

1 Tuesday, 22 January 2019

2 (9.00 am)

3 (Proceedings delayed)

4 (9.07 am)

5 Housekeeping

6 THE PRESIDENT: Good morning everybody. We're
7 resuming the hearing. I think we need, first, to turn to
8 respondent regarding the verification of the video.

9 MR LEWIS: Sir, thank you. I just had two short
10 procedural points. The first is the video. We have
11 checked. So far as we can tell it is in compliance with
12 paragraph 13 of the specific procedural rules.

13 The second point is this: we just had a small
14 disparity with the time keeping yesterday. We're very
15 grateful to the secretary for keeping the times. What
16 I suggested to Professor Capper is that we each send one
17 person to liaise with the secretary and just see if we can
18 sort that out shortly and I hope that will be acceptable to
19 the Tribunal.

20 And one further observation: we're very conscious
21 of the timings in the case; and we're doing our very best to
22 seek to limit where we can, fairly to the ACP, our
23 cross-examination. But we would just make this observation:
24 it is important that there is a balance between the length
25 of the presentation and the length of the cross-examination.

1 conflict, under the duty of good faith is there an
2 obligation of the contractor to raise that issue with the
3 State authority? Because you said that the contractor may
4 raise this issue with the State authority, which could be
5 understood that it has the possibility to do so.

6 My question is that whether it shall do so, in
7 your view, under the principle of good faith. Or can the
8 contractor, being aware of this potential conflict, simply
9 not react and, in such case, is the contractor not breaching
10 the principle of good faith if it is raising this issue
11 later on?

12 A. (Interpreted). Yes. Correct. As I told
13 you in the first answer I gave you, good faith applies to both
14 parties, the contracting party and the owner of the
15 work, naturally. Just like the contractor has -- just like the owner
16 of the work has to act in good faith, the tenderer -- the contracting
17 party, upon finding out that there is some act within this bidding
18 process that could be harmful, has all the obligation -- is also obliged
19 to act in good faith and manifest that up.

20 What happens, generally, is that the contractor
21 does not agree with some of the demands and so states. The authority
22 or, in this case, the ACP, is not under an obligation to attend to the
23 claims or the suggestions made by the
24 contractor. But, likewise, the contractor must act in good
25 faith with the authority.

1 Going a little bit beyond to what is the duty to inform,
2 which is related to your question, what we must bear in mind under these
3 circumstances is the quality of the parties. If one of the parties
4 creates -- and we referred to this in the previous questions asked by
5 the attorney -- a legitimate reliance, then it could --one could somehow
6 excuse the actions by the contractor for not having advised about some
7 circumstances that should not have prospered within the contract. But
8 coming from, as it is, the Panama Canal Authority, there is a legitimate
9 reliance created which, generally, the contractors, in this case, don't
10 make

11 any great suggestions because they trust the information that's been
12 provided to them. It's not that they're acting in bad faith, but it's
13 that they are relying -- they're operating based on legitimate reliance
14 which has been proposed by one of the contracting parties.

15 But, to answer your question, both have the
16 obligation to act in good faith.

17 THE PRESIDENT: Thank you. I just have a last
18 question, as a follow-up.

19 Do you have a Spanish version of section 107D of
20 the employer's requirement, which is the temporary
21 environmental control? 107D, which is referred to in -- it
22 was in yesterday's opening of the side of the respondent,
23 but there is no Spanish version?

24 MR JANA: No.

25 THE PRESIDENT: Okay. So then, I think, it

1 doesn't -- it doesn't read at all English in fact. Yes.

2 Okay.

3 Can you -- can you read English or not? And if
4 you don't feel comfortable reading a document in English.
5 Okay. So do we have any -- do we have any opportunity to
6 translate this provision in -- it's not very long -- from
7 English into Spanish?

8 MR BOUCHARDIE: Well, yes. I -- to my knowledge,
9 that's absolutely nothing that Dr Troyano was considered or
10 reviewed for his opinion, but ...

11 THE PRESIDENT: It's okay, but I am still
12 interested in raising the question.

13 MR BOUCHARDIE: If the President -- if you wish to
14 read someone can translate it, I suppose, yes, as we go.

15 THE PRESIDENT: But is it possible to -- that
16 somebody takes this text and translate it for the expert.

17 MR GEISINGER: Mr Chairman, that provision cannot
18 be translated on the fly, because it contains highly
19 technical language that has potentially important
20 consequences in how an engineer would read it. So we
21 cannot -- we cannot translate it within a matter of minutes
22 for a non-engineer.

23 THE PRESIDENT: Well, let see. We will have all
24 the reservations on the record. But I suggest that my
25 co-arbitrator -- can you translate it into Spanish --

1 otherwise I raise a hypothetical question. But, I mean,
2 I want to raise the question.

3 MR GEISINGER: Mr Chairman, could we then have the
4 translation consequential and not simultaneous.

5 MR VON WOBESER: Why don't we give it to the
6 translator to translate?

7 THE PRESIDENT: Yes. Exactly.

8 (Pause).

9 MR LEWIS: Sir, the translator just asked to confirm
10 the section you would like translated. I assume it is
11 the section beginning:

12 "A potential source of aggregates ..."

13 THE PRESIDENT: Correct. So if he can translate
14 it slowly.

15 And maybe before you start -- before you start,
16 just one second, okay.

17 THE INTERPRETER: Would the Tribunal like us to
18 translate in Spanish to the witness.

19 THE PRESIDENT: Yes. If you could come upfront.
20 Thank you.

21 PROFESSOR CAPPER: Mr President, it may be what
22 I'm about to say is blindingly obvious to all members of the
23 Tribunal. If it is, I'm grateful for their preparation.
24 But you will appreciate that this provision that we're about
25 to translate is the subject of very considerable differences

1 between the parties as to its meaning and result. And,
2 therefore, this is, in no sense, an example of a provision
3 which is said, by all parties -- all parties -- to be clear
4 as to its meaning and scope and as to which, effectively,
5 there's no real difference between engineers or lawyers.
6 I just want to make that very, very clear, which is why you
7 are seeing a certain amount of reaction to the question: how
8 does one go about translating something.

9 It's also a provision which occurs in the
10 temporary facilities part of the employer's requirements, as
11 you, yourself, recognise, which is, essentially, a document,
12 albeit part of the employer's requirements, which is written
13 for engineers.

14 It is part of the contract; and I am going to
15 address you on it tomorrow. But I didn't want there to be
16 any doubt about the significance of how this is read; who
17 needs it interpreted; and, in what -- and why that party
18 needs it interpreted.

19 In our view, the meaning is clear; and it is ACP
20 who seeks to give this -- this provision meaning.

21 You -- I just make these points in order that you
22 appreciate the sensitivity of what we're about to do.

23 MR LEWIS: Sir, if I --

24 THE PRESIDENT: Sorry. Yes.

25 MR LEWIS: May I respond briefly? I think, from

1 our perspective, we would say that if the Tribunal would
2 find it helpful for this witness to look at this document
3 and to answer the Tribunal's questions then the ACP thinks
4 that's the right for the Tribunal to do. And, as to
5 submissions as to the precise meaning of the clause, you
6 will hear openings in detail on that, probably tomorrow now.
7 But we certainly, on this side, don't see any difficulty in
8 questions being asked of this witness in relation to this
9 provision.

10 THE PRESIDENT: Thank you.

11 Well, you know, for the record, I want to make,
12 you know, really clear that what we're going to do is very
13 simple. I'm going to ask the interpreter to translate into
14 Spanish that clause. We are not asking the witness to
15 express any view as to the interpretation of that clause.
16 We know that it is debated. And I will have a very simple
17 question once the clause is translated.

18 I will ask the expert witness whether he has seen
19 this provision or whether he did consider it in the context
20 of his opinion. And I think we are fully entitled to raise
21 that question. So can you translate that clause in Spanish
22 for the record, please.

23 THE INTERPRETER: Yes, sir.

24 THE PRESIDENT: Make sure you use the mic because
25 we need to make sure that it is recorded.

1 (clause translated).

2 So my question, Mr Troyano, again the issue is not
3 whether the interpretation goes in one direction or the
4 other. It is just you have heard the translation by a
5 translator of a provision; right? And so you understand the
6 content as such. My question is very simple: have you seen
7 in the context or considered in the context of your expert
8 analysis under Panamanian law that particular clause.
9 I mean, either you have seen it or you have not seen it. It
10 is very simple.

11 A. (Interpreted). A clause of this nature I have not
12 seen. Nonetheless, I cannot -- I would not like to, nor could I, give
13 an opinion on the same because I just saw it. So I would have to analyse
14 it, on one hand; and, on the other hand, it contains technical aspects
15 that are not inherent to my professional knowledge as an
16 attorney or even as an expert witness in the application
17 of Panamanian law. Therefore, this I cannot really give you
18 an answer, because I would be totally distanced from the contents --
19 the technical contents of the same.

20 THE PRESIDENT: Thank you, you've answered my question.
21 Thank you. No further questions.

22 That concludes your examination. We thank you very much.
23 And we're going to move to -- shall we have a break now?
24 I think of 15 minutes. And then we continue with Professor
25 Morales Moreno. Thank you very much. Thank you.

1 (4.27 pm)

2 PROFESSOR DR MORALES MORENO and PROFESSOR

3 DR GREGORACI FERNÁNDEZ

4 THE PRESIDENT: Good afternoon. The expert is
5 going to testify in Spanish?

6 MR BOUCHARDIE: Yes, in Spanish.

7 THE PRESIDENT: Okay. Thank you very much.

8 So good afternoon Professor. Many thanks for --
9 do you have the translation? It is channel 1. Okay.

10 DR MORALES MORENO: (Interpreted). Channel 1. We
11 can hear you.

12 THE PRESIDENT: Okay. Thanks for appearing before
13 this arbitral tribunal which is composed of the following
14 three arbitrators: on my right side, Claus von Wobeser; on
15 my left side, Robert Gaitskell; and myself Pierre-Yves
16 Gunter. And I have one associate, Mrs Marinkovich, she is
17 sitting over there, who is the secretary to the Tribunal.

18 I understand that you will make, first, a
19 presentation of your legal opinion or expert report. Can
20 you hear? Yes? And then, once this presentation is done,
21 we have agreed with the parties counsel that we will start
22 asking a couple of questions to you; and then the counsel,
23 on both sides, have the opportunity to ask follow-up
24 questions. Okay.

25 DR MORALES MORENO: (Interpreted). Thank you very