of the shipments  
21 specifically from [REDACTED]. And there are many more  
22 documents that we ask the Tribunal to take into



1 account.

2           Again, for the benefit of time, I'm not  
3 going to stop on all of these. This one on the right  
4 is the RECPO. The Registry of companies authorized to  
5 sell gold in Perú. These four Suppliers were in that  
6 Registry of the Government of Perú, not only in 2013  
7 and 2014, but they remained in that Registry until  
8 2018. Then they say, for instance, [REDACTED] ceased  
9 operation, but [REDACTED] won a lawsuit last year that they  
10 conveniently want to use, and that this is a document  
11 good for nothing, simply a formalistic filing.

12           But for purposes of Article 4 of the Mining  
13 Law which I mentioned before, the only consequence  
14 under that article is that if you buy gold from  
15 unauthorized persons and not find the origin, then  
16 apparently you cannot claim property. But these four  
17 Suppliers were authorized to sell gold by the  
18 Government of Perú. That is not disputed. They were  
19 authorized in 2013 and 2014, and they continued to be  
20 on that Registry in 2018.

21           There are a lot.

22           What are the problems that then Perú has

1 alleged in this Arbitration that those Five Shipments  
2 had? Let's see each of them.

3 Shipment No. 1, delivered to Kaloti by  
4 [REDACTED]. They say that the company supplied gold to  
5 Kaloti for four months prior, and that the company was  
6 incorporated in 1993. Well, this company supplied  
7 gold to Kaloti for four months and it had no problems  
8 with shipments before this one, except for what Perú  
9 is alleging right now, that the Company was an  
10 artisanal miner. Maybe, but those are demonstrated  
11 this gold is illegal? Absolutely not.

12 That [REDACTED] skyrocketed sales or production  
13 in 2013, maybe. Does that mean that this gold is  
14 illegal? Absolutely not. That the Company did not  
15 pay taxes in 2007, something to which Kaloti could not  
16 have access under a reasonable due diligence, and they  
17 have access to these because they are the Government  
18 of Perú and they have internal documents from the tax  
19 authority to the General Attorney's office, et cetera.  
20 That did not come into possession of us, of Kaloti  
21 Metals, under a reasonable due diligence.

22 That one of the ID's of the Ultimate

1 Beneficial Owners was expired. A driver's license may  
2 not be good to drive if it's expired. A Passport may  
3 be not good enough to travel if it's expired. But an  
4 ID never expires to prove the identity of the person.  
5 An ID even if it's expired, proved that that person is  
6 who their ID says and they have not alleged otherwise.

7 That virtually all the documents relate to  
8 other Transactions. If they virtually all relate to,  
9 at least they are conceding that some relate to this  
10 Transaction. That the CEO of Transvalue was recently  
11 indicted in the United States. He was not indicted in  
12 the United States in connection with the  
13 transportation of this gold.

14 That [REDACTED], they say, was  
15 "convicted," and this is in Perú's Rejoinder in  
16 Paragraph 117. This is an absolute lie. [REDACTED]  
17 [REDACTED], a company not corporately related to Kaloti  
18 Metals, was never indicted of any crime. It was  
19 subject to investigation in connection with gold in  
20 Africa and a recent whistleblower in London. Those  
21 did not lead to any conviction. This is a lie. And  
22 that some of the waybills were allegedly incorrect.

1           Do any of these prove that this gold is  
2 illegal? In our view, No.

3           Shipment No. 2, very similar to the other  
4 one. They allege, for instance, that [REDACTED] had a  
5 small social capital. Social capital does not  
6 evidence the financial strength of a company. All  
7 that social capital is is the par value of issued and  
8 Registered Shares, not the Market Value of those  
9 Shares, and certainly not the result of subtracting  
10 liabilities from assets which is capital in an  
11 accounting sense. Social capital is only one entry in  
12 the capital account which is assets minus liability.  
13 It does not speak about the financial strength or  
14 health of this company whatsoever. Does it mean that  
15 the gold was illegal? Not necessarily, of course.  
16 That the Ultimate Beneficial Owner is not the  
17 Shareholder. Kaloti Metals, as it said, reviewed the  
18 Ultimate Beneficial Owner, and we are not conceding  
19 this point.

20           But again, does this point prove that this  
21 gold was illegal? No. That Kaloti should have  
22 refused to deal with [REDACTED]. That's their opinion.

1 Not the opinion of a very well-trained Compliance  
2 Officer of Kaloti Metals.

3           Other allegations of companies owned by a  
4 Mr. Chamy. Maybe Mr. Chamy unfortunately was not a  
5 good husband and incurring domestic violence. Maybe  
6 he bought and fired a gun into the air in one  
7 instance. Does that mean that this was illegal?  
8 Absolutely not. That we should have access to [REDACTED]  
9 checkbooks and confirm that the gold was paid--gold to  
10 different Supplier was paid with subsequent checks of  
11 the same checkbook. We did not have access to that  
12 checkbook. And even if we did, that would not  
13 demonstrate that this gold is illegal.

14           Shipment No. 3, they also allege the same  
15 problem with--alleged problem with the social capital.  
16 That has nothing to do with the financial status of  
17 the Company. That the owners were figureheads. They  
18 have no proof of this. This is an allegation. That  
19 Kaloti bought gold from Minera Juan Diego, yes, so?  
20 No gold delivered to Kaloti by Minera Juan Diego was  
21 ever questioned by Perú or seized or immobilized by  
22 the Government of Perú. That Kaloti did not

1 demonstrate that it received the documents before the  
2 shipments but only when the documents were delivered  
3 to the Government of Perú. How can we demonstrate the  
4 timing of receiving of these documents? When SUNAT  
5 asked for them, they were delivered. It proves they  
6 were in our possession at that time, and in accordance  
7 with the Compliance Manual before that time.

8           That the toll booths of the highways in Perú  
9 demonstrate that the gold was not transported to the  
10 roads to which some of the documents referred. How  
11 would we have access to those toll booths? A due  
12 diligence imposes an obligation of diligence, an  
13 obligación de medio, no obligación de resultado--

14           (Overlapping interpretation with speaker.)

15           MR. DÍAZ-CANDIA: No due diligence is  
16 supposed to obtain a 100 percent guarantee that the  
17 gold was legal because, in that case, there would be  
18 no argument for a good-faith purchaser which is  
19 allowed under Peruvian law and specifically under the  
20 Civil Court of Perú, something that Mr. Missiego has  
21 not contested.

22           Shipments Nos. 4 and 5. | ██████ was recently

1 established, that doesn't mean that the gold is  
2 illegal. And it was only natural for Kaloti Metals to  
3 start doing business in Perú because Kaloti Metals  
4 only entered this market in 2012 to start doing  
5 business with more recent companies. Does it mean  
6 that this gold was illegal? Absolutely not.

7           That the Company was owned by a young  
8 Secretary without experience. It might have been  
9 incorporated by her. That's not an unusual practice  
10 in civil law jurisdictions. You have a law clerk or a  
11 Secretary being the initial Shareholder just to  
12 incorporate and register the company like it was an  
13 incorporation entity in Delaware.

14           REALTIME STENOGRAPHER: Could you slow down  
15 just a little bit, please. You're going too fast.

16           MR. DIAZ-CANDIA: Yes, sir.

17           That does not mean that Secretary was the  
18 Ultimate Beneficial Owner of that company. Similar to  
19 what happens with a registered incorporation service  
20 in the State of Delaware, the initial Shareholder may  
21 be one, then it is transferred to the Ultimate  
22 Beneficial Owner.

1           And even if she was the Ultimate Beneficial  
2 Owner, which we do not concede, this doesn't mean that  
3 this gold was illegal.

4           That some of the managers and owners of  
5 these companies were related to an individual called

6 [REDACTED] We don't know if that's a fact.

7 First, they do have the same last name, Miranda, they  
8 may be related to him but that Mr. [REDACTED] was a bad  
9 actor does not mean that his cousins were bad actors  
10 and certainly does not demonstrate that this gold was  
11 illegal, and that Claimants submitted a list of  
12 unrelated transactions.

13           What is the conclusion from all this? If  
14 anything, whatsoever, at all can be used for those  
15 alleged problems, it was to justify the beginning of  
16 investigations, nothing more. They need proof beyond  
17 a reasonable doubt to convict these companies of  
18 asset-laundering. They have not convicted those  
19 companies. They did not finish the investigations  
20 within a reasonable period of time. They took  
21 Kaloti's gold for too long.

22           Witnesses in this Arbitration are



1 consistent. Banks and Sellers of gold refused to deal  
2 with Kaloti's only after the news was leaked by Perú  
3 to the Peruvian authorities.

4 Let's see the timeline of the seizure of  
5 these Five Shipments, of each of them.

6 Shipment No. 1 delivered by [REDACTED], there  
7 was an initial seizure order by a court in  
8 21 February 2014. That substituted [REDACTED] initial  
9 Immobilization. Pursuant to Peruvian law, that  
10 investigation--that initial seizure had to last at the  
11 maximum 90 plus 90 days for a total of 180 days. That  
12 term, pursuant to Peruvian law, expired on  
13 September 29, 2014. It was not until March 15, 2015  
14 that the seizure was extended or prorogued by a court.  
15 How can you extend or maintain something that had  
16 previously expired? This is arbitrary action by the  
17 Government of Perú.

18 In connection with Shipment No. 2, delivered  
19 to Kaloti by [REDACTED] The initial seizure order was  
20 pursuant to its own term. Here, we don't even have to  
21 go to Peruvian law. It had an execution period of 15  
22 days, and after that a seizure period of 45 days.

1 This is not what Kaloti is saying. This is not what a  
2 lawyer is saying. This is what this document says.  
3 That term "expire" pursuant to its own conditions on  
4 May 16, 2004--2014. It was not until a year later  
5 that a court decided to "maintain or make subsist this  
6 seizure." How can you maintain something that  
7 pursuant to its own Terms expired almost a year ago?

8 Shipment No. 3, supplied to Kaloti by [REDACTED]  
9 [REDACTED]. The initial order of seizure dated  
10 April 2014, again pursuant to its own term had an  
11 execution period of 15 days and a seizure period of 45  
12 days. Those expired on 20 June 2014. Only three  
13 months later, after this has expired pursuant to its  
14 own term, a court decided to maintain, not to issue a  
15 new seizure, but to maintain something that had  
16 expired pursuant to its own term.

17 Shipment No. 4 delivered to Kaloti by [REDACTED],  
18 the same issue. Pursuant to this document and its own  
19 terms, that seizure expired on September 17, 2014. It  
20 was not until the following year that a court decided  
21 to "maintain something that had expired pursuant to  
22 its own term."

1           Shipment No. 5 also, as I explained before,  
2 there are questions with the facts regarding this  
3 shipment, I refer you to the documents. There is no  
4 question that at least at some point in time this gold  
5 was taken physically by Banco de la Nación and CONABI,  
6 and that [REDACTED] prevented the export of this on January  
7 9, 2014. The seizure term, however, expired on  
8 30 May 2015. We don't know if there are orders  
9 extending this, we don't have access. There is some  
10 important information as asymmetry in this case, which  
11 evidences the lack of transparency by Perú, but this  
12 gold as of today is not in the possession and has been  
13 lost for Kaloti Metals, as of November 2014.

14           With that, I'm going to move to the section  
15 on jurisdiction with the permission of the Tribunal.

16           Perú, in this case should not be allowed to  
17 present a labyrinthic argument that no treaty breach  
18 occurred, but that if it did occur, it was before  
19 April 30, 2018. Perú has said that no breach  
20 whatsoever occurred ever. Then their own position is  
21 that no breach occurred before April 30, 2018. An  
22 investor pursuant to case law cannot be obliged or

1 deemed to know a breach before it occurs. This is  
2 from the Infinito Gold Case.

3           It is important to note also that, at the  
4 jurisdictional stage, a tribunal must be guided by the  
5 case as put forward by the Claimant in order to avoid  
6 breaching the Claimant's due process rights. To  
7 proceed otherwise is to incur the risk of dismissing  
8 the case based on arguments not put forward by the  
9 Claimant at a great procedural cost. What Kaloti has  
10 alleged is that three breaches, one of Article 10.3,  
11 one of Article 10.5, and one of Article 10.7 occurred  
12 after April 30, 2018, and not before. It is for the  
13 Investor, as case law also stated, to allege and  
14 formulate its claims of a breach of relevant treaty  
15 standards as it sees fit. It is not the place of the  
16 Respondent State to recast those claims in a different  
17 manner of its own choosing. The Claimant's Claim,  
18 accordingly, fall to be assessed on the basis on which  
19 they are pleaded by Claimant, in this case by Kaloti  
20 Metals.

21           Perú has tried to reorganize the Claims,  
22 especially the claim regarding to Article 10.5 to the

1 bylaws in individual breaches that occur in very  
2 particular dates, of course, to say that three years  
3 occurred after those alleged in the individualized  
4 breaches. Perú--Claimant has not alleged  
5 individualized breaches. Only progressive, creeping  
6 breaches of Article 10.3, 10.5, and 10.8, all of which  
7 crystallized after April 30, 2018. That is what  
8 Claimant has put forward.

9 Breaches with multiple components and  
10 actions or acts that occurred before April 30. We did  
11 not argue 2018. We did not argue otherwise. But we  
12 did say very clearly that individually considered each  
13 of those actions do not constitute by themselves a  
14 breach of the Treaty. That is the case put forward at  
15 the jurisdictional stage by Claimant.

16 ARBITRATOR KNIEPER: Excuse me, may I ask a  
17 question?

18 MR. DÍAZ-CANDIA: Yes, sir.

19 ARBITRATOR KNIEPER: Because it is still not  
20 very clear in my head, and perhaps you can explain  
21 that to me.

22 What is your case? You say when SUNAT

1 immobilized the gold, this action was not illegal. Is  
2 that what you say?

3 MR. DÍAZ-CANDIA: Was not in itself--

4 ARBITRATOR KNIEPER: Let me ask this  
5 question.

6 MR. DÍAZ-CANDIA: Yes, sir.

7 ARBITRATOR KNIEPER: In 2013 and the  
8 beginning of 2014, when the Immobilization took place,  
9 you say that was a legal act. Do you say that or do  
10 you not say that?

11 MR. DÍAZ-CANDIA: We say that it was not a  
12 breach of the Treaty.

13 ARBITRATOR KNIEPER: Then it means it was  
14 legal?

15 MR. DÍAZ-CANDIA: That can be disputed under  
16 Peruvian law and the Peruvian law expert will talk  
17 about this on Thursday.

18 ARBITRATOR KNIEPER: Okay.

19 MR. DÍAZ-CANDIA: What we are saying is that  
20 that itself does not breach the Treaty. We're not  
21 asking the Tribunal to adjudicate Peruvian law but the  
22 Treaty.

1           ARBITRATOR KNIEPER: Okay. Now, SUNAT ended  
2 its Immobilizations--

3           MR. DÍAZ-CANDIA: Correct.

4           ARBITRATOR KNIEPER: --quite early, and they  
5 were replaced by court orders.

6           MR. DÍAZ-CANDIA: Correct.

7           ARBITRATOR KNIEPER: And correct me if my  
8 thinking is too short-minded.

9           MR. DÍAZ-CANDIA: Yes, sir.

10          ARBITRATOR KNIEPER: I think it is a logical  
11 consequence of what you say that SUNAT never acted in  
12 breach, now to use your words, "in breach" of the  
13 Treaty, because when it released the gold, it was too  
14 early to be a breach of the Treaty. Is my  
15 understanding correct? I want to know whether I get  
16 it correctly.

17          MR. DÍAZ-CANDIA: No, a couple of  
18 corrections with your permission, Professor Knieper.  
19 When those were lifted, the gold was not returned to  
20 Kaloti.

21          ARBITRATOR KNIEPER: No. No--

22          MR. DÍAZ-CANDIA: When those were lifted,

1 Kaloti was still deprived of the possession. The  
2 formal order was replaced by an order of courts in the  
3 Five Shipments, but the gold was never returned to  
4 Kaloti.

5 ARBITRATOR KNIEPER: Yes, but again, we come  
6 to this, we turn around. Do you not say and write  
7 also in your papers and in your submissions that the  
8 first seizures were not in breach of the Treaty, but  
9 the other ones were?

10 MR. DÍAZ-CANDIA: No.

11 ARBITRATOR KNIEPER: You don't say that?

12 MR. DÍAZ-CANDIA: No. We're saying that  
13 none of those actions isolated in and of themselves  
14 constituted a breach of the Treaty. Only when  
15 considered in the aggregate and combined, not only  
16 with actions but with omissions--I'm going to touch on  
17 that later--by the unlength--by the unduly lengthy  
18 duration of the possession of the gold, including by  
19 omissions, not only by actions. That, all put  
20 together, constitute a breach of the Treaty of  
21 Article 10.3, 10.5, and 10.7 after 30 April 2018.  
22 About the legality under Peruvian law, again, I would



1 refer you to our Legal Expert and to Mr. Missiego on  
2 Thursday. But this Tribunal cannot be put in a  
3 position to analyze and adjudicate Peruvian law and  
4 even less to come to conclusions against Kaloti that  
5 no Peruvian authority made at that time and no  
6 contemporaneous documents made against Kaloti at that  
7 time.

8 ARBITRATOR KNIEPER: No, I'm far from making  
9 conclusions. I simply want to know what you mean when  
10 you say when the gold was seized originally, there was  
11 no breach of the Treaty. I want--that is a very  
12 simple question. Do you want to say that when the  
13 gold was seized, it was not a breach of the Treaty?  
14 Do you want to say that?

15 MR. DÍAZ-CANDIA: Yes. At that moment, an  
16 isolated, considered in and of itself that was not a  
17 breach of the Treaty.

18 ARBITRATOR KNIEPER: Thank you.

19 MR. DÍAZ-CANDIA: Correct. A composite  
20 breach, a progressive and creeping breach of  
21 Article 10.3, 10.5, and 10.8 occurred after April 30,  
22 2018, when the gold and this investment lost

1 permanently all value to Kaloti Metals.

2 Does that answer your question, Professor  
3 Knieper?

4 ARBITRATOR KNIEPER: I tried to make the  
5 best out of it.

6 MR. DÍAZ-CANDIA: Okay. Thank you very  
7 much. And we do appreciate that statement.

8 We simply ask the Tribunal to interpret it,  
9 to interpret Articles 10.28, 10.1 of the Treaty in  
10 accordance with its plain meaning.

11 This Treaty, for expropriation purposes, of  
12 and for breach of the Fair and Equitable Treatment  
13 Provision requires either property of an asset or  
14 control one assets. So, even if the Tribunal  
15 concludes that this gold, under Peruvian gold--law  
16 does not belong to Kaloti, these were assets that were  
17 in the physical possession of Kaloti, and that Kaloti  
18 would have exported to Miami at a profit to Kaloti  
19 even if the property, according to them, was not  
20 vested under Peruvian law, a point that we object.  
21 Our argument is that Kaloti Metals became the owner of  
22 the Five Shipments legitimately as a good-faith

1 purchaser under Peruvian law.

2           But even if not, these Five Shipments were  
3 in our physical possession and control, and when the  
4 shipment was lost, it was lost for Kaloti, not for the  
5 Sellers.

6           The Investments of Kaloti Metals in Perú had  
7 an operational or investment risk. Claimant leased an  
8 office inside Perú, rented an apartment, hired  
9 personnel, made a business plan, made investments in  
10 Perú, traded at trade conferences. Met multiple times  
11 with Suppliers and partners in the industry. All of  
12 that without knowing the result of that operation. At  
13 that time, it cannot be predicted how much gold would  
14 Kaloti obtain inside Perú. There was an investment  
15 risk.

16           Most importantly, as I mentioned before, the  
17 risk of loss of the gold was bared by Kaloti. If  
18 after delivery of the gold to Kaloti at the offices in  
19 Hermes, that loss was lost--gold was lost by  
20 lightning, fire, or by the illegal actions or  
21 arbitrary actions under the Treaty of the Peruvian  
22 Government, that loss was for Kaloti Metals, not for

1 those Sellers. The three Sellers that received money,  
2 in accordance with the investigations of Perú, can  
3 keep that money for them. They're not being asked to  
4 return the money that they received from Kaloti for  
5 those shipments.

6 SUNAT, [REDACTED], and [REDACTED], the Sellers  
7 of Shipment 3 and 5, the gold does not affect them.  
8 The breach or the loss of this gold pursuant to the  
9 Treaty for Kaloti Metals had only consequences,  
10 economic and financial consequences upon Kaloti  
11 Metals. Kaloti is not disputing that it may have  
12 obligations that are unrelated to this Treaty to pay  
13 for Shipments 3 and 5. That is unrelated to the  
14 treaty breaches. The gold was taken from Kaloti while  
15 it was in the possession of Kaloti, and that, in and  
16 of itself, is an investment risk.

17 Kaloti made a substantial commitment inside  
18 Perú. Only in the Year 2013, Kaloti paid for  
19 approximately 1.3 billion, with a B, of gold, most of  
20 it in Perú to Peruvian banks. All that money went  
21 into the Peruvian economy. Kaloti had personnel who  
22 trained, Kaloti had a law firm who paid. Kaloti had

1 accountants in Perú who Kaloti paid. All that  
2 Investment, again, that went into the Peruvian  
3 economy, all that money that was put into the Peruvian  
4 economy by the Claimant, significant  
5 contributed--fully contributed to the development of  
6 Perú, and specifically to the development of that  
7 country and the fulfillment of the formalization plan.

8           This investment has a duration from 2012 to  
9 2018, and during those years the Company made profits  
10 from its on-the-ground operations in Perú.

11           Perú has put forward a number of cases, a  
12 case related to the exporting of chicken into Ukraine,  
13 a case related to the Greek Government bonds, a case  
14 related to a Russian residential dwelling in Korea  
15 that was not acquired for commercial purposes.

16 Absolutely those three cases, and the rest are  
17 different from the facts of this case in the  
18 investment risk and operational risk and the  
19 commitment that Kaloti made inside Perú.

20           Then going to the issue of the statute of  
21 limitations. Perú, first of all, has admitted that  
22 none of the Claims from Claimant has--are affected or

1 barred by the statute of limitations. That should be  
2 taken into account. But, more importantly, under this  
3 Treaty, the statute of limitations could only start  
4 running when two things actually happened: A breach  
5 of the Treaty--not the potential breach and not the  
6 constructive knowledge of a future breach--an actual  
7 breach had to occur. This is the language of this  
8 Treaty. There are treaties with different language,  
9 including the one that the United States signed from  
10 Colombia that refers to some facts in the dispute but  
11 not to actual consummated breaches like this Treaty.  
12 That should be interpreted in accordance with the  
13 Vienna Convention on the Law of Treaties.

14           Then loss had to occur, not any loss, but  
15 loss directly connected and derived from the breaches  
16 that are being alleged. Here Perú is trying to claim  
17 that Kaloti Metals suffered some damages before  
18 April 30, 2018. First of all, that cannot refer to  
19 any damage, and has to refer to damages that were  
20 irreversible, consummated. That is what the law  
21 requires. A temporary decline in value cannot be  
22 considered for purposes of an expropriation. Our

1 legal expert, quantum expert, and even Brattle's,  
2 Perú's quantum expert, have confirmed that the loss of  
3 the inventory was sufficient to cause the insolvency  
4 of Kaloti. Then they go into an argument of whether  
5 that gold was formally written off for accounting  
6 purposes or not on November 30, 2018. The reality is  
7 that the gold was never written off before  
8 November 30, 2018. There was no damage that was  
9 irreversible. Secretariat, our quantum expert, even  
10 says, had Kaloti received this gold in 2018, for  
11 instance in August or September, something that could  
12 have happened even sua sponte by the courts if they  
13 found that the gold was not implicated in  
14 money-laundering, Kaloti would have received gold at  
15 prices higher than 2013 and 2014. It would have been  
16 made up financially. It would have been able to pay  
17 all the debt to [REDACTED] Dubai. That is  
18 undisputed. It was in November of 2018 that [REDACTED]  
19 [REDACTED] Dubai said--and there's a letter, a  
20 contemporaneous document on the record, that says it  
21 was on that date and not before that Kaloti Dubai  
22 accelerated the debt and demanded full payment.

1           So the damages claimed in this arbitration  
2 only were incurred after April 30, 2018. That damages  
3 had to be actual. The breach had to be actual. Then  
4 the knowledge can be constructive. But there is no  
5 constructive breach or constructive damages. We are  
6 not alleging that some damages started happening in  
7 2013 and then increased in value. These specific  
8 damages for lost profits and for expropriation only  
9 were incurred after 30 April, 2018.

10           According to case law, three conditions must  
11 be met or fulfilled for the statute of limitations to  
12 start running. The alleged breach must be actual,  
13 must actually have occurred. The resulting  
14 damage--damage resulting from that breach, not any  
15 damage--must actually have been incurred. And then  
16 only after that can the Claimant know or be in a  
17 position to know, constructive knowledge, that a  
18 breach or damages had been incurred, but they cannot  
19 be constructive, they cannot be speculative. They  
20 have to be irreversible and include.

21           Breaches became actionable in this case only  
22 where their economic effect became irreversible after



1 April 30, 2018.

2           Also, Perú is claiming that they did nothing  
3 in particular on November 30, 2018; that that date is  
4 arbitrary. And it is true that Perú didn't do  
5 anything by November 30, 2018. They did not return  
6 the gold. That is an omission that contributed to a  
7 breach of the Treaty. Again, had this gold been  
8 returned in August 2018, the damages would have been  
9 reversed, Kaloti would have been able to continue on a  
10 going-concern operation inside Lima, would have paid  
11 Kaloti, would have injected more than \$20 million into  
12 its cash flow, and the Company would have survived.

13           A State cannot be held responsible, an  
14 authority says, for the provision of investment value  
15 of difficulties if faced as a consequence of the  
16 host-State's action if such impairment are only  
17 temporary in nature and the financial situation of the  
18 Investor has improved or is bound to improve. Those  
19 are not our words.

20           Perú is trying to use against Kaloti a  
21 letter sent in 2016 that they have deceptively called  
22 a "First Notice of Intent" in this Arbitration. First

1 of all, we disclosed the existence of that letter,  
2 both in the Request for Arbitration and in our First  
3 Memorial. We have nothing to hide. Perú, however, in  
4 its Counter-Memorial, quoted this letter extensively,  
5 literally, but selectively. They did not file a copy  
6 of this letter at the time that they made those  
7 allegations. Only after that, Claimant, which had  
8 previously considered this letter irrelevant in this  
9 arbitration, we filed a copy of that letter in this  
10 operation. Why didn't Perú produce this copy? Simply  
11 because the text of the letter, the clear meaning of  
12 the words and the irrefutable conclusion that was  
13 stated in this letter was that no expropriation had  
14 occurred at that time. The letter says this. The  
15 letter says that an expropriation could happen in the  
16 future, potencial de culminar en la expropiación (in  
17 Spanish), in the future, at that time pursuant to this  
18 letter no expropriation had incurred.

19 (Overlapping interpretation with speaker.)

20 MR. DÍAZ-CANDIA: Okay. This letter in  
21 Spanish--I'm going to read it in Spanish--says: "The  
22 treatment by Perú is arbitrary, and have the potential

1 to culminate in the expropriation de la inversión  
2 protegida (in Spanish).

3 In Spanish it says: Perú continues  
4 exercising--sorry. Continúa ejerciendo un trato  
5 injusto y arbitrario que tiene el potencial de  
6 culminar en la expropiación de la inversión de Kaloti.

7 This refers to the future. This letter does  
8 not make claims for lost profits at all. This letter  
9 does not claim a breach of Article 10.7. This letter  
10 refers in its essence to a breach of Article 10.8 of  
11 the Treaty because the obstruction to repatriate the  
12 Investment or the profit. That is not what Kaloti is  
13 seeking in this Arbitration. We're not seeking the  
14 return or repatriation of the gold. We are seeking  
15 damages in money. If after that Perú wants to pay the  
16 damages partially with gold, we would consider it, but  
17 we are not seeking the physical return of this gold  
18 anymore because the gold was lost for Kaloti when the  
19 operation closed on 30 November 2018, the operations  
20 ceased, [REDACTED] gave up hope of obtaining physical  
21 return of this gold, and closed the books.

22 This is a very--these are very different

1 facts. After this letter, Kaloti Metals continued and  
2 filed actions with Peruvian court trying to get not  
3 damages but the physical return of the gold.

4           Then they made reference to an Amparo,  
5 constitutional petition, filed by Kaloti in Perú.  
6 That Amparo petition referred strictly to two Actas,  
7 two documents issued by SUNAT, I believe, and this  
8 goes to Professor Knieper's point: Those Actas, in  
9 and of themselves, were revoked. Consequently, under  
10 those Actas was the only thing challenged in that  
11 Amparo did not incur--did not constitute an  
12 expropriation. The Amparo was withdrawn by Kaloti  
13 Metals. It is true that this Amparo made by a  
14 Peruvian lawyer contains a reference to Article 10.7  
15 of the Treaty. We don't argue with that. But this  
16 Amparo was not looking for adjudication of a treaty  
17 breach. It was looking for the physical return of the  
18 gold, an Amparo petition under Peruvian law is not  
19 enough to pay damages to the Claimant. It's simply  
20 not what the action is constitutionally permitted to  
21 act. It's an injunction of fact for physical return  
22 of the gold, something that is expressly permitted as

1 exception of the "fork in the road" provision of this  
2 Treaty.

3 Kaloti never made an allegation of breach of  
4 Article 10.7, 10.5 and 10.3 to any authority with  
5 jurisdiction and competence to adjudicate those  
6 breaches. Only before this Tribunal on 30 April 2021.

7 Again, case law demonstrate that something  
8 irreversible must have happened, something to be  
9 permanent. This is a case law that demonstrates this.

10 Loss of the inventory does not depend on the technical  
11 concept of a write-off. The loss of the inventory,  
12 not the write-off, Brattle says, Perú's quantum  
13 expert, that the loss of the inventory was sufficient  
14 to cause the insolvency of Kaloti Metals. These are  
15 not our words. Then we don't even understand if  
16 Brattle is arguing that no insolvency occurred, or  
17 that it occurred before November 30, 2018. They're  
18 simply trying to have the cake and eat it, too.

19 Shall the Tribunal come to the conclusion  
20 that Article 10.18, the statute of limitations,  
21 constitutes an egregious period and also that the  
22 breach was consummated before April 30, 2018, then we

1 ask you to consider Article 10.4 of the Treaty which  
2 contains a most-favored-nation clause.

3           This section only has a footnote and an  
4 exception saying that this doesn't apply "to  
5 dispute-resolution mechanism." We're not trying to  
6 import a dispute-resolution mechanism which is the  
7 only thing excluded from this Clause.

8           Also, the substance of these breaches cannot  
9 be separated from allegedly procedural issues. Why?

10 If only the consent to arbitration expired pursuant to  
11 Article 10.18, but then the breaches of Article 10.3,  
12 10.5, and 10.7 that we allege have survived, would  
13 survive. Where would we present those claims under  
14 the Treaty? If the Tribunal concludes that entering  
15 into a treaty is treatment, and we understand that  
16 this is contrary to what Perú has submitted and to  
17 what the United States has submitted, and on this  
18 issue the United States is more concerned with this  
19 filing being used against them in future cases against  
20 them, and they make some unsubstantiated statement  
21 that entering to a treaty--entering into a treaty in  
22 and of itself is not treatment. Look at that and see

1 that that statement in the submission by the United  
2 States has no authority, no cite whatsoever.

3 Factual treatment, identifying an investor  
4 concretely that was treated under a different Treaty  
5 is almost impossible. How would you found in facts an  
6 investor and know what he was given by Perú  
7 individually? That is an impossible task, dripping,  
8 as the majority of case law recognizes, is entering  
9 into a treaty. And in any point, also the United  
10 States does not argue that this Clause says that--does  
11 not say "applicable treatment," but it does not say  
12 that if it's considered treatment, that it should not  
13 be applied.

14 The same case that Perú and our colleagues  
15 from another Arnold & Porter actually won against  
16 Colombia says that in that Tribunal, presided by  
17 Ms. Kaufmann-Kohler, I believe, they analyzed the most  
18 favored nation clause, but concluded that under the  
19 other Treaty, the statute of limitations had other  
20 breach. They did not say that the Treaty was not--the  
21 most favored nation clause was not applicable to a  
22 Limitations Period.

1           The date of the breach on this case--again,  
2 this is case law I'm going to read from it: "If the  
3 State administration is a measure that is originally  
4 conceived as only temporarily (and truly custodial)  
5 like Perú has said in this case, then the diacritical  
6 date should commence and the date that the Measure is  
7 determined to have ripened into a taking." There is  
8 the authority of the case law. The date of the  
9 appropriation, that is the date of the treaty breach,  
10 is the point in time when the owner has been  
11 irreversibly deprived of the property, not when it was  
12 taken temporarily. This is the case of Rumeli Telekom  
13 versus Kazakhstan.

14           Another case says that when a temporary  
15 seizure is simply maintained by a State, the breach is  
16 consummated when the investment value is permanently  
17 destroyed, not before.

18           In the most paradigmatic case of  
19 international law regarding a creeping or indirect  
20 expropriation, there was no final affirmative action  
21 required from the State. An omission is sufficient  
22 for a composite act or a creeping violation of the



1 Treaty. In that case, the expropriation crystallized  
2 when the Plant Manager finally shut down operations,  
3 and upon confirmation that non-profit-making  
4 enterprise could continue under the circumstances,  
5 which is exactly the conclusion to which [REDACTED]  
6 came in November of 2018. In creeping expropriations,  
7 no obvious overt markers will exist to enable a  
8 Tribunal to set the moment of valuation at some point  
9 before the Investor's contemporaneous conclusion that  
10 it had been expropriated. And there is the source of  
11 that quote.

12 In the Resolute versus Canada Case, which  
13 the Respondent put on the record, the Tribunal gave  
14 deference to the date when an investor closed an  
15 operation in Canada for establishing that a treaty  
16 breach had occurred.

17 Also, when a slow accretion of interferences  
18 with the management or control of the foreign  
19 enterprise results in the inability of the Project to  
20 continue, determining the date of which an action  
21 created and a result is simply an absurd exercise.

22 In this case: "However, the Transaction

1 history and the records shows that Kaloti Metals  
2 operated and bought gold in Perú well after  
3 30 April 2018."

4           With that, I conclude my presentation. My  
5 partner Ramón Azpúrua will continue on the legal basis  
6 applicable to KML's claims, and my colleague Gabriella  
7 Hormazabal will deal with the issues of damages.

8           If it's okay with the Tribunal, however, we  
9 would like to take the break at this point.

10           PRESIDENT McRAE: Thank you.

11           Since you're proceeding to a new topic, I  
12 think that's a good idea to take the break now, so we  
13 will resume in 15 minutes, which will be, let's say,  
14 11:25.

15           MR. DÍAZ-CANDIA: Yes, sir, thank you.

16           If the Respondent has no objection, we would  
17 like to give the Tribunal and Respondent the printed  
18 copies of the chronology and the substantive issues,  
19 which I understand you would also do? Can we? Okay,  
20 thank you.

21           (Recess.)

22           PRESIDENT McRAE: Counsel, when you're

1 ready, you can proceed.

2 MR. AZPÚRUA: Thank you. Good morning,  
3 again. For the record, my name is Ramón Azpúrua, and  
4 I will be delivering the section on the legal basis  
5 for Kaloti Metals's Claims in this Arbitration.

6 (Pause.)

7 MR. AZPÚRUA: First, as noted in  
8 Article 42.1 of the ICSID Convention, the law that is  
9 applicable in this case is the law that the Parties  
10 have agreed to, and Perú and the Government of the  
11 U.S. in benefit of U.S. investors have signed the  
12 U.S.-Peru Treaty which is the relevant law that is to  
13 be applied for purposes of adjudication of substantive  
14 obligations imposed under the Treaty.

15 Also, General Principles of International  
16 Law and customary international law apply; and, as  
17 noted by my colleague, Claimant has stated that all  
18 breaches alleged in this case must be considered in  
19 conjunction with the most-favored-nation clause  
20 contained in Article 10.4 of the Treaty.

21 Peruvian law is applicable, if not  
22 inconsistent with the foregoing, and for these

1 purposes Perú cannot immunize itself from treaty  
2 breaches based on any alleged non-compliance with  
3 Peruvian law.

4           Perú cannot weaponize its legal system to  
5 avoid its responsibilities and obligations under the  
6 Treaty.

7           In connection with Peruvian law, we would  
8 like to call the Tribunal's attention to three  
9 particular bodies of law in Perú. My colleague,  
10 Hernando Díaz, previously referred to due-diligence  
11 standards, and we would like to ratify that Law 27693,  
12 which created the unit of financial intelligence in  
13 Perú and which contains standards for due-diligence  
14 investigations, is not applicable to Kaloti Metals and  
15 never has been. As noted by our expert, Dr. Caro  
16 Coria, Kaloti Metals, not being domiciled in Perú, is  
17 not subject to the provisions of that statute. And  
18 Mr. Missiego, the Expert, the Legal Expert, for Perú,  
19 has conceded this point.

20           Secondly, we want to call the attention of  
21 the Tribunal to Article 2 of Law 27379 which basically  
22 provides for the provisions that are applicable to

1 issue Exceptional Measures in Preliminary  
2 Investigations. As provided in that Article, those  
3 Measures could be issued for a period of 15 days,  
4 renewable for an additional period of 15 days. All of  
5 the contemporaneous documents in this case reference  
6 this Article. The initial Immobilizations made by  
7 SUNAT were solely and uniquely based on this  
8 particular Article of the law. No other article was  
9 invoked.

10           Post hoc, after the fact and in the course  
11 of this investigation, Perú and its Legal Expert had  
12 belatedly invoked application of Article 94 of Perú's  
13 code of criminal procedure. Perú cannot invoke post  
14 hoc for the past measures taken over assets not owned  
15 by the inculpados. That is to say, the accused in the  
16 relevant investigations.

17           If relevant, Article 94 should serve to note  
18 that Perú is holding the gold to guarantee any civil  
19 or monetary responsibility of the inculpados, and in  
20 this case the inculpados are the four Sellers of gold  
21 to Kaloti Metals: [REDACTED], [REDACTED], [REDACTED], and  
22 [REDACTED]. And as noted previously, three of those

1 companies received payment for the price of the gold,  
2 and the other one filed a formal document before the  
3 judicial authorities stating that Kaloti Metals was  
4 the owner of the gold.

5           So, basically, Perú is holding gold to  
6 secure the responsibility of the four entities that  
7 are being investigated but the gold is owned by Kaloti  
8 Metals.

9           Secondly, the first subsection of this  
10 Article 94 requires that the gold that is seized must  
11 be seized from the owner, again the four entities that  
12 are inculpados or accused in this investigation are  
13 not the owners of the gold.

14           We concede that Subsection 3 provides that  
15 Perú could initially take the goods possessed, not  
16 owned, by third parties, but if Perú wanted to prolong  
17 the holding of that gold Perú should have made Kaloti  
18 Metals an inculpado in the process, and it did not  
19 proceed in that direction.

20           No ownership or pérdida de dominio process  
21 was initiated by Perú in four of the five shipments of  
22 the gold, and the one that it did start it began after

1 this Arbitration had already commenced. Perú has the  
2 burden of proving any alleged or suspected wrongdoing  
3 by the Sellers of gold, Kaloti, or any third parties,  
4 and that burden has to be met with plena prueba, with  
5 actual proof and not with simple indicia.

6           The third body of laws we want to address  
7 are the confidentiality laws of Perú. When preparing  
8 the Redferns, Perú made use of Article 16 on the law  
9 on access to public information, justifying the  
10 non-submission of certain documents based on the  
11 confidentiality limitations provided under such  
12 statute. Similarly, Article 139 contains similar  
13 prohibitions against the disclosure of information  
14 contained in criminal files or files pertaining to  
15 criminal investigations.

16           This law invoked by Perú, set affirmative  
17 duties upon the Peruvian authorities. As noted by my  
18 colleague previously, Kaloti did not disclose the  
19 existence of this information. It was the last Party  
20 interested in having this information known, and that  
21 is an absolute negative fact. This type of leakage  
22 basically occurs when there is negligence, misconduct,

1 or even intent of public officers that hold or have  
2 access to that information in those files. We call  
3 the attention of the Tribunal to this Article which is  
4 referenced, and which provides strong indication that  
5 the leakage originated in SUNAT, the tax authorities  
6 that made public the risk profiles that were contained  
7 in the relevant--in the documentations.

8           Now, let's go into the Treaty itself, the  
9 provision in the Treaty itself, and what Kaloti is  
10 claiming in this case. Basically, we're holding that  
11 Perú failed to accord fair and equitable treatment to  
12 Kaloti Metals as provided under Article 10.5 of the  
13 Treaty and as further clarified in Annex 10-A, which  
14 explains that the provisions protect investment from a  
15 broad range of State measures and not only for denial  
16 of justice. In this regard, I will read a portion of  
17 the text of that annex, which reads: "The customary  
18 international law minimum standard of treatment of  
19 aliens refers to all customary international law  
20 principles that protect economic rights and interests  
21 of aliens."

22           Further decisions of other tribunals have



1 expanded in these concepts as in the case of Waste  
2 Management v. Mexico and RDC v. Guatemala.

3           Perú has argued that Kaloti has agreed that  
4 the International Minimum Standard of Treatment is  
5 relevant in this case only for purposes of the  
6 lost-profit claim, and that is false. Kaloti, every  
7 time in every submission it has made in this  
8 Arbitration, has argued that the breaches contained in  
9 the Memorial must be considered in conjunction with  
10 Article 10.4, which, as you know, contains the  
11 most-favored-nation clause. Here, Perú not only  
12 breached the standard under the Agreement, but also  
13 breached the standards under other agreements or  
14 treaties that it has subscribed with other countries  
15 which are more convenient--are more favorable to  
16 Kaloti Metals and which we invoke. Those treaties are  
17 those subscribed with Italy, Australia, and United  
18 Kingdom.

19           My colleague, Hernando Díaz advanced a bit  
20 on the issue of the language contained in this Article  
21 10.4, the most-favored-nation clause, and I would like  
22 to call your attention to the fact that the Parties,

1 when they drafted the Treaty, they chose to use the  
2 word "accord" throughout the language of the  
3 Agreement. "Accord" is synonymous with "agree" and  
4 with "Treaty." So, if the country, Perú, has other  
5 treaties with other nations, and those treaties  
6 contain more favorable clauses and provisions, those  
7 must be applied for the simple fact of being included  
8 in those treaties. If the Parties had chosen to  
9 change the language and provide, for example, that it  
10 would factually give, then it would be reasonable to  
11 request four comparators under each of those treaties,  
12 but that is not the case, and that is extremely  
13 difficult and would basically make the clause useless  
14 for practical purposes.

15           Again, Kaloti has argued and alleged that  
16 there are several--not alleged--there are several  
17 individualized breaches to the Agreement, but rather  
18 that a creeping violation of the Treaty, and therefore  
19 obligations of Perú under the Treaty, has occurred.  
20 As noted in the Wena Hotels v. Egypt Decision, this  
21 can be described as a process of extending over time  
22 and comprising a succession or an accumulation of

1 measures which, taken separately, would not breach  
2 that standard. But when taken together, do lead to  
3 such result.

4           How did Perú breach its FET commitments  
5 towards Kaloti? This breach has seven different  
6 components: First, by denying justice to Kaloti;  
7 second, by depriving Kaloti of its property without  
8 due process of law; third, by holding a prosecutorial  
9 sword of Damocles over Kaloti's head; by treating  
10 similarly situated investors differently in judicial  
11 proceedings; by treating Peruvian purchasers of gold  
12 differently from foreign purchasers; by refusing to  
13 engage in good-faith negotiations with Kaloti; and by  
14 not meeting Kaloti's legitimate expectations. Again,  
15 these are components of the same breach.

16           The first one, denying justice to Kaloti.  
17 And this goes to the essence of what is expected in  
18 international law as fair and equitable treatment,  
19 which, by the way, was highlighted in  
20 Article 10.5(2) (a), that the promise of due process is  
21 central to the components of the Treaty in this case.

22           In the *Krederi v. Ukraine* Decision, it was

1 held that "the right of access to the courts or other  
2 adjudicatory bodies is a basic aspect of due process.  
3 Refusing such access constitute the classical case of  
4 denial of justice." Also it reads: "It is generally  
5 accepted that overly long court proceedings may amount  
6 to a denial of justice."

7 Denial of justice can also occur at the  
8 level of non-judicial authorities or not only caused  
9 by actions or omissions of the courts, as stated in  
10 Iberdrola-Guatemala and TECO-Guatemala Cases.

11 Here, the denial of justice, like the  
12 indirect expropriation, was the result of composite  
13 acts accumulated over time and bringing about a  
14 violation of the Treaty.

15 Secondly, Perú deprived Kaloti of the  
16 property without due process of law. From the facts  
17 that have been described by my colleague, Hernando  
18 Díaz, it is clear that Kaloti was denied the enjoyment  
19 of the gold of those Five Shipments of gold, and that  
20 that had the consequence of destroying the viability  
21 and value of Kaloti's operations in Perú and abroad.  
22 Perú denied Claimant the opportunity to present a

1 good-faith Buyer defense, even though Articles 913 and  
2 914 contain and set forth a presumption of good faith.

3 In the meantime, Perú has not attributed  
4 absolutely any crime to Kaloti Metals since 2015.  
5 Eight years.

6 Kaloti has made multiple requests for the  
7 return of the gold, and basically received no response  
8 whatsoever. Perú's lawyers have provided multiple  
9 post hoc explanations trying to justify that Kaloti  
10 Metals was allegedly not entitled to receive the gold  
11 back from Perú, but the fact is that those were never  
12 provided to Kaloti prior to initiating this  
13 Arbitration.

14 Perú also questions the propriety of the  
15 notifications and notices provided to Government  
16 authorities in Perú in connection with its ownership  
17 of the gold. However, Dr. Caro, our Legal Expert, has  
18 determined that those notices were sufficient to put  
19 Perú on notice and have legal value.

20 Finally, Perú did not even begin eminent  
21 domain, pérdida de dominio processes, in connection  
22 with four of the Five Shipments, and the one that it

1 did begin, began after this arbitration had already  
2 commenced.

3           The third, holding a sword of Damocles over  
4 Kaloti's head, is basically the unreasonable amount of  
5 time that this process and investigations have taken.  
6 It's seven or eight years since those investigations  
7 begun, and absolutely no determination has been made.

8           Mr. Missiego, the Legal Expert for Perú, has  
9 submitted in this Arbitration a couple of documents, a  
10 couple of Excel sheets listing approximately 161  
11 criminal cases in Perú--with the intent of explaining  
12 that it's completely normal in Perú for a criminal  
13 investigation to last this long. However, that  
14 information does not have practical relevance. Why?  
15 Because Mr. Missiego fails to provide the authority of  
16 the documents, these are just spreadsheets prepared, I  
17 presume, or we presume, by Mr. Missiego itself for  
18 assistance. Secondly, he fails to explain what the  
19 statistical relevance of the information provided is.  
20 There is no information on what the Parties to those  
21 processes are, what the investigations are about, and  
22 provide absolutely no comparators that can be used in

1 our case.

2 In any case, the Constitution of Perú also  
3 contains a provision on the reasonableness of the time  
4 that this type of investigation must take, and this  
5 investigation has taken a lot more than is reasonable  
6 under Peruvian standards and on the International  
7 Standards that are relevant under the Treaty.

8 Perú has stated that Kaloti itself, as an  
9 entity, has been and continues to be investigated  
10 since 2015. Eight years. Perú has not notified  
11 Kaloti of this investigation, has not called any  
12 official or employee of Kaloti to render statements in  
13 connection with those investigations. Perú has not  
14 given any avenue to Kaloti and its representative to  
15 clear their name. And it's been eight years.

16 Perú's own Legal Expert has failed to  
17 pinpoint specific dispositions or articles that had  
18 been breached by Kaloti or the advance and content of  
19 those investigations. As noted by my colleague before  
20 me, Kaloti has always recognized that Perú has the  
21 right to initiate investigations, but those  
22 investigations need to be conducted on reasonable and

1 proportionate terms. And an investigation lasting  
2 seven or eight years is in no way reasonable. And on  
3 unreasonable and proportionality, we refer the  
4 Tribunal to the Decision of Tecmed v. Mexico.

5           Again, the foregoing must be considered  
6 under the guidance of the articles that are relevant  
7 in other treaties that have been subscribed with Perú  
8 and which terms are most favorable than the one  
9 contained in the instant case, in particular the  
10 treaties that have been described by Perú with  
11 Australia, Italy, and the United Kingdom.

12           Fourth, by treating similarly situated  
13 investors differently in judicial proceedings. Under  
14 the Muszynianka Spólkz v. Slovak Republic Decision, it  
15 was held that discriminatory conduct is unlawful where  
16 investors in like circumstances are subjected to  
17 different treatment without a reasonable  
18 justification. A similar holding is contained in the  
19 Pey Casado v. Chile Decision.

20           Now, when the initial Immobilizations  
21 occurred back in the Years 2013 and 2014, Perú carried  
22 out several seizures concerning other purchases of



1 gold in Perú and not only Kaloti. We would like to  
2 point out that in no case was there a Peruvian  
3 national.

4           Among the foreign purchasers that were  
5 affected by these Measures was ██████████,  
6 which is a company based in Curaçao and controlled by  
7 an Italian investor. ██████ did exactly the same thing  
8 that Kaloti did, basically, purchased gold from  
9 Suppliers in Perú and later re-exported for resale in  
10 the United States and abroad. SUNAT and the Peruvian  
11 courts treated ██████ completely different than it  
12 treated Kaloti Metals.

13           Perú has acknowledged that the SUNAT gave an  
14 express answer to ██████ when it opposed the provisional  
15 measures, as noted in its filings. This type of  
16 answer was never provided to Kaloti at all. This  
17 answer allowed ██████ to exercise recourses under  
18 Peruvian law. ██████ appealed that Decision, and  
19 several Tax Courts in Perú ordered the return of the  
20 gold to ██████ ██████████. Now, it's true that SUNAT  
21 and Perú challenged those decisions, they also  
22 appealed to those decisions and some of those

1 decisions were favorable to [REDACTED] and some were not.  
2 The legal fact is that [REDACTED]--those decisions opened  
3 the door to [REDACTED] to exercise its rights under Peruvian  
4 law, and no such opportunity was ever afforded to  
5 Kaloti Metals.

6           Perú has stated that [REDACTED] is not a similarly  
7 situated comparator because [REDACTED] gold had been  
8 seized initially for purposes of conducting a document  
9 review, or for reviewing documents. However, this is  
10 false. If you review the documents in file, you will  
11 find that all of the initial Immobilization orders in  
12 connection with Kaloti Metals were precisely for the  
13 same reason: For purposes of reviewing documentation.  
14 So, it was exactly the same situation.

15           Perú states that the procedures available to  
16 [REDACTED] were not legally available to Kaloti Metals, and  
17 that, by itself, is evidence of discriminatory  
18 treatment.

19           Perú also argues that, in [REDACTED] case, a  
20 formal proceso de extinción de dominio, a formal  
21 forfeiture proceeding, was initiated over the gold.  
22 This never happened in the case of Kaloti Metals

1 except for the one that began last year after this  
2 Arbitration had already commenced. That result, that  
3 process, even if that Decision was adverse to [REDACTED],  
4 also opened the door to [REDACTED] to exercise its rights to  
5 judicial remedies under Peruvian law. Again, Kaloti  
6 Metals never had that opportunity.

7           Perú has made a mind-blowing argument that  
8 it was actually better to leave Kaloti's gold in  
9 limbo, as opposed to formal, even if adverse,  
10 determination about such gold. In particular, in  
11 Perú's Counter-Memorial in Paragraph 581, it states  
12 that Perú was objectively justified in not upholding  
13 Kaloti's intervention request. The problem is that  
14 ignoring is not the same as formally providing a  
15 response on the matter. That would have opened the  
16 door to Kaloti Metals to exercise legal recourses  
17 under Peruvian law.

18           Fifth, by treating domestic purchasers of  
19 gold differently from foreign purchasers. And in this  
20 regard, Perú has argued and complained that we have  
21 failed to provide a comparator for purposes of the  
22 analysis, and that is incorrect. We have provided a

1 comparator, which shows how grotesque the breach by  
2 Perú was, and that comparator is all Peruvian national  
3 purchasers of mined and scrap gold in Perú in 2013 and  
4 2014 for processing, selling, and refining of gold.

5 That is to say, all Peruvian companies that invested  
6 in the same business as Kaloti Metals did. It cannot  
7 be argued--Perú cannot reasonably claim that  
8 absolutely all of the gold that was produced in Perú  
9 during the relevant years was sold solely and  
10 exclusively to foreigners. Peruvian companies must  
11 have purchased a substantial amount of that gold.

12 However, Perú has failed to provide a single  
13 comparator, a single Peruvian national, placed in  
14 exactly the same situation as Kaloti was at the time.

15           The exhibits which are referenced in this  
16 slide basically prove that all of the companies that  
17 were affected by the Measures were foreign nationals,  
18 foreign companies, that were purchasing gold for  
19 re-export--for export to Perú--to the United States,  
20 I'm sorry.

21           Perú has tried to argue that the suitable  
22 comparators are the Sellers of the gold. Naturally,

1 all of the Sellers of the gold are Peruvian national  
2 companies registered in the country. However, that is  
3 not the relevant comparator. They were not  
4 selling--purchasing gold in Perú for purposes of  
5 re-sale and export to the United States.

6 It is, therefore, clear that Perú breached  
7 its obligation under Article 10.3 of the Treaty.

8 Perú also refused to engage in good-faith  
9 negotiations with Kaloti. Kaloti sent its Notice of  
10 Intent in April 8, 2019. Kaloti Metals did not  
11 receive any substantial Reply response from the  
12 Peruvian Government. Perú claims that it did engage  
13 in negotiations with Kaloti Metals, but, as we will  
14 discuss in a couple of minutes, that is false and  
15 incorrect. Perú had the obligation to engage in  
16 good-faith negotiations with Kaloti especially in a  
17 case like this in which no other Peruvian authority  
18 had provided absolutely an explanation to Kaloti  
19 Metals about the seizure of the gold and why it wasn't  
20 being returned to Kaloti. Good faith is a general  
21 principle that must be applied in the entirety of  
22 international legal order and process as held in the

1 Nuclear Tests Case v. France Case.

2           Perú calls the attention and remits to a  
3 couple of letters it sent to Kaloti when it received  
4 their notice. If you, the Tribunal takes the time to  
5 review those letters, it will find that all Perú did  
6 was apply dilatory tactics. They only requested  
7 additional information and they brushed off Perú--they  
8 brushed off Kaloti Metals. They didn't ask any  
9 relevant questions regarding what price or what  
10 compensation would Kaloti Metals be willing to  
11 receive, or anything of that sort. And for those  
12 purposes, the Decision of the Award issued in the  
13 Decision of ConocoPhillips v. Venezuela is very  
14 relevant, as it makes clear that the failure to  
15 negotiate compensation in good faith represents a  
16 breach of an international obligation, including after  
17 the Respondent State had received a trigger letter or  
18 Notice of Dispute. Again, Perú failed to engage in  
19 good-faith negotiations with Kaloti Metals, never  
20 inquired as to what would constitute a reasonable  
21 compromise for settlement.

22           Seventh, Perú did not meet Kaloti's

1 legitimate expectations. As noted by my colleague in  
2 the facts section, Kaloti Metals undertook a  
3 substantial amount of work to prepare to make business  
4 in Perú. It undertook many activities. It planned to  
5 purchase 45 tons of gold per year, and was preparing  
6 to set up a refinery in the country. Kaloti did  
7 reasonably expect, among other things, that Perú would  
8 comply with its confidentiality obligations under its  
9 own internal law; that Perú would not hold Kaloti  
10 Metals hostage in internal investigations in which, it  
11 was not even notified. Kaloti would expect Perú to  
12 provide answers to the multiple requests it made.  
13 Perú never replied. Kaloti expected Perú to finish or  
14 end the investigations, and this could be favorably or  
15 unfavorably to Kaloti Metals. The fact of the matter  
16 is, even if it had been unfavorable, Kaloti Metals  
17 would have had the opportunity to exercise legal  
18 remedies under Peruvian law, and that was not the  
19 case.

20           Now, we talk about Perú's actions and  
21 omissions that constitute an indirect creeping  
22 expropriation of the assets of Kaloti, the gold, and

1 as well as of its business enterprise.

2           Perú's actions and omissions resulted in two  
3 distinct but related indirect expropriations for which  
4 Perú owes compensation to Kaloti Metals. The first  
5 one is for the gold itself, the gold it immobilized  
6 back in 2013 and '14; and, secondly, because of that  
7 seizure of the gold in 2013 and '14, that caused the  
8 Company to go down in a downward spiral that basically  
9 made the business unviable, and it was forced to close  
10 in 2018, November 30th.

11           Kaloti's two expropriation claims are  
12 separately cognizable from the Lost-Profit Claim under  
13 the Treaty because the economic impact independently  
14 may not have established that an indirect  
15 expropriation had occurred, and to that extent we  
16 refer to Annex 10-B of the Treaty.

17           As noted by my colleague, the indirect  
18 expropriation was materialized by Kaloti Metals when  
19 forced to terminate its operations in November 30,  
20 2018. Perú has argued that the gold that was  
21 expropriated and immobilized in 2013 and '14 was not  
22 the property of Kaloti Metals. We contend otherwise.



1 However, it's clear that the intent of the Treaty is  
2 that expropriation may include something less than  
3 property rights, "property interests" are the same as  
4 saying "interest in property." And this is something  
5 the submission of the U.S. has agreed to in  
6 Paragraph 45.

7           Similarly, the same Treaty and it's  
8 Article 10.28 defines what "investment" means, and it  
9 means every asset that an investor owns or controls.  
10 It is indisputable that at the time of the taking back  
11 in 2013 and '14, the gold was controlled by Kaloti  
12 Metals.

13           This is not the first time that this type of  
14 conduct occurs, and we call the attention of the  
15 Tribunal to previous a ICSID Decision, specifically  
16 the one in the Tza Yap Shum v. Perú Case. In that  
17 case, the Tribunal held that the SUNAT, exactly the  
18 same Tax Authority that initially immobilized Kaloti  
19 Metals's gold, had expropriated a Chinese investor's  
20 investment by imposing Interim Measures, the same as  
21 in the case with Kaloti Metals, that froze some of the  
22 Company assets and substantially impacted its ability

1 to conduct business. This is very, very similar to  
2 what Kaloti Metals has submitted and is contending  
3 today.

4 In that Decision, the Tribunal found that  
5 Perú had not complied with its obligations under  
6 international law and under Peruvian law. When Perú  
7 sought to annul that Decision, the Decision was  
8 upheld.

9 The concept of creeping expropriation is  
10 contained in Article 10.7(1) of the Treaty, which is  
11 further complemented by Annex 10-B, in the Subsection,  
12 in the third Subsection of that annex, and it called  
13 for--that annex called for the exam that had been made  
14 and the evaluation that needs to be made to ensure  
15 that a creeping or indirect expropriation has  
16 occurred. And it basically calls for the analysis of  
17 several factors, including the economic impact of the  
18 Government action, the extent to which the government  
19 action interfered with the distinct investment  
20 expectations of the Party, and the character of the  
21 government action.

22 Perú, here, took a series of cumulative

1 steps which together had the effect of substantially  
2 depriving the covered investment of their economic  
3 value.

4           Here, the following slides contain a list of  
5 the actions and omissions of Perú. For the sake of  
6 time, I will go over them, but I do invite the  
7 Tribunal to review them closely afterwards because,  
8 basically, they describe the process and creeping  
9 expropriation that occurred in this case and which was  
10 discussed in amplitude by my partner Hernando Díaz  
11 when discussing the facts of the case.

12           In any event, it is clear that those facts  
13 constitute a paradigmatic case of creeping  
14 expropriation. As defined in *Siemens v. Argentina*,  
15 this is, one in which not one action by itself  
16 constitutes the expropriation, but taken together the  
17 cumulative steps eventually had the effect of an  
18 expropriation.

19           As regards the elements contained in the  
20 annex, in Annex 10-B, it must be--it is indisputable  
21 that the taking of the gold caused an adverse effect  
22 on Claimant; that Perú interfered with Kaloti's

1 distinct and reasonable investment-backed  
2 expectations; and that the actions taken by Perú  
3 constitute a physical invasion.

4           Now, I refer to the submission made by the  
5 U.S., specifically in Paragraph 51, in which it  
6 describes this type of taking. Perú's measures also  
7 constitute a creeping expropriation of a going-concern  
8 enterprise, that is the business that Kaloti conducted  
9 in Perú.

10           And it basically, for purposes of  
11 understanding how this works, it is important for the  
12 Tribunal to understand what the business strategy of  
13 Kaloti Metals was in Perú. This was a business of  
14 very small margins, so Kaloti needed a substantial  
15 number of Suppliers willing to sell large amounts of  
16 gold to Kaloti Metals; and it also required Buyers  
17 willing to buy those same large amounts of gold from  
18 Kaloti. Kaloti Metals had both. It was able--it  
19 positioned itself in the market in the first year, in  
20 2013 it approximately sold \$1.3 billion.

21           And why was that? Simply because Kaloti's  
22 strategy was to pay its local providers of gold, its

1 Sellers of the gold, at the time Kaloti Metals  
2 received the gold in Perú, in its Peruvian facilities.  
3 Other competitors in the market waited to make that  
4 payment after the gold was re-exported and paid by the  
5 Company that was receiving the gold outside Perú.

6 This required Kaloti to finance the  
7 acquisition. It was assuming a substantial risk; and,  
8 for that purpose, it entered into loan agreements with  
9 its main Purchaser of gold, [REDACTED] in Dubai.

10 Basically, for the purchase of these particular  
11 shipments of gold, Kaloti Metals loaned approximately  
12 \$12 million.

13 The actions taken by Perú basically  
14 torpedoed the business model that Perú--that Kaloti  
15 Metals had implemented. Why? Because it wasn't able  
16 to resell that gold; and, since it didn't have the  
17 money in hand, it couldn't pay for the loan, so it had  
18 to keep on accruing interest in the loan. And that,  
19 according to the calculations made by Secretariat, was  
20 a substantial burden that is quantified at  
21 approximately \$8 million a month. This created a huge  
22 debt burden on Kaloti Metals which eventually led to

1 the failure of its business in Perú and worldwide.

2           Perú's measures also forced Kaloti Metals to  
3 suffer adverse effects on Working Capital and higher  
4 cost per unit.

5           With this, I finalize my portion of this  
6 initial statement and pass the microphone to my  
7 colleague, Gabriella Hormazabal, who will be  
8 discussing damages.

9           Thank you.

10           PRESIDENT McRAE: Thank you very much.

11           MR. DÍAZ-CANDIA: We respectfully ask for a  
12 check on time.

13           SECRETARY KETTLEWELL: It's two hours and  
14 three minutes.

15           MR. DÍAZ-CANDIA: Okay. Thank you.

16           MS. HORMAZABAL: Good afternoon. My name is  
17 Gabriella Hormazabal, and I will be presenting the  
18 damages portion of this Opening Statement.

19           In summary, Claimant is seeking three  
20 separate main heads of damages, specifically lost  
21 profits, indirect expropriation of gold inventory, the  
22 physical assets, and indirect expropriation of KML's

1 enterprise as a going-business concern.

2 Here are Claimant's Quantum Expert's initial  
3 calculations of damages, which has been revised after  
4 a more detailed analysis of evidentiary documents took  
5 place, and he no longer applied taxes to earnings,  
6 which will be later further discussed in this  
7 presentation.

8 Here are the updated damages calculated by  
9 Claimant's Quantum Expert from Secretariat. As you  
10 can see, lost profits have been calculated based on  
11 incremental cash flow until November 2018 and resulted  
12 in damages in the amount of 27 million.

13 Expropriation of the gold inventory, the  
14 physical inventory of gold, was calculated based on  
15 its physical properties and gold prices using  
16 different dates. Specifically Claimant is seeking the  
17 highest of 17.6 million plus Pre-Award Interest or  
18 24.6 million as of November 2022, which will be  
19 updated to a date closer to the Award Date.

20 Apologies.

21 (Pause.)

22 MS. HORMAZABAL: Finally, Claimant is also

1 seeking for the expropriation of the enterprise which  
2 was based on the cash flow projected after  
3 November 30, 2018, as if the business had continued.  
4 70.1 million.

5 In the next few slides, I will discuss  
6 causation.

7 It is undisputed that causation may be  
8 determined by using factual causation or the but-for  
9 test; and legal causation, which filters harms too  
10 remote, not proximate or not foreseeable.

11 Importantly, it is not necessary to prove that Perú's  
12 actions were the sole cause of KML's injuries. This  
13 is confirmed by commentaries to Article 31 of the ILC  
14 Draft Articles, which explains that "the existence of  
15 one contributing cause does not exclude the causality  
16 of the other (and vice versa)." I invite the Tribunal  
17 to review these Commentaries.

18 Standard and burden of proof. Jurisprudence  
19 has confirmed that the causation of damages cannot,  
20 and is not, required to be proven with absolute or  
21 mathematical certainty. This is stated in Ioan versus  
22 Romania. Here, KML has proven with either a balance



1 of probability or in all probability (with a  
2 sufficient degree of certainty), that the decline and  
3 subsequent total loss of KML's business was the result  
4 of the Measures taken by the Peruvian Government.

5           The Tribunal in Ioan versus Romania stated:  
6 "This principle has been generally understood to mean  
7 that the Claimant must be placed back in the position  
8 it would have been in all probability but for the  
9 international wrong. In most cases, this involves the  
10 payment of compensation."

11           Other than accusing KML of being affiliated  
12 with [REDACTED], which Perú  
13 speculates contributed to the loss of value of KML's  
14 investments, Perú has presented no evidence whatsoever  
15 to support its alternative theories of causation nor  
16 evidence of self-destructing actions by KML. Again,  
17 Perú is attempting to portray KML as guilty by  
18 association and providing innuendos.

19           So, but for Perú's Measures, KML would have  
20 exported all Five Shipments of gold to the United  
21 States and had been able to resell them. Perú has  
22 admitted in this Arbitration that Perú took and is

1 still maintaining as of today physical control and  
2 actual possession of at least four shipments of KML's  
3 gold seized. This is self-evident.

4 Shipment No. 5 was also adversely affected  
5 by Perú's Measures and was ordered to be seized and  
6 even sent to Perú's Banco de la Nación. There is a  
7 portion in one of the Orders that states that the  
8 export was prevented by SUNAT's intervention in  
9 January 2014. The Measures, the gold  
10 immobilization/seizures taken by Peruvian Government  
11 had a direct and proximate severe impact on KML's  
12 operations, both in Perú and worldwide. By seizing  
13 the gold shipments for over eight years, Perú deprived  
14 KML of a large amount of liquid assets, 17.6 million  
15 at 2014 values that KML could not resell, increasing  
16 KML's Operating Costs, and thus the average cost per  
17 unit of gold purchased.

18 The variable interest rates on [REDACTED]  
19 [REDACTED] loans also raised. KML was placed in a  
20 negative networking capital position. The seizure of  
21 gold inventory prevented KML from reinvesting the  
22 value in its business. KML could have used such

1 amount to service all its debts in or by 2018.

2           As noted by the Tribunal in Hydro versus  
3 Albania, where a tribunal finds that "there has been  
4 an expropriation or total destruction of an  
5 investment, it is unnecessary to consider the causal  
6 link between each specific act and claimed loss,  
7 rather it is merely a matter of compensating the  
8 Claimant for the Market Value of its Investment."

9           Further, the Tribunal in Hydro versus  
10 Albania found that: "The fact that the seizure  
11 decisions are temporary, in a sense of lasting only so  
12 long as the Criminal Proceeding is pending, is  
13 therefore not relevant if the practical effect of even  
14 a temporary seizing of assets is that the Company  
15 could not pay its outgoings, leading to the Company's  
16 value being permanently destroyed." This is very  
17 similar to what has happened to this case at bar.

18           Moreover, the Tribunal in Hydro versus  
19 Albania stated, that as a formal matter, it is true to  
20 say that the seizure decisions did not prevent these  
21 liabilities from being paid from other sources by the  
22 Investors. However, the evidence in that case was

1 clear that this was a practical impossibility due to  
2 the allegations that underpinned the seizure decisions  
3 and the criminal investigations more broadly. This is  
4 also the case here.

5           Perú's quantum experts have incurred in  
6 several intrinsic contradictions. For instance,  
7 Perú's Quantum Expert Brattle argues that there was no  
8 reason to deem the inventory lost on November 30,  
9 2018, as if to say that KML was not really financially  
10 insolvent on November 30, 2018. However, the same  
11 experts seem to suggest that the inventory should have  
12 been written off way before 2018 because even a  
13 relatively small chance that the inventories would not  
14 be returned was more than sufficient to make KML  
15 effectively insolvent.

16           Notwithstanding, it is agreed that as of  
17 November 30, 2018, KML's Balance Sheet, after  
18 adjusting for the value of the inventory, reported a  
19 negative value of equity. This was confirmed in  
20 Brattle's, Perú's Quantum Expert's Second Report, in  
21 Paragraph 210.

22           Perú's own Quantum Experts have implicitly

1 admitted and declared, without a doubt, that the  
2 seizures--the seizure of the inventory by Perú  
3 similarly led to KML's insolvency, even if such  
4 experts disagree about the date when the inventory  
5 should have been deemed irreversibly lost, as you will  
6 see below.

7           There is an unquestionably direct causal  
8 link between Perú's seizure of KML's gold inventory  
9 and KML's insolvency, as a going-concern business  
10 enterprise globally. Such insolvency would not have  
11 occurred but for the seizure of the gold inventory.  
12 The same is true as to KML's lost profits. The  
13 insolvency was caused by, and, in Perú, and directly  
14 affected KML's entire operations. This has been  
15 confirmed in Secretariat's Second Report, see  
16 Paragraph 6.5.

17           Another triggering event of KML's insolvency  
18 is proven by [REDACTED] letter  
19 of November 14, 2018, approximately two weeks prior to  
20 KML's cessation of operations, wherein it says the  
21 following: "[REDACTED] will no  
22 longer give advances to Kaloti Metals & Logistics with

1 immediate effect due to the large outstanding  
2 balances, liquidity blockage and the big reduction in  
3 gold supply from your firm. We urge you to take  
4 immediate action to settle the outstanding credit  
5 amount."

6           As you will understand below, the unfair and  
7 unreasonably long cloud of suspicion created by Perú  
8 against KML caused financial institutions to stop  
9 dealing with KML. Not only did some banks inform  
10 Ms. [REDACTED] that the accounts were being closed  
11 because of red flags due to the Peruvian-related  
12 investigations, but there is also a clear proximity  
13 and connection in time between KML's Bank Account  
14 Closures and Perú's Measures.

15           In late November-December 2013, Shipment 1  
16 was immobilized. In January 2014, Shipments 2 to 4  
17 were immobilized. In February 2014, the first news  
18 article alluding to KML being involved in  
19 money-laundering was published. Subsequently, KML's  
20 bank accounts closures followed.

21           Without ample access to financial  
22 institutions, KML could not continue its legitimate

1 and successful strategy actually proven to have been  
2 successful and effective in 2013 of paying Sellers of  
3 Peruvian gold very promptly and at prices better than  
4 those paid by KML's competitors.

5           Furthermore, Suppliers and Sellers of gold  
6 in Perú and other Latin American countries were not,  
7 and needed not be concerned with investigations or  
8 allegations in Europe and Africa about entities  
9 different from KML. KML is not only a separate and  
10 distinct corporate entity from those supposedly  
11 investigated elsewhere, but also KML was established  
12 in and is directly subject to the laws, regulations,  
13 and supervisions of the United States.

14           It is well-known that the United States is a  
15 jurisdiction well reputed for having strong  
16 anti-corruption legislation and enforcement, which  
17 includes statutes covering corruption of the United  
18 States entities and persons in other countries like  
19 Perú. However, Perú publicly made a direct, unfair  
20 connection between KML and money-laundering. That is  
21 what spooked the Sellers of gold, potential new  
22 Sellers or Suppliers in Perú, and other countries, and

1 banking institutions.

2           The evidence in this case also clearly  
3 demonstrates that the actual loss of Suppliers in Perú  
4 and other countries was due to the actions and  
5 omissions of Perú. There was a campaign against KML  
6 legally traceable to Perú who breached its own laws  
7 regarding the confidentiality of investigations.  
8 KML's reputation in Perú and other Latin American  
9 countries was tarnished by such leaks. This further  
10 affected KML's and Mr. [REDACTED] relationship with  
11 their Suppliers, lowering the amount of gold they were  
12 able to purchase, which ultimately resulted in a  
13 complete loss of KML's business on November 30, 2018.  
14 Perú's distorted expectations regarding causation  
15 issues are unduly burdensome and impossible to be met.  
16 Nevertheless, causation has been shown throughout this  
17 Arbitration. I have here an excerpt that comes from  
18 the February 2014 El Comercio Article, which explains  
19 that the story was strictly confidential until El  
20 Comercio found out that SUNAT personnel, after  
21 receiving information about exportation with risk  
22 profiles, began operations in the warehouses of Talma.



1           There is no need for KML to prove that Perú  
2 intentionally or purposefully leaked the details of  
3 the investigations. Perú has ardently asserted in  
4 this Arbitration, that the investigations, which  
5 includes risk profiles, were confidential. The  
6 foregoing meant that Perú itself, as a conductor of  
7 the investigations, had an affirmative legal duty to  
8 maintain confidentiality and actively protect its  
9 investigations against leaks. Nonetheless, details of  
10 the relevant investigations were published in the  
11 Peruvian press and media. Here, *res ipsa loquitur*,  
12 the things speak for themselves, applies, and only one  
13 logical conclusion can follow: The Peruvian media  
14 published damaging articles about KML because Perú  
15 breached its legal duty of confidentiality, be it  
16 assertively or by omission.

17           I'm going to skip this slide because we were  
18 asked.

19           Perú has admitted in this Arbitration that  
20 KML is under investigation, but that such  
21 investigation has not progressed. There have been no  
22 subsequent actions against KML since January 9, 2017.

1 There was not even a risk profile prepared by Perú  
2 concerning KML.

3           During the Redfern exchanges, Perú states  
4 Perú confirms that it has conducted a reasonable  
5 search and has not found any risk profiles prepared by  
6 SUNAT, and the INPCFA on Kaloti, whereas they had  
7 prepared allegedly the risk profiles on the Suppliers.  
8 To date, such alleged investigations have not  
9 progressed or resulted in anything more than simply  
10 inserting KML's name amongst others in a very long  
11 list of Parties purportedly being investigated.

12           Due to KML's loss of its gold, loss of its  
13 established vendor base, bank account closures,  
14 insolvency, and it's ruined reputation, KML was never  
15 able to return to a position in which it was able to  
16 purchase similar quantities of gold as it had acquired  
17 in 2013. Further, it was unable to acquire a new and  
18 solid customer base that it would have needed to  
19 source 45,000 kilograms of Peruvian gold, which has  
20 proven to be a demand of its purchasers. This has  
21 been clearly expressed by various witnesses in this  
22 case, as you will see below.

1           Perú's unduly prolonged interim seizures of  
2 gold, a drawn-out loss of access to the significant  
3 quantities, resulted in a greater cost of operating  
4 KML's business, greater financing costs, lower  
5 profits/cash flows, and the lengthened inability to  
6 sell the inventory of those Five Shipments, that are  
7 still to this day in Perú's possession. After  
8 exhausting its options and attempting to mitigate its  
9 damages, meaning KML continued operations past the  
10 initial Immobilizations, KML was forced to shut down  
11 its operations due to its inevitable insolvency in  
12 November 2018.

13           Based on the Quantum Expert's analysis, by  
14 November 30, 2018, all of the prolonged Measures taken  
15 and omissions incurred by Perú resulted in permanent  
16 and irreversible economic losses for KML. This is  
17 undisputed. As you will see Perú's experts have  
18 agreed that, as of November 30, 2018, KML's balance  
19 sheet reported a negative value of equity.

20           KML's equity turned negative on that date,  
21 and KML became de facto insolvent after having to deem  
22 its gold inventory lost for issues relating to

1 valuation, specifically in indirect expropriation,  
2 including the setting of an appropriate Valuation  
3 Date, you can see the expropriation and valuation in  
4 the BIT generation.

5           It was Perú's actions and omissions that  
6 caused KML's financial crisis, an outcome that would  
7 not have occurred in the absence of SUNAT's initial  
8 actions as combined with subsequent actions and  
9 omissions of Perú's prosecutors and criminal courts as  
10 discussed in the previous sections.

11           Perú has presented alternate causation of  
12 damages theories as a defense in this Arbitration,  
13 specifically that KML's reputation and ability to  
14 purchase more gold was damaged by investigations and  
15 claims made outside of Perú and not against KML. And  
16 KML deviated business--Perú also alleges that KML  
17 deviated business to [REDACTED]  
18 another company founded by Mr. [REDACTED] It is  
19 Perú who has the burden of proving its own alternate  
20 causation theory, which it has not done so. However,  
21 Perú has only presented innuendo, elucubrations, and  
22 speculations regarding purported effects of

1 investigations in England and Africa against companies  
2 different from KML. Further, [REDACTED]  
3 [REDACTED] did not have commercial operations in 2018.  
4 2018 is when KML's business was closed--ceased  
5 operations.

6 As previously discussed, KML was domiciled  
7 in and continues to be legally in good standing with  
8 the State of Florida and the United States as of  
9 today, which is a serious jurisdiction well reputed  
10 for having high standards in anti-money-laundering and  
11 anti-corruption regulations and enforcements. KML's  
12 Suppliers were aware of this, as all of the gold KML  
13 purchased in Perú and other Latin American countries  
14 between 2012 and 2018 were exported to the United  
15 States.

16 Also, all payments by KML were originated in  
17 the United States. Hence, Sellers, Suppliers of gold  
18 never expressed to KML and, in fact, had no plausible  
19 discernible reason to be concerned or apprehensive  
20 regarding any alleged investigations of other entities  
21 and different people in Europe or in Africa.

22 In contrast, the investigations in Perú

1 which, indeed, have specifically mentioned KML itself,  
2 remain, according to Perú, open and unconcluded as of  
3 today, having been prolonged for more than seven  
4 years. Perú has expressly admitted this. The undue  
5 lengthening of the actual physical taking of KML's  
6 gold, and the prolongation and leaking of related  
7 investigations in Perú, by Perú, is what caused a  
8 total loss of KML's investments.

9           This is not the first time that interim or  
10 temporary measures by SUNAT exceeded its authority and  
11 caused an expropriation. The Tribunal in Tza Yap Shum  
12 versus Perú considered that the preventative measures  
13 taken by SUNAT caused the expropriation of the  
14 Claimant's investment, and found Perú liable for those  
15 actions and consequent damages. Here, SUNAT also  
16 exceeded its authority and required more documents  
17 than necessary under Peruvian law, that exceeded the  
18 temporary immobilizations and Peruvian Courts exceeded  
19 the terms of the judicial seizures. Importantly, this  
20 Tza Yap Shum versus Perú Award was been confirmed and  
21 was not annulled. Again, Claimant has established and  
22 is seeking three main heads of damages.

1           The first is the lost profits of KML which  
2 were caused by Perú's breach of Articles 10.3 and 10.5  
3 of the U.S.-Peru TPA, including because, unduly  
4 prolonging of the interim seizures of KML's gold, and  
5 failure to prevent the disclosure (leaks) of its  
6 confidential investigations.

7           KML's Quantum Expert revised the lost  
8 profits calculation from his First Report as he no  
9 longer applies taxes to the projected earnings, hence  
10 there is no need for a gross-up; updates were made to  
11 the Working Capital calculation; and the Pre-Award  
12 Interest was updated to reflect such changes.

13           Lost profits relates to the period after the  
14 Measures from January 2014 up to 2018. For purposes  
15 of the U.S.-Peru TPA, this particular loss was  
16 incurred and became actionable on November 30, 2018.  
17 This is because the treaty breach by Perú was a series  
18 of actions or omissions which only as defined in the  
19 aggregate are sufficient to constitute an  
20 international wrongful act. The initial temporary  
21 Immobilizations of gold by Perú in 2013 and 2014, and  
22 further subsequent actions and omissions by Perú,

1 together breached the U.S.-Peru TPA. KML's total lost  
2 profit claim became financially irreversible in 2018  
3 when KML's economic viability was impaired, not merely  
4 because Perú initiated investigations about the origin  
5 of the seized gold, but rather because Perú  
6 arbitrarily extended and prolonged its holding of the  
7 gold for far too long and caused reputational harm and  
8 other adverse consequences against KML.

9           To briefly explain the lost profits  
10 calculations, it is important to understand that lost  
11 profits encompasses the lost net cash flows from KML  
12 Enterprise starting from January 1, 2014, to  
13 November 30, 2018, the Valuation Date, brought forward  
14 to their Present Value as the Valuation Date using an  
15 appropriate Interest Rate.

16           In the Quantum Expert's Second Report, the  
17 Pre-Award Interest was calculated through December of  
18 2023. Claimant's actual cash flows, which are now  
19 considered historical values, including cash flows  
20 resulting from mitigation efforts from 2014 through  
21 2018 were subtracted from the but-for cash flows  
22 during the relevant period.



1           To be clear, KML attempted to mitigate its  
2 damages by continuing to operation, even after the  
3 initial Measures. In sum, after analyzing KML's  
4 historical trend, growth in revenues, and available  
5 contemporaneous records for its gold demand, the  
6 Quantum Expert forecasted the but-for revenues based  
7 on the estimation of what would have been KML's Market  
8 Share of the gold market, absent Perú's wrongful  
9 Measures. Needless to say, after comparing  
10 Secretariat's volumes with the observed historic  
11 trend, it is clear that Secretariat chose a  
12 conservative approach.

13           Additionally, KML's Quantum Expert  
14 considered actual economic development, such as annual  
15 gold production, gold price, taxes, Working Capital,  
16 and other actual economic developments which occurred  
17 during this historical period. This approach allowed  
18 Secretariat to forecast without inherent forecasting  
19 errors, and calculate a conservative restitution as  
20 close to reality as possible. The Claimant's Quantum  
21 Expert found that the Present Value of KML's lost  
22 profits is 27-point--approximately 27.1 million before

1 Pre-Award Interests are added.

2           The next main head of damage is the claim  
3 for the gold inventory Shipments 1 through 5 that were  
4 creepingly expropriated by Perú. This claim is based  
5 on the breach by Perú of Article 10.7 of U.S.-Perú TPA  
6 which consummated on November 30, 2018. KML's Quantum  
7 Expert conducted a deep analysis to value the Five  
8 Shipments that were immobilized and subsequently  
9 seized by Perú's measures.

10           KML's Quantum Expert has updated  
11 calculations of the inventory value and has adopted  
12 lower weights which correspond to the net weight based  
13 on documents with invoice level details.

14           Here is a chart showing the value of seized  
15 gold as of November 30, 2018. The Valuation Date.  
16 Here the Quantum Expert multiplied the net or pure  
17 weight of gold by the price of gold at November 2018  
18 prices to arrive at the values in the last column.

19           Perú has attempted to allege that  
20 approximately 0.08 percent of the total value assigned  
21 by KML to the inventory seized by Perú should be  
22 deducted because volumes used are unrefined, but this

1 is inaccurate. Perú attempts to discount what would  
2 have been the cost of refining the gold. However,  
3 this was not stated as being KML's practice.  
4 Nonetheless, KML's Quantum Expert's volumes are  
5 already reflected and accounted for such  
6 considerations, as you will see in his Second Report.

7           Importantly, Claimant's Legal Expert  
8 explains that the sales contract requires agreement on  
9 the price, the specific object, and the delivery of  
10 the object to the person that's engaged by the Buyer.  
11 Since it is a consensual agreement, it is perfected.  
12 The Contract generates obligations for both Parties  
13 with the meeting of the wills intent between the  
14 Parties. Therefore, it does not require the effective  
15 payment of the price. Where Perú had further claimed  
16 that KML could not carry as inventory or be the owner  
17 of shipments for which KML has not effectively paid,  
18 Claimant's Legal Expert has provided this information  
19 regarding the actual deal of the Parties is what  
20 mattered.

21           KML's agreement with the Suppliers met all  
22 of the levels necessary for a Sales Contract. The

1 gold was delivered to KML's office. Whether payment  
2 was made or the Contract was breached is a separate  
3 issue not relevant to this Arbitration. What matters  
4 is that there was an actual taking of KML's property  
5 without compensation and without due process.

6           Concerning Shipment No. 5, a court's  
7 decision invoked by Perú dated 2022, after this  
8 Arbitration began, which purports to transfer the  
9 ownership of Shipment No. 5 back its Supplier [REDACTED],  
10 further confirms that on November 30, 2018, KML was  
11 the legal owner of such gold under Peruvian laws. The  
12 valuation of KML as a going-concern business  
13 enterprise, KML's Quantum Expert adjusted (subtracted)  
14 for all of the debts of KML, including those owed to  
15 [REDACTED] and [REDACTED]

16           Perú cannot use in its favor in this  
17 Arbitration, facts that actually occurred after the  
18 Expropriation Date. In addition, it is important to  
19 note that the only reason why KML could not actually  
20 pay [REDACTED] and [REDACTED] was precisely because of  
21 Perú's Measures. And KML could not turn the gold into  
22 cash. Whether or not KML will have to make payments

1 to its creditors in the future and for what specific  
2 amount, if any, is an issue external and irrelevant in  
3 this Arbitration.

4           In this Arbitration, KML is entitled to  
5 damages, including for the expropriation of Five  
6 Shipments of gold as if Perú had never seized the  
7 gold. The Arbitral Award will need to effectively  
8 erase all economic effects of Perú's actions and  
9 omissions, including as to KML's gold inventory, which  
10 KML carried in its Financial Statements until at least  
11 2018. KML has been very clear and consistent  
12 throughout this Arbitration specifying the volume,  
13 weight of gold, that Perú seized, in Terms of gross  
14 weight. In 2013 and 2014, SUNAT temporarily  
15 immobilized 448,566 net grams of gold from KML, and  
16 according to the documents provided by Perú in this  
17 Arbitration, there were subsequent judicial seizure  
18 orders that were then issued. This indirectly  
19 (progressively or creepingly) expropriated gold would  
20 be valued at 24-point--approximately USD  
21 24.5 million on November 2022 prices which will be  
22 adjusted to prices closer to the Award Date. The gold

1 inventory could also be valued at USD 17.6 million as  
2 of the Valuation Date November 30, 2018. This  
3 alternative scenario requires adding Pre-Award  
4 Interest.

5           Because the expropriation of the inventory  
6 was progressive, creeping, and unlawful, KML is  
7 entitled to be compensated at whatever results in the  
8 highest on the date of the final Arbitral Award  
9 between the value of the gold inventory at 2018 prices  
10 plus the Pre-Award Interest or the value of the  
11 inventory at the then current prices. KML hereby  
12 respectfully requests compensation on such precise  
13 Terms.

14           The third and last head of damages, the  
15 expropriation of KML as a going-concern business  
16 enterprise, also became legally cognizable on  
17 November 30, 2018. It is based on the breach by Perú  
18 of Article 10.7 of the TPA consummated on such date.  
19 Similar to lost profits, KML's Quantum Expert revised  
20 his calculation of this head of damage from his First  
21 Report. The Enterprise Value now reflects no tax and,  
22 hence, cash flow increased, and the updated Pre-Award

1 Interest reflects such increases.

2           Here, the Quantum Expert used a DCF  
3 valuation analysis which includes forward-looking  
4 assumptions and projections. For conservative  
5 reasons, however, Secretariat did not model any  
6 additional Gold Reserve developments in Perú, thus  
7 limiting total volumes that KML could have acquired  
8 through 2048.

9           A forecast cannot be 100 percent  
10 certain--that is impossible in practice. Prior  
11 tribunals have confirmed that mathematical certainty  
12 is not required. KML has presented a reasonably  
13 logical and conservative valuation using generally  
14 accepted valuation practices and applicable standards,  
15 which minimized the risk of overstating KML's revenues  
16 and expenses.

17           Perú's own Quantum Expert presented their  
18 own calculations of damages incurred using the same  
19 DCF method, relying on KML's calculations. Perú's  
20 Quantum Experts simply made modifications to account  
21 for certain purported differences, alleged errors, or  
22 quantitative consequences, all based on assumptions

1 instructed by Perú's lawyers.

2           Here are Perú's main adjustments. It is  
3 worth noting that Perú's proposed but-for volumes  
4 assigned to KML are greater than the actual volumes  
5 purchased by KML between 2014 and 2018, which  
6 effectively confirms that KML's volumes were  
7 negatively impacted by the actions and omissions of  
8 Perú.

9           KML's separation of claims and their  
10 relevant quantifications are warranted because, first,  
11 the lost profit claim is based on Perú's breach of  
12 Articles 10.3 and 10.5 of the Treaty, whereas the two  
13 expropriation claims are based on Perú's breach of  
14 Article 10.7 of the Treaty.

15           Second, the lost profit claim was calculated  
16 on an analysis of cash flow lost until November 30,  
17 2018, whereas the expropriation claims used two other  
18 different methodologies. The first, the price value  
19 of the gold inventory seized by Perú; and for the  
20 expropriation of the business, they used DCF  
21 projections after November 30, 2018, as if the Company  
22 had continued. It should be further noted that



1 Secretariat's damages calculations ensure that there  
2 is no double-counting.

3           Perú and its Quantum Experts vigorously  
4 attacked and disregarded KML's Buyer's demand for  
5 45,000 kilograms of Peruvian gold per year referring  
6 to it as a "short-term forecast," and without taking  
7 into consideration the established commercial  
8 relationship of the entities. For that reason, Perú's  
9 modeled volumes remain grossly below the known demand  
10 that actually existed at the time. On average,  
11 approximately a third lower compared to the 2013  
12 volumes.

13           Per Secretariat's conservative methodology,  
14 the gold volumes included in KML's damages  
15 calculations experience compounding decline over time.  
16 This is due to the assumed decline in gold production  
17 in Perú, which did not take into account any new  
18 discovery as assumed by Secretariat, and additional  
19 risk adjustments which will be shown in the next  
20 slide. Therefore, the gold volumes projected by KML  
21 are conservatively well below the 45,000 kilograms of  
22 gold per year that KML proved as an actual demand.

1           Here you will see that Secretariat already  
2 accounted for competition in its calculations of KML's  
3 damages.

4           Perú has presented unfounded projections  
5 that assume that a status quo should be maintained  
6 from 2013 through 2014. For example, 35 years without  
7 any growth in Market Share by KML using  
8 questionable--using a questionable submarket, as you  
9 will see on the next slide. Perú's Quantum Experts  
10 speculates that a reason for KML's loss of Market  
11 Share could have been due to stronger competition,  
12 without any evidence. Brattle acknowledges, however,  
13 that KML was able to compete successfully for a period  
14 of approximately 15 months before the occurrence of  
15 the initial set of Measures. Nevertheless, Brattle  
16 assumes that the existing customer base, which was  
17 primarily driven by the artisanal and small companies,  
18 would remain unchanged through 2048.

19           Perú has not provided any reliable support  
20 or evidence for its argumentative and unfounded  
21 exclusion of the vast majority of the Peruvian gold  
22 volumes from KML's access. Perú has presented zero

1 evidence or data evidencing that KML would not be able  
2 to buy gold from the other 71 percent of Peruvian gold  
3 Suppliers, which includes all remaining gold producers  
4 other than just the artisanal and others. Perú simply  
5 assumes, arbitrarily, that the growth experienced by  
6 KML in the initial 15 months of operations in Perú  
7 plateaued, and that in the remaining 35 years of its  
8 business there would be no growth in the Market Share  
9 whatsoever.

10           This graph shows the Subsection that  
11 Brattle, Perú's Quantum Expert, claims to be the only  
12 potential serviceable market available to KML, the  
13 smaller circle. Brattle's forecast fixes the values  
14 based on a static percentage of the small and  
15 artisanal producers which is unreasonable.

16           Lost profits, Perú's Quantum Expert's  
17 projections are unreliable, unreasonable, and  
18 illogical. Lost profits damages should represent the  
19 amount KML lost from 2014 through 2018. This is a  
20 period of time of a little bit less than five years,  
21 while expropriation of the enterprise damages  
22 represents the loss from 2019 through 2048, which

1 represents 30 years. Here, Perú's Quantum Experts  
2 have assessed that lost profits, which comprise of  
3 almost five years of loss, represents more than three  
4 times the amount as the enterprise expropriation  
5 damages, which is comprised by 30 years. You can see  
6 this in their own table where they allege the  
7 3.3 million versus the 13.7.

8 KML's Quantum Experts' forecast is  
9 conservative. This graph compares the future prices  
10 Perú's Quantum Experts, Brattle, used for its  
11 forecasts as of January 2023, this represents the  
12 yellow solid line against the Claimant's Quantum  
13 Experts' future prices, which is the blue solid line,  
14 which has been constant throughout this Arbitration,  
15 against an alternative pricing as of the date of  
16 Secretariat's Second Report, which is represented by  
17 the red dotted line. It is clear that the pricing  
18 curve used by Secretariat is conservative.

19 Claimant has challenged and complained in  
20 this Arbitration of actions and omissions by Perú that  
21 permanently impacted the value of KML's investment as  
22 of November 30, 2018. Therefore, those actions and

1 omissions by Perú must be excluded in a but-for  
2 damages analysis under "full reparation" standard.  
3 Because the expropriation implemented by Perú was  
4 unlawful, KML can actually benefit and hereby request  
5 the application of whatever is most favorable to KML  
6 between the future prices of gold as projected in 2018  
7 or the actual prices after 2018, if higher.

8 KML was not in the business which engages in  
9 risky exploration, development, and production of  
10 mineral properties. Brattle ignores this point. For  
11 the Discount Rate, which is the Weighted Average Cost  
12 of Capital or the lack, Brattle suggests should be  
13 8.4 percent based on the estimated WACC for mining  
14 companies that operate in Perú. Secretariat finds  
15 that a WACC of 5.2 percent is reasonable.

16 The chart here summarizes that the main  
17 risks faced by mining companies globally, it shows  
18 that Brattle's suggestion is inappropriate because the  
19 risks presented are not risks that KML's business  
20 operations face. Out of all of the risks faced by  
21 mining companies, as shown in this figure, the only  
22 ones that applied were possibly supply chain and

1 Capital Banking assistance. This shows that Brattle's  
2 proposed Discount Rate is unreasonable. KML is a  
3 purchase and re-sold business; as such, banking inputs  
4 are more closely related than mining inputs.

5 MR. GRANÉ LABAT: Mr. President, sorry to  
6 interrupt. For the record, Slide 185 that we just saw  
7 also contains a reference to a document that we  
8 believe is not on the record. Thank you.

9 PRESIDENT McRAE: You are simply noting that  
10 point at this point of time?

11 MR. GRANÉ LABAT: Yes, and our objections.

12 MS. HORMAZABAL: In its Memorial on  
13 March 16, 2022, KML requested the Tribunal to order  
14 Perú to pay grossed up damages based on the tax  
15 implications of the Award. This was because  
16 Secretariat had originally calculated after-tax  
17 damages.

18 KML's Quantum Expert has confirmed that  
19 Corporate Income Taxes should not apply to an entity  
20 such as KML because KML is a Florida Limited Liability  
21 Company. As a Default Rule, LLCs registered in the  
22 United States are not subject to Corporate Taxation.

1 Rather, for income-tax purposes, the ultimate  
2 liability resides with its members, the  
3 equity-holders. That is the reason why a tax  
4 liability does not apply here. As such, being a LLC,  
5 tax is not levied on the company itself but on its  
6 members.

7 KML agrees that the members are legally  
8 distinct from Claimant and, therefore their tax burden  
9 should be ignored in this arbitration, but the  
10 compensation to be awarded to KML should not give rise  
11 to any income tax liability under Peruvian law for  
12 which Claimant is not kept whole. An award going to  
13 KML, a U.S. company, would only be subject to the U.S.  
14 Tax Code, and as such must not be subject to taxation  
15 from outside of the United States. KML hereby  
16 reconfirms its request that the Arbitral Award made  
17 clear that damages awarded to KML must be free and  
18 clear of all--of any and all taxes, including Peruvian  
19 taxes.

20 You will see this in Secretariat's reports  
21 as well.

22 Perú and its Quantum Experts have alleged

1 that KML contributed to its own demise because,  
2 according to Perú, KML deviated and channeled business  
3 and commercial Transactions towards [REDACTED]  
4 [REDACTED], a Florida Limited Liability Company  
5 founded by [REDACTED] in 2018.

6 Perú has the burden of proof regarding its  
7 assertion, but Perú has not proven such alleged theory  
8 which, in fact, never occurred. [REDACTED]

9 [REDACTED] is not an affiliate or subsidiary of,  
10 and is not under common control with KML. [REDACTED]

11 [REDACTED], who originally founded [REDACTED]  
12 [REDACTED] is, in fact, as regards to equity

13 interests, a minority owner of Claimant. [REDACTED]

14 [REDACTED] is not a Claimant or a party in this

15 Arbitration. [REDACTED] and [REDACTED]

16 are not, and have never been, members of [REDACTED]

17 [REDACTED]. [REDACTED] has

18 never purchased gold in Perú.

19 Here is a letter from [REDACTED]  
20 accounting expressing that an Income Tax Return for  
21 [REDACTED] was never filed in 2018.

22 Notably, KML ended its operations on



1 November 30, 2018, when its losses crystallized, when  
2 its business was expropriated by Perú and the  
3 outstanding debt became due, prior to the start of  
4 [REDACTED] operations.

5 Also, the Suppliers of gold that [REDACTED]  
6 [REDACTED] has been dealing with since 2019 do not  
7 present a relevant or material overlap or overlay with  
8 Suppliers that sold gold to KML until November 30,  
9 2018. Additionally, none of [REDACTED]  
10 Suppliers are from Perú. While Perú in this  
11 Arbitration alleges that KML should not receive  
12 damages for KML's Transactions related to other  
13 countries, Perú contradicts itself by alleging that  
14 [REDACTED] is relevant to the calculations of  
15 damages.

16 KML has fully disclosed in this Arbitration  
17 all the Suppliers of KML between 2013 and 2018. It  
18 has also produced to Perú on October 12, 2023, the  
19 lists of Suppliers that sold to [REDACTED]  
20 [REDACTED] between 2019 and 2022. [REDACTED] an is  
21 not a successor of KML. What KML had, it lost  
22 entirely and permanently because of Perú's actions and

1 omissions.

2           Perú and KML agree that the Treaty requires  
3 compensation for an expropriation must include  
4 interest at a "commercially reasonable" rate until the  
5 Date of Payment. Perú has argued, however, that the  
6 Pre-Award Interest rate of LIBOR + 4% claimed by KML's  
7 Quantum Expert is not commercially reasonable, and  
8 that the appropriate Pre-Award Interest should reflect  
9 the time value of money and risk.

10           KML's Quantum Expert used LIBOR + 4% because  
11 it approximates Claimant's short-term commercial  
12 borrowing rate for its operations in Perú, which  
13 ranged from 4.75 percent to 7.5 percent, depending on  
14 the amount borrowed. And it closely resembles a  
15 normal commercial rate in Perú.

16           Perú's Quantum Expert does not actually make  
17 an economic or independent assessment as to such  
18 position, but takes refuge in an instruction from  
19 Perú's lawyers.

20           Here, we discuss compound interest. Perú  
21 has not disputed that Pre-Award Interest must be  
22 calculated on a compounded basis.

1           The compensation owed by Perú includes the  
2 lost profits until 2018, the indirect expropriation of  
3 Claimant's gold, and the Fair Market Value of KML's  
4 enterprise as a going concern, absent the wrongful  
5 Measures. As explained, compound interest at a normal  
6 commercial rate must be added to those damages.  
7 Calculated at a rate of LIBOR + 4% compounded  
8 annually, Pre-Award Interest associated with damages  
9 in this matter totals 38-point--approximately  
10 38.8 million until November 2022. This may be updated  
11 to a date closer to the Award Date.

12           Claimant is also seeking post-award compound  
13 interests and costs and expenses associated with this  
14 proceeding. Claimant will submit its statement of  
15 costs and expenses at the close of this proceeding.

16           Perú has made no effort whatsoever to  
17 negotiate or even communicate with KML after April 8,  
18 2019, when the Notice of Dispute--Notice of  
19 Intent--was delivered to Perú by KML. Perú instead  
20 chose to simply wait for KML to hopefully disappear  
21 and go away because of the lack of resources to  
22 commence this Arbitration. Such egregious conduct by

1 Perú constitutes, in and of itself, a violation of the  
2 TPA, and should also be considered for the qualitative  
3 and quantitative adjudications of all other treaty  
4 breaches alleged herein, especially costs and expenses  
5 associated with this proceeding and being here today.

6 Here is an outline summary of Claimant's  
7 request for relief.

8 Thank you very much.

9 PRESIDENT McRAE: Thank you.

10 Do either of my colleagues have a question?

11 ARBITRATOR KNIEPER: No.

12 ARBITRATOR FERNÁNDEZ: No.

13 PRESIDENT McRAE: Then we have no questions.

14 Thank you very much. That brings the end of  
15 the presentation by the Claimants, and we'll start  
16 this afternoon with the Presentation by the  
17 Respondents. We will resume at--

18 (Tribunal conferring.)

19 PRESIDENT McRAE: We actually do have a  
20 question, sorry, but not of you.

21 ARBITRATOR KNIEPER: I have a question which  
22 I wanted--I don't want to specifically ask you, but I

1 want to specifically--I wanted to ask this question to  
2 the Claimant.

3 MR. DÍAZ-CANDIA: Yes, sir.

4 ARBITRATOR KNIEPER: Being all three of you  
5 have been presenting the case, and the question that I  
6 have is: The--you haven't raised that point very  
7 much.

8 In the definition of the "investment," you  
9 talk about the inventory, and you talk about that you  
10 purchased gold. And I suppose that we agree that  
11 legally the commercial activities, commercial  
12 contracts, by themselves are not investments. Would  
13 we agree with that?

14 MR. DÍAZ-CANDIA: I believe we do, in and of  
15 itself, isolated.

16 ARBITRATOR KNIEPER: Okay. And then the  
17 question is what then is there as an investment beyond  
18 the purchase of gold? And you talk about the  
19 structural infrastructure that you were provided.

20 MR. DÍAZ-CANDIA: Yes.

21 ARBITRATOR KNIEPER: And at one point in  
22 time, and perhaps it's a very easy question, you say

1 it was [REDACTED] who opened the offices in Lima, so  
2 it was not the Claimant. And you insist a lot that  
3 there is a difference between [REDACTED] and Claimant,  
4 and you say in your written submissions that it was  
5 not KML that opened the offices but [REDACTED] That  
6 wouldn't be an investment by the Claimants; right?

7 MR. DÍAZ-CANDIA: No, and I apologize for  
8 phrasing it in that matter. The arbitrators have on  
9 the record the Contract for that office and the  
10 Contract for the apartment, and they are made by the  
11 Claimant, Kaloti Metals.

12 ARBITRATOR KNIEPER: So, it's a simple  
13 mistake in your--

14 MR. DÍAZ-CANDIA: Of the phrasing of the  
15 question? Not strictly because [REDACTED] was the  
16 Manager and the founder of the Company. He went to  
17 Perú, he took the decisions on behalf of the Company  
18 in his corporate authority.

19 ARBITRATOR KNIEPER: Yes.

20 MR. DÍAZ-CANDIA: But the Contracts are for  
21 the office, for the apartment, and the employees were  
22 employees of Kaloti Metals, when Claimant attended

1 trade conferences were on behalf of the Company.

2 ARBITRATOR KNIEPER: So, I take it that you  
3 correct your written submission when you talk about  
4 [REDACTED] being the person who financed and organized  
5 the Investments in Perú. You wanted to say the  
6 Claimant did.

7 MR. DÍAZ-CANDIA: The Claimant through  
8 [REDACTED] a corporate entity needs to act through a  
9 human being, and it was him as Manager, but it was all  
10 actions on behalf of the Claimant, Kaloti Metals &  
11 Logistics, that's correct.

12 ARBITRATOR KNIEPER: You say in your written  
13 submission, but anyway--

14 MR. DÍAZ-CANDIA: Yes.

15 ARBITRATOR KNIEPER: It is clear that  
16 whenever you talk about [REDACTED] you mean KML the  
17 Claimant?

18 MR. DÍAZ-CANDIA: Correct, as the founder of  
19 the Company, as the manager of the Company in his  
20 corporate capacity, yes.

21 ARBITRATOR KNIEPER: Okay. Good. Thank  
22 you.

1 MR. DÍAZ-CANDIA: Sure.

2 Mr. Chairman, if we may, I'm sorry for  
3 bringing this up late, we appreciate our colleagues'  
4 assurance that we take at face value that there is  
5 nobody on the other side that is not listed on the  
6 attendees for Perú, but we would like to leave it on  
7 the record who is actually here inside the room today  
8 on behalf of the Republic of Perú on the other table,  
9 very respectfully.

10 PRESIDENT McRAE: Thank you.

11 I believe you said that when they speak you  
12 will introduce the other individuals, or perhaps you  
13 could do it all now just for clarity.

14 MR. GRANÉ LABAT: Thank you very much,  
15 Mr. President. I have introduced my colleagues who  
16 have a speaking role.

17 I think I will go down the table and account  
18 for everyone that is on this side.

19 So, I introduced Mr. Timothy Smyth. Next to  
20 him is Ms. Katelyn Horne. Next to her is Mr. Jhans  
21 Panihuara; next to him, Cristina Arizmendi from Arnold  
22 & Porter; next to her, Andrea Mauri; next to her, Pete



1 Saban; and next to him, Paula Gómez, and next to him,  
2 apart to her, Agustin Hubner. All of them are from  
3 A&P, and I believe that all of them are on the  
4 participants' list.

5 I don't think I'm missing anyone on this  
6 side of room. Thank you.

7 PRESIDENT McRAE: Thank you.

8 MR. GRANÉ LABAT: I'm sorry, I have been  
9 informed that one of our colleagues, Andrés Calderón  
10 had been here but he has since left, but he's also  
11 part of A&P.

12 PRESIDENT McRAE: Thank you.

13 MR. DÍAZ-CANDIA: Thank you very much. And  
14 even if they're not on the list, which again, we take  
15 at face value, we don't object. We simply wanted to  
16 put it on the record, and we appreciate it.

17 PRESIDENT McRAE: Thank you very much.

18 Well, we will break for lunch now and  
19 perhaps we'll resume at 2:15, so we have a full hour.  
20 Thank you.

21 (Whereupon, at 1:12 p.m., the Hearing was  
22 adjourned until 2:15 p.m., the same day.)

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AFTERNOON SESSION

PRESIDENT McRAE: I think we're ready to resume.

Is the Respondent ready, too?

MR. GRANÉ LABAT: We are, Mr. President, and we believe that my colleagues have distributed a hard copy of the slide deck, the PowerPoint presentation, as well as the list of issues, chronology, and Dramatis Personae.

OPENING STATEMENT BY COUNSEL FOR RESPONDENT

MR. GRANÉ LABAT: As you can see, Members of the Tribunal, from the level of participation in this Hearing, Perú takes this case very seriously, and indeed, it is not often that a State faces claims as baseless as those that have been launched by Claimant in this case against measures that pursue legitimate policy objectives of such importance as combating illegal mining and money-laundering. And at this Hearing, we intend to address and debunk not every aspect of Claimant's case because we do not have the time to do that, but certainly to supplement Perú's detailed written submissions which are supported by

1 extensive evidence.

2           But before we address the substance, I wish  
3 to register our firm objection to certain  
4 irresponsible and unbecoming statements made by  
5 Claimant in its presentation this morning.

6           Now, the Tribunal heard counsel for Claimant  
7 state that Perú "is playing with corruption" and also  
8 "Kaloti Metals didn't accede to that corruption, and  
9 that's maybe why this gold has not been returned."

10           Mr. President, Members of the Tribunal,  
11 there is absolutely no evidence of any corruption by  
12 any Peruvian official in connection with this dispute,  
13 and no such allegation had been made by Claimant  
14 before today. It is improper for counsel to suggest  
15 that there might have been. Responsible Parties are  
16 expected to make serious arguments based on the law  
17 and the facts on the record rather than casting  
18 aspersions on the spur of the moment and throwing  
19 serious accusations at the Hearing, and we regret that  
20 Claimant has fallen short of that standard this  
21 morning.

22           Now, Claimant, in its presentation this

1 morning, also stated several times that Perú is, quote  
2 "faking outrage." I assure this Tribunal, without any  
3 reservation, that this Party's outrage is sincere and  
4 justified. Perú stands by the submissions that it has  
5 made throughout this Arbitration. The conduct of  
6 Kaloti, including its grossly-negligent due diligence,  
7 the unsubstantiated nature of the Claims, the sheer  
8 lack of evidence, and the cursory treatment of  
9 applicable law show that Claimant's case is frivolous.

10 Now, Claimant also said that Perú is "serial  
11 Respondent." Now, I believe that I do not need to  
12 explain to this Tribunal the impropriety of this ad  
13 hominem attack by Claimant. In any event, the  
14 excellent track record of Perú in investment  
15 arbitration speaks for itself, having defeated the  
16 vast majority of the Claims that it has faced.

17 Now, having said that, I will begin by  
18 providing a brief introduction to the case, after  
19 which I will yield the floor to my colleague  
20 Mr. Nistal, who will address one of the key and  
21 overarching issues of this case, which is that  
22 Claimant is not the bona fide purchaser of the alleged

1 investment.

2           Then, my colleague Ms. Mélida Hodgson and I  
3 will address Perú's jurisdictional objections and the  
4 merits of the Claims.

5           And then, Mr. Tim Smyth will address the  
6 damages side of the case.

7           And, finally, Ms. Rivas Plata will provide  
8 concluding remarks on behalf of the State.

9           Now, reduced in its essence, this case was  
10 initiated by an American arm of a jewelry conglomerate  
11 that has been implicated in criminal activity in  
12 various jurisdictions, that either knowingly or  
13 negligently traded in "dirty gold," that has invoked  
14 an investment treaty, but which cannot prove that it  
15 ever owned the alleged investment.

16           Now, this purported investor has asserted  
17 claims that fall outside of the temporal scope of the  
18 Treaty, challenges reasonable and justified measures  
19 adopted by the Peruvian authorities to combat the twin  
20 scourge of illegal mining and money-laundering, and is  
21 utterly unable to establish any causal link between  
22 the complained of conduct and the purported loss.

1           The backdrop of the Measures challenged by  
2 Claimant in this case is that gold-producing States  
3 like Perú have experienced a dramatic increase in  
4 illegal mining during the past 20 years. Illegal  
5 mining has had devastating impacts on the environment  
6 and local communities and the fruit of this illicit  
7 activity known as "dirty gold," is frequently used in  
8 the commission of other crimes, including  
9 money-laundering. And like other affected States,  
10 Perú developed a robust legal framework to combat  
11 these crimes.

12           Now, Kaloti, eager to supply gold to its  
13 sister company, ██████████ linked up with  
14 numerous highly-suspect gold suppliers in Perú,  
15 including ████████, ████████, ████████, and ████████.  
16 Now, we refer to these four entities as the  
17 "Suppliers." At issue in this Arbitration are Five  
18 Shipments of gold from these Suppliers, which Kaloti  
19 claims to have purchased between 2012 and 2013, and we  
20 will speak more about that shortly.

21           But, critically, the evidence reveals that  
22 Kaloti was blithely unconcerned--or willfully

1 blind--about the provenance of the gold. It did not  
2 verify, and seemingly did not care, whether the gold  
3 was legal. Kaloti paid lip service to its  
4 due-diligence obligations and casually overlooked the  
5 red flags indicating that the Suppliers were criminal  
6 enterprises trading in "dirty gold."

7           By way of example, while the Suppliers had  
8 alleged that the entirety of the gold was extracted  
9 from certain mines in Perú, the evidence showed that  
10 these mines lacked the required permits to mine gold,  
11 were inoperative, did not belong to the Suppliers, or  
12 belonged to third parties that have expressly denied  
13 having any relationship with the Suppliers.

14           The result of Kaloti's manifest disregard of  
15 its due-diligence obligations was both predictable and  
16 justified. The Superintendencia Nacional de Aduanas y  
17 de Administración Tributaria, or SUNAT, is Perú's  
18 National Customs and Tax Management Agency.

19           Acting in accordance with its statutory  
20 mandate and regulations, SUNAT identified glaring  
21 indicia of illegal activity on the part of the  
22 Suppliers. On that basis, SUNAT immobilized four of

1 the Five Shipments and notified the prosecutorial  
2 authorities of the potentially criminal activity.

3 Now, following these Immobilizations by  
4 SUNAT, Perú's prosecutorial authorities initiated  
5 criminal investigations into the Suppliers, and the  
6 evidence strongly suggested that the gold had been  
7 illegally mined and was being used for the purpose of  
8 money-laundering.

9 Based upon that evidence and pursuant to  
10 Perú's legal framework, Perú's authorities sought and  
11 obtained from the competent Peruvian courts  
12 Precautionary Seizures over the gold.

13 Criminal Proceedings were launched on the  
14 basis of the compelling evidence of criminal activity.  
15 At the outset, the Criminal Courts determined that the  
16 Precautionary Seizures remained necessary to prevent  
17 the dissipation of the gold before the conclusion of  
18 those proceedings. And in particular, if the evidence  
19 proved that the gold was dirty, then it would be  
20 permanently confiscated in accordance, again, with  
21 Peruvian law.

22 Now, money-laundering schemes, including



1 those involving multiple actors, are inherently  
2 difficult to untangle. Nonetheless, the Criminal  
3 Proceedings against the Suppliers have continued to  
4 advance through their different stages in accordance,  
5 again, with Peruvian law.

6           Now, Kaloti is not a party to those Criminal  
7 Proceedings. Still, Peruvian law provided Kaloti with  
8 at least three different remedies through which it  
9 could have intervened and challenged the Precautionary  
10 Seizures. But as Claimant and its Legal Expert have  
11 expressly admitted in this Arbitration, Kaloti elected  
12 not to make use of any of those remedies. Instead,  
13 Kaloti submitted to various entities a handful of  
14 letters, all of which were fundamentally flawed. To  
15 be clear--and as we have demonstrated in our written  
16 submissions--none were consistent with Peruvian law.

17           In sum, in the ordinary course of their  
18 regulatory activities, the Peruvian authorities  
19 identified evidence of illegal activity, adopted  
20 responsive measures that were reasonable,  
21 proportionate, and consistent with Peruvian law.

22           Now, this morning, Claimant predictably

1 sought to criticize Perú for not presenting any fact  
2 witness; and the reason for this is quite simple:  
3 Fact witnesses from the State are wholly unnecessary  
4 in this case. Perú produced contemporaneous  
5 documentary evidence pertaining to the State's  
6 conduct, and Claimant has not and cannot contest that  
7 evidence. The Measures that Claimant challenges were  
8 issued by the customs authority, SUNAT, the  
9 Prosecutor's Office, and Peruvian courts. As Perú has  
10 shown in this Arbitration, those Measures were not  
11 challenged by Kaloti in Perú through the available  
12 legal recourse.

13           In short, the key facts are not in dispute  
14 as they are all supported by documentary evidence such  
15 that the factual testimony from Peruvian officials  
16 would not have assisted the Tribunal. But in any  
17 event, Claimant complains that the contact information  
18 of those officials was not produced by Perú. This is  
19 what we heard again this morning, and in so doing,  
20 Claimant essentially is challenging the recent  
21 decision that this Tribunal reached in its Procedural  
22 Order No. 2 which rejected Claimant's request for that

1 information, the contact information of the Peruvian  
2 officials.

3           And since we are on the issue of Document  
4 Production, and in light of Claimant's request that  
5 this Tribunal draw adverse inferences, I take the  
6 opportunity to respectfully refer the Tribunal to  
7 Section 2(g) of Perú's Rejoinder where we explain why  
8 that request for adverse inferences is unjustified and  
9 has no basis; and, as we explained throughout that  
10 submission, and we will recall today, adverse  
11 inferences should be drawn against Claimant for its  
12 failure to produce documents, that it agreed or was  
13 ordered to produce, but did not.

14           Perú has shown that Claimant, who sought to  
15 buy the "dirty gold" while ignoring glaring red flags,  
16 has the temerity to claim, among other things, that  
17 Perú violated international law by combating crime,  
18 and that Perú's seizure of the proceeds of criminal  
19 activity constitutes expropriation.

20           The Claims not only represent a misuse of  
21 the Investment Treaty between Perú and the United  
22 States but fall outside of the Tribunal's jurisdiction

1 and are manifestly unfounded.

2           And, as we will show, Claimant cannot  
3 satisfy even the most basic jurisdictional  
4 requirement, which is the existence of a covered  
5 investment. Nor can Claimant show that its claims  
6 fall within the temporal scope of the Treaty and this  
7 Tribunal's jurisdiction. And even if the Tribunal  
8 were to reach the merits of the case, which it should  
9 not, it would have to find that the crimes--sorry, it  
10 would have to find that the Claims are wholly  
11 unsubstantiated.

12           And, finally, even if the Tribunal had  
13 jurisdiction, and even if any of the Claims had merit,  
14 Claimant would not be entitled to any compensation  
15 pursuant to both public international law and the  
16 Treaty.

17           And with the Tribunal's indulgence, I will  
18 now cede the floor to my colleague, Mr. Nistal, who  
19 will address certain key facts.

20           MR. NISTAL: Good afternoon, Mr. President,  
21 Members of the Tribunal.

22           In this segment of our presentation, we will

1 explain that Kaloti does not qualify as a bona fide  
2 Buyer of the Five Shipments. We will address a number  
3 of examples of how Kaloti has failed to establish that  
4 it acquired ownership or control over the Five  
5 Shipments; it has failed to show that it conducted  
6 appropriate due diligence on the Suppliers; and it has  
7 failed to prove that it verified the lawful origin of  
8 the gold.

9           As outlined in the next four slides, these  
10 serious failings by Kaloti are highly relevant to the  
11 wide range of questions identified in the lists of  
12 substantive issues that the Parties have submitted in  
13 this Arbitration. Kaloti's failings are fatal to its  
14 claims on jurisdiction, merits, and quantum. For  
15 example, the fact that Kaloti has not established that  
16 it acquired ownership or control over the gold and  
17 that it verified its lawful origin means that Kaloti  
18 also has failed to prove that it holds the covered  
19 investment. Therefore, the Tribunal lacks  
20 jurisdiction *ratione materiae*.

21           It also means that Kaloti did not have any  
22 legitimate interest to intervene in the administrative

1 and Criminal Proceedings directed against the  
2 Suppliers, such that Claimant's denial-of-justice  
3 claims are meritless.

4           It means that the allegedly expropriated  
5 gold doesn't even belong to the Claimant, which is  
6 fatal to its expropriation claims.

7           Equally, Kaloti's failure to conduct  
8 appropriate due diligence means that it is solely  
9 responsible for any losses that it might have suffered  
10 as a result of the Precautionary Seizures of the gold,  
11 such that, in any event, its compensation claims  
12 should be rejected.

13           Numerous specialized agencies and judicial  
14 entities of the Republic of Perú have gathered large  
15 volumes of evidence regarding the Five Shipments.  
16 This evidence proves that Kaloti's Suppliers lied  
17 about the origin of the gold. Perú's State agencies  
18 and judicial entities have conducted on-site  
19 inspections that confirmed that the gold could not  
20 have been extracted from the mines identified by the  
21 Suppliers. They have inspected the Suppliers'  
22 facilities, confirming that no gold could have been

1 lawfully processed there. They have taken statements  
2 from the relevant concession-holders and alleged  
3 miners, some of whom did not even know the Suppliers.

4           Perú's authorities also have prepared Expert  
5 Reports that determined that the Suppliers had forged  
6 the signatures on multiple invoices. The allegations  
7 made by the Suppliers have been contrasted with the  
8 information held by numerous independent State  
9 agencies, including the Financial Intelligence Unit,  
10 SUNAT; the Public Registry Office, and regional  
11 Governments of Perú--all of which detected serious  
12 irregularities and inconsistencies in the  
13 documentation provided by Suppliers.

14           Perú's authorities also have analyzed the  
15 Suppliers' finances which made clear that they lacked  
16 the lawful source of income to produce or buy the  
17 gold.

18           The Ministry of Mining has confirmed that  
19 the relevant mines either had no legal connection with  
20 the Suppliers or lacked the permits required to  
21 exploit gold.

22           The SUNAT, the State Attorney's Office, the

1 Prosecutor's Office, Criminal Courts in each of the  
2 four proceedings against the Suppliers, and at least  
3 one court specialized in Asset Forfeiture, have  
4 unanimously concluded that, to date, the Suppliers  
5 have failed to prove the origin of the gold. They  
6 also have determined that the Suppliers are likely to  
7 have engaged in money-laundering or illegal mining,  
8 specifically in relation to the Five Shipments.

9           On that basis, Perú's courts have rightly  
10 ordered that the gold be precautionarily seized until  
11 the resolution of the ongoing Criminal Proceedings  
12 against the Suppliers.

13           After two rounds of pleadings, Claimant has  
14 failed to rebut any of the evidence underlying these  
15 court decisions. Instead Claimant invokes, I quote,  
16 "a bona fide purchaser defense." Public international  
17 law required that Claimant first invoke this defense  
18 before Perú's courts, and that it do so through the  
19 appropriate procedural avenues. But as you can see,  
20 Claimant has admitted that it failed to follow these  
21 procedural avenues. Nonetheless, Claimant asks this  
22 international Tribunal to find that Perú's courts have



1 failed to recognize Kaloti's alleged rights as a bona  
2 fide Buyer.

3 As the Party making this Claim, Claimant  
4 must prove that Kaloti qualifies as a bona fide Buyer  
5 under Peruvian law, but Claimant has failed to satisfy  
6 that burden of proof.

7 As you can see, the requirements that  
8 Claimant must meet to qualify as a bona fide Buyer  
9 under Peruvian law are codified in Article 66 of the  
10 Asset Forfeiture Regulations.

11 Among other requirements, Claimant bears the  
12 burden of proving that it has met three criteria.  
13 First, that Kaloti acquired ownership over the gold.  
14 Second, that Kaloti displayed honest, diligent, and  
15 prudent behavior. And third, that Kaloti complied  
16 with the laws and regulations applicable to gold  
17 buyers in Perú. But Claimant has failed to any of  
18 these criteria. Claimant fails at the first hurdle  
19 because it has not adduced fundamental evidence needed  
20 to demonstrate that Kaloti ever owned the gold.

21 As you can see, Claimant has repeatedly  
22 alleged that it acquired ownership over the gold

1 pursuant to a series of Purchase Agreements. Perú has  
2 repeatedly challenged Claimant to prove this factual  
3 premise. In the Counter-Memorial, Perú explained that  
4 Claimant had failed to submit the relevant Purchase  
5 Agreements or any other document establishing the  
6 conditions under which Kaloti was to acquire ownership  
7 over the gold.

8           As you can see, Perú then requested that  
9 Claimant produce the Purchase Agreements. Claimant  
10 committed to produce them and the Tribunal noted that  
11 commitment in Procedural Order No. 2. Claimant later  
12 admitted that, I quote, "property changes hands in  
13 accordance with the agreed upon terms normally defined  
14 in a contract."

15           Yet, to this day, Claimant has not produced  
16 any Purchase Agreement for the gold. Notably, earlier  
17 today, Claimant did not show you the Purchase  
18 Agreement for the gold because no such Agreement can  
19 be found in the record of this Arbitration. Instead,  
20 Claimant has produced four proforma Terms and  
21 Conditions for bullion trading. For the record, these  
22 are Exhibits C-165 to C-168.

1           These trading terms lack characteristics  
2 that would have been essential to any Purchase  
3 Agreement for the gold. As you can see, and as  
4 Claimant itself noted in Slide 169 of its presentation  
5 today, Claimant's own Legal Expert has testified that  
6 the Purchase Agreement must reflect: One, the  
7 Seller's undertaking to transfer ownership of a  
8 specific asset to the Buyer; and two, that Buyer's  
9 undertaking to pay a certain price for the asset.

10 Accordingly, Claimant's own expert has explained that,  
11 to qualify as a Purchase Agreement for the gold, the  
12 relevant contracts must reflect an agreement between  
13 the Contractual Parties on the following four issues:

14           First, their intention to enter into a  
15 legally binding commitment to transfer ownership over  
16 the gold, from the Suppliers to Kaloti.

17           Second, the specific amount of gold  
18 contained in each of the shipments.

19           Third, the price that Kaloti undertook to  
20 pay for that gold.

21           And fourth, the conditions governing the  
22 delivery of the gold to Kaloti. But the Trading Terms

1 do not articulate an agreement on any of these four  
2 elements.

3           As shown on the screen, through the Trading  
4 Terms, Kaloti did not commit to buy any gold  
5 whatsoever. Rather, the Suppliers would borrow money  
6 from Kaloti so that they could buy unspecified volumes  
7 of metals, which would then serve as collateral for  
8 the loan. Kaloti would then trade those metals with  
9 third parties on behalf of the Suppliers.

10           In addition, the Trading Terms merely  
11 delineate general rules governing potential  
12 Transactions. And Kaloti expressly reserved its right  
13 not to enter into any such Transactions with the  
14 Suppliers. Thus, the Trading Terms do not reflect a  
15 legally binding commitment to transfer ownership over  
16 the Five Shipments to Kaloti. In fact, the Trading  
17 Terms do not even mention the shipments.

18           They also fail to indicate the specific  
19 quantity of gold that Kaloti would potentially trade  
20 on behalf of the Suppliers, the price that the Buyer  
21 would pay for that gold, and the place or even the  
22 country in which the Suppliers were to deliver the

1 gold to the potential Buyer.

2           In sum, the Trading Terms do not meet any of  
3 the four requirements that the Purchase Agreement must  
4 meet according to Claimant's own Legal Expert.

5           Not only has Claimant failed to prove that  
6 Kaloti qualifies as a Buyer, but the evidence on the  
7 record suggests that Kaloti, in fact, never acquired  
8 ownership over the gold. By definition, any Purchase  
9 Agreement would have required that Kaloti pay the  
10 price of the gold. As you can see, Claimant has  
11 repeatedly argued that it committed to pay its  
12 Suppliers as soon as the gold reached its Lima  
13 facilities.

14           However, as Claimant admitted this morning  
15 here in this Hearing, to this date, Claimant has not  
16 paid the full price of Shipments 1, 2, and 4.  
17 Claimant also admitted that it has made no payment  
18 whatsoever for Shipments 3 and 5.

19           Importantly, a Court has already ruled that  
20 Kaloti does not own Shipment 5 including--because it  
21 has not paid for it.

22           As shown on the screen, Claimant argues that

1 its failure to pay the price for multiple shipments  
2 does not undermine its ownership claim. It alleges  
3 that, once the Suppliers delivered the Shipments to  
4 Kaloti's Lima facilities, Kaloti took possession of  
5 the gold and automatically became its legal owner,  
6 even if Kaloti had failed to pay for the Shipments.  
7 According to Claimant, this argument is based on both  
8 Peruvian law and the Terms of the alleged Purchase  
9 Agreements.

10 But Claimant's argument fails for at least  
11 three reasons. First, Claimant itself has argued that  
12 the alleged Purchase Agreements for the gold were  
13 governed not by Peruvian law but rather by the laws of  
14 Florida. Therefore, the alleged legal effect of the  
15 delivery of the gold under Peruvian law is irrelevant  
16 under Claimant's own account of the facts.

17 Second, Claimant has refused to submit the  
18 Purchase Agreements. As a result, it has failed to  
19 prove that, pursuant to these agreements, ownership  
20 would transfer to Kaloti once it took possession of  
21 the gold in its Lima facilities. There is simply no  
22 documentary evidence of that contractual agreement.

1           Third, and in any event, contrary to what  
2 you heard this morning, Claimant also has failed to  
3 prove that Kaloti ever took possession of the gold.

4           Claimant alleges that, after the Suppliers  
5 delivered the gold to the Lima facilities that Kaloti  
6 rented from Hermes, Kaloti inspected the purity of the  
7 gold and took possession of the gold. According to  
8 Claimant, Kaloti itself was then supposed to export  
9 the gold to Miami. In order to support this  
10 allegation, Claimant has only cited its own witnesses  
11 and its self-serving statements that two Suppliers  
12 made when they were attempting to lift the SUNAT  
13 Immobilizations over the gold. However, like  
14 Claimant's witnesses, these Suppliers failed to submit  
15 any contractual document proving that the ownership of  
16 the gold had, in fact, transferred to Kaloti.

17           Moreover, the representatives of the  
18 Suppliers had extensive criminal records, they lied  
19 about the origin of the gold, and they had an obvious  
20 interest in alleging that the gold belonged to Kaloti.  
21 Therefore, their statements lack credibility and  
22 evidentiary weight.

1           In fact, the unsupported statements of  
2 Claimant and of these dubious Suppliers are directly  
3 contradicted by Claimant's own documentary evidence.

4           Mr. President, Members of the Tribunal,  
5 counsel for Claimant quickly skipped through a series  
6 of slides that had allegedly proved that Kaloti owned  
7 the gold as well that it had conducted due diligence  
8 on the Suppliers on the gold. We will not skip  
9 through the evidence. We want you to see it.

10           For example, the waybill on the screen  
11 concerns the transport of Shipment 1, from the Lima  
12 facilities that Kaloti rented from Hermes to the  
13 airport facilities operated by Talma. Pursuant to  
14 Peruvian law, waybills are issued by the owner or  
15 possessor of the asset being transported. Therefore,  
16 had Kaloti truly taken possession and become the legal  
17 owner of the gold upon its delivery in Hermes  
18 facilities, the waybill on the screen would have been  
19 issued either by Kaloti or by an agent of Kaloti. But  
20 as you can see, the waybill was issued by [REDACTED]. The  
21 Supplier of Shipment 1 therefore remained in  
22 possession of that Shipment, even after Kaloti had



1 tested its purity in its Lima facilities. The same  
2 applies to the relevant waybills concerning the other  
3 Suppliers.

4           The next slide shows an extract of an Air  
5 Waybill prepared for the transport of Shipment 3 from  
6 Lima to Miami. The shipper of the gold was not Kaloti  
7 but rather [REDACTED]. The same applies to the Air  
8 Waybills for the other shipments. In other words, the  
9 Suppliers were expected to remain in possession of the  
10 gold during its export and transport to Miami.

11           Similarly, this slide shows a Customs  
12 Declarations that designates the Supplier [REDACTED] as  
13 the exporter of Shipment 2. Again, the same applies  
14 to the Customs Declarations of the other shipments.

15           Further still, as shown on the screen,  
16 Claimant's own evidence indicates that it was the  
17 Suppliers rather than Kaloti who were legally  
18 responsible for covering the export costs and for  
19 ensuring that the gold was delivered in Miami.

20           Under Claimant's own legal theory, the fact  
21 that the Supplier should remain in possession of the  
22 gold and were responsible for transporting it from

1 Kaloti's Lima facilities to Miami indicates that  
2 Kaloti was to become the owner of the gold only upon  
3 its delivery in Miami. And given that the gold was  
4 never exported to Miami, Kaloti never acquired  
5 ownership over the gold.

6 In short, all of Claimant's treaty claims  
7 rest upon the basic premise that Kaloti at some point  
8 acquired ownership over the Five Shipments of gold,  
9 but there is simply no evidence on the record  
10 demonstrating that Kaloti ever acquired such  
11 ownership.

12 Perú has repeatedly challenged Claimant to  
13 submit the Purchase Agreements for the gold, Claimant  
14 undertook to produce them, but it then failed to do  
15 so.

16 ARBITRATOR KNIEPER: Just a question for my  
17 understanding, because I don't know the laws of  
18 Florida, is the law of Florida different from Peruvian  
19 law in the sense that it requires different criteria  
20 for the transfer of property? Like, in most European  
21 countries, you have constitutals (phonetic) and models,  
22 which means the Contract, and then the transfer of the

1 good. Do you know whether Florida law is different  
2 from that?

3 MR. NISTAL: Thank you, Professor Knieper.

4 I mentioned before that Peruvian law was  
5 irrelevant because the Contracts were governed by  
6 Florida law, and I made that argument because the  
7 Claimant's argument is based on a Peruvian law.

8 Now, in response to your question, we  
9 understand that, under Florida law, like most  
10 jurisdictions, the conditions regarding the transfer  
11 of ownership can be decided by the Parties in the  
12 Contract. So, a contract can provide, for example,  
13 depending on the terms agreed, that ownership would  
14 transfer upon delivery, upon payment, at X moment of  
15 time. We just don't know here because we don't have  
16 the Contract.

17 ARBITRATOR KNIEPER: Okay. I understand  
18 now, yes.

19 And the other question, perhaps you will  
20 give the same answer, but I don't know, would it not  
21 have been possible easily for the two parties like the  
22 Supplier and Kaloti to say the transport costs from

1 Miami to Florida is on the Supplier, but that does not  
2 mean that Kaloti is not already the owner? That could  
3 be agreed; right? Would you agree with that?

4 MR. NISTAL: The short answer is I would  
5 agree, but the argument of Claimant is that they  
6 become the legal owner upon delivery of the gold in  
7 Lima--in Kaloti's Lima facilities. So, they say,  
8 "from that moment we took possession of the gold," and  
9 therefore, according to these Purchase Agreements we  
10 haven't seen, "we became the owners."

11 Now, that's inconsistent with the documents  
12 that I'm showing you. Because if they had taken  
13 possession of the gold in the Lima facilities, then  
14 the waybills, which cover the transport from the Lima  
15 facilities to the airport, they would have been issued  
16 by Kaloti. There would be no reason for the Supplier  
17 to issue a waybill if it no longer has possession over  
18 the gold.

19 ARBITRATOR KNIEPER: I understand what you  
20 mean, but my question actually is, was it not possible  
21 for Kaloti and the Supplier to say "we make it  
22 differently," so the waybill will still be--all the

1 paperwork would still be because there was a very  
2 small shop, as the Claimant says, in Lima, so the  
3 waybill will be issued and filled by the Supplier.  
4 Would that be possible or not?

5 MR. NISTAL: I think theoretically, it  
6 potentially would have been possible. Whether it  
7 would have been legal, that the Supplier issues a  
8 waybill when it's not the possessor or the owner,  
9 that's a different issue under Peruvian law. We don't  
10 know--we assume that there can be all sorts of  
11 contractual agreements. But, based on the evidence,  
12 everything suggests that they remain in possession,  
13 the Suppliers, that they were responsible for the  
14 costs.

15 And not only that, the previous slide that I  
16 showed, made them responsible for making sure that the  
17 gold reached Miami, if they were not the owners, they  
18 would have no reason to agree to such terms.

19 Now, of course, all of this would be solved  
20 if Claimant had submitted the Purchase Agreements.  
21 But to answer your question, we also asked for  
22 Purchase Agreements for thousands of purchases or

1 sales that they alleged to have made with other  
2 deliveries, and you can see that in document  
3 production. They didn't produce any. We don't have  
4 any Purchase Agreement regarding any sale with any  
5 other Supplier apart from one which is in Miami, and  
6 that one, contrary to the Trading Terms, is titled  
7 Purchase Agreement, the Trading Terms are not.

8           So, the reality is we don't know the  
9 arrangements of Claimants but we do know that they  
10 haven't proven ownership in this case.

11           ARBITRATOR KNIEPER: Thank you.

12           MR. NISTAL: I was saying that Perú has  
13 repeatedly challenged Claimant to submit the Purchase  
14 Agreement for the gold, Claimant undertook to produce  
15 them, but then it failed to do so. Either Claimant  
16 has chosen to conceal that crucial piece of evidence,  
17 or the evidence simply does not exist. Either way,  
18 Claimant has failed to prove that it ever acquired  
19 ownership over the gold, as a result, it has not met  
20 the first requirement to qualify as a bona fide Buyer.

21           I will now show that Claimant also has  
22 failed to prove that Kaloti displayed honest,

1 diligent, and prudent behavior. An honest Buyer would  
2 have abided by its own Compliance Manual. A diligent  
3 Buyer would have conducted adequate diligence on its  
4 Suppliers. A prudent Buyer would have refused to buy  
5 gold from companies that raised numerous red flags.

6 Kaloti failed on all three counts. It  
7 breached its own Compliance Manual in numerous ways,  
8 it failed to conduct appropriate due diligence on the  
9 Suppliers, and it traded hundreds of millions of  
10 dollars in gold for companies that raised the most  
11 obvious red flags of money-laundering and illegal  
12 mining.

13 Kaloti's conduct in Perú was irresponsible  
14 in so many ways that I simply do not have time to  
15 describe it fully, but I will show a few examples that  
16 illustrate its reckless behavior.

17 Claimant alleges that the Suppliers of the  
18 Five Shipments are medium size, reputable gold  
19 Suppliers with which Kaloti had developed continuous  
20 and established relationships. At least that's what  
21 it claimed until this Hearing. Today we heard that  
22 maybe they are artisanal. Based on what they said

1 during the pleadings, they claim that they were medium  
2 size, and therefore not artisanal.

3           The reality is that the Suppliers were newly  
4 created companies which have only a handful of  
5 employees, minimum Share Capital, and lacked any  
6 significant experience in the mining industry. None  
7 of them had a website or any type of public-domain  
8 presence.

9           There were shell companies controlled by  
10 suspicious individuals.

11           Claimant's counsel suggested this morning  
12 that the fact that the Suppliers were recently  
13 incorporated companies or had failed to pay taxes in  
14 Perú somehow was irrelevant. It was not. As you can  
15 see, Claimant's own Compliance Manual identified as  
16 red flags the fact that the Supplier is new or  
17 recently established. The fact that it lacks  
18 sufficient industry knowledge and that it displays a  
19 sudden increase in production. All of this is highly  
20 relevant because it is common for money-launderers to  
21 create new companies that immediately trade  
22 significant volumes of illegally mined gold only to



1 then quickly disappear to avoid paying the  
2 corresponding taxes, and that is precisely what the  
3 Suppliers of the Five Shipments did.

4           The timeline on the screen shows that three  
5 of the four Suppliers had been incorporated in 2013,  
6 and all four Suppliers had started their export  
7 operations only days or weeks before Kaloti began  
8 trading gold for them. This confirms that most of the  
9 Suppliers were newly created companies, and all of  
10 them lacked industry knowledge.

11           In fact, as shown on the slide, [REDACTED]  
12 expressly stated to Perú's authorities that it had no  
13 experience in the trade of gold. You can see this in  
14 the quote in the upper part of the slide.

15           The following slide shows that the gold  
16 exports of each of the Suppliers suddenly increased  
17 precisely at the same time they started dealing with  
18 Kaloti. Then, in 2014, all of the Suppliers shut down  
19 their short-lived export operations.

20           Claimant also has repeatedly alleged that it  
21 verified that none of the Suppliers' Ultimate  
22 Beneficial Owners and Shareholders had received

1 adverse media attention, as this would have  
2 constituted a red flag under Claimant's own Compliance  
3 Manual. And yet, multi-Shareholders and Ultimate  
4 Beneficial Owners of the Suppliers had been widely  
5 criticized by the press before Kaloti started dealing  
6 with them.

7 As shown on the screen, [REDACTED], the Supplier  
8 of Shipment 2, was co-founded by an individual called  
9 Alfredo Chamy Román.

10 A cursory Google search would have revealed  
11 that, in 2006, and then again in 2011, two popular  
12 Peruvian TV shows had played a video of Mr. Chamy  
13 shooting in the air in plain sight on the street with  
14 a firearm that he had taken from a police officer. We  
15 will now play that video so that the Tribunal can  
16 assess by itself whether the behavior of [REDACTED]  
17 Founder is that of a reputable gold supplier.

18 (Video played.)

19 MR. NISTAL: In 2011, the press noted that  
20 Mr. Chamy had been found criminally liable as a result  
21 of this incident.

22 As you can see on the screen, by then, the

1 press regularly referred to Mr. Chamy, not as a  
2 reputable individual, but as a violent thug.

3 In 2011, the press also noted that multiple  
4 additional criminal complaints had been filed against  
5 Mr. Chamy, including for physical aggression,  
6 embezzlement, misappropriation of public funds,  
7 extortion, and illicit enrichment.

8 Counsel for Claimant argued this morning  
9 that the criminal background of Mr. Chamy was  
10 irrelevant; but, based on this and numerous other red  
11 flags that Perú identified in its written pleadings,  
12 any prudent gold Buyer would have refused to deal with  
13 [REDACTED] and with any other company associated with  
14 Mr. Chamy.

15 The email on the screen shows that Claimant  
16 knew well that Mr. Chamy--that the Chamy conglomerate  
17 included the recently incorporated companies Darsahn,  
18 Axbridge, Titanium, and [REDACTED] itself.

19 And yet, Kaloti's own Transaction History  
20 confirms that, between 2012 and 2014, Kaloti traded  
21 more than 10,000 kilograms of gold worth more than  
22 US 500 million for these four companies of the Chamy

1 conglomerate.

2           The basic background check on the other  
3 Suppliers of the Five Shipments would have revealed  
4 similar red flags. For example, as shown on the  
5 screen, ██████ was incorporated by Alberto Miranda and  
6 his 24-year old daughter, Yamilia Miranda. The sister  
7 of Alberto Miranda was appointed as the company's  
8 Chief Financial Officer, despite having no higher  
9 education and no corporate experience whatsoever.

10           A diligent gold Buyer would have realized  
11 that all of these individuals were close relatives of  
12 the notorious ████████████████████, alias ██████  
13 ██████. Indeed, as counsel for Claimant noted this  
14 morning, they all shared the Miranda surname.

15           Alberto Miranda was also the Manager of the  
16 company Business Investments, which had been founded  
17 by ██████████. The links between ██████ and ██████  
18 ██████ were obvious.

19           Since the 1990s, ██████████ had been a  
20 notorious individual in Perú. The slide on the screen  
21 shows that the media had repeatedly described ██████  
22 ██████ as a drug-trafficker and a convicted criminal.

1 According to the press, in 2011, [REDACTED] was  
2 considered as the main exporter of illegal gold in  
3 Perú.

4 Had Kaloti truly conducted background checks  
5 on its Suppliers, it would have discovered that  
6 Alberto Miranda himself had spent time in prison for  
7 money-laundering and drug trafficking. He also had  
8 been investigated for fraud, and for the manufacture,  
9 supply and possession of weapons. In sum, [REDACTED] was  
10 not a reputable gold trader. Like [REDACTED], it was a  
11 recently established shell company controlled by  
12 highly suspicious individuals.

13 In these circumstances, no prudent company  
14 would have acquired gold from [REDACTED]. Kaloti, however,  
15 traded hundreds of kilograms of gold and silver for  
16 that company. It also traded more than  
17 1,300 kilograms of gold for multiple other companies  
18 owned or controlled by relatives of [REDACTED]  
19 These include the newly established company Minera  
20 Nueva Arica, which was managed by a cousin of [REDACTED]  
21 [REDACTED], and the also newly established company  
22 Comercializadora de Minerales Rivero, which was

1 founded with [REDACTED] money and was owned by  
2 his nephew.

3 In sum, Claimant's own Transaction History  
4 shows that 73 percent of the Peruvian gold that Kaloti  
5 traded between 2012 and 2013 was supplied by companies  
6 of the Chamy and [REDACTED] conglomerates. As Perú  
7 demonstrated in its written pleadings, numerous other  
8 Suppliers and business partners of Kaloti have been  
9 investigated or convicted for criminal activities  
10 connected to money-laundering and illegal mining. For  
11 instance, as can you see, Kaloti contracted the  
12 company Transvalue to transport the Suppliers' gold  
13 from Miami's airport to Kaloti's offices in that city,  
14 as well as for the customs paperwork required in the  
15 U.S.

16 The next slide, the email on the screen  
17 shows that Kaloti dealt directly with the CEO of  
18 Transvalue, Jesús Rodríguez.

19 The next slide shows that Mr. Rodríguez  
20 recently pled guilty to committing Customs fraud  
21 connected to money-laundering in the U.S. He admitted  
22 that he had submitted false Customs documents that hid

1 the true origin of gold being imported into Miami.  
2 Again, counsel for Claimant alleged that this was  
3 irrelevant in this case. But Mr. Rodríguez committed  
4 these specific crimes from early 2015, that is,  
5 approximately at the same time he processed the  
6 Customs paperwork for the Five Shipments.

7 In addition, countless articles and  
8 investigations by reputable media outlets have  
9 reported unscrupulous practices by Kaloti and by its  
10 main customer and lender, [REDACTED] The slide  
11 on the screen lists about a dozen Articles, which  
12 represent only part of the Articles on the record in  
13 this arbitration, and a small fraction of those in the  
14 public domain.

15 The [REDACTED] widely reported practices  
16 have included forged audits, smuggling of gold,  
17 purchasing conflict minerals, funding criminal  
18 organizations, and money-laundering on a massive  
19 scale.

20 Counsel for Claimant said this morning that  
21 reputable media outlets have praised Kaloti or its  
22 owners but it did not show you the alleged

1 publications. By contrast, the slide on the screen  
2 shows that the media outlets that have reported on the  
3 [REDACTED] unscrupulous practices, include  
4 Bloomberg, the BBC, the Financial Times, Reuters, the  
5 Guardian, and The Wall Street Journal.

6 In 2013, Ernst & Young auditors identified  
7 \$5.2 billion in cash-for-gold transactions and serious  
8 due-diligence breaches by [REDACTED] The  
9 Tribunal might recall that, according to [REDACTED]  
10 [REDACTED] was the Ultimate Buyer of the Five  
11 Shipments.

12 In 2013, JPMorgan submitted the suspicious  
13 activity report and explicitly mentioned Claimant as  
14 the primary beneficiary of large transfers from [REDACTED]  
15 [REDACTED]. JPMorgan also referred to suspicious  
16 Transactions by Claimant in Perú and other countries  
17 with companies that were based in bank secrecy havens,  
18 that operated in the high risk, "cash for gold"  
19 industry, that appeared to lack a public-domain  
20 presence, and that seemed to be mere shell companies.

21 More recently, the English High Court  
22 concluded that, I quote: "There were reasonable



1 grounds to suppose that [REDACTED] could be  
2 involved in money-laundering." The Court also  
3 determined that, in 2012, [REDACTED] and [REDACTED]  
4 [REDACTED] had colluded with the gold Supplier to smuggle  
5 more than 4 tons of gold out of Morocco by coating it  
6 in silver to disguise it. To recall, these two  
7 individuals own 75 percent of the Claimant in this  
8 Arbitration.

9           Mr. President, Members of the Tribunal,  
10 there is evidence, admissions and court findings  
11 confirming criminal activity in every single stage of  
12 Kaloti's supply chain. Kaloti cannot be reasonably  
13 described as an honest, prudent, and diligent actor.  
14 Therefore, Claimant also has failed to meet this  
15 second requirement to qualify as a bona fide Buyer.  
16 Equally, Claimant has failed to meet the third  
17 requirement, because it has not proven that it  
18 complied with the due-diligence obligations applicable  
19 to gold Buyers in Perú. Claimant seems to argue that  
20 it complied with those obligations mainly by verifying  
21 that the Suppliers were inscribed in a Peruvian  
22 registry known as RECPO. Claimant has stated that

1 this gave it great confidence and that the Suppliers  
2 were in good standing with the Peruvian Government.  
3 Claimant also has suggested that the Registry somehow  
4 enabled Kaloti to trace the origin of the Five  
5 Shipments of gold.

6 But these statements are entirely unfounded  
7 for at least two reasons:

8 First, Claimant has failed to show that it  
9 verified that the Suppliers were inscribed in the  
10 Registry before its alleged purchase of the Five  
11 Shipments. As you can see, the list of companies that  
12 Claimant cited this morning in Slide 49 of its  
13 presentation was retrieved from the Registry in 2020,  
14 more than six years after Kaloti's alleged purchase of  
15 the gold. This suggests that Claimant has  
16 manufactured its arguments regarding the Registry for  
17 the purposes of this Arbitration.

18 Second, in any event, Claimant's arguments  
19 significantly overstate the purpose of the Registry.  
20 That Registry's main purpose was to identify the  
21 agents involved in the sale and purchase of gold.  
22 Between 2013 and 2014, registering with the Registry

1 was a simple process. As shown on the screen, the  
2 registrant merely needed to fill out the form,  
3 providing basic company information. The form did not  
4 require any information on gold transactions or on the  
5 origin of the gold traded by registrants.

6           The Registry did not guarantee that the  
7 inscribed entities were in good standing with the  
8 Government or that the gold sold by these entities was  
9 of lawful origin. In fact, as you can see,  
10 legislative proposals to reform the Registry have  
11 noted that it does not crosscheck its information with  
12 other Registries, and it cannot be used to trace the  
13 origin of the gold sold by registered entities.

14           Peruvian law simply does not include any  
15 mechanism for the State to guarantee that the lawful  
16 origin of mining products traded among private  
17 parties. Rather, it is the Buyer that must verify the  
18 origin of mineral products. As you can see, that is  
19 clearly established in the General Mining Law and in  
20 multiple other regulations that were already in force  
21 when Kaloti began operating in Perú. And the fact  
22 that the Suppliers might have been inscribed in the

1 Registry did not release Kaloti in any way from this  
2 due-diligence obligation.

3           This morning, counsel for Claimant alleged  
4 that Peruvian--that Peruvian law did not require  
5 Kaloti to obtain or verify specific due diligence  
6 documents regarding the shipments. This is simply  
7 false. The slide on the screen sets out part of the  
8 minimum documentation that Kaloti was required to  
9 obtain from the Suppliers pursuant to Article 11 of  
10 the Illegal Mining Decree. This minimum documentation  
11 included (1), the mining concession from which the  
12 Suppliers had allegedly extracted the gold; (2), proof  
13 that the Suppliers' mining rights over the Concession  
14 remained in force; (3), the administrative  
15 authorizations held by the Suppliers to exploit the  
16 gold; and (4), the waybills proving that the gold had  
17 been transported, from its extraction point to  
18 Kaloti's Lima facilities through the mandatory routes  
19 established by the State.

20           As you can see, Kaloti also was under a  
21 legal obligation to consult the necessary official  
22 information systems to verify the authenticity of the

1 documents provided by the Suppliers.

2 Equally, Peruvian law, U.S. law, and  
3 Kaloti's own Compliance Manual required Kaloti to keep  
4 evidence of its due diligence. That is why we were  
5 particularly surprised to hear today that somehow  
6 verification could be done orally. Claimant should  
7 have been in a position to produce such evidence in  
8 this Arbitration.

9 Claimant alleged this morning that it was  
10 impossible for Claimant to prove that it had verified  
11 the required documentation. In particular, it  
12 said--it suggested that it could not prove the timing  
13 of that verification, but this is not true. Claimant  
14 should have contemporary email communications and  
15 reports showing that it conducted due diligence before  
16 the alleged purchase of the Five Shipments.

17 Therefore, Perú requested that Claimant produce  
18 communications between Kaloti and the Suppliers  
19 showing that Kaloti had verified the lawful origin of  
20 the gold prior to the alleged purchase of each of the  
21 Five Shipments.

22 Claimant committed to produce responsive

1 documents, and the Tribunal took note of that  
2 commitment. But Claimant only produced the documents  
3 contained in Exhibits C-128 and C-129. These Exhibits  
4 contain no exchange whatsoever regarding Shipments 3,  
5 4, and 5.

6 And in relation to Shipments 1 and 2, the  
7 Exhibits show that Kaloti failed to verify the lawful  
8 origin of the gold. For example, Exhibits C-128 and  
9 C-129 do not contain any document regarding the  
10 Suppliers' alleged concession rights, the exploitation  
11 permits concerning the mines from which the gold had  
12 been allegedly extracted or the required waybills for  
13 the transport of Shipments 1 and 2. This morning,  
14 Claimant cited certain waybills that Kaloti submitted  
15 to SUNAT after the immobilizations of the four after  
16 Kaloti's alleged purchase of Shipment 1.

17 We invite the Tribunal to review Slides 31  
18 to 34 of Claimant's slides. You will see that,  
19 contrary to Peruvian law, the boxes of the waybills  
20 concerning the identity of the carrier are blank.  
21 This violation is important because, without knowing  
22 who was the carrier of the gold, the State cannot

1 contrast the waybills with the official records of the  
2 relevant toll booths. In other words, neither the  
3 State nor Kaloti can verify the transport route of the  
4 gold from the alleged mine to the point of sale of the  
5 gold.

6 Counsel for Claimant also alleged this  
7 morning that it had no way to identify the indicia of  
8 criminal activities uncovered by Perú's authorities in  
9 relation to each of the Five Shipments. This is  
10 false, too. Had Kaloti complied with its  
11 due-diligence obligations, it would have realized that  
12 the Suppliers were lying about the origin of the gold.  
13 For example, ██████ claimed that the gold contained in  
14 Shipment 1 came from a mine called "Mi Buena Suerte."  
15 ██████ also claimed to have concession rights over  
16 that mine. However, had Kaloti consulted the  
17 corresponding registry, it would have realized that  
18 ██████ in fact had no rights whatsoever with respect  
19 to the "Mi Buena Suerte" mine. You can see this on  
20 the screen.

21 ██████, for its part, claimed that most of  
22 the gold contained in Shipment 2 had been extracted

1 from the mines "Santana 2005" and "Los Astros 1." As  
2 you can see, had Kaloti complied with its obligations,  
3 it would have discovered that both mines lacked the  
4 required Environmental Permits. As a result, no  
5 mining activity was authorized in these mines.

6 [REDACTED] claimed to have extracted the  
7 gold in Shipment 3 from a mine called "Virgen del  
8 Carmen," which by then had already been renamed  
9 "Emmanuel I." But this slide shows that the mine,  
10 too, lacked any authorization to exploit Mineral  
11 Resources.

12 Finally, [REDACTED] claimed that it had extracted  
13 the gold in Shipments 4 and 5 from a mine called  
14 "Alder 3." That's not even a gold mine. It's a  
15 copper mine. And in any event, [REDACTED] did not have the  
16 necessary authorizations to extract any type of  
17 mineral from the "Alder 3" mine.

18 The words of a Peruvian Criminal Court in  
19 relation to Shipment 4 that I have now on the screen  
20 applied to all shipments. Kaloti has not submitted  
21 any documents proving that it acquired the gold in  
22 good faith or that it took the necessary precautions



1 to avoid being used as a money-laundering agent.

2           This morning, Claimant alleged that, and I  
3 quote, "no Peruvian authority and no contemporaneous  
4 document said Kaloti failed to do due diligence." The  
5 slide on the screen shows that that was just another  
6 false accusation by Claimant.

7           In sum, the evidence confirms that Kaloti  
8 failed to comply with its due-diligence obligations  
9 and that it ignored alarming red flags of criminal  
10 activity. Kaloti, therefore, does not qualify as a  
11 bone fide Buyer of the gold, which is fatal to  
12 Claimant's case on jurisdiction, merits, and quantum.

13           With the Tribunal's permission, I now yield  
14 the floor to Mr. Grané. Thank you for your attention.

15           MR. GRANÉ LABAT: I will now address the  
16 objections that Perú has submitted on jurisdiction,  
17 and it is well-established that and uncontroversial  
18 that the Party alleging that the Tribunal has  
19 jurisdiction bears the burden of proving the facts  
20 necessary to establish such jurisdiction. And in this  
21 segment of our presentation, I will summarize  
22 Claimant's failure to establish the existence of a

1 covered investment in Perú, which means that the  
2 Tribunal lacks jurisdiction *ratione materiae*.

3           Following that discussion, my colleague,  
4 Ms. Mélida Hodgson, will recall that all claims, bar  
5 one, must be dismissed for lack of jurisdiction  
6 *ratione temporis* because Claimant has failed to comply  
7 with the temporal limitations that is contained in  
8 Article 1018 of the Treaty.

9           So, let's start with Perú's objection  
10 *ratione materiae*. In the words of the Tribunal in  
11 *Bridgestone versus Panamá*, "the burden of proof lies  
12 fairly and squarely on Claimant to demonstrate that it  
13 owns or controls a qualifying investment."

14           Now, this case is not the exception to that  
15 principle that was stated by that Tribunal. Treaty  
16 Article 10.1 provides that for the Investment  
17 protections under the Treaty to be applicable, the  
18 foreign investor must hold a, and I quote, "covered  
19 investment." Claimant does not dispute that it must  
20 clearly identify the covered investment that is the  
21 subject of the Arbitration, but Claimant has failed to  
22 do so.

1           On the other hand, Perú has demonstrated  
2 that none of the alleged investments invoked by  
3 Perú--I'm sorry, by Claimant, qualify as a "covered  
4 investment" under either the Treaty or the ICSID  
5 Convention.

6           Let's look in more detail on the  
7 jurisdictional requirements *ratione materiae*.

8           Pursuant to Treaty Article 1.3, a Claimant's  
9 assets can only qualify as a covered investment if it  
10 is located in the territory of the Respondent State,  
11 in this case, Perú. In its non-disputing Party  
12 submission, the United States emphasized the  
13 importance of this "territorial" requirement. The  
14 United States noted that, to ignore this requirement  
15 would be to effect, and I quote, "a radical expansion  
16 of the rights the Parties have granted to foreign  
17 investors under the BITs."

18           And as we are referring to the Non-Disputing  
19 Party submission of the United States, we wish to  
20 recall that pursuant to Article 31.3, Paragraph (a)  
21 of the Vienna Convention on the Law of Treaties, the  
22 Agreement of Perú and the United States regarding the

1 interpretation of the Treaty, and I quote, "shall be  
2 taken into account." And throughout this  
3 presentation, we will refer to some of the many issues  
4 of interpretation of the Treaty in respect of which  
5 there is agreement between Perú and the United States,  
6 the two parties to the Treaty invoked by Claimant.

7           Claimant must also demonstrate that its  
8 alleged investment complies with the definition of  
9 "investment" set forth in Treaty Article 10.28. That  
10 Article defines an investment as an asset that an  
11 investor owns or controls. And in that regard, Perú  
12 and the United States agree that in determining  
13 whether there is an investment, and I quote, "it is  
14 necessary to look to the law of the host-State for a  
15 determination of the definition and scope of the  
16 alleged property right or property interest at issue,  
17 including any applicable limitations." And I'm  
18 quoting from the U.S. Non-Disputing Party Submission  
19 Paragraph 45.

20           Further, as correctly pointed out by the  
21 United States in its written submission, and I quote,  
22 "the enumeration of a type of an asset in

1 Article 10.28 is not dispositive as to whether a  
2 particular asset, owned or controlled by an investor,  
3 meets the definition of 'investment'; it must still  
4 always possess the characteristics of an investment."

5 This is U.S. Submission Paragraph 4.

6           Now, the Treaty here specifies in  
7 Article 10.28 that those characteristics include a  
8 commitment of capital or other resource, an  
9 expectation of gain or profit, and an assumption of  
10 risk.

11           Similarly, the alleged investment must  
12 possess the characteristics of an investment as in  
13 connection with Article 25 of the ICSID Convention.  
14 Case law has identified these characteristics, and  
15 they are similar to those expressly set forth in the  
16 Treaty. And they include a contribution having an  
17 economic value, the expectation of return, the  
18 assumption of an investment risk, and certain minimum  
19 duration.

20           An additional and important requirement for  
21 investment to qualify for protection under the Treaty  
22 is that it must comply with domestic law of the host

1 State and international public policy. Now, while the  
2 Claimant contests this requirement, Perú and the  
3 United States agree that compliance with domestic law  
4 is a prerequisite to protection under the Treaty. As  
5 the United States noted in its written submission,  
6 "while Article 10.28 does not expressly provide that  
7 each type of investment must be made in compliance  
8 with the law of the host-State, it is implicit that  
9 the protections in Chapter 10 only apply to  
10 investments made in compliance with the host-State's  
11 domestic law at the time."

12           This requirement that an investment must  
13 comply with domestic law and international public  
14 policy has been confirmed by numerous investment  
15 tribunals, many of which were identified by both Perú  
16 and the United States in their respective written  
17 submissions.

18           And the rationale behind this requirement is  
19 obvious. As explained by the Tribunal in *Mamidoil*  
20 *versus Albania*, which you have on your screen, when  
21 Sovereign States ratify investment treaties, and  
22 thereby undertake obligations with respect to the

1 protection of investment, such States are not agreeing  
2 to protect investments made in violation of their own  
3 legal regimes, or in violation of fundamental  
4 principles of public policy.

5           Now, the alleged "investment" invoked by  
6 Claimant do not meet the requirements that I have  
7 mentioned. In other words, Claimant does not have a  
8 covered investment. And this is the case both in  
9 respect of Kaloti as a going concern and the Five  
10 Shipments of gold. It is also the case in respect of  
11 the alleged--the other alleged "investments" which are  
12 vague and plainly spurious, and which I will refer to  
13 briefly in light of Professor Knieper's question.

14           I will start with Kaloti as a going concern,  
15 which Claimant argues is an investment.

16           By Claimant's own submissions in this  
17 Arbitration demonstrate that its alleged investment do  
18 not satisfy even the "territorial" requirement.  
19 Specifically, Claimant has admitted that Kaloti is,  
20 and I quote, "a limited liability company registered  
21 in the State of Florida; is not incorporated in Perú,  
22 has substantial business actives in the territory of

1 the United States; and maintain its principal place of  
2 business" in the United States.

3           Claimant made these admissions to prove that  
4 it satisfied the separate nationality requirement  
5 which is necessary to establish jurisdiction *ratione*  
6 *personae*. But, in doing so, it contradicted its  
7 arguments that it is a domestic investment in the  
8 territory of Perú.

9           Claimant's Claim that Kaloti was a domestic  
10 investment in Perú is also contradicted by the fact  
11 that Kaloti never paid taxes in Perú. Under Peruvian  
12 law, foreign companies that operate through a  
13 permanent establishment in Perú are subject to Income  
14 Tax to their Peruvian-sourced income, including income  
15 from economic activities and property in Perú. If  
16 Kaloti had conducted economic activities in Perú, it  
17 would have been required to pay Income Tax, but Perú's  
18 tax records confirm that Kaloti never did so.

19           And this means either one of two things:  
20 Either Kaloti did not operate through a permanent  
21 establishment in the territory of Perú, or Kaloti owed  
22 but did not pay Peruvian tax income, meaning that the



1 alleged investment was made in violation of Peruvian  
2 law.

3 Now, Claimant has carefully avoided taking a  
4 position on this issue but cannot avoid the  
5 implications resulting from either scenario, which is  
6 that Kaloti is not a covered investment.

7 ARBITRATOR KNIEPER: A question which  
8 perhaps you must not answer now because one would have  
9 to look into the files. What do you say to the  
10 registration which has been put to the record by the  
11 Claimant, which is C-0159, where Kaloti Metals is in a  
12 Peruvian register. Does that change your opinion?  
13 Not for now. Simply take your time to look it up and  
14 then perhaps we can discuss it and perhaps you can  
15 also react to that.

16 MR. GRANÉ LABAT: Thank you, Professor  
17 Knieper. Yes, certainly, we will come back to this  
18 point, and without prejudice to the fulsome answer  
19 that we will provide, the quick and preliminary  
20 response is that incorporation into that registry does  
21 not demonstrate or mean that the Company has paid and  
22 complied with its tax obligations. It is a formality

1 that has to be observed. But again, does not mean  
2 that domestic tax law has been satisfied. But we will  
3 revert to this point with your indulgence.

4 ARBITRATOR KNIEPER: And just to specify, I  
5 was astonished to see that Claimant is registered  
6 there as an LLC, which means as a corporate form of  
7 the United States, and I didn't know what to do with  
8 it. Today I didn't have the time to ask you that  
9 question but now I ask it to both Parties.

10 Thank you.

11 MR. GRANÉ LABAT: Thank you, Professor  
12 Knieper. We will return to this point.

13 MR. DÍAZ-CANDIA: Do you want me to answer  
14 now or later?

15 ARBITRATOR KNIEPER: Perhaps you can  
16 postpone until later.

17 MR. DÍAZ-CANDIA: Okay, very good. Thank  
18 you.

19 MR. GRANÉ LABAT: So, let us now look, we  
20 have covered the Kaloti as a going concern as an  
21 alleged investment. Let us now look at the other  
22 alleged "investments" which is the Five Shipments of

1 the gold. And here I very briefly recall that the  
2 Five Shipments of the gold cannot be taken as an  
3 indivisible whole. There are separate shipments or  
4 alleged shipments of gold and they have to be assessed  
5 independently of each other.

6 And the Parties have referred to the  
7 shipments as shipments but that is a misnomer because  
8 the gold was never shipped outside of Perú as Claimant  
9 intended.

10 Now, these alleged shipments likewise fail  
11 to qualify as a covered investment for at least three  
12 reasons:

13 One, the gold does not possess the  
14 characteristics of a covered investment;

15 Two, Claimant failed to prove that it  
16 acquired ownership over the Five Shipments; and

17 Three, Claimant's alleged investment in the  
18 Five Shipments was not made in accordance with  
19 Peruvian law.

20 I will briefly address each of these issues,  
21 but we respectfully, again, refer the Tribunal to  
22 Perú's detailed written submissions and the extensive

1 evidence that has been attached to those submissions.  
2 As I noted a few minutes ago, a covered investment  
3 under the Treaty and the ICSID Convention must possess  
4 the characteristics of an "investment," including an  
5 economic contribution, assumption of risk, and a  
6 certain duration. And, as confirmed by case law,  
7 including the quotes on your screen, these  
8 characteristics serve to distinguish a covered  
9 investment or a qualifying investment from a mere sale  
10 of goods which is not a covered investment.

11           Now, Claimant's alleged investment consisted  
12 of the Five Shipments of gold, and they do not satisfy  
13 any of the requisite characteristics of an  
14 "investment," precisely because they were ordinary  
15 commercial Transactions for the purchase of goods.  
16 And we begin with the requirement of commitment or  
17 contribution of capital.

18           Claimant itself described purchases as, and  
19 I quote, "buying gold in Perú and selling it to  
20 overseas Buyers at a small Profit Margin." This is in  
21 the Memorial, Paragraph 3. That is the textbook  
22 description of an ordinary commercial sale, which is

1 not a covered investment. And in any event, as  
2 demonstrated by Perú and admitted by Claimant, Kaloti  
3 did not even pay for all of the shipments.

4 And Claimant has likewise admitted that the  
5 Five Shipments of gold do not possess the  
6 characteristics of an assumption of risk. In the  
7 Memorial, Claimant stated in no uncertain terms, and I  
8 quote, "risk associated with its trading operation was  
9 non-existent." And you have the reference on your  
10 screen. This was in part because, as Claimant has  
11 also conceded, it was merely serving as a middleman  
12 for [REDACTED]

13 This morning, however, Claimant alleged that  
14 Kaloti "bore the risk of loss of the gold." That is  
15 not an investment risk but rather the risk borne by  
16 any Buyer of a good in an ordinary commercial  
17 Transaction.

18 Claimant's alleged investment also does not  
19 satisfy the "duration" requirement. Claimant  
20 allegedly purchased the Five Shipments merely to  
21 resell them shortly thereafter. In fact, Kaloti's  
22 Head Trader, Ms. [REDACTED], testified and I quote,

1 "Kaloti could always be certain to resell the gold  
2 very quickly to [REDACTED]

3           In conclusion, the alleged purchase of the  
4 gold by the Claimant was, at best, no more than an  
5 ordinary commercial Transaction rather than a  
6 qualifying investment under the Treaty and Article 25  
7 of the ICSID Convention. But there is yet another  
8 independent reason why the Five Shipments do not  
9 qualify as a covered investment. Claimant has failed  
10 to demonstrate that it ever acquired ownership or  
11 control over the Five Shipments. Under Peruvian law,  
12 as discussed by Mr. Nistal and in greater detail in  
13 Perú's written submissions, Claimant has failed to  
14 produce Purchase Agreements sufficient to show that  
15 Kaloti had acquired ownership under Peruvian law.  
16 Claimant has conceded that it did not pay for all of  
17 the shipments, and Claimant has failed to prove that  
18 Kaloti ever took possession of the gold. And this  
19 further demonstrates that the Five Shipments of gold  
20 do not constitute a covered investment.

21           And, finally, even if Claimant could  
22 demonstrate that it owns or controls the gold, such

1 assets would not be covered by the Treaty because it  
2 was made in violation of Peruvian law and  
3 international public policy.

4           Again, we have already addressed the subject  
5 in great detail including by demonstrating that  
6 Peruvian Mining Law required Kaloti to conduct due  
7 diligence and to verify the origin of the Five  
8 Shipments of gold, which Kaloti did not do.

9           The evidence also demonstrates that it is  
10 more probable than not that the Five Shipments were  
11 the product of illegal mining and part of a  
12 money-laundering scheme, which both Peruvian law and  
13 international public policy prescribe. Now, the  
14 evidence led to the commencement of the Criminal  
15 Proceedings against the four Suppliers. Because the  
16 alleged investment in the Five Shipments was procured  
17 in violation of Peruvian law and international public  
18 policy, this alleged investment does not qualify for  
19 protection under the Treaty.

20           But before I conclude on the issue of  
21 *ratione materiae*, I pause here to respond briefly to  
22 Professor Knieper's question before the break

1 concerning Kaloti's offices in Lima, as this goes to  
2 the issue of *ratione materiae*. Perú demonstrated in  
3 the Counter-Memorial and again in the Rejoinder that  
4 what Claimant argues is an office in Lima was, in  
5 fact, a facility within the premises of Hermes which  
6 provided space for storage and administration as part  
7 of a broader transport and storage agreement. Also,  
8 the apartment that Kaloti claimed that it rented in  
9 Lima was, in fact, the private residence of Mr. Álvaro  
10 Rodríguez, which is Claimant's Operations Manager in  
11 Perú. And the lease agreement for that apartment  
12 expressly prohibited any sublease or other use.

13           And similarly, while Claimant had claimed to  
14 have employees in Perú, the only purported evidence  
15 consisted of three service contracts which Kaloti  
16 could terminate at any time for the performance of  
17 specific tasks. Now, in the Reply claim, it was  
18 forced to concede that these were independent  
19 contractors, i.e., not employees. In fact, Exhibit  
20 C-37 at Page 12 states this expressly: "There is no  
21 employment relationship." And I respectfully refer  
22 the Tribunal to Paragraph 485 of our Rejoinder as well



1 as Exhibits R-208 and C-35.

2 For the reasons summarized above and  
3 discussed in far more detail in Perú's written  
4 submissions, there can be no serious disagreement that  
5 the Tribunal lacks jurisdiction *ratione materiae*. And  
6 with the Tribunal's indulgence, I concede the floor to  
7 my colleague Ms. Mélida Hodgson, but since we are half  
8 way, this could be a good opportunity to take a break,  
9 but we are in your hands, Mr. President.

10 PRESIDENT McRAE: Thank you, Mr. Grané.

11 But before I respond on that point, there is  
12 a question I was going to ask you. Goes back to your  
13 reference to the Vienna Convention and subsequent  
14 agreements and subsequent practices, and then you went  
15 on and talked about the United States's submission.

16 Are you suggesting that we should treat the  
17 United States's submission as evidence of a subsequent  
18 agreement or subsequent practice between Perú? And  
19 it's simply a unilateral statement by the United  
20 States.

21 MR. GRANÉ LABAT: We would submit,  
22 Mr. President, that, under the Vienna Convention and

1 international law, it must be treated as an agreement.  
2 There is no formality that is necessary for States to  
3 conclude an agreement, and this has been stated, of  
4 course, also in relation to 31(3)(a) of the Vienna  
5 Convention. We would be happy, Mr. President, to  
6 brief the Tribunal in full as part of our Closing  
7 Statements or indeed tomorrow about that issue which  
8 we have amply discussed in other cases and other  
9 submissions. But it is our firm position,  
10 Mr. President, that the Agreement of States to a  
11 treaty shall be taken into account by the Tribunal  
12 when interpreting the Treaty, again, per the Vienna  
13 Convention which, of course, as you know, is customary  
14 international law.

15           PRESIDENT McRAE: I'm not suggesting that's  
16 in question. It's certainly true, the tribunals can  
17 take into account subsequent agreement and subsequent  
18 practice. My question was whether the unilateral  
19 statement of the United States in its submission is to  
20 be treated by the Tribunal as an agreement with Perú.  
21 And I don't want to distract you now, and I don't want  
22 to waste a lot of time in your Closing Submission, but

1 I would like to hear how you turn that unilateral  
2 statement into an agreement.

3 MR. GRANÉ LABAT: I'm happy to do so,  
4 Mr. President. In our submission, we will explain how  
5 the views of the States that coincide on the issue of  
6 interpretation should be taken as an agreement of the  
7 parties, irrespective of--again, whether there is, for  
8 instance, a protocol or a letter subscribed by both  
9 States. To the extent that the States agree and have  
10 a common understanding and view on an issue of  
11 interpretation, it must be taken as an agreement for  
12 the purposes of 31(3) (a).

13 PRESIDENT McRAE: I don't disagree with that  
14 proposition at all. I just simply wonder how the  
15 statement of one party transforms into an agreement.  
16 Where is the evidence the Agreement grew out of it.

17 MR. GRANÉ LABAT: Right. It would be the  
18 submission of the United States, to the extent that it  
19 coincides to the submissions that Perú has made in its  
20 written submissions, either in this case or in other  
21 fora, would constitute an agreement.

22 PRESIDENT McRAE: Okay. I think you

1 probably, in that statement, you answered my question.

2 MR. GRANÉ LABAT: Thank you.

3 PRESIDENT McRAE: We will take a break now.

4 I see that it's 3:40, so maybe 15 minutes, 5 to 4:00

5 we will resume? Thank you.

6 (Recess.)

7 PRESIDENT McRAE: So, we will resume.

8 Ms. Hodgson.

9 MR. GRANÉ LABAT: Mr. President, would it be  
10 convenient for me to address Professor Knieper's  
11 question on C-159 now, or should we wait until the end  
12 of our presentation?

13 PRESIDENT McRAE: I think it's entirely up  
14 to you. It's your time now, and if you want to have a  
15 digression where both Parties engage, that's fine with  
16 the Tribunal. But if you don't, then I think it's  
17 appropriate to wait.

18 MR. GRANÉ LABAT: I thought, Mr. President,  
19 that since it's a response to the Tribunal's question  
20 that it wouldn't come out of our time.

21 MR. DÍAZ-CANDIA: And we would agree to  
22 that. Correct.

1           PRESIDENT McRAE: It seems that Professor  
2 Knieper would like an answer now, so go ahead.

3           MR. GRANÉ LABAT: Perfect. Thank you,  
4 Professor Knieper, for the question. And you referred  
5 to Exhibit C-159. This is, of course, an exhibit that  
6 was submitted by Kaloti. It is not the official  
7 registration with the agency that's called the  
8 Superintendency for Public Registry. That is merely a  
9 screen-shot of that Registry. However, we did submit  
10 the entry, the full entry, and that is Exhibit R-240.  
11 And what we submitted is the resolution that contains  
12 the registration to which Claimant refers incompletely  
13 in 159.

14           And as Perú explained in the Rejoinder, in  
15 Paragraph 477, Kaloti registered with this agency  
16 simply for the purposes of being able to issue a Power  
17 of Attorney to a lawyer on 10 February 2014. And this  
18 is because this registration, as you noted, lists  
19 Kaloti as an LLC, but Peruvian law allows foreign  
20 companies to register Powers of Attorney in this  
21 agency, SUNARP, and this is pursuant to the regulation  
22 of the National Superintendent of Registries,

1 Article 165, and this is Exhibit 239. But, as I said,  
2 as a result, this registration in no way proves that  
3 Kaloti was either incorporated as a permanent--had  
4 permanent residency in Perú or that it was complying  
5 with Peruvian laws, including tax obligations that  
6 apply to all established entities in Perú.

7 Thank you.

8 ARBITRATOR KNIEPER: Thank you.

9 MR. DÍAZ-CANDIA: Thank you, Professor  
10 Knieper.

11 I think this argument was made in  
12 combination with the allegation that Kaloti did not  
13 pay taxes in Perú, so with your permission, I would  
14 like to address that as part of the answer. Okay.

15 First of all, the record is undisputed that  
16 Kaloti Metals had an office, an apartment, and a Power  
17 of Attorney in that country, and Mr. Missiego says  
18 that, for purposes of certain Peruvian laws, Kaloti  
19 Metals did conduct activities within the territory of  
20 Perú. That's on the record. That is not something we  
21 are making up. About the validity, I'm not an expert  
22 on Peruvian law, I'm not allowed to practice under

1 Peruvian law.

2           Then they combine that with the alleged fact  
3 that Kaloti Metals did not pay Income Taxes in Perú,  
4 and I just want to remind, this is a basic taxation  
5 issue. This is not an indirect tax, like, for  
6 instance, a Value Added Tax. They're referring to a  
7 tax on income. A company has to pay a tax on income  
8 when it has more income than expenses. Most of the  
9 income of Kaloti Metals came from Kaloti Dubai which  
10 was the main purchaser, but not the only purchaser of  
11 gold, into an account in Miami. That's the main  
12 income.

13           Inside Perú, what Kaloti Metals had was  
14 mostly expenses, the rent for the office, the rent for  
15 the apartment, the payment of the personnel, you can  
16 call them "independent contractors" or whatever. Only  
17 a very small amount of income was territorially in  
18 Perú which was the interest charged in open positions  
19 and others to the Suppliers which did not accede. No  
20 Peruvian authority ever said that Kaloti Metals did  
21 not pay taxes inside Perú.

22           So, this is, again, a cloud of suspicion,

1 guilt by association, and part of the strategy.

2 Kaloti complied with all its obligations inside Perú.

3 It had a very prestigious law firm, accountants, et

4 cetera, and no Peruvian authority said otherwise ever

5 to Kaloti Metals.

6 ARBITRATOR KNIEPER: Thank you very much.

7 PRESIDENT McRAE: So, go back to Respondent.

8 Ms. Hodgson?

9 MS. HODGSON: Good afternoon, Mr. President,

10 Members of the Tribunal. As Mr. Grané Labat

11 mentioned, I will address Perú's jurisdictional

12 objection *ratione temporis*. Perú respectfully submits

13 that this Tribunal lacks jurisdiction *ratione temporis*

14 over all but one of Claimant's claims. Nothing you've

15 heard from Claimant this morning on this issue changes

16 the fact that it brought its claims, which at any rate

17 are meritless, out of time. To find otherwise would

18 be to overrule the State Parties' conditions for

19 agreeing to arbitration, and render the Treaty

20 ineffective. Thus, we note the substantive issues to

21 be determined as was shown on your screen in

22 Slide 112.



1           First, is Treaty Article 10.18.1, which  
2 establishes a three-year temporal limitation period, a  
3 condition of the Treaty Parties' consent to  
4 arbitration?

5           Second, does that Article require Perú to  
6 prove that it has been prejudiced, as Claimant  
7 suggests?

8           Third, what is the Cut-off Date for the  
9 purpose of the temporal Limitations Period?

10          Fourth, has Claimant demonstrated that all  
11 of its claims complied with the temporal Limitations  
12 Period?

13           I will address each in turn.

14           We begin with the interpretation of Article  
15 10.18.1, which reads in part: "No claim may be  
16 submitted to arbitration... if more than three years  
17 have elapsed from the date on which the Claimant first  
18 acquired, or should have first acquired, knowledge of  
19 the breach alleged under Article 10.16.1 and knowledge  
20 that the Claimant... has incurred loss or damage."

21           Perú has referred to this as the Temporal  
22 Limitations Provision.

1           The State Parties to the Treaty agree that  
2 the Temporal Limitations Provision is a firm  
3 requirement, as it serves as a condition of the State  
4 Parties' consent to arbitration. In its Non-Disputing  
5 Party Submission, the United States affirmed that the  
6 Temporal Limitations Provision "imposes a *ratione*  
7 *temporis* jurisdictional limitation on the authority of  
8 a tribunal to act on the merits of a dispute."

9           This is confirmed by jurisprudence  
10 interpreting similar clauses, including those cited in  
11 Perú's written submissions. In the Reply, and again  
12 during Opening Presentation this morning, Claimant  
13 suggested that the Temporal Limitations Provision is  
14 not a firm requirement, and that it only bars claims  
15 if the State can show that it has been prejudiced.  
16 This is incorrect. Nowhere does the text of the  
17 Treaty provide such a requirement, and Claimant cannot  
18 unilaterally create such a requirement. Claimant's  
19 argument thus must be rejected.

20           Moreover, it is not a question of making the  
21 Treaty's language overly broad, as was suggested this  
22 morning. It's a question of respecting the Agreement

1 of the State Parties.

2           As we have explained in Perú's pleadings,  
3 investment tribunals applying similarly worded  
4 provisions have established a three-step analysis to  
5 assess a Claimant's compliance with this condition of  
6 consent. This analysis requires the Tribunal to:  
7 One, identify the Cut-off Date, which is a specific  
8 date three years before the Claimant submitted its  
9 claims to arbitration; two, determine whether Claimant  
10 first acquired, or should have first acquired,  
11 knowledge of the alleged breach before the Cut-off  
12 Date; and three, determine whether Claimant acquired  
13 or should have first acquired, knowledge that it has  
14 incurred loss or damage before the Cut-off Date.

15           If the result of this analysis is that  
16 Claimant acquired or should have acquired knowledge of  
17 the alleged breach and loss or damage before the  
18 Cut-off Date, its claims will fail for lack of  
19 jurisdiction *ratione temporis*. Here, the Parties  
20 agree that the Cut-off Date is 30 April 2018, so the  
21 first step of the analysis is met.

22           Claimant, therefore, in order to establish

1 that this Tribunal has jurisdiction, must demonstrate  
2 that it did not acquire or should have acquired  
3 knowledge of the alleged breaches and loss before  
4 April 30, 2018. Claimant makes many claims regarding  
5 alleged knowledge acquired after April 2018. But  
6 Claimant has failed to establish that it did not have  
7 such knowledge before April 2018. This is illustrated  
8 in the timeline that appears on your screen.

9           Claimant must show that it did not acquire  
10 or should not have acquired knowledge of the breach or  
11 loss within the red zone, which is a period leading up  
12 to the Cut-off Date. Claimant, however, has been  
13 unable to do so, and that is because the evidence  
14 shows that Claimant did, in fact, acquire knowledge of  
15 the alleged breaches and loss before the Cut-off Date.

16           Let's begin by considering the key  
17 Challenged Measures on which Claimant bases its  
18 claims. These are the SUNAT Immobilizations of  
19 Shipments 1 through 4, which took place between  
20 November 2013 and May 2014; and the Precautionary  
21 Seizures which the Peruvian Criminal Courts ordered  
22 between February and May 2014. As you can see, all of

1 these Measures fall squarely within the red zone  
2 because they all took place several years before the  
3 Cut-off Date, again, April 2018.

4           Not only did the Challenged Measures  
5 comprising the alleged breaches pre-date the Cut-off  
6 Date by years, but there is no doubt that Claimant  
7 knew or should have known of these breaches well  
8 before the Cut-off Date.

9           Mr. Díaz-Candia told you this morning that  
10 the first Immobilization was not a breach, this is  
11 inconsistent with the evidence. It is clear from the  
12 first Notice of Intent dated 3 May 2016 which is on  
13 the record as Exhibit R-242 and is projected in side  
14 117. I note that what was referred to as a "letter"  
15 is 19 pages. I encourage you to take a good look at  
16 it, it is much more substantive than implied. In the  
17 Notice, Kaloti claimed that Perú had breached the  
18 Treaty through the same Measures of which it now  
19 complains, namely, the SUNAT Immobilizations and  
20 Precautionary Seizures, that is in subpart 65(a) and  
21 (b), the conduct of the prosecutorial and judicial  
22 authorities in subpart (c), and civil attachment of

1 Shipment 5, subpart (d). Thus, the second step of the  
2 analysis is met.

3 I would also note that in the Notice,  
4 Claimant stated clearly that it had suffered loss as a  
5 result of Perú's alleged misconduct. You can see this  
6 on Slide 118 wherein Kaloti even alleges a specific  
7 amount of loss, thus the third step of the analysis is  
8 met. And again, going back to the Notice of Intent,  
9 if you look at Paragraph 67, it refers to various  
10 articles, including 10.7, the Expropriation Provision,  
11 which Claimant's counsel implied this morning was not  
12 part of its Notice of Intent, as well as other various  
13 claims; as well as in Paragraph 68, very specific  
14 amounts of alleged loss or damage which such  
15 specificity is not required under the Notice of Intent  
16 requirements.

17 In sum, Claimants first Notice, on its face,  
18 demonstrates that Claimant knew of the alleged  
19 breaches and loss well before the Cut-off Date. Perú  
20 has also adduced additional evidence which is  
21 discussed in our pleadings at the Counter-Memorial,  
22 Paragraphs 419 to 420 and Rejoinder 515. We don't

1 have time to discuss them here today, but Kaloti also  
2 made contemporaneous allegations of treaty breaches in  
3 Peruvian courts before the Cut-off Date. We heard a  
4 reference this morning to the amparo and that they  
5 were not seeking relief under the Treaty, but they did  
6 make allegations regarding the Treaty, and the point  
7 is simply to say that they had knowledge well before  
8 the Cut-off Date of any breaches or possible loss.

9           Faced with the reality that most of its  
10 claims are time-barred, Claimant attempts to  
11 circumvent the Temporal Limitations Provisions. While  
12 we respond to these efforts, let's remember that  
13 Claimant is proposing an exception that is not found  
14 in the Treaty; first, because Kaloti knows that it  
15 cannot submit a claim of treaty breach based on any of  
16 the individual events just discussed because they are  
17 out of time. Claimant attempts to add events to  
18 amalgamate those events into a so-called "composite  
19 act" that crystallized somehow on 30 November, which  
20 we know, including from the extensive discussion this  
21 morning, is a date determined for financial purposes  
22 by Kaloti itself. They admit that there was no act or

1 measure by Perú on 30 November 2018.

2           These events also have no impact on their  
3 claims. Kaloti attempts to circumvent the Limitations  
4 Provisions altogether using the MFN Clause. Neither  
5 of these desperate efforts to circumvent the Treaty is  
6 successful. The Composite Act Theory fails at the  
7 outset because Claimant has not proven the existence  
8 of a composite act under international law. Mr. Grané  
9 Labat will address this issue in greater detail when  
10 we reach our discussion of the merits of the Claims.  
11 But the NOI says the Claimant alleged a breach or  
12 loss, as we know, before the Cut-off Date, so reaching  
13 or trying to amalgamate these events into a  
14 crystallizing event has not been demonstrated.

15           For now, let's focus on the fact that  
16 Claimant's theory that, again, the composite act  
17 crystallized after the Cut-off Date is utterly  
18 unsubstantiated. In order for that to be true, Perú  
19 must have enacted measures after the Cut-off Date in  
20 April 2018, which measures then "would have  
21 crystallized" the measures from years before into a  
22 single composite act. Again, they have not



1 demonstrated that, and today they admitted that there  
2 was no Peruvian Government act on 30 November. The  
3 trouble for Claimant is that there is no evidence of  
4 these crystallizing events. Indeed, the only two  
5 events that took place during the, let's call it,  
6 catch-up period, are two judicial decisions which  
7 coincidentally Claimant mentions only once and in  
8 passing in the Reply. These are a ruling of the First  
9 Criminal Liquidator Court issued on 23 July 2018,  
10 which declared the pre-trial stage of the [REDACTED]  
11 Criminal Proceedings closed, and ordered that these  
12 proceedings advance to the next stage; a ruling of the  
13 Third Civil Chamber of the Superior Court of Justice  
14 of Lima, dated 11 October 2018, in favor of Kaloti,  
15 upholding Kaloti's appeal against a ruling issued in  
16 the Civil Proceedings concerning Shipment No. 5.  
17 Recall this was a matter between Kaloti and the owner  
18 of Shipment 5, [REDACTED], for non-payment by Kaloti.

19           But Claimant does not even allege that these  
20 two events constitute part of the alleged breaches of  
21 the Treaty, or had any adverse impact whatsoever on  
22 Kaloti's alleged "investments."

1           Anyway, this morning Claimant said that the  
2 loss of gold caused insolvency. Well, the gold was  
3 lost in 2013 and 2014, not 2018. And in any event,  
4 Claimant still cannot explain whether or how the  
5 alleged breaches purportedly crystallized on  
6 30 November 2018, again a random date determined by  
7 Claimant. Therefore, these events do not or cannot  
8 bring forward the date of Claimant's knowledge of the  
9 alleged breaches to and after the Cut-off Date, such  
10 that Claimant cannot piggyback on these two events to  
11 drag its claim within the Tribunal's jurisdiction.

12           Jurisprudence supports that Claimant cannot  
13 simply point to later-in-time events to try to tie  
14 together and bring all of its claims within the scope  
15 of a Temporal Limitations Provision. The United  
16 States agrees and stated in its Non-Disputing Party  
17 Submission here that: "[W]here a 'series of similar  
18 and related actions by a Respondent State' is at  
19 issue, the Claimant cannot evade the Limitations  
20 Period by basing its claim on 'the most recent  
21 transgression' in that series. To allow a claimant to  
22 do so would 'render the limitations provisions

1 ineffective[.]'"

2           Thus, claimant's first attempt to salvage  
3 its claims through the Composite Act Theory fails.  
4 Claimant's next and last-ditch effort to save its  
5 claims consists of its attempt to erase the Temporal  
6 Limitations Provision altogether. In its Reply, and  
7 again this morning, Claimant invoked the MFN Clause  
8 and argued that it could import the longer temporal  
9 Limitations Period from the Perú-Australia Free Trade  
10 Agreement and/or invoke the absence of any Temporal  
11 Limitations Provisions in other treaties. It is  
12 unfortunate that such a disingenuous argument even has  
13 to be addressed. We really heard the truly absurd  
14 argument this morning that, because the word "accord"  
15 is used in the language of the Treaty, that somehow  
16 means that there is agreement to allow MFN to breach  
17 the Treaty's clear instructions.

18           This MFN Clause is, by its Terms, limited in  
19 scope to the treatment in the territory of Perú of  
20 investors or investments with respect to the  
21 establishment, acquisition, expansion, management,  
22 conduct, operation, and sale or other disposition of

1 the Investment. Its scope as a treatment provision  
2 could not be more clear.

3           Furthermore, the Treaty Parties expressly  
4 explained the scope of the MFN Provision in a footnote  
5 which provides as follows: "For greater certainty,  
6 treatment with respect to the establishment,  
7 acquisition, expansion, management, conduct,  
8 operation, and sale or other disposition of  
9 investments referred to in Paragraphs 1 and 2 of  
10 Article 10.4 does not encompass dispute-resolution  
11 mechanisms, such as those in Section B, that are  
12 provided for in international investment treaties or  
13 trade agreements."

14           This MFN Clause, thus, does not apply to  
15 jurisdictional requirements such as Article 10.18.1,  
16 which is part of Section B of the Treaty and thus  
17 excluded from the scope of the MFN Clause.

18           Again, in this respect, both State Parties  
19 to the Treaty are in agreement, and that Agreement, as  
20 Mr. Grané Labat noted, shall be taken into account for  
21 the purpose of the interpretation of the Treaty. That  
22 Agreement, in the words of the United States, is that:

1 "A party does not accord treatment through the mere  
2 existence of provisions in its other international  
3 agreements such as procedural provisions, umbrella  
4 clauses, or clauses that impose autonomous  
5 fair-and-equitable-treatment standards." Therefore,  
6 the language of the relevant treaty provisions and the  
7 interpretation of the State Parties to the Treaty,  
8 confirm that Claimant's attempt to invoke the MFN  
9 Clause to exclude the Temporal Limitations Provision  
10 cannot be countenanced.

11 In conclusion, the Temporal Limitations  
12 Provision is a limit on the consent of the State  
13 Parties to the Treaty that must be respected.

14 Thank you.

15 MR. GRANÉ LABAT: Mr. President and Members  
16 of the Tribunal, with your indulgence, we will now  
17 move on to the merits segment of our presentation, and  
18 although this case can be dismissed for lack of  
19 jurisdiction, Perú has demonstrated in its written  
20 submissions, and again will do so, that each and every  
21 one of Claimant's Claims are unfounded and  
22 unmeritorious. I will begin by addressing the Claims

1 under Article 10.5 which prescribes the minimum  
2 standard of treatment under customary international  
3 law. I will then address Claimants expropriation  
4 claim under Article 10.7, and then Ms. Hodgson will  
5 address Claimant's national-treatment claim under  
6 10.3.

7           In this first segment, we will address the  
8 following topics: First, the applicable legal  
9 standard under Article 10.5 of the Treaty, which,  
10 again, as I said, established MST; the second, whether  
11 Claimant can lower that standard by invoking  
12 provisions from other treaties; and third, Claimant's  
13 failure to establish the existence of a composite act.  
14 And I will then turn to the subparts--and then I will  
15 turn to the subparts of Claimant's MST claims  
16 including its claim of denial of justice and  
17 discrimination.

18           The plain language of Article 10.5 and  
19 Annex 10-A of the Treaty, which are shown on your  
20 screen, expressly state the applicable standard, and  
21 that is the minimum standard of treatment or what we  
22 have referred to as "MST," under customary

1 international law. This standard is well-known to  
2 this experienced Tribunal and was discussed in detail  
3 in Perú's written submissions.

4           The Claimant recognized that in the Memorial  
5 that MST imposes a high threshold. It quoted Waste  
6 Management, which famously articulated the standard  
7 and has since been repeated by numerous investment  
8 tribunals. That Tribunal in Waste Management  
9 explained that, in order to demonstrate a breach of  
10 MST, the Claimant must demonstrate that Perú's conduct  
11 was, and you see the famous language from Waste  
12 Management on your screen, the conduct that is  
13 "arbitrary, grossly unfair, unjust or idiosyncratic,  
14 [wa]s discriminatory, and expose[d] the Claimant to  
15 sectional or racial prejudice, lack of due process  
16 leading to an outcome which offends judicial  
17 propriety."

18           Realizing that its claims could not possibly  
19 reach that high threshold, in the Reply, Claimant  
20 attempted to avoid the MST standard altogether.  
21 Claimant argued in the Reply and for the first time in  
22 this Arbitration that it could import the different

1 legal standard from other treaties by dint of the MFN  
2 Clause. Now, this desperate and belated attempt by  
3 Claimant fails for various reasons:

4           First, as Perú demonstrated in the  
5 Rejoinder, Claimant's argument is untimely and it is,  
6 therefore, inadmissible. Pursuant to the ICSID Rules,  
7 Procedural Order No. 1, and arbitral practice,  
8 Claimant was required to submit its arguments with its  
9 Memorial. It is improper for Claimant to wait until  
10 the Reply to present a new argument, invoke the MFN  
11 provision for the first time, invoke a new legal  
12 standard, and on that basis reformulate its claims,  
13 but now under an autonomous FET standard or obligation  
14 that is not contained in the Treaty but that is  
15 being--or attempted to be imported from other  
16 treaties.

17           But in addition to being inadmissible, this  
18 attempt by Claimant to evade the Minimum Standard of  
19 Treatment must be rejected because the MFN Clause  
20 cannot be used to import an autonomous FET provision  
21 from other treaties. As Perú explained in detail in  
22 the Rejoinder, the MFN Clause is expressly limited in



1 scope, and applies only to the treatment of investors  
2 and investments in the territory of Perú with respect  
3 to, and here I quote the language, "the establishment,  
4 acquisition, expansion, management, conduct,  
5 operation, and sale or other disposition of" their  
6 Investments.

7           But the existence of  
8 fair-and-equitable-treatment obligations in other  
9 treaties does not constitute treatment by Perú of  
10 investments in its territory. Here again, the two  
11 State Parties to the Treaty agree. The United States  
12 affirmed, "a Party does not accord treatment through  
13 the mere existence of provisions in its other  
14 international agreements such as procedural  
15 provisions, umbrella clauses, or clauses that impose  
16 autonomous fair and equitable treatment standards."  
17 This is from the U.S. Submission, Paragraph 16, which  
18 you have on your screen.

19           In any event, Perú has shown in its written  
20 submissions that the relevant State act do not  
21 constitute an internationally wrongful act either  
22 under the minimum standard of treatment or under a

1 lower fair-and-equitable-treatment standard.

2           And let's move to the substance of the  
3 claim. Now, the Tribunal will recall that Claimant  
4 concedes that none of the individual measures that  
5 Claimant challenges in this Arbitration, on its own,  
6 gives rise to liability. Instead, Claimant's MST  
7 claims, like its expropriation claim, is premised on a  
8 theory of composite act. However, Claimant has not  
9 established the existence of a composite act.

10           As the Tribunal knows, a composite act is a  
11 specific type of State conduct under international  
12 law. Article 15 of the ILC Articles on State  
13 Responsibility provides that a composite act is  
14 comprised of, and I quote, "a series of acts or  
15 omissions." The authoritative commentary to the Draft  
16 Articles on State Responsibility clarifies that a  
17 composite act is not merely a random set of acts or  
18 omissions but rather is comprised only of a set of  
19 acts or omissions that are "sufficiently numerous and  
20 interconnected to amount not merely to isolated  
21 incidents or exceptions but to a pattern or system."

22           The late Professor James Crawford explained

1 that, and I quote, "a composite act is more than a  
2 simple series of repeated actions, but, rather, a  
3 legal entity the whole of which represents more than  
4 the sum of its parts."

5 Now, to substantiate its theory of a  
6 composite act, Claimant therefore had to identify the  
7 specific measures that it challenges and demonstrate  
8 that those Challenged Measures are interconnected,  
9 forming part of an underlying pattern or system, such  
10 that the Measures combined to form a legal entity that  
11 is more than the sum of its parts.

12 Now, Claimant has utterly failed to satisfy  
13 these requirements. In fact, it has not even  
14 attempted to do so. And here, as a preliminary  
15 matter, we note that the Claimant has not even  
16 consistently identified the Measures that it alleges  
17 form part of a composite act. Instead, it has  
18 targeted and criticized different measures throughout  
19 its written submissions.

20 Now, this leaves the Tribunal and Perú  
21 guessing as to which specific Measures, according to  
22 Claimant, comprised the alleged composited act that is

1 the basis of its FET claims. Now, Perú identified in  
2 Claimant's Memorials 16 Challenged Measures. In the  
3 Reply, however, Claimant abandoned certain complaints  
4 and added new ones, such that Perú is uncertain that  
5 even these Measures constitute the basis of Claimant's  
6 composite act theory and claim. And, of course, it is  
7 a fundamental rule of due process that a Respondent  
8 must know with sufficient clarity what is the basis of  
9 the Claims against it, and here no such clarity  
10 exists.

11 But even if Claimant had clearly and  
12 consistently identified the Challenged Measures which,  
13 it did not, it has not even attempted to show, that  
14 such Measures comprise a composite act. And to be  
15 clear, Claimant has not shown and cannot show any  
16 interconnection, or common pattern or scheme,  
17 underlying its various complaints.

18 The Challenged Measures that we have been  
19 able to identify span many years and were enacted by a  
20 variety of different governmental actors, with no  
21 underlying pattern that could transform these  
22 different Measures into a legal entity or composite

1 act. There is no central authority that was directing  
2 the actions of these separate agencies or pulling the  
3 strings in a concerted manner.

4 But, even though Claimant's claims under  
5 Article 10.5 should be dismissed based on the above,  
6 Perú has also demonstrated that such claims can be  
7 dismissed for other reasons, including lack of merit,  
8 and I will address very briefly each part of the  
9 claims in turn, again, referring the Tribunal  
10 respectfully to our written submissions. Let's take,  
11 for instance, the denial-of-justice claim.

12 The threshold for establishing a denial of  
13 justice is exceedingly high, and there are numerous  
14 hurdles that Claimant must overcome but has not been  
15 able to. First, there is a presumption that decisions  
16 taken by domestic courts and adjudicatory entities  
17 with respect to domestic law are valid. This is, and  
18 I quote, "a presumption of regularity under  
19 international law." It has been acknowledged by other  
20 tribunals including Chevron, which you have on the  
21 screen, and also by the United States in its  
22 Non-Disputing Party Submission in Paragraph 30.

1           Also, an additional hurdle, only egregious  
2 failings in adjudicatory proceedings as a whole will  
3 lend or will lead to a finding of denial of justice.

4           Now, the outcome of domestic proceedings  
5 must offend judicial propriety for them to constitute  
6 a serious deficiency or failure to accord due process  
7 and be an error of a kind which no competent judge  
8 could reasonably have made. Merely erroneous  
9 domestic-court decisions or misapplications or  
10 misinterpretation of domestic law do not constitute a  
11 denial of justice under customary international law.  
12 This too is confirmed by the United States in its  
13 Non-Disputing Party Submission, and it is supported by  
14 various Legal Authorities that Perú has attached to  
15 its Submissions. And it's not a controversial  
16 standard under international law. It is well-known.

17           Third, Claimant must demonstrate that the  
18 systemic failure of the State's judicial system, as  
19 noted by the United States also in its Written  
20 Submission.

21           And, fourth, Claimant must have availed  
22 itself of available recourses under Peruvian law

1 before challenging those judicial decisions before an  
2 international tribunal. And, indeed, again, this is  
3 well-established that States are only liable for  
4 judicial decisions of a court of last resort. As  
5 correctly noted by the United States in its Written  
6 Submission, and I quote, "non-final judicial acts  
7 cannot be the basis for claims under Chapter 10 of  
8 this Treaty." Well, to be precise, they did not say  
9 "this Treaty." The United States says "of the  
10 U.S.-Peru TPA." This is U.S. Submission Paragraph 35.

11 Now, Claimant's denial-of-justice claim is  
12 based on the premise that Perú, and I quote, "deprived  
13 KML of its property without due process of law."  
14 However, as demonstrated by my colleague, Mr. Nistal,  
15 Claimant did not show that it had any valid property  
16 rights in the gold. The State simply did not deprive  
17 Claimant of its property. It did not own that  
18 property under Peruvian law. And in any event, Perú  
19 has thoroughly rebutted Claimant's baseless assertion  
20 that it was denied due process under Peruvian law, let  
21 alone under international law.

22 Now, the analysis could end there.

1 Nevertheless, Perú has also demonstrated that the  
2 facts do not support Claimant's claims of denial of  
3 justice. Let's take the conduct of SUNAT, for  
4 example, the Customs and Tax Authority.

5           The evidence, which Perú discussed at length  
6 in its Submissions, show that SUNAT initially inspected  
7 Shipments 1 to 4 in accordance with its statutory  
8 mandate and based upon objective risk indicators of  
9 unlawful activity by the Suppliers. SUNAT does  
10 immobilize those shipments based upon the Supplier's  
11 failure to prove the lawful origin of the gold. Far  
12 from an egregious failure which, in any event, must be  
13 grave enough to shock a sense of judicial propriety,  
14 there is, in fact, no failure or error of law by  
15 SUNAT.

16           In fact, Claimant has conceded and confirmed  
17 this morning in response to Professor Knieper's  
18 question that, and I quote, "in and of themselves, the  
19 initial Immobilizations by SUNAT did not rise to the  
20 level of a breach of the TPA by Perú." And this is in  
21 Reply Paragraph 125.

22           Claimant's only other complaint concerns the



1 conduct of the prosecutorial authorities and Criminal  
2 Courts in the context of the criminal proceedings that  
3 were commenced against the Suppliers, and specifically  
4 Claimant complains of the issuance of Precautionary  
5 Seizures (1), the rejection of certain requests  
6 submitted by Kaloti, (2), and the length of the  
7 Criminal Proceedings, (3).

8 I will address each in turn. Even though  
9 Perú does not bear the burden of proof, because  
10 Claimant did not even establish a prima facie case,  
11 Perú demonstrated in its written submissions that  
12 these Peruvian authorities acted reasonable,  
13 proportionally and in accordance with their respective  
14 competencies.

15 Perú has demonstrated that Peruvian law  
16 authorizes the issuance of Provisional Measures,  
17 including the seizure of objects, instruments or  
18 proceeds of a crime. The relevant provisions of  
19 Peruvian law, including Article 2 of Preliminary  
20 Investigations Law, which is shown on this slide, and  
21 Article 94 of the Code of Criminal Procedure on the  
22 next slide, establish that.

1           And I note here in connection with Article 2  
2 of this law, Preliminary Investigations Law, that, in  
3 its presentation this morning, Claimant insisted on  
4 presenting to you timeframes of 15 days that could be  
5 expanded to a further 15 for a total of 30 days, taken  
6 from a version of Article 2.3 of the--of this  
7 Preliminary Investigations Law that was derogated in  
8 12 April 2007, that is seven years before the  
9 Precautionary Seizures were ordered. And in this  
10 respect, we refer the Tribunal to Paragraph 212 of our  
11 Rejoinder and Exhibits R-300 and R-106.

12           And concerning Article 94 of the other  
13 provision that I mentioned, Claimant's counsel argued  
14 this morning that this provision was invoked post hoc  
15 in this Arbitration. That is false. Perú  
16 demonstrated this in Paragraph 212 of its Rejoinder.  
17 It demonstrated that the Criminal Courts did expressly  
18 invoke Article 94 of the Code of Criminal Procedure,  
19 and it cited R-145, which is dated 14 May 2015 as  
20 support.

21           Now, it is evident, based on these two  
22 examples and countless others that Claimant has

1 largely ignored the rebuttal submissions of Perú  
2 contained in its Rejoinder.

3           Independent Legal Expert Professor Missiego  
4 explained in his Expert Report that, Precautionary  
5 Measures may fall on the assets of third parties.  
6 Professor Missiego also confirms, as you can see on  
7 your screen, and I quote, "once the measures are  
8 decreed in the initial investigation phase, for  
9 example, with the issuance of the Order initiating  
10 Criminal Proceedings, they could be maintained  
11 throughout the process, even until the final ruling is  
12 issued."

13           Claimant's own Legal Expert, Mr. Caro Coria,  
14 agrees with Perú that Peruvian law authorizes the  
15 precautionary seizure of assets even if those assets  
16 are owned by third parties.

17           The evidence reveals that the prosecutorial  
18 authorities and Criminal Courts acted consistently  
19 with this regulatory framework. Specifically, SUNAT  
20 identified conspicuous irregularities concerning the  
21 Five Shipments and immobilized them in accordance with  
22 Peruvian law. And then based on information received

1 from SUNAT, the Prosecutor's Office opened preliminary  
2 criminal investigations into the Suppliers.

3           Now, to avoid dissipation of the gold during  
4 the Preliminary Investigations, the Prosecutor's  
5 Office requested and obtained from Criminal Courts  
6 orders for the Precautionary Seizures of Shipments 1  
7 to 4. The Prosecutor's Office then filed criminal  
8 complaints against the Suppliers and certain of their  
9 representatives.

10           And then, based on the independent analysis  
11 of the evidence, the Criminal Courts ordered the  
12 initiation of four Criminal Proceedings against the  
13 Suppliers and/or their representatives for alleged  
14 money-laundering in connection with the gold. The  
15 Courts also decided to maintain the Precautionary  
16 Seizures during the course of the Criminal Proceedings  
17 because if the gold was found to be part of a  
18 money-laundering scheme, it would have to be  
19 permanently confiscated as required by Article 102 of  
20 the Criminal Code.

21           And given that these Criminal Proceedings  
22 are still ongoing, the Precautionary Seizures remain

1 in place as of the date of the present Submission, in  
2 accordance with the Court's orders. And this is found  
3 in Exhibits R-139, R-145, R-224, and R-150. Again, in  
4 respect of the Shipments 1 to 4.

5 Now, critically, Claimant itself concedes  
6 that the Precautionary Seizures were issued in  
7 accordance with Peruvian law, and specifically as  
8 shown on your screen, Claimant admitted in the Reply  
9 that, and I quote, "Perú could take temporarily  
10 physical control of Kaloti's alleged gold to  
11 investigate its origin for a reasonable and limited  
12 period of time based on realistic suspicions."

13 And the Claimant also admitted that each of  
14 the subsequent Precautionary Seizures individually,  
15 and I quote, "did not rise to the level of a breach of  
16 the TPA." Reply 125 at 228, as shown on your screen.

17 Now, these submissions confirm that the  
18 Precautionary Seizures neither violate Peruvian law  
19 nor approach the high threshold for a denial of  
20 justice under customary international law.

21 In sum, the Written Submissions and the  
22 evidence on the record show that Claimant has failed

1 to demonstrate the existence of any breach of Peruvian  
2 law, let alone a defect so egregious that it could  
3 reflect a failing in the State's entire judicial  
4 system resulting in denial of justice.

5 In addition to its meritless complaint about  
6 the seizures, Claimant alleges that the Criminal  
7 Courts improperly rejected Kaloti's requests to  
8 intervene in the Criminal Proceedings. Perú has shown  
9 that this complaint is equally meritless. As Perú and  
10 Professor Missiego have explained, Peruvian law did  
11 provide Kaloti, as a third party to the Criminal  
12 Proceedings, with at least three available remedies.  
13 Kaloti could have submitted a reevaluation request, an  
14 appeal, or an Amparo request.

15 Claimant has admitted that the above  
16 remedies were and always have been available to  
17 Kaloti, and that Kaloti failed to make use of any of  
18 these remedies in respect of the seizures. Claimant  
19 cannot claim denial of justice when it manifestly and  
20 admittedly failed to use the remedies available to  
21 challenge the same judicial measures that it complains  
22 of in this Arbitration.

1           Instead of pursuing the legal remedies that  
2 were available to it, Kaloti made various ad hoc and,  
3 frankly, bizarre applications, all in respect of  
4 Shipments 2 and 3 only. However, as Perú and  
5 Professor Missiego have explained in detail, the  
6 nature of those applications were not consistent or  
7 even contemplated by Peruvian law. They consisted of  
8 four Written Submissions to the Prosecutor's  
9 Office--not the Court, to the Prosecutor's  
10 Office--concerning Shipments 2 and 3; and three  
11 requests filed before the Criminal Courts in the  
12 proceeding concerning ██████████, which is the  
13 Supplier of Shipment 3.

14           Now, by way of example only of how misplaced  
15 these submissions were, it should have been obvious to  
16 Kaloti that the Prosecutor's Office had no authority  
17 under Peruvian law to grant Kaloti access to the  
18 criminal record, which is what Kaloti was seeking  
19 through that Submission and the Criminal Proceedings  
20 in particular of ██████████. Nor did the  
21 Prosecutor's Office have the authority to reject or  
22 lift a Precautionary Seizure over Shipment 3, which,

1 according to Claimant, SUNAT had requested. But, in  
2 fact, it turns out and contrary to Kaloti's  
3 allegations, SUNAT's did not request the Precautionary  
4 Seizure.

5 Now, given all these glaring defects in  
6 these handful of applications by Kaloti, which have  
7 been exposed in more detail in Perú's Submissions,  
8 there is absolutely no basis for Claimant's claim that  
9 the Prosecutor's Office or the Criminal Courts acted  
10 arbitrarily, unjustly, or with idiosyncratically when  
11 they were disregarded or dismissed.

12 In addition, and importantly, Claimant has  
13 provided no evidence whatsoever to show that Kaloti  
14 attempted to intervene in the investigations and  
15 Criminal Proceedings concerning Shipments 1, 4, or 5.

16 In sum, Claimant's failure to pursue the  
17 available remedies under Peruvian law to assert its  
18 alleged property rights, including the constitutional  
19 recourse of Amparo, is fatal to Claimant's  
20 denial-of-justice claim. As Professor Paulsson has  
21 explained, and I quote, "exhaustion of local remedies  
22 in the context of denial of justice is not a matter of



1 procedure or admissibility, but an inherent material  
2 element of the delict" under international law.

3           Claimant has also accused Perú of taking an  
4 unreasonable length of time to conclude the Criminal  
5 Proceedings. Now, this argument fails for multiple  
6 reasons:

7           First, Claimant's interest in the  
8 Precautionary Seizures is entirely contingent on  
9 Claimant proving that it qualifies as a bona fide  
10 purchaser of the gold, which, as we have explained and  
11 demonstrated, it has failed to do.

12           Second, Claimant is improperly seeking to  
13 reverse the burden of proof by arguing that Perú has  
14 failed to justify the length of the Criminal  
15 Proceedings. But the fact is that Claimant bears the  
16 burden of proving that there have been serious  
17 irregularities or deviations from Peruvian procedural  
18 law in these proceedings, which it has failed to do.

19           Third, and in any event, Perú has  
20 demonstrated that the Criminal Proceedings have  
21 proceeded at a reasonable pace, given the complexity  
22 of those proceedings. For example, each of the

1 Criminal Proceedings involved the performance of  
2 numerals investigative inquiries, which are known in  
3 Spanish as actos de investigación, including on-site  
4 inspections of the multiple mining concessions located  
5 in remote places of Perú from which the Suppliers  
6 claimed to have sourced the gold, which, as we have  
7 seen through Mr. Nistal's presentation, simply did not  
8 occur.

9           And fourth, as explained by  
10 Professor Missiego, to the extent that Kaloti  
11 considered that the duration of the Criminal  
12 Proceedings had breached any of its due-process rights  
13 under Peruvian law, it could and should have pursued  
14 multiple legal remedies under Peruvian law, including  
15 rebuttal, the constitutional right of submitting  
16 amparo when it considers it's one of its fundamental  
17 rights have been violated, but Kaloti again failed to  
18 do so.

19           Importantly, Claimant's own Legal Expert has  
20 admitted that, and I quote: "Not every delay in the  
21 proceeding can be identified as a violation." And he  
22 went on to say, and I quote: "Undue delays have been

1 understood as extreme abnormal scenarios of the  
2 administration of justice, with unreasonable  
3 irregularities in the duration, exceeding what is  
4 foreseeable or tolerable, and also attributable to the  
5 negligence or inactivity of the institutions in charge  
6 of the administration of justice." That high standard  
7 has certainly not been met here. Kaloti has not tried  
8 to prove this at the domestic level using the recourse  
9 that Peruvian law accords and it certainly has not  
10 done so in the context of this Arbitration.

11 In conclusion, Claimant has not even come  
12 close to demonstrating that the Peruvian authorities  
13 have denied justice to Kaloti.

14 The Claimant as also alleged that Perú  
15 violated the MST by discriminating against Kaloti. I  
16 will try to be very brief here also in the interest of  
17 time and because this has been also addressed in  
18 detail in our submissions.

19 Even if discrimination was part of the MST  
20 standard--and that is something that has not been  
21 established--Claimant would be required to identify a  
22 comparator in like circumstances, demonstrate that

1 Claimant was treated less favorably than that of  
2 comparator, and show that there was no reasonable  
3 justification for such differential treatment. But  
4 Claimant has not satisfied any of these requirements.

5 Claimant has pointed to [REDACTED]  
6 [REDACTED], a Curaçaoan company that sought to  
7 purchase gold in Perú as a purported comparator, but  
8 as we have explained in our Submissions, [REDACTED]  
9 shipments were immobilized pursuant to an entirely  
10 different legal basis. That was Article 56 of the  
11 Peruvian Tax Code. This is R-234. That is entirely  
12 distinct from the circumstances that Kaloti complains  
13 in respect of Shipments 1 to 4, which were immobilized  
14 pursuant to the General Customs Law, based on risk  
15 indicators of illegal mining and money-laundering, not  
16 Tax Code violations.

17 Claimant has also failed to demonstrate the  
18 existence of deferential treatment. And specifically  
19 while Kaloti alleges that [REDACTED] had options for  
20 recourse not available to Kaloti, Perú and Professor  
21 Missiego have demonstrated that Kaloti had several  
22 avenues for legal recourse which it simply chose not

1 to pursue.

2           The next and penultimate argument that  
3 Claimant makes is related to legitimate expectations  
4 and here again, I can and will be very brief because  
5 this claim fails both in law at a threshold level, a  
6 very basic threshold level, and also in fact.

7           As a threshold matter, it fails because  
8 customary international law and MST does not protect  
9 investor's legitimate expectations as a source of  
10 obligation on the part of the State. And this is  
11 well-known. It has been repeated over and over again  
12 by Legal Authorities, discussed at length by  
13 investment tribunal, but it has also been recognized  
14 by the ICJ in a ruling of October 2018 in the dispute  
15 between Bolivia and Chile concerning access to the  
16 Pacific Ocean. And there the International Court of  
17 Justice affirmed that there is no such obligation  
18 under customary international law, and you have the  
19 excerpt on the screen, which I will not read in the  
20 interest of time.

21           And here again, Perú and the United States  
22 are in complete agreement in this regard. The United

1 States has stated, and I quote, "the concept of  
2 'legitimate expectations' is not a component element  
3 of 'fair and equitable treatment' under customary  
4 international law that gives rise to an independent  
5 host-State obligation."

6           Even if legitimate expectations were  
7 protected under MST, which they are not, Claimant has  
8 been unable to identify any legitimate expectations  
9 that were involved.

10           We've addressed this in our Written  
11 Submissions, Claimant has not been able to respond,  
12 and again, in the interest of time I will move on.

13           I will perhaps only very quickly recall that  
14 the investment tribunals that have, under the  
15 autonomous FET obligation, which is not applicable  
16 here, referred to legitimate expectations as something  
17 that is protected under that autonomous standard, have  
18 indicated that for those expectations to be  
19 legitimate, they must be reasonable, take into account  
20 all the relevant circumstances. They must have arisen  
21 from specific circumstances, commitments or  
22 representations made by the State to the Investor and

1 must have been relied upon by the Investor when making  
2 its Investment. Those conditions are not met here,  
3 even if they were applicable, which we insist are not  
4 applicable because MST does not protect legitimate  
5 expectations.

6 In the interest of time, I will skip over  
7 the next few slides and I will go to the final  
8 argument that Claimant makes under the heading of MST  
9 alleged violation, and that is Perú's supposed  
10 obligation to negotiate and Perú's alleged failure to  
11 do so.

12 Now, the problem with this argument is  
13 numerous--are numerous and obvious, but I was tempted  
14 not to even address this as part of our presentation,  
15 but since Claimant has insisted on this claim, I will  
16 devote just perhaps one or two minutes to it.

17 Now, first, Claimant has not demonstrated  
18 that MST, under customary international law, imposes  
19 any obligation on Perú to negotiate. But Claimant has  
20 also failed to identify any provision of the Treaty  
21 that imposed such duty. Nor is there, as Claimant has  
22 alleged, a free-standing obligation of good faith

1 which creates an obligation to negotiate, and here I  
2 refer to the Tribunal to the Award in Alps Finance  
3 versus Slovakia, in particular, Paragraph 210, which  
4 is R-L 235, which I do not have time to read it, but  
5 the Tribunal will be able to find that in our  
6 Rejoinder. And it's simply that Tribunal said indeed  
7 that there is no obligation to negotiate. And, in  
8 fact, it refers to a situation similar to the one that  
9 we face here. The State considered that the Claims  
10 were wrong and it had no obligation considering the  
11 Claims were wrong to sit down and try to negotiate and  
12 offer compensation to Claimant.

13           But in any event, Perú has demonstrated with  
14 documentary evidence that it did engage in good-faith  
15 negotiations with Claimant, and this has been  
16 demonstrated by Perú in its Written Submissions,  
17 including in Paragraphs 589 to 595 in the  
18 Counter-Memorial and Paragraph 690 of the Rejoinder,  
19 and therein we cite Exhibits 3--I'm sorry, R-30, 31,  
20 and 32.

21           In conclusion, Claimant presented a  
22 convoluted MST claim invoking non-existential legal



1 obligations complaining of various instances of State  
2 conduct and has been utterly unable to substantiate  
3 any of its claims. Those claims lack merit and must  
4 be rejected.

5 I'm prepared to move on to expropriation,  
6 Mr. Chairman, but could I please have an indication of  
7 the time that we have remaining.

8 SECRETARY KETTLEWELL: It has been two hours  
9 used by the Respondent. You have one hour left.

10 MR. GRANÉ LABAT: Thank you. May I just  
11 take one minute to consult with my colleagues and make  
12 sure that we are within time?

13 PRESIDENT McRAE: Go ahead.

14 MR. DÍAZ-CANDIA: With your permission,  
15 Mr. President, we would like to lodge a couple of  
16 objections to the PowerPoint as demonstrative  
17 exhibits. We didn't want to interrupt Mr. Grané  
18 during his presentation, a courtesy that he didn't  
19 grant to Ms. Hormazabal when he interrupted her this  
20 morning in the middle of her presentation.

21 In Slide No. 152--sorry, 153, to be correct,  
22 Mr. Grané referred that there are contemporaneous

1 documents that allege that Article 94 were--was  
2 applicable to these proceedings. In that slide, 153,  
3 we don't see any contemporaneous documents. We stated  
4 that there are none, and we would like to note what  
5 Mr. Grané referred in connection with this slide.  
6 Where in the record is that or if it's outside the  
7 record, please, tell us where to find it.

8 Slide No. 153, and we can go to the  
9 Transcript. He said that there were contemporaneous  
10 documents alleging that this Article was applied. All  
11 that we see here is the Criminal Proceeding Code.

12 And secondly, in Slide 157 he said that  
13 Claimant admitted that the initial--that some of the  
14 Measures where Perú complied with Peruvian law. We  
15 don't see anything in Slide 157 to demonstrate that  
16 statement. We would like to know if he's basing  
17 that--where in the record he's basing that or where we  
18 can find that admission. I responded this morning to  
19 Professor Knieper saying that compliance with Peruvian  
20 law will be addressed by Professor Caro on Thursday,  
21 and what we said this morning is what we said here,  
22 that those did not rise to the level of breach of the

1 TPA by Perú. We did not mention Peruvian law, at  
2 least not in this document.

3 So, we have those two objections to the  
4 PowerPoints and the presentation as demonstrative  
5 exhibits.

6 Thank you.

7 PRESIDENT McRAE: Mr. Grané, do you want to  
8 comment on that at the moment?

9 MR. GRANÉ LABAT: Thank you, Mr. President.

10 Perhaps counsel for Claimant,  
11 Mr. Díaz-Candia, did not hear what I said in respect  
12 of Article 94. I was responding to the presentation  
13 that they made this morning saying that it was a post  
14 hoc argument made in this Arbitration. I indicated  
15 that was false, and I said that we demonstrated in  
16 Paragraph 212 of our Rejoinder that the Criminal  
17 Courts did expressly invoke Article 94 of the Code of  
18 Criminal Procedure, and I refer to Exhibit R-145,  
19 which is cited in our Rejoinder, and that is dated  
20 14 May 2015. So, I frankly don't understand what the  
21 objection in relation to our presentation is.

22 In respect to 157, I fail, again, to

1 understand what Mr. Díaz-Candia is referring to.  
2 Therein in 157 we have cited our Reply, and we have  
3 provided the pin site in accordance with the PO.

4 Thank you.

5 MR. DÍAZ-CANDIA: Correct, but you said that  
6 this exhibit demonstrates that we admitted that the  
7 Measures did not breach Peruvian law. Where is that  
8 in this exhibit?

9 And again, we're not prepared--we can  
10 discuss this later. We just wanted to lodge our  
11 objections for the record, as he did this morning. I  
12 don't mean to engage in any discussion here.

13 MR. GRANÉ LABAT: Unfortunately, we have  
14 engaged in the discussion as a result of this improper  
15 intervention by Claimant. They're attempting to turn  
16 this into a debate. It is our presentation, if they  
17 have any objections to the arguments that we are  
18 making and the references that we are providing to the  
19 record and to the Submission, I suggest that they wait  
20 until Closing Arguments. We did extend the courtesy  
21 of not interrupting to rebut what they were saying and  
22 we expected the same courtesy to be extended to us.

1 Thank you.

2 PRESIDENT McRAE: I think this can be dealt  
3 with in Closing Submissions or later on.

4 MR. DÍAZ-CANDIA: Yes, thank you,  
5 Mr. Chairman.

6 (Pause.)

7 MR. GRANÉ LABAT: I'm sorry, given the  
8 interruption from Claimant, I still need to check on  
9 timing with my team. Thank you.

10 PRESIDENT McRAE: Yes, go ahead.

11 REALTIME STENOGRAPHER: As a personal point  
12 back here in the back of the room, can we take a  
13 bathroom break?

14 PRESIDENT McRAE: Go ahead.

15 REALTIME STENOGRAPHER: Thank you.

16 (Brief recess.)

17 PRESIDENT McRAE: Then we can resume.

18 Mr. Grané?

19 MR. GRANÉ LABAT: Thank you very much,  
20 Mr. President. And I will try to speed up, and if I'm  
21 going too fast, I know I can count on David to let me  
22 know in no uncertain terms that I should slow down.

1           Now, addressing expropriation, Claimant's  
2 final claim is that Perú expropriated its Investment  
3 in violation of 10.7 of the Treaty, which, of course I  
4 will refer to as an Expropriation Provision, and it  
5 specifically alleges that Perú's Measures resulted in  
6 two expropriations: The seizure of the Five Shipments  
7 and the indirect expropriation of Kaloti's going  
8 concern.

9           I will address each of four issues to be  
10 determined by the Tribunal in respect of these claims,  
11 and we have on the screen, you will see that we have  
12 included this in the list of substantive issues that  
13 we submitted to the Tribunal.

14           The first issue is whether the Claims are  
15 admissible. The second is whether the Claimant has  
16 identified a covered investment. The third is whether  
17 Claimant has demonstrated that there is a composite  
18 act, and the fourth and final issue is whether  
19 Claimant has satisfied the requisite element of an  
20 expropriation.

21           Starting with the first issue, Perú has  
22 demonstrated that the expropriation claim is

1 inadmissible in respect of at least two of the  
2 shipments because it is barred by the "fork in the  
3 road" provision of the Treaty, which is contained in  
4 Annex 10-G, and that provision bars the submission of  
5 claims if the Investor has already alleged that breach  
6 in a court or Administrative Tribunal of the  
7 Respondent State, which is precisely what happened in  
8 this case.

9           Indeed, as Perú explained in its Written  
10 Submissions, Kaloti has already claimed a breach of  
11 the Expropriation Provision before Peruvian courts,  
12 and specifically it did so in March of 2014. That's  
13 when Kaloti filed an Amparo request asking that a  
14 Peruvian Constitutional Court find that SUNAT  
15 Immobilizations of Shipments 2 and 3 violated  
16 Article 10.7 of the Treaty. That document is on the  
17 record as Exhibit R-230, and Claimant's expropriation  
18 claim in respect of those shipments is therefore  
19 barred by this "fork in the road" provision.

20           Claimant has also failed in respect of the  
21 expropriation claim because it does not even meet the  
22 threshold requirement of demonstrating that there is a

1 covered investment that has been expropriated. And I  
2 referred to this in the context of *ratione materiae*,  
3 and therefore, I will try to go quickly in respect of  
4 this claim.

5 And again, this requirement is derived from  
6 Article 10.7, which provides, and I quote, "no party  
7 may expropriate or nationalize a covered investment."  
8 So, we go back to the concept of covered investment.

9 And Annex 10-B of the Treaty, further  
10 clarifies that the alleged expropriation must  
11 interfere with, and I quote, "tangible or intangible  
12 property interest in an investment."

13 And as the United States correctly noted in  
14 its Submission, the first step in any expropriation  
15 analysis must be an examination of whether there is an  
16 investment capable of being expropriated. Here there  
17 is no investment.

18 As Perú demonstrated and Mr. Nistal recalled  
19 earlier today, Kaloti never acquired ownership over  
20 the Five Shipments of the gold. And as we have been  
21 at pains to demonstrate and stress, it is telling and  
22 remarkable that Claimant did not even produce Purchase



1 Agreements that would establish ownership of the gold.  
2 Perú had to request such agreements in Document  
3 Production, and what Claimant produced does not show  
4 that Kaloti acquired ownership of the Five Shipments.  
5 They are not Purchase Agreements.

6           As I already have explained, the Five  
7 Shipments of gold do not possess the characteristics  
8 of an "investment" either under the Treaty or under  
9 the ICSID Convention. As I pointed out, to the  
10 contrary, even assuming that Kaloti did acquire  
11 ownership of the gold, which has not been established,  
12 that Transaction would have constituted a mere  
13 commercial Transaction of the purchase of the goods,  
14 and it is universally accepted that such Transactions  
15 are not covered investments.

16           And also as we have demonstrated, even if it  
17 had acquired ownership, it did so in violation of  
18 Peruvian law and international public policy.

19           For all these reasons, the Five Shipments do  
20 not constitute a covered investment; and, on that  
21 ground, the claim can be dismissed.

22           Now, the second expropriation claim

1 concerning Kaloti as a going concern, that also fails  
2 because Claimant could not satisfy, again, the  
3 threshold requirement of covered investment. And in  
4 this respect, the rule explained that Kaloti--and this  
5 is on Claimant's own case--is a U.S.-based investor.  
6 It is not an investment in the territory of Perú, and  
7 this claim, therefore, also does not concern a covered  
8 investment in the territory of Perú.

9           And again, even if Claimant had cleared all  
10 those hurdles, which it has not and cannot, it is not  
11 a covered investment because they are premised on the  
12 existence of a--the claim is premised on the existence  
13 of a composite act, which simply does not exist for  
14 the reasons that I have explained in respect of the  
15 MST claim. There is no pattern, there's no system  
16 that is interconnected and, therefore, the premise  
17 under international law for a Composite Act Theory of  
18 expropriation is not met here or creeping  
19 expropriation.

20           But even if the Tribunal were minded to  
21 proceed to the merits of the claims, it would find  
22 that Claimant has not satisfied any of the

1 requirements for an expropriation pursuant to the  
2 Treaty and customary international law, and I will  
3 address each requirement in turn.

4           One such requisite element of an  
5 expropriation pursuant to Annex 10-B is interference  
6 by the State with, and I quote, "a distinct,  
7 reasonable investment-backed expectation." Now, the  
8 *Ríos versus Chile Tribunal* interpreted an almost  
9 identical Treaty provision in Spanish, and clarified  
10 the meaning of each of these three characteristics.  
11 First, Claimant's expectations are distinct when they  
12 result from unambiguous or unmistakable commitments or  
13 statements by the host-State. This is in *Ríos*  
14 Paragraph 254.

15           Second, Claimant's expectations are  
16 reasonable when they are objective, taking into  
17 account the commitment or statement made and all  
18 relevant facts, *Ríos* Paragraph 255.

19           The U.S. confirmed that the reasonableness  
20 of investment-backed expectations depends, among other  
21 factors, and I quote, "whether the Government provided  
22 the investor with binding written assurances" and the

1 "potential for Government regulation in the relevant  
2 sector."

3           And these expectations would be  
4 investment-backed when the expectations serve as the  
5 basis for the Claimant's decisions to invest. None of  
6 these requirements are met in this case. In our  
7 Submissions we have explained, and we have also  
8 referred to actual statements made by Claimant and  
9 ██████████ that actually demonstrate that it was very  
10 clear what the regulatory framework in Perú was and  
11 entailed, including in relation to illegal mining.

12           But, in fact, Claimant has completely  
13 ignored this Treaty text requirements. Instead, it  
14 has referred to various general, vague, and  
15 unsupported alleged expectations without any  
16 attempting to demonstrate that they were distinct,  
17 reasonable and investment-backed.

18           This Concession, this recognition, by Kaloti  
19 can be found in Reply Paragraph 377.

20           Claimant has also alleged that it expected  
21 that it would, and I quote, "would be able to appeal  
22 or challenge at appropriate opportunities any decision

1 potentially adverse to Kaloti in Perú." Reply  
2 Paragraph 389. Yet again, this generalized assertion  
3 does not identify a specific expectation based upon a  
4 specific representation by Perú upon which Claimant  
5 relied in making its Investment, but as we have also  
6 already demonstrated and Claimant cannot deny, it had  
7 available the avenues necessary to challenge or appeal  
8 decisions that were potentially adverse. It simply  
9 chose not to make use of them, at its own discretion  
10 were words they used such that expectation, even if it  
11 existed, was not frustrated in any way.

12 Now, let me--I will try not to speed too  
13 much through this next requirement, which is the basic  
14 requirement of the economic impact on the Investment,  
15 the effect of test, which is required and now  
16 expressly by Annex 10-B, but the Treaty simply  
17 reflects the long-standing practice and jurisprudence  
18 in investment tribunals to focus on the economic  
19 impact that the Challenged Measures have on an  
20 investment. And here, this Investment Law confirms  
21 that an expropriation consists of, and I quote,  
22 "virtual annihilation, effective neutralization, or

1 factual destruction of an investment, its value or  
2 enjoyment" of such a magnitude as to be "equivalent to  
3 a deprivation of property, or the loss of all  
4 attributes of ownership." This is, of course,  
5 Electrabel, 6.62.

6 And also, as the Infinito Tribunal indicated  
7 or simply recalled, the deprivation must be permanent.  
8 It's not merely temporary.

9 Claimants, in this respect, must prove that  
10 the alleged State conduct caused such a destruction of  
11 the value of the Investment. Now, this requires, in  
12 the words of El Paso, showing that the loss was, and I  
13 quote, "the automatic consequence, i.e., the only and  
14 unavoidable consequence, of the State's Measures."  
15 This is the El Paso Tribunal Paragraph 270.

16 Now, Claimant does not dispute that it must  
17 meet these requirements or the applicable legal  
18 standard. In fact, Annex 10-B of the Treaty is  
19 something that Claimant cannot challenge, and yet it  
20 has been unable to satisfy any of these requirements  
21 and therefore has not established expropriation.  
22 Let's take, for instance, just the permanence

1 requirement. Here, there has been no permanent  
2 destruction in economic value of the Five Shipments  
3 caused by Perú. Quite the contrary. In fact, far  
4 from showing any destruction in value, Claimant has  
5 taken the position that the value of the shipment of  
6 gold has increased over time. Claimant alleges that,  
7 in 2014, the value of the gold was 17.6 million. Now,  
8 for the purpose of its damages claim, Claimant assert  
9 that the value of the gold in 2023 is 24.5 million,  
10 and this is in Reply 120 and 413.

11           If the Peruvian courts find that the gold  
12 was not illegally mined and accepting Claimant's own  
13 submission that it owns the gold, its value would have  
14 increased rather than be wiped out over time. Now,  
15 this directly contradicts the claim of expropriation  
16 that must be premised on the destruction of the value  
17 of the Investment to the point that it's rendered  
18 worthless. That has not happened even by Claimant's  
19 own admission.

20           Now, further, the Precautionary Seizures are  
21 by definition temporary measures. Pursuant to  
22 Peruvian law, if the proceedings before the Criminal

1 Courts yield the determination that no crime was  
2 committed by the Suppliers in connection with the  
3 gold, then the Seizures will be lifted and the gold  
4 will be returned to its rightful owner.

5 For its second claim, the alleged  
6 expropriation of Kaloti as a going concern, Claimant  
7 has also failed to satisfy the economic impact  
8 requirement. Claimant's argument concerning the  
9 economic impact on that alleged investment, Kaloti as  
10 a going concern, is that Perú caused, and I quote, "a  
11 sharp decline in gold Supplier's willingness to sell  
12 to Kaloti," and also "a negative impact on Kaloti's  
13 ability to maintain and use bank accounts," and "an  
14 overwhelming debt burden." All of these assertions  
15 are in the Reply and are being shown excerpts on your  
16 screen.

17 However, [REDACTED] himself contradicts the  
18 notion of any such impact. He asserted in his First  
19 Witness Statement that, and I quote, "KML, i.e.,  
20 Kaloti, actually invested in and processed and sold  
21 very significant quantities of Peruvian gold between  
22 2012 and 2018." This is First Witness Statement at



1 Paragraph 35 of Mr. [REDACTED] This submission  
2 contradicts Claimant's arguments and so does the  
3 evidence. The documents on the record in fact  
4 disprove the notion that Perú's measures caused the  
5 destruction of value of Kaloti as a going-concern  
6 enterprise. And although the independent damages  
7 experts of the Brattle Group will address this  
8 evidence in more detail in their presentations and,  
9 indeed, in cross-examination at the end of this week,  
10 I will mention only a couple of illustrative examples  
11 of what I'm saying.

12 For instance, while Claimant alleges that  
13 certain Suppliers stopped selling to Kaloti due to the  
14 Challenged Measures, the documentary evidence  
15 disproves that allegation. Take, for example,  
16 Claimant's assertion that, in 2015, Veta de Oro and  
17 Vega Granada supplying gold. This is Memorial  
18 Paragraph 59. This is not accurate. Claimant's  
19 exhibits, its transactional history C-30, shows that  
20 they are going to supply only four kilograms of gold  
21 to Kaloti in 2015 but supplied more than 24 kilograms  
22 of gold to Kaloti in 2016, i.e., after the Measures

1 were adopted.

2 By 2017, Vega Granada supplied 932 kilograms  
3 of gold, an increase of approximately 22,600 percent.

4 Similarly, Veta de Oro in fact increased its  
5 supply from 27.7-kilograms in 2013 to 735 kilograms in  
6 2016, an increase of approximately 2,500 percent.

7 And even if some Suppliers did cease trading  
8 with Kaloti during the relevant period, Claimant has  
9 not shown that this was caused by any Measure adopted  
10 by Perú. To the contrary, the evidence shows that  
11 this was reflective of the nature of the market and  
12 Kaloti's own choices of gold Suppliers.

13 Exhibit R-251, it's a report on the  
14 socioeconomic impact of illegal mining in Perú. It  
15 notes that unscrupulous gold suppliers in Perú  
16 typically exported significant quantities, or  
17 significant volumes of gold over short periods of time  
18 and then willingly shut down operations before paying  
19 taxes and to avoid criminal prosecution. This  
20 certainly was not the exception the Suppliers that  
21 Kaloti used, and Mr. Nistal showed a slide that  
22 indicated that peak very short period of time during

1 which there was Transactions.

2           And indeed, this is consistent with Kaloti's  
3 own Suppliers and the Transaction history as set forth  
4 in that Exhibit C-30 that we have referred to and  
5 which we will be looking quite frequently in the  
6 course of this week.

7           Specifically, 231 of Kaloti's 286 Suppliers,  
8 that is 80 percent, supplied gold for two years or  
9 less. It shows, therefore, that there is this pattern  
10 in the industry, at least in this type of market in  
11 which Kaloti operates, where the Suppliers come and  
12 go. There is no causation here to the Measures  
13 adopted and challenged in this Arbitration.

14           It is thus perverse for Claimant to suggest  
15 that Perú is somehow to blame for these short-to-term  
16 supply chains while ignoring its own habit and that of  
17 the wider ██████████ of choosing to trade with  
18 suspect and even criminal Suppliers.

19           For instance, between 2014 and 2015, Kaloti  
20 traded 1,841 kilograms of gold with Clearprocess, an  
21 Ecuadorian company run by Mr. Javier Roberto. This  
22 company was investigated by the Ecuadorian authorities

1 and Mr. Roberto was arrested for smuggling gold out of  
2 Perú in 2014. You have the citation there on the  
3 slide, R-273 and 301 and 30.

4           Similarly, Claimant admits that Kaloti  
5 purchased gold from Bolivian company River Gold and  
6 sought blame Perú for the fact that River Gold stopped  
7 selling to Kaloti. But, Claimant, again, omitted the  
8 fact that River Gold went out of business after it was  
9 investigated in Bolivia for a variety of crimes,  
10 including tax evasion, failing to comply with Export  
11 Rules, and registering at a fake address. And this is  
12 Exhibit R-191.

13           Additionally, Kaloti had purchased gold from  
14 a company called Darsahn, which is part of the  
15 infamous Chamy conglomerate. Again, Claimant admitted  
16 an important fact, this company, Darsahn, operated for  
17 only eight months and was abruptly dissolved in  
18 May 2014. This is R-356. The evidence thus shows  
19 that Kaloti bought gold from short-term Suppliers that  
20 in many cases ceased operations to evade justice.  
21 There is ample additional evidence showing that  
22 Claimant's attempt to blame Perú for its decline in

1 sales or loss of Suppliers is baseless, and again, you  
2 will hear from the experts from The Brattle Group  
3 later this week addressing many of those exhibits in  
4 evidence.

5 As to the allegation that somehow the  
6 Measures affected the banking relationship, again,  
7 this is false and has been disproven. My colleague  
8 Mr. Smyth and The Brattle Group will address this  
9 issue in greater detail. And specifically, Claimant's  
10 failure to show causation.

11 And finally, of course, to recall Mr. [REDACTED]  
12 created [REDACTED] before Kaloti wrote  
13 off the value of gold on 30 November 2018. [REDACTED]  
14 [REDACTED] was established in September of 2018 before  
15 Kaloti decided, for reasons that are beyond our  
16 comprehension, that in 30 November 2018 suddenly  
17 Kaloti was bankrupt, even though there is no formal  
18 bankruptcy, of course.

19 Now, [REDACTED] continued carrying out  
20 Kaloti's business under this new name and inherited  
21 Kaloti's business, Suppliers and staff. And this  
22 is--I refer you to R-345 and a comparison of C-134 and

1 C-30 to see that overlap and crossover of Suppliers.

2 In sum, the Challenged Measures simply did  
3 not cause the destruction in value of Kaloti as a  
4 going concern, and there is no causation between any  
5 effects that Kaloti claims to have suffered or any  
6 loss that Kaloti claims to have suffered and the  
7 Challenged Measures in this Arbitration.

8 In conclusion, the application of the Treaty  
9 and international law to Claimant's expropriation  
10 claims reveal that Claimant has not established a  
11 single one of the requisite elements of expropriation.  
12 Claimant has not identified a covered investment that  
13 could have been expropriated, any destruction in value  
14 caused by the State or the Challenged Measures or any  
15 distinct and reasonable expectations with which the  
16 State has interfered. And Claimant has failed to  
17 rebut proof showing that the Challenged Measures  
18 consist of the enforcement of non-discriminatory  
19 regulatory actions that are designed and applied to  
20 protect legitimate public welfare objectives.

21 And with the Tribunal's indulgence, I will  
22 cede the floor to my colleague, Ms. Mélida Hodgson.

1 MS. HODGSON: Thank you.

2 Members of the Tribunal, I will briefly  
3 address Claimant's national treatment claim, which, as  
4 with its other treaty claims, has little basis in  
5 reality.

6 I begin by addressing two threshold flaws,  
7 which you can see projected on the screen at  
8 Slide 209. The first is whether Claimant has actually  
9 asserted a separate claim of breach of Article 10.3.  
10 Both in the Memorial and in the Reply, as well as this  
11 morning, Claimant alleged a breach of the National  
12 Treatment Obligation but did so as a sub-argument of  
13 its minimum-standard-of-treatment claim. It is  
14 therefore, as we have noted, not immediately clear  
15 whether this is meant to be a separate claim at all.  
16 But, if it is, Treaty Article 10.3 or the National  
17 Treatment Provision, that is what governs,  
18 nationality-based discrimination.

19 The second threshold flaw with Claimant's  
20 national-treatment claim is that it is entirely based  
21 on a false premise. The claim is based upon the  
22 conduct of SUNAT and specifically the Immobilization

1 of Shipments 1 to 4. According to Claimant, this  
2 conduct targeted Kaloti as a foreign purchaser of gold  
3 and breached the Treaty. That premise is demonstrably  
4 false. As Perú has explained and as the evidence  
5 shows, SUNAT's Immobilizations did not target Kaloti  
6 at all. When SUNAT, in its role as customs authority,  
7 immobilized Shipments 1 to 4, based upon objective  
8 risk indicators of illegality, those Immobilization  
9 orders were directed at Suppliers. Thus the premise  
10 of Kaloti's claim that SUNAT's conduct targeted Kaloti  
11 is utterly false. The claim should be rejected on  
12 this basis alone.

13           In any event, for the sake of completeness  
14 Perú has proceeded to demonstrate that the claim is  
15 baseless and lacks merit, beginning with the  
16 applicable legal standard.

17           To reiterate what is on the screen on  
18 Slide 216, Article 10.3 of the Treaty establishes an  
19 obligation for each Party to accord to investors of  
20 the other Party or to their covered investments  
21 treatment that is no less favorable than treatment  
22 that it accords to its own investors or to their



1 Investments in its own territory.

2           Investment tribunals interpreting similar  
3 National Treatment Provisions have developed a  
4 three-part legal test to assess claims of violation of  
5 the National Treatment Provision. Applied to this  
6 case, the test requires Kaloti to, first, identify a  
7 local comparator in like circumstances; second,  
8 demonstrate that the treatment afforded to the local  
9 comparator was more favorable than that afforded to  
10 Claimant; and third, demonstrate that the difference  
11 in treatment was not reasonably justified. Claimant  
12 has been unable to satisfy any of these requisite  
13 elements.

14           In the Memorial, Claimant did not even try  
15 to identify any such comparator. After Perú exposed  
16 this fundamental flaw, Claimant has attempted to  
17 correct this error by pointing to "all Peruvian  
18 national purchasers of mined and scrapped gold in Perú  
19 in 2013 and 2014 for processing, assaying, and  
20 refining." So, Claimant appears to believe that it  
21 can refer to an entire market sector, while being  
22 unable to identify a single entity as a comparator.

1 That is, on its face, insufficient to satisfy  
2 Claimant's burden.

3           Moreover, even if Claimant could identify a  
4 specific Peruvian purchaser, it would not be in like  
5 circumstances. The gold at issue in this Arbitration  
6 was subject to SUNAT's customs authority because the  
7 gold was being exported from Perú. By contrast,  
8 Claimant has not demonstrated that Peruvian purchasers  
9 are exporting gold out of the country and thus are  
10 subject to Peruvian customs laws and regulations.  
11 This means that, by definition, they are not subject  
12 to the same legal and regulatory regime that is under  
13 SUNAT's remit. Thus, the first prong of the test is  
14 not satisfied.

15           But, even if Claimant had identified a  
16 comparator in like circumstances, which it has not,  
17 Kaloti has also failed to satisfy the second prong  
18 because it has not been able to show that the alleged  
19 comparators receive more favorable treatment than  
20 Kaloti. Rather, the only purported evidence advanced  
21 by Claimant in support of its contention is a  
22 conspiracy theory based on [REDACTED]

1 testimony, reproduced on the screen, that the Peruvian  
2 Government was targeting foreign purchasers.

3           Having recognized its failure to show any  
4 differential treatment, Claimant in the Reply made a  
5 new argument, alleging that, quote, "all the companies  
6 that suffered Immobilizations and seizures of gold in  
7 Perú in 2013 and 2014, were, in fact, foreign  
8 purchasers of gold." That's in the Reply at  
9 Paragraph 124. Yet, again, this argument is wholly  
10 unsubstantiated.

11           Claimant cites Exhibit C-51, which contains  
12 news articles and coverage of Kaloti. Nowhere does  
13 that exhibit state, let alone show, that Perú targeted  
14 foreign purchasers. Claimant also referred to the  
15 description of a Netflix documentary, but was unable  
16 to provide any statistics or documentary evidence.  
17 These citations are at best misleading, and even a  
18 cursory review of the, quote, "evidence" cited in that  
19 exhibit demonstrates this. That allegation is utterly  
20 unfounded.

21           Moreover, Perú has demonstrated citing  
22 evidence on the record that Claimant's allegation is

1 false. Again, the SUNAT Immobilizations of four of  
2 the Five Shipments of gold were directed at the  
3 Peruvian Suppliers, not the foreign purchaser.

4 Thus, Claimant has failed to meet the second  
5 prong required for a finding of a national-treatment  
6 violation.

7 Finally, even assuming that none of these  
8 other fatal and insurmountable flaws existed,  
9 Claimant's national-treatment claim fails at the third  
10 and final step because any alleged differential  
11 treatment would have been justified, as Perú has  
12 demonstrated in its pleadings.

13 Claimant has thus failed to satisfy its  
14 burden of proving a national-treatment claim. The  
15 claim is meritless and must be rejected.

16 Unless there are any other additional or any  
17 questions for me, I will turn the floor to Mr. Smyth  
18 who will address Claimant's damages claims.

19 MR. GRANÉ LABAT: Before we do so,  
20 Mr. President, I have been told that there is a  
21 clerical mistake in one of our slides which I wish to  
22 correct now, and that is Slide 199, which I referred a

1 few minutes ago. And the error lies in the unit that  
2 is used there. It's not kilograms, it's grams. But  
3 the rest, including the percentage jump remains  
4 correct.

5 Thank you.

6 MR. SMYTH: Thank you. Good afternoon,  
7 Mr. President and Members of the Tribunal. As Perú  
8 has demonstrated in its pleadings and I will further  
9 elaborate during this segment of the presentation,  
10 Kaloti's claims for damages are baseless and must be  
11 dismissed.

12 Before we get into specifics, let's take a  
13 step back and recall what Kaloti is claiming here.  
14 Kaloti has taken the temporary seizure of Five  
15 Shipments of gold worth \$17 million, which it admits  
16 it did not fully pay for, and turned it into a claim  
17 for more than \$150 million.

18 To reach that figure, Kaloti asks the  
19 Tribunal to take a number of logical leaps. First,  
20 Kaloti asserts that the seizure of a relatively small  
21 amount of gold in 2013 led to the destruction of its  
22 entire business five years later in 2018. Next, in

1 order to value that business, Kaloti extrapolates from  
2 its one and only year of trading in Perú to project  
3 that it would more than double its Market Share within  
4 two years, and then maintain that share for a further  
5 30 years. Kaloti then applies the same assumed growth  
6 in volumes from Perú to its business outside of Perú,  
7 but without providing any evidence or analysis to  
8 support such growth in those markets.

9           If that all sounds speculative, it's because  
10 it is. Kaloti's damages claims suffer from numerous  
11 flaws and must, therefore, be dismissed. Over the  
12 next 20 minutes or so, I will discuss the principal  
13 flaws in Claimant's damages case. Later in the week,  
14 the Tribunal will also hear from Messrs. Chodorow and  
15 Nuñez, Perú's independent quantum experts who have  
16 provided two detailed reports addressing the  
17 deficiencies in Claimant's damages claim.

18           In terms of the structure of Perú's damages  
19 presentation, I will start with the applicable legal  
20 standards for the assessment of damages. Then I will  
21 discuss Kaloti's failure to establish causation. And  
22 finally, I will address the various deficiencies in

1 Kaloti's damages calculations.

2 I won't spend long discussing the relevant  
3 legal standards, as they are largely undisputed, but  
4 for present purposes, I will just pick out two.

5 First, Kaloti has the burden to establish  
6 (1), that its losses were proximately caused by  
7 actions or omissions that are attributable to Perú,  
8 and (2), that the quantification of its claims equates  
9 to the actual loss that it has suffered.

10 And, second, I wish to highlight that  
11 speculative, remote or uncertain damages may not be  
12 awarded. Thus, as the Tribunal held in LG&E versus  
13 Argentina, quote, "prospective gains which are highly  
14 conjectural, too remote or speculative, are disallowed  
15 by Arbitral Tribunals."

16 And that's at Legal Authority R-L 28,  
17 Paragraph 89. But as we shall see, Kaloti's damages  
18 claims in this case are just that, highly conjectural,  
19 remote, and speculative.

20 To recall, Kaloti's damage claim comprises  
21 three prongs. First, Kaloti claims approximately  
22 \$27 million for alleged lost profits for the period

1 from December 2013 to 30 November 2018.

2           Second, Kaloti claims approximately  
3 \$70 million for the alleged expropriation of its  
4 going-concern enterprise. This claim is based on  
5 projected cash flows for Kaloti's business from after  
6 November 2018 up to the Year 2048.

7           But the Going Concern Claim and the Lost  
8 Profits Claim rely on a discounted cash flow or DCF  
9 Model compiled by Kaloti's Expert, Mr. Almir  
10 Smajlovic.

11           Third, Kaloti claims approximately  
12 \$17.6 million for the value of the Five Shipments as  
13 of November 2018. Or, in the alternative, it claims  
14 approximately \$24.5 million as of November 2022. And  
15 again, Kaloti relies on the same expert reports.

16           Finally, Kaloti claims Pre-Award Interest at  
17 LIBOR + 4%.

18           All of these claims fail. The first major  
19 reason for this is that Kaloti has failed to establish  
20 causation and, therefore, is not entitled to any  
21 damages at all. And this goes to Issue 41 in Perú's  
22 List of Issues.



1           Kaloti's lost profits and going-concern  
2 claims are both based on the same factual premise,  
3 that Perú's measures damaged its reputation and caused  
4 Suppliers and banks to cease doing business with it,  
5 ultimately leading to the collapse of its business.  
6 But that premise is false. As my colleague, Mr. Grané  
7 Labat, explained earlier in the context of Kaloti's  
8 expropriation claim, there is no credible evidence  
9 that the SUNAT Immobilizations and Precautionary  
10 Seizures led to the termination of Kaloti's Supplier  
11 relationships.

12           Equally, there is no evidence that Perú's  
13 measures affected Kaloti's banking relationships.  
14 Kaloti's allegation here appears to be the various  
15 bank accounts were closed as a result of Perú's  
16 measures. However, the only documentary evidence  
17 Kaloti has submitted to support this allegation is  
18 various letters from U.S. banks at Exhibit C-27  
19 notifying Kaloti of the closure of its accounts. But  
20 not a single one of those letters even mentions any  
21 measures taken by Perú.

22           Moreover, it is far more likely that these

1 banks closed their accounts due to the wider concerns  
2 and scandals affecting the [REDACTED] which had led  
3 many banks to issue Suspicious Activity Reports to the  
4 relevant financial investigative agencies. Indeed, as  
5 my colleague Mr. Nistal explained earlier, JPMorgan  
6 appears to have closed its account with Kaloti before  
7 the relevant measures and in direct response to such  
8 concerns. The same is true with Citibank, as Brattle  
9 explains in its Second Report at Paragraph 73. All of  
10 this directly contradicts the submission you heard  
11 this morning that closures occurred only after the  
12 relevant measures.

13           I further fact that belies Kaloti's  
14 causation arguments is that its volumes of gold from  
15 Perú were, in fact, decreasing even before any of the  
16 relevant measures in this case. You can see this in  
17 Figure 4 in Brattle's First Report, which is  
18 reproduced on the slide. As you can see, Kaloti's  
19 gold volumes in Perú decreased by 38 percent between  
20 October and November 2013, before the first of the  
21 SUNAT Immobilizations took place on 30 November 2013.  
22 Such decline cannot possibly be attributed to Perú.

1           When Perú pointed to the lack of evidence of  
2 the loss of any banking or supplier relationships in  
3 its Counter-Memorial, Kaloti advanced a new argument  
4 in its Reply, which it repeated again this morning,  
5 that the seizures of gold led to its insolvency  
6 because Kaloti could not sell the relevant gold and,  
7 therefore, could not finance its debt obligations.  
8 This argument is simply not credible.

9           This morning, Claimant put forward two  
10 separate factual premises for its argument that KML  
11 became insolvent and/or could not trade from  
12 November 2018. The first is the alleged write-down of  
13 inventory on 30th of November 2018, but there is no  
14 evidence anywhere on the record that such a write-down  
15 ever took place.

16           Furthermore, a write-down of the inventory  
17 even before this date, even when amounting to a small  
18 fraction of the value of the gold, would have sent  
19 KML's equity negative. And there is no particular  
20 reason for the seemingly subjective and possibly post  
21 hoc choice of November 2018 for the write-down.  
22 Really, in Perú's submission, it's just an attempt to

1 evade the temporal restrictions under the Treaty.

2 In addition, the amounts of the gold that  
3 was seized and the value of it was extremely small  
4 compared to the overall amount of gold turned by KML  
5 in the relevant periods. It amounted to just  
6 0.6 percent of the entirety of the gold traded by  
7 Kaloti from 2014 to 2018.

8 The second factual premise that Kaloti  
9 relies on is based on a letter from the sister  
10 company, [REDACTED] dated the 14th of November  
11 2023 that's on the record at C-137 and was only  
12 submitted with Kaloti's Reply.

13 Despite Claimant's arguments, there was no  
14 actual insolvency filing. In addition, there is no  
15 evidence that [REDACTED] ever took any action to  
16 enforce its loan to KML. Indeed, as a creditor, it  
17 would not want to, given that if it forced insolvency  
18 of its debtor, it would be left with virtually  
19 nothing.

20 And, in fact, as we heard this morning, KML  
21 remains in good standing from the State of Florida, so  
22 this gives rise to several questions: What happened

1 to the loan? Was it forgiven? Was it repaid? And,  
2 ultimately, could Kaloti simply have continued it  
3 trade? In addition, did Kaloti ever seek financing  
4 from other sources? And, unfortunately, we did not  
5 know the answers to these questions because Kaloti has  
6 not explained them.

7 Finally, Kaloti has already ceased sourcing  
8 gold in Perú in July 2018, four months before this  
9 letter, and admits this fact in the Request for  
10 Arbitration at Paragraph 78(c).

11 There are also numerous supervening causes  
12 for Kaloti's loss. For the sake of brevity, I won't  
13 go through all of them, but I mention just four:

14 First, as my colleague Mr. Nistal explained,  
15 the [REDACTED] of which Kaloti is part was rocked by  
16 a series of international scandals from 2011 onwards,  
17 which were reported by numerous reputable  
18 international media outlets. For example, in 2014, a  
19 whistleblower from Ernst & Young revealed very  
20 scandalous practices by the [REDACTED] including  
21 the payments of \$5.2 billion in cash for the purchase  
22 of gold, the failure to follow adequate "know your

1 customer" procedures, and an admitted practice of  
2 disguising gold shipments by coating them in silver to  
3 evade export restrictions. The whistleblower, the  
4 former Ernst & Young auditor, described such practices  
5 in a February 2014 interview as "appalling, immoral,  
6 and extremely unethical." You could find that  
7 transcript and video of that interview at Exhibit  
8 R-123. It was scandals such as these, not any actions  
9 by Perú, that damaged Kaloti's reputation.

10           Second, as Mr. Nistal again explained,  
11 companies linked to Alfredo Chamy and [REDACTED]  
12 supplied nearly 75 percent of the gold traded by  
13 Kaloti in 2012-2013. Many of these companies were  
14 then subsequently dissolved or ceased trading or were  
15 the subject of criminal investigations. In other  
16 words, the "dirty gold" from these sources dried up.

17           Third, Kaloti's business suffered as a  
18 result of the 50 percent downturn in production from  
19 artisanal and small-scale producers from whom Kaloti  
20 sourced the vast majority of its gold in Perú.

21           A fourth major supervening cause was the  
22 establishment by Kaloti's Founder and witness of a

1 competing business, [REDACTED], in  
2 September 2018, which was just two months before  
3 Kaloti alleges it became insolvent. [REDACTED]  
4 carried out the same commercial activities; traded  
5 from the same address; had same Founder, Mr. [REDACTED]  
6 and more than 25 percent of its supplies were formerly  
7 supplies to Kaloti.

8 In other words, Kaloti's own Shareholder  
9 decided to shut up shop and sue Perú on the basis of  
10 an alleged expropriation whilst at the same time  
11 continuing exactly the same business he alleges was  
12 expropriated. In Perú's respectful submission, this  
13 attempt to manufacture a damages claim should not be  
14 countenanced by the Tribunal.

15 If the Tribunal disagrees with Perú and  
16 finds that causation is established and, therefore,  
17 moves to examine the damages model advanced by  
18 Claimant's expert, Mr. Smajlovic, it will find that  
19 such model is speculative and unsupported by evidence.  
20 Several of these key issues are contained in Perú's  
21 List of Issues that it prepared for the Tribunal.

22 One such critical flaw relates to purchase

1 volumes. Now, Mr. Smajlovic's DCF Model projects  
2 counterfactual cash flows for Kaloti through to 2048  
3 and discounts them back to 2018. The key driver for  
4 those cash flows is the volumes of gold that Kaloti is  
5 able to source in Perú and then export to its  
6 customers.

7 Kaloti's projections for the growth of its  
8 purchase volumes in Perú is speculative. Kaloti  
9 asserts that, having gained a 9.25 percent share of  
10 the Peruvian gold export market in 2013, in a  
11 counterfactual world, Kaloti would then more than  
12 double that Market Share to 21.25 percent in two years  
13 and then maintain that Market Share for more than  
14 three decades.

15 One would expect there to be hard evidence  
16 to back up such ambitious projections, but there is  
17 none. Kaloti has not exhibited any business plans to  
18 support its growth projections s or contracts with  
19 Suppliers committing them to providing any particular  
20 quantity of gold to Kaloti or to a particular price.  
21 Instead, the only piece of documentary evidence relied  
22 on by Kaloti to support its projections is a letter



1 from its sister company, [REDACTED], allegedly  
2 committing to purchase 45 tons of gold from Kaloti  
3 annually. This is Exhibit C-47.

4           However, a closer examination of the letter,  
5 and the extracts of the relevant text on the slide,  
6 reveals it provides no commitments of any kind. It  
7 says [REDACTED] "will channel the necessary  
8 resources to support the exponential growth in  
9 quantities by pledging the required resources  
10 technically and financially to meet and satisfy your  
11 need to cater to your client base in Perú so you can  
12 achieve the forecasted target of 45 tons per year for  
13 the coming two to three years."

14           Stating an intention to "channel resources"  
15 for Kaloti "to achieve its forecasted target" for two  
16 to three years is hardly a commitment on which to base  
17 an assumption of 35 years of success.

18           Kaloti's projections also assume that there  
19 would be no competitive response from other market  
20 participants. The Peruvian gold market has low  
21 barriers to entry. Kaloti was, therefore, able to  
22 enter the market in 2013 largely by offering a higher

1 price to its Suppliers than its competitors did.  
2 There would be absolutely nothing to stop new entrants  
3 or market incumbents from doing exactly the same  
4 thing, thus eroding Kaloti's newly gained Market Share  
5 and/or squeezing its margins. Indeed, this is a far  
6 more likely explanation for Kaloti's decline in  
7 volumes from the end of 2013.

8           Moving to Kaloti's projected volumes from  
9 outside of Perú, these account for more than  
10 50 percent of its overall projected volumes, and also  
11 its damages claim. Given these facts, do Kaloti or  
12 Mr. Smajlovic provide any evidence regarding how  
13 Kaloti expected to grow its volumes outside of Perú?  
14 No. Mr. Smajlovic simply assumes a fixed ratio  
15 between volumes sourced from within and outside Perú,  
16 and thus exactly the same speculative assumptions  
17 regarding growth of volumes and maintenance of Market  
18 Share in Perú are applied to volumes outside of Perú.

19           Mr. Smajlovic's Discount Rate is also  
20 artificially low. He uses a rate of 5.19 percent,  
21 which he arrives at by taking the Risk-Free Rate and  
22 adding an arbitrary premium of 2 percent to account

1 for systematic risk in Perú. That's at Smajlovic's  
2 First Report, Paragraph 6.74.

3           However, he ignores the fact that the  
4 average WACC, or Weighted Average Cost of Capital, for  
5 the precious metals industry is significantly higher,  
6 namely 8.4 percent, as Brattle explained in their  
7 First Report at Paragraph 164. And as they explain  
8 there, that rate of 8.4 percent is a more appropriate  
9 approximation of the required Discount Rate.

10           A final flaw in Mr. Smajlovic's DCF Model is  
11 that he inexplicably ignores any liability for Kaloti  
12 to pay for Peruvian taxes. This is despite the fact  
13 that he, himself, says in his First Report that taxes  
14 should be deducted from projected cash flows in the  
15 DCF model, and that's Paragraph 4.9 of his First  
16 Report.

17           And to be clear here, we are talking about  
18 Peruvian taxes; and so, contrary to our colleague's  
19 submission this morning, the U.S. tax status of Kaloti  
20 is irrelevant here.

21           We've also heard for the first time just a  
22 short while ago, an argument that only very small

1 amounts of income were derived from Perú. This  
2 doesn't change the fact that the record shows that no  
3 tax was paid, and no tax was taken into account by  
4 Mr. Smajlovic in his DCF Model.

5 Kaloti's claim with respect to inventory is  
6 similarly flawed. As we noted earlier, Kaloti has  
7 failed to establish that it legally owned any of the  
8 Five Shipments. That fact, in and of itself, is  
9 sufficient to dismiss Kaloti's Inventory Claim.

10 In addition, Kaloti, by its own admission,  
11 has not paid for two of the relevant shipments,  
12 Shipments 3 and 5, and no liability appears on  
13 Kaloti's 2018 Balance Sheet in relation to them.  
14 That's at Exhibit AS-66. Thus, Kaloti should not  
15 receive compensation for such shipments in any event  
16 as it would constitute a windfall.

17 A further problem is that Mr. Smajlovic uses  
18 actual gold prices that post-date the Valuation Date,  
19 the 30th of November 2018. Similarly, for the  
20 purposes of the lost profits and going-concern claims,  
21 he uses futures and analyst forecasts from after  
22 30 November 2018. This contravenes the valuation

1 principles contained in the Treaty which provide that  
2 compensation for expropriation be "equivalent to the  
3 fair market value of the expropriated investment  
4 immediately before the expropriation took place." And  
5 that's at Article 10.7(2) (b) of the Treaty.

6 Further flaws that apply to the whole of  
7 Claimant's damages claim are (1) the fact it claims an  
8 inflated Pre-Award Interest rate, and (2) it has not  
9 mitigated its damages. On the contrary, as discussed,  
10 Kaloti's own shareholder set up a competing business  
11 to Kaloti shortly around the time that Kaloti  
12 allegedly became insolvent.

13 Perú submits that, given Kaloti's limited  
14 trading history of just a year and the consequent lack  
15 of reliable basis to estimate the relevant inputs to a  
16 DCF Model, such a model is an inappropriate basis on  
17 which to value Kaloti's damages. However, assuming  
18 arguendo that such model were appropriate, it would  
19 require significant adjustments in light of the issues  
20 that we have just discussed. Brattle has applied a  
21 series of corrections to reflect these issues as well  
22 as the issues with Kaloti's valuation of the Five

1 Shipments, and these are illustrated on the slide in  
2 front of you. Such deductions result in an  
3 alternative damages figure of \$14.38 million. You can  
4 find detail of this in Brattle's Second Report at  
5 Paragraph 309 and Table 9. Thus, if the Tribunal  
6 disagrees with Perú and finds that Kaloti has  
7 established a causal link, and that the use of a DCF  
8 Model is appropriate, this is the maximum amount of  
9 damages that should be awarded.

10 Mr. President, Members of the Tribunal,  
11 thank you for your time. Ms. Vanessa Rivas Plata will  
12 now provide some concluding remarks on behalf of the  
13 Republic of Perú.

14 MS. RIVAS PLATA: Thank you very much,  
15 Mr. Smyth.

16 Good afternoon, Mr. President and Members of  
17 the Tribunal. On behalf of the Republic of Perú, I  
18 respectfully request your indulgence to make some  
19 concluding remarks.

20 In the Amazon region of Perú, not all that  
21 glitters is gold. Absence of authorized mining sites,  
22 the toxicity of mercury is from illegal, unregistered

1 and untaxed gold-mining evaporates with the rain in  
2 the jungle and enters the bloodstreams of the rivers  
3 and lifeline of biodiversity. The uncontrolled use of  
4 this lethal metal by illegal miners harms the lives of  
5 tens of thousands of vulnerable residents, including  
6 children, posing a deadly threat to public health and  
7 to the environment in Perú.

8           Mercury causes problems in the central  
9 nervous system. It contaminates the water, soil, and  
10 air, which, in turn, has the effect of polluting the  
11 food chain. Mercury is especially dangerous for  
12 pregnant women because it can cross the placenta and  
13 affect the fetus. Mercury exposure can harm major  
14 organs such as the brain, heart, kidneys, and lungs.  
15 And young children may develop impairment of  
16 peripheral vision and disturbance in sensations. This  
17 includes the ability to feel, see, move, and taste.  
18 Long-term exposure to mercury can lead to coma or  
19 death.

20           Perú has to declare a health emergency  
21 because the bodies of 40 percent inhabitants who have  
22 been tested in 97 villages in the Madre de Ríos

1 region, which in Spanish means "Mother of God," shows  
2 dangerously high levels of mercury. Extensive use of  
3 mercury has had significant health impact on  
4 indigenous and poor communities in particular.

5           For instance, in 2013, the Carnegie Americas  
6 Mercury Project found that children in native  
7 communities had mercury levels more than five times  
8 the safe limit. Illegal mining of gold has many  
9 pernicious effects, and it's closely linked to  
10 money-laundering as well as other crimes s such as  
11 racketeering, child labor, sexual exploitation, other  
12 forms of violence and intimidation. In Perú,  
13 organized crime and unscrupulous gold-traders are  
14 behind illegal mining around the world.

15           The devastating effects of illegal mining,  
16 particularly from 2006 onwards, led the State to take  
17 decisive action to address that particular form of  
18 criminal activity. In addition to legislation, Perú  
19 conferred on several State entities the legal mandate  
20 to intensify controls on gold exports, and to combat  
21 illegal mining and money-laundering.

22           In exercise of its sovereign powers to



1 protect legitimate public welfare objectives and in  
2 full compliance with its commitments under the Treaty,  
3 Perú has enacted numerous laws elaborating and  
4 bolstering the nation's framework against illegal  
5 mining, in order to guarantee the population's health,  
6 personal safety, tax collection, conservation of the  
7 natural heritage and development of sustainable  
8 economical activities.

9           More specifically, Perú has strengthened its  
10 legal framework by criminalizing illegal mining and  
11 increasing prison sentences for money-laundering.

12 Developing concrete mechanisms to fight these illegal  
13 activities including by increasing export controls and  
14 placing a stronger focus on the issue of proceeds from  
15 the illegal activity; and granting the relevant State  
16 agencies the legal and financial means to implement  
17 those mechanisms.

18           Perú established due-diligence obligations  
19 for gold purchasers. The toxic truth about this  
20 investment arbitration, Members of the Tribunal, is  
21 that the law-enforcement actions undertaken by Perú  
22 pursuant to this regulatory regime, designed to

1 discourage illegal mining and money-laundering are  
2 precisely the Measures challenged by Claimant. The  
3 Measures by SUNAT, the Prosecutor's Office, the State  
4 Attorney's Office, and the domestic Criminal Courts  
5 play a key role in enforcing Perú's legal framework  
6 against illegal mining and money-laundering. Not only  
7 Perú has acted reasonably, diligently, and in  
8 accordance with its obligations under public  
9 international law, it has also implemented measures  
10 aimed at achieving regional policy goals, established  
11 by international fora such as the Asia-Pacific  
12 Economic Cooperation, APEC, which is comprised of 21  
13 economies in the Asia-Pacific region, including the  
14 United States and Perú.

15           And specifically, the Measures challenged in  
16 this Arbitration constitute Perú's APEC regional  
17 mandate to combat the growing convergence of  
18 corruption and illicit trade, including environmental  
19 crimes; and to tackle the harmful effects of the  
20 illegal economy in the region by promoting integrity  
21 across borders, markets, and supply chains.

22           The Measures challenged in this case are in

1 full compliance with environmental objectives  
2 expressly recognized by the very same treaty that  
3 Claimant has invoked to bring an investment  
4 arbitration against Perú. That Treaty expressly  
5 recognizes the sovereign rights of the Contracting  
6 Parties with respect to its natural resources, and the  
7 aspirational goals to ensure that trade and  
8 environmental policies are mutually supportive, with  
9 the aim of promoting the optimal use of resources in  
10 accordance with the objectives of sustainable  
11 development.

12           As the push for gold sends mercury down the  
13 river and as Perú vigorously continues fighting to  
14 eradicate the toxicity of illegal mining from its  
15 rivers, Kaloti's claims should be dismissed.

16           Members of the Tribunal, there is nothing  
17 glittery in Kaloti's claims. As counsel for Perú has  
18 demonstrated in this Arbitration, Claimant has not  
19 succeeded in establishing that the Tribunal has  
20 jurisdiction; and, in any event, there is absolutely  
21 no merit to any of Kaloti's claims. Kaloti failed to  
22 comply with its due-diligence obligations, and all of

1 the Measures adopted by the relevant authorities in  
2 Perú, both administrative and judicial, were  
3 reasonable, proportionate, and justified. They were  
4 designed to advance legitimate public welfare  
5 objectives and, thus, in accordance with Perú's  
6 obligations under the Treaty and other sources of  
7 international law.

8           Finally, I will like to conclude my remarks  
9 by extending the deepest respect and appreciation to  
10 the Members of the Tribunal on behalf of the Republic  
11 of Perú.

12           PRESIDENT McRAE: Mr. Grané?

13           MR. GRANÉ LABAT: This concludes Perú's  
14 presentation.

15           PRESIDENT McRAE: Thank you very much.

16           First, do either of any colleagues have  
17 questions further at this stage? No?

18           ARBITRATOR FERNÁNDEZ: Thank you very much.

19 It is a little late, but I would like to ask  
20 questions, a question of both Parties, something  
21 that's a little confusing for me, and I would like  
22 clarification.

1           We do have a body of the public  
2 administration in Perú that has sanction-imposing  
3 powers, and also we have a number of Criminal  
4 Proceedings against companies. What I would like to  
5 know is what is the role that Kaloti plays in the  
6 Criminal Proceedings, and could you please relate this  
7 with the administrative proceedings that were taken?

8           MR. DÍAZ-CANDIA: I would like to address  
9 Professor Fernández in Spanish.

10           Thank you very much for your question,  
11 Professor Fernández Rozas.

12           SUNAT has only administrative powers in the  
13 fold of customs. This operation started because of a  
14 pressure exerted by the United States so there would  
15 be no illegal gold coming into the U.S. That is not  
16 relevant for Kaloti's arguments. The relevant thing  
17 is the authorities in Perú first raised this excuse,  
18 which is customs-related, but there was no sanction  
19 imposed on Kaloti. Immobilizations, initial  
20 Immobilizations, were not done anymore, and the gold  
21 was not returned to Kaloti, and then the gold was  
22 taken by judicial authorities. The common denominator

1 of the activities is the Five Shipments, the Five Gold  
2 Shipments.

3 Now, the reasons changed simply to keep the  
4 Five Shipments. If it could investigate them, it had  
5 to conclude the investigations within reasonable  
6 timeframes, respecting the rights of defense of Kaloti  
7 under the TPA. There was coordination here and  
8 composite and progressive actions by the Peruvian  
9 State.

10 Thank you very much. I don't know if that  
11 clarifies your question.

12 ARBITRATOR FERNÁNDEZ: Yes.

13 PRESIDENT McRAE: Mr. Grané, you wish to  
14 comment on the question?

15 MR. GRANÉ LABAT: Yes. Thank you, Mr.  
16 President.

17 Thank you, Arbitrator Fernández Rozas, for  
18 that question. First of all, I will not address what  
19 I have heard from Claimant's counsel, new conspiracy  
20 theories, the allegations that all of the gold was in  
21 possession of Kaloti. We have rebutted those factual  
22 assertions, so I will just focus on your question, but

1 we will, of course, in due course, once again rebut  
2 what Claimant has said.

3           Kaloti's role in this stage, in the  
4 administrative stage, of SUNAT is nonexistent because  
5 we did not comply--I'm sorry. Kaloti did not comply  
6 with the procedure, did not provide the information  
7 that it would have needed to provide in order to have  
8 standing in those procedures, including Customs  
9 Declaration. Some of that information again has been  
10 addressed in our pleadings. So, it simply had no  
11 standing as a result of the failures of that committed  
12 in responding to what would have been necessary to  
13 produce to SUNAT. And once again, we will refer you  
14 to specific passages in our submissions in which we  
15 explained this.

16           At the judicial level, that is also  
17 something that you will be hearing more about from  
18 legal experts this week, but Perú has demonstrated  
19 that Kaloti attempted to intervene in those judicial  
20 proceedings by asserting that it was a purchaser of  
21 good faith, bona fide purchaser. However, it did not  
22 avail itself of the legal recourse that was

1 contemplated by Peruvian law. Instead, it submitted  
2 seven requests, some to the Prosecutor's Office that  
3 lacked competence for what Kaloti was requesting, and  
4 others to the Criminal Courts. Again, in the course  
5 of this week, we will explain in what ways those  
6 submissions to the Criminal Courts also were defective  
7 and flawed.

8           And even the ones that it did submit to the  
9 courts lacked any documentation that would have been  
10 necessary to attest even in a prima facie level that  
11 it was the owner of the gold and, therefore, had a  
12 legitimate interest as a good-faith party.

13           So, once again, they failed--and this is an  
14 admission by Claimant: They failed to use the  
15 necessary resources to be able to assert that alleged  
16 property right, gain standing in the proceedings and,  
17 therefore, participate in those judicial proceedings.

18           I hope that answers your question,  
19 Mr. Fernández Rozas.

20           ARBITRATOR FERNÁNDEZ: Yes, thank you very  
21 much. Yes, we're going to wait until the Experts  
22 speak about this.



1           I have a very specific question. I have a  
2 doubt in this connection. You have said in connection  
3 with the legitimate expectations by the Respondent  
4 that they're not recognized by international law, and  
5 you cited a ruling in the Bolivia v. Chile Case. What  
6 is the relevance of this case of Bolivia v. Chile to  
7 justify this?

8           So, do you maintain that international law  
9 does not recognize the expectations of the Investors?

10           (Overlapping interpretation with speaker.)

11           MR. GRANÉ LABAT: I was stating that Perú  
12 certainly maintains its position that customary  
13 international law does not protect legitimate  
14 expectations as a source of obligations, and this is  
15 something that has been discussed again not only in  
16 investment arbitration but also by the ICJ in 2018.

17           Now, the passage--and I don't know if we can  
18 quickly pull up that quote from the ICJ--therein, the  
19 International Court of Justice recognized that  
20 investment arbitration had referred to legitimate  
21 expectations, but the ICJ concluded that, as a matter  
22 of public international law and customary

1 international law, there was no obligation to protect  
2 legitimate expectations.

3           Now, it is true that investment arbitration,  
4 mostly in the context of autonomous FET obligations,  
5 has recognized that legitimate expectations is a  
6 factor that is taken into account when assessing  
7 whether a State has complied with its FET obligation,  
8 but it's a different proposition. It's not a source  
9 of obligation, but it is one of many factors that has  
10 to be taken into account. Even when it is taken into  
11 account, the jurisprudence has recognized various  
12 elements that have to be met for those legitimate  
13 expectations to be taken into account in determining  
14 whether the State has incurred an arbitrary or  
15 unreasonable conduct.

16           And we're happy to also provide the  
17 references to that other line of jurisprudence, but I  
18 wish to stress the fact that you have to distinguish  
19 between legitimate expectations under an FET  
20 autonomous standard, on the one hand, and legitimate  
21 expectations under the MST customary international law  
22 treatment. And we have consistently indicated that,

1 in any event, the burden of proof lies with Claimant  
2 to demonstrate that legitimate expectations, as a  
3 matter of opinio juris and consistent practice, has  
4 become an element of customary international law, and  
5 Claimant has not even attempted to do that. And so,  
6 therefore, it is not an obligation that has been  
7 established.

8 Thank you.

9 ARBITRATOR FERNÁNDEZ: Thank you very much.

10 PRESIDENT McRAE: Thank you very much.

11 I think now, according to the timetable, we  
12 should take a 15-minute break, and then hear from the  
13 submission of the United States. Given that we are  
14 slightly behind the time projected, unless there is a  
15 groundswell of interest for a 15-minute break, I  
16 suggest we proceed with the United States--

17 REALTIME STENOGRAPHER: Can we take a  
18 five-minute break?

19 PRESIDENT McRAE: We got a fairly large  
20 groundswell for a five-minute break, so let's take a  
21 five-minute break and resume to hear the submission of  
22 the United States.

1 MR. DÍAZ-CANDIA: We agree, thank you.

2 (Brief recess.)

3 PRESIDENT McRAE: I think we are now ready  
4 to proceed, and we will--with the United States  
5 presentation, which I believe Ms. Kuritzky will  
6 present.

7 PRESENTATION BY COUNSEL FOR NON-DISPUTING PARTY  
8 UNITED STATES OF AMERICA

9 MS. KURITZKY: Thank you, Mr. President and  
10 Members of the Tribunal, for this opportunity for the  
11 United States to provide an oral submission in this  
12 case pursuant to Article 10.20.2 of the United  
13 States-Perú Trade Promotion Agreement, or TPA.

14 My name is Mérida Kuritzky, and I'm an  
15 attorney-advisor with the U.S. Department of State.

16 I will make a brief submission addressing  
17 questions of treaty interpretation arising out of the  
18 Claimant's and Respondent's Submissions in this case.

19 As is always the case with our Non-Disputing  
20 Submissions, the United States does not take a  
21 position here on how the interpretations offered apply  
22 to the facts of the case, and no inference should be

1 drawn from the absence of comment on any issue.

2           In this oral submission, I will address five  
3 topics: One, the definition of "investment" under  
4 Article 10.28; two, the Minimum Standard of Treatment  
5 under Article 10.5; three, the national treatment and  
6 most-favored-nation standards under Articles 10.3 and  
7 10.4; four, the standard for expropriation under  
8 Article 10.7; and five, the authority of Non-Disputing  
9 Party Submissions under Article 10.20.2.

10           I begin with the definition of "investment"  
11 under Article 10.28. This Provision states in  
12 pertinent part, that "investment" means "every asset  
13 that an investor owns or controls, directly or  
14 indirectly, that has the characteristics of an  
15 'investment,' including such characteristics as the  
16 commitment of capital or other resources, the  
17 expectation of gain or profit, or the assumption of  
18 risk."

19           Article 10.28 further states that the forms  
20 that an investment may take include the assets listed  
21 in the subparagraphs. These include construction,  
22 management, production, Concession, and

1 revenue-sharing contracts but typically do not include  
2 ordinary commercial contracts for the sale of goods or  
3 services. The list also includes "licenses,  
4 authorizations, permits, and similar rights conferred  
5 pursuant to domestic law" as well as "other tangible  
6 or intangible, movable or immovable property, and  
7 related property rights."

8           The listing of a type of an asset in  
9 Article 10.28 does not necessarily mean that a  
10 particular asset owned or controlled by an investor  
11 meets the definition of investment. An asset, of  
12 course, must possess some or all of the  
13 characteristics of an "investment" I just described.  
14 Article 10.28's use of the word "including" in  
15 relation to the characteristics of an "investment"  
16 means that the list of identified characteristics in  
17 Article 10.28 is not exhaustive, and additional  
18 characteristics may be relevant. Whether a particular  
19 instrument has the characteristics of an "investment"  
20 is a case-by-case inquiry, involving an examination of  
21 the nature and extent of any rights conferred under  
22 the State's domestic law.

1           Moreover, while not stated expressly, the  
2           protections in Chapter 10 implicitly only apply to  
3           investments made in compliance with the host State's  
4           domestic law at the time that investment was  
5           established or acquired. Exceptions would apply,  
6           however, to trivial violations of the applicable law,  
7           such as minor defects in paperwork for registering an  
8           investment, as in the Tokios Tokelés Case.

9           I now turn to the Minimum Standard of  
10          Treatment under customary international law in  
11          Article 10.5 of the U.S.-Peru TPA, and I will make  
12          three points at the top:

13                 First, the customary international law  
14          Minimum Standard of Treatment is the applicable  
15          standard in Article 10.5 of the TPA, which is evident  
16          from the text of the Treaty.

17                 Second, customary international law results  
18          from a general and consistent practice of States that  
19          they follow from a sense of legal obligation.

20                 And third, the burden is on the Claimant to  
21          establish the existence and applicability of a  
22          relevant obligation under customary international law

1 that meets the requirements of State practice and  
2 opinio juris.

3           Currently, customary international law has  
4 crystallized to establish a Minimum Standard of  
5 Treatment in only a few areas. One such area,  
6 expressly addressed in Article 10.5.2(a), concerns the  
7 obligation to provide fair and equitable treatment,  
8 which includes "the obligation not to deny justice in  
9 criminal, civil, or administrative adjudicatory  
10 proceedings in accordance with the principle of due  
11 process embodied in the principal legal systems of the  
12 world."

13           I will first discuss the denial-of-justice  
14 standard, and I will briefly touch upon the other  
15 standards that have crystalized and concepts that have  
16 not yet crystallized into customary international law.

17           The well-accepted standards for denial of  
18 justice under customary international law require  
19 misconduct or inaction in adjudicatory proceedings.  
20 Denial of justice involves some violation of rights in  
21 the administration of justice or a wrong perpetrated  
22 by the abuse of judicial process. Importantly, the



1 threshold required for judicial measures to rise to  
2 the level of a denial of justice in customary  
3 international law is high. A fairly administered  
4 domestic system of law that conforms to a reasonable  
5 standard of civilized justice cannot give rise to a  
6 complaint by a foreign investor under international  
7 law. Civilized justice has been described by Edwin  
8 Borchard as requiring "fair courts readily open to  
9 aliens, administering justice honestly, impartially,  
10 and without bias or political control." A denial of  
11 justice may occur in instances such as when the Final  
12 Act of a State's judiciary constitutes a notoriously  
13 unjust egregious administration of justice, or one  
14 which offends a sense of judicial propriety. More  
15 specifically, a denial of justice exists where there  
16 is, for example, an obstruction of access to courts, a  
17 failure to provide guarantees indispensable to the  
18 proper administration of justice, or a manifestly  
19 unjust judgment. Instances of denial of justice also  
20 have included corruption in judicial proceedings,  
21 discrimination or ill will against foreigners, and  
22 executive or legislative interference with the freedom

1 or impartiality of the judicial process. At the same  
2 time, erroneous domestic-court decisions, or  
3 misapplications or misinterpretation of domestic law,  
4 do not in themselves constitute a denial of justice  
5 under customary international law. Indeed, as a  
6 matter of customary international law, international  
7 tribunals will defer to domestic courts interpreting  
8 matters of domestic law unless there is a denial of  
9 justice.

10 My last point with respect to denial of  
11 justice is that the International Responsibility of  
12 States may not be invoked with respect to non-final  
13 judicial acts. While the acts of State organs are  
14 attributable to the State, there will be a breach of  
15 10.5 based on judicial acts only if the system as a  
16 whole produces a denial of justice. In other words,  
17 international responsibility for a denial of justice  
18 will only attach once there has been a decision of the  
19 court of last resort. Thus, decisions of lower courts  
20 that may be appealed, for example, cannot produce a  
21 denial of justice and cannot be the basis of a TPA  
22 Chapter 10 claim.

1           For the foregoing reasons, judicial measures  
2 may form the basis of a claim under the customary  
3 international law Minimum Standard of Treatment under  
4 Article 10.5.1 only if they are final and it is proved  
5 that a denial of justice has occurred. Were it  
6 otherwise, it would be impossible to prevent arbitral  
7 tribunals from becoming supra-national Appellate  
8 Courts on matters of the application of substantive  
9 domestic law.

10           I now turn to other standards within the  
11 Minimum Standard of Treatment as well as of concepts  
12 that have not yet crystallized into customary  
13 international law.

14           Other areas included within the Minimum  
15 Standard of Treatment concern the obligation not to  
16 expropriate covered investments except under the  
17 conditions specified in Article 10.7, any obligation  
18 to provide full protection and security specified in  
19 Article 10.5.2(b). In contrast, the concepts of  
20 legitimate expectations, non-discrimination,  
21 transparency, and good faith are not component  
22 elements of the fair-and-equitable-treatment standard

1 under customary international law that give rise to  
2 independent host State obligations.

3           With respect to non-discrimination, to the  
4 extent that the customary international law Minimum  
5 Standard of Treatment incorporated in Article 10.5  
6 prohibits discrimination, it does so only in the  
7 context of other established customary  
8 international-law rules, such as prohibitions against  
9 discriminatory takings, access to judicial remedies or  
10 treatment by the courts, or the obligation of States  
11 to provide full protection and security. Moreover,  
12 investor-State claims of nationality-based  
13 discrimination are governed exclusively by the  
14 provisions of Chapter 10 in Articles 10.3 and 10.4  
15 that specifically address that subject, which I will  
16 discuss shortly, and not in Article 10.5.

17           Turning to legitimate expectations, the  
18 United States is aware of no general and consistent  
19 State practice and opinio juris establishing an  
20 obligation under the Minimum Standard of Treatment not  
21 to frustrate investors' expectations.

22           And, finally, the principle that every

1 treaty in force must be performed in good faith is  
2 established in customary international law, not in  
3 Chapter 10 of the U.S.-Peru TPA. Thus, claims  
4 alleging breach of the good-faith principle in a  
5 party's performance of its treaty obligations do not  
6 fall within the limited jurisdictional grant for  
7 investor-State disputes afforded in the Treaty.

8           Similarly, as expressed by the concept *pacta*  
9 *sunt servanda*, the good-faith principle applies as  
10 between the State parties to the Treaty and does not  
11 extend to third parties outside of the Treaty  
12 relationship. In other words, each Treaty Party has  
13 an obligation vis-à-vis the other Treaty Party to  
14 apply the Treaty in good faith. It is not an  
15 independent obligation owed to investors under the  
16 concept of fair and equitable treatment or otherwise.  
17 As such, the good-faith principle does not impose any  
18 obligation on the State to engage directly in  
19 negotiations with the Investor.

20           Moreover, as the International Court of  
21 Justice stated in its 1988 Judgment in the *Border and*  
22 *Transboundary Armed Actions Case*, it is

1 well-established in international law that good faith  
2 is "one of the basic principles governing the creation  
3 and performance of legal obligations but it is not in  
4 itself a source of obligation where none would  
5 otherwise exist." As such, customary international  
6 law does not impose a free-standing, substantive  
7 obligation of good faith that, if breached, can result  
8 in State liability.

9 I will now briefly address Articles 10.3 and  
10 10.4 of the Treaty, which govern national treatment  
11 and most-favored-nation treatment, respectively.

12 Article 10.3 is intended to prevent  
13 discrimination based on nationality between domestic  
14 investors or investments and investors or investments  
15 of the other party, that are in "like circumstances."  
16 To establish a breach of national treatment under  
17 Article 10.3, a Claimant has the burden of proving  
18 that it or its Investments (1), were accorded  
19 treatment, (2), were in like circumstances with  
20 domestic investors or investments, and (3), received  
21 treatment less favorable than that accorded to  
22 domestic investors or investments. The burden to

1 prove a violation of this Article and each element of  
2 its claim rests with the Claimant.

3           Moreover, determining whether a domestic  
4 investor or investment identified by a Claimant is in  
5 like circumstances to the Claimant or its Investment  
6 is a fact-specific inquiry. This analysis requires  
7 consideration of more than just the business or  
8 economic sector, but also the regulatory framework and  
9 policy objectives, among other possible relevant  
10 characteristics.

11           Article 10.4 of the Agreement, on the other  
12 hand, addresses discrimination based on nationality  
13 between non-party investors or investments and  
14 investors or investments of the other party. As with  
15 national treatment, if the Claimant does not identify  
16 treatment that is actually being accorded with respect  
17 to an investor or investment of a non-party or another  
18 party in like circumstances, no violation of  
19 Article 10.4 can be established. In other words, a  
20 Claimant must identify a measure adopted or maintained  
21 by a party through which that party accorded more  
22 favorable treatment, as opposed to speculation as to

1 how a hypothetical measure might have applied to  
2 investors of a non-party or another party.

3           As the 2010 UNCTAD study on the MFN  
4 Provision noted, such a comparison between two foreign  
5 investors in like circumstances is required to assess  
6 an alleged breach of the MFN Clause.

7           Further, a party does not accord treatment  
8 for the purposes of Article 10.4 through the mere  
9 existence of provisions in its other international  
10 agreements such as procedural provisions, umbrella  
11 clauses or clauses that impose autonomous  
12 fair-and-equitable-treatment standards.

13           For Article 10.4 to be invoked, there has to  
14 be actual treatment by the Respondent Party accorded  
15 to an actual investor in like circumstances from a  
16 third party. Treatment accorded by a party could  
17 include measures adopted or maintained by a party in  
18 connection with carrying out its obligations under a  
19 different Treaty as applied to different investors,  
20 but the mere existence of other Treaty provisions by  
21 itself is insufficient to establish a breach of  
22 Article 10.4.



1           Indeed, according to a 2015 International  
2 Law Commission study, the prevailing view among  
3 tribunals is that MFN provisions can't apply to change  
4 jurisdictional limitations established in treaties.

5           I will now address Article 10.7 of the  
6 Treaty, which governs expropriation. Article 10.7  
7 provides that no party may expropriate or nationalize  
8 a covered investment, directly or indirectly, except  
9 for a public purpose; in a non-discriminatory manner;  
10 on payment of prompt, adequate, and effective  
11 compensation; and in accordance with due process of  
12 law.

13           Importantly, it is a principle of customary  
14 international law that, in order for there to have  
15 been an expropriation, a property right or property  
16 interest must have been taken.

17           Moreover, under international law, where an  
18 action is a bona fide non-discriminatory regulation or  
19 application of such a regulation, it will not  
20 ordinarily be deemed expropriatory. This principle in  
21 public international law, referred to as the Police  
22 Powers Doctrine, is not an exception that applies

1 after an expropriation has been found, but rather is a  
2 recognition that certain actions, by their nature, do  
3 not engage State Responsibility.

4 I will end my remarks by addressing the  
5 weight due to U.S. views on matters addressed in a  
6 Non-Disputing Party's Submission. States Parties are  
7 well-placed to provide authentic interpretations of  
8 their Treaties, including in proceedings before  
9 investor-State tribunals like this one. The United  
10 States consistently includes Non-Disputing Party  
11 Provisions in its Investment agreements, including the  
12 TPA, to reinforce the importance of these submissions  
13 in the interpretation of the provisions of these  
14 agreements and we routinely make such submissions.

15 And in response to the President's question  
16 directed to Respondent on this issue, Article 31 of  
17 the Vienna Convention on the Law of Treaties  
18 recognizes the important role that States Parties play  
19 in the interpretation of their agreements. Although  
20 the United States is not a party to the Vienna  
21 Convention, we consider that Article 31 reflects  
22 customary international law on treaty interpretation.

1 Article 31, Paragraph 3 states that, in interpreting a  
2 treaty, "there shall be taken into account, together  
3 with context, (a), any subsequent agreement between  
4 the Parties regarding the interpretation of the Treaty  
5 or application of its provisions, and (b), any  
6 subsequent practice in the application of the Treaty  
7 which establishes the agreement of the Parties  
8 regarding its interpretation."

9 Article 31 is framed in mandatory terms. It  
10 is unequivocal that subsequent agreement between the  
11 parties, and subsequent practice of the parties, shall  
12 be taken into account. Thus, where the submissions by  
13 both TPA Parties demonstrate that they agree on the  
14 proper interpretation of a given provision, the  
15 Tribunal must, in accordance with Article 31(3)(a),  
16 take this subsequent agreement into account.

17 The TPA Parties' concordant interpretations  
18 may also constitute subsequent practice that the  
19 Tribunal must take into account under Article  
20 31(3)(b). The International Law Commission has  
21 commented that subsequent practice may include  
22 statements in the course of a legal dispute.

1 Investment tribunals have agreed, in the context of  
2 Non-Disputing Party Submissions under the NAFTA, that  
3 submissions by the NAFTA Parties in arbitrations under  
4 Chapter Eleven may serve to form subsequent practice.  
5 Specifically, I would point you to Paragraph 158 of  
6 the *Mobile v. Canada* Decision on Jurisdiction and  
7 Admissibility dated July 13, 2018, as well as  
8 Paragraphs 103, 104, and 158 to 160 of that Decision  
9 for context.

10 I also refer you to Paragraphs 188 to 189 of  
11 the Award on Jurisdiction in *Canadian Cattlemen for*  
12 *Fair Trade*, dated January 28, 2008. Accordingly,  
13 where the Parties' submissions in an arbitration  
14 document a common understanding of a given provision,  
15 this constitutes subsequent practice that must be  
16 taken into account by the Tribunal under Article  
17 31(3)(b).

18 To sum up this point, whether the Tribunal  
19 considers that the interpretations presented by the  
20 TPA Parties are subsequent agreement under Article  
21 31(3)(a), subsequent practice under 31(3)(b), or both,  
22 on any particular provision, the outcome is the same.

1 The Tribunal must take the TPA Parties' common  
2 understanding of the provision of their Treaty into  
3 account.

4 In concluding, I would emphasize that the  
5 United States stands by the interpretation set forth  
6 in its Written Submission, although we did not address  
7 all of those issues today. With that final  
8 observation, I will close my remarks. I thank the  
9 Tribunal for the opportunity to present the views of  
10 the United States on these important interpretive  
11 issues, and we remain at the Tribunal's disposal  
12 should further interventions be useful in this case.

13 Thank you.

14 PRESIDENT McRAE: Thank you very much.

15 Do either of my colleagues have a question?

16 Thank you very much.

17 MS. KURITZKY: Thank you.

18 PRESIDENT McRAE: We've reached the point, I  
19 think, where the Tribunal may ask questions, and I  
20 guess we have exhausted the questions we want to ask.  
21 We don't have any further questions at the present  
22 stage, unless you have any further questions. And

1 that means that we bring the session to an end.

2 Before I do, are there any procedural or other matters  
3 that the Claimants wish to raise at this stage?

4 MR. DÍAZ-CANDIA: No, Mr. President. Thank  
5 you.

6 PRESIDENT McRAE: And the Respondent?

7 MR. GRANÉ LABAT: None, thank you.

8 PRESIDENT McRAE: Thank you.

9 Then we will resume tomorrow at 9:30 again  
10 with, I believe, the statement and then  
11 cross-examination of Mr. [REDACTED] So, we will resume  
12 at 9:30 tomorrow.

13 (Whereupon, at 6:38 p.m., the Hearing was  
14 adjourned until 9:30 a.m. the following day.)

POST-HEARING REVISIONS  
CERTIFICATE OF REPORTER

I, David A. Kasdan, RDR-CRR, Court Reporter, do hereby attest that the foregoing English-speaking proceedings, after agreed-upon revisions submitted to me by the Parties, were revised and re-submitted to the Parties per their instructions.

I further certify that I am neither counsel for, related to, nor employed by any of the Parties to this action in this proceeding, nor financially or otherwise interested in the outcome of this litigation.

A handwritten signature in black ink, appearing to read "David A. Kasdan", written in a cursive style. The signature is positioned above a horizontal line.

DAVID A. KASDAN