
**INTERNATIONAL CENTRE
FOR SETTLEMENT OF INVESTMENT DISPUTES**

KALOTI METALS & LOGISTICS, LLC,

Claimant,

v.

THE REPUBLIC OF PERU,

Respondent.

**CLAIMANT'S
(1) COUNTER-MEMORIAL ON JURISDICTION; AND
(2) REPLY MEMORIAL ON THE MERITS**

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Dated: January 13, 2023

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Claimant Kaloti Metals & Logistics, LLC (the Claimant or KML) submits this Counter-Memorial on Jurisdiction, and Reply Memorial on the Merits, in additional support of its claims against the Republic of Peru (Respondent or Peru) in this arbitration proceeding administered by the International Centre for Settlement of Investment Disputes (ICSID), pursuant to Procedural Order No. 1, issued by the Arbitral Tribunal on October 28, 2021, as amended.

I. INTRODUCTION AND SUMMARY

1. In its memorial of March 16, 2022, KML made five fundamental assertions of facts: (1) that KML and its principals have not been indicted (much less convicted) of any crime anywhere in the world, including, of course, Peru; (2) that the investigations in Peru involving the five shipments of gold relevant in this arbitration have not been concluded, and have remained open for more than seven years, *i.e.*, no determination has been made by Peru as of today about the origin of the gold; (3) that KML tried to intervene and present defenses in the relevant investigations, requesting the return of the gold to KML, but KML never received any answer from Peru, much less any notice about what would happen to KML's property; (4) that any and all measures, be them immobilizations or seizures, affecting such gold are inherently, under Peruvian laws, strictly interim or temporary, and hence still—as of today—subject to reversal (*i.e.*, capable of being lifted pursuant to Peruvian laws); and, (5) that Peru is still in physical possession and control of the five shipments of gold originally taken in 2013 - 2014, relevant to this arbitration.

2. In its Counter-Memorial of August 05, 2022, Peru added some facts and government documents which, because of Peru's arbitrary conduct and lack of transparency, were not previously available or known to KML. However, those newly revealed facts and documents do not alter, but rather confirm the above-mentioned five fundamental assertions made by KML.

3. Peru has agreed with KML in that the Peruvian Constitution, applicable statutes, and the US-Peru TPA all protect due process and require that government actions must be reasonable and proportional, *i.e.*, fair and equitable. And in any case, Peru cannot use

compliance with, or enforcement of, its local laws to avoid international investment-protection obligations.

4. Faced with the foregoing, undisputed facts, Peru has made “kitchen sink” objections containing redundant and superfluous allegations, trying to turn what should be a straightforward arbitration into a complicated quagmire. Peru is throwing everything against the wall to see what sticks, and it is basically trying to confuse the Tribunal with irrelevant arguments purportedly grounded on Peruvian laws. It is apparent that Peru does not want the Tribunal to reach the truth about the underlying facts of this case.

5. Peru has, among other things, incongruously admitted that the State measures affecting the inventory of gold relevant to this arbitration are interim and temporary under Peruvian law, but also alleged that the statute of limitations (*prescripción*) for KML to challenge in arbitration the expropriation of such inventory, under the same temporary State measures, started lapsing before KML’s investments permanently lost all value.

6. Peru, in essence, wants to actually hold onto the gold “temporarily”—yet indefinitely—without KML having a recourse under international law. Peru wants its measures to be interim for some purposes, but permanent—and unquestionable—for other purposes. Peru has also alleged that KML’s ground operation (going concern business enterprise, which lasted seven years) inside Peru, and KML’s inventory taken by Peru, in Peru, are not investments. In reality, those are investments clearly protected by the US-Peru TPA.

7. Here, Peru wants to use the excuse of anti money-laundering investigations against KML’s suppliers as a pretext to keep KML’s gold. Peru, however, has not alleged that KML was an accomplice or an *inculpado* in money laundering. But Peru would seemingly—and absurdly—allow the sellers of such gold (*i.e.*, the alleged money launderers) to keep the proceeds from the sale of the gold. And, if Peru’s arguments are to be believed, Peru may even allow the seller of one of the shipments ([REDACTED]) to keep some of the gold for itself.

8. Again, the only legally relevant question in this arbitration is whether Peru violated international law by prolonging the temporary or interim seizure of Claimant's property, placing KML in legal limbo by not charging it with any crimes or making it indirectly subject to a pseudo-trial for close to eight years, and not providing KML with any notice of relevant proceedings—all the while ruining Claimant's reputation in Peru and abroad, choking KML's business, and eventually running it into the ground.

9. Peru's lack of transparency has been made evident by Peru's own Counter-Memorial. Peru's negligent omissions led to a devastating information asymmetry, with Peru knowing everything about its actions and intentions, while Claimant was left to feel around in the dark as best it could. Peru, also, recalcitrantly resisted the production of fundamental documents requested by KML in this arbitration. This lack of transparency—and the uncertainty that it created—is what ultimately destroyed KML's operations in Peru.

10. As KML predicted in its March 16, 2022, Memorial, during the course of these proceedings Peru and its first-rate lawyers have given a carefully detailed explanation trying to justify the State's actions. In this arbitration and trying to come up with *post hoc* justifications for the seizure of KML's gold, Peru's lawyers and legal expert have invoked alleged facts and Peruvian laws that, as relevant documents show, Peruvian administrative and judicial authorities never invoked prior to Peru's submissions in this arbitration. Claimant asks the Tribunal to remember that no such explanations or justifications were ever given to KML during the eight-year period following the seizure of Claimant's gold. No explanation provided by lawyers in an arbitration can substitute what in fact occurred—and what was omitted—*tempore non suspecto*.

11. Peru's Counter-Memorial is full of innuendo and unproven accusations against KML. Peru has made plenty of allusive or oblique remarks and hints, suggestive and disparaging of KML, without the support of any evidence. Here, Peru has continued and expanded its defamation campaign against KML (in a Counter-Memorial made available to the public), referring to investigations conducted outside of Peru, none involving KML, and none of which concluded in any indictment or conviction.

12. This case brings the Tribunal to the essence of investment protection: an obligation to respect investors' property, and a duty to give them due process and access to justice. Peru failed to provide these two bedrocks, foundational protections, and KML is therefore entitled to compensation as a result.

II. FACTS

13. Claimant hereby confirms and incorporates herein by reference the entire statement of facts contained in its Memorial of March 16, 2022. KML hereby highlights that Peru's factual narrative, as reflected in its Counter-Memorial, has confirmed the chronology of relevant facts included as Annex A appended to KML's memorial of March 16, 2022.

14. Peru's Counter-Memorial added new facts and documents, which were previously unknown to KML, because of a gross information asymmetry and lack of transparency that kept KML in the dark, including the government documents that replaced the initial immobilizations of KML's gold by seizure orders issued by Peruvian courts.¹ The new facts and documents presented by Peru, however, do not alter KML's fundamental allegations and claims, *e.g.*, that Peru is still in possession of KML's gold based on "temporary" government orders.

15. This case involves the following five purchases or shipments of gold (collectively, KML's gold, inventory, or shipments of gold) by KML from certain Peruvian suppliers (collectively, Suppliers), which were initially immobilized between November 2013 and January 2014:

- Purchase of 111,545 grams of gold (gross weight) from [REDACTED] ([REDACTED]) (Shipment No. 1).
- Purchase of 98,591 grams of gold (gross weight) from [REDACTED] ([REDACTED]) (Shipment No. 2).

¹ Precautionary Seizure against Shipment 1, 21 February 2014, **R-0134**; Precautionary Seizure against Shipment 2, 25 March 2014, **R-0135**; [REDACTED]. Ruling of the Superior Court of Justice of Callao – Permanent Criminal Court, April 30, 2014, **C-0090-SPA**; Precautionary Seizure against Shipment 4, 1 May 2014, **R-0136**; Resolution No. 1, Precautionary Seizure against Shipment 5, 20 March 2015, **R-0210**.

- Purchase of 38,601 grams of gold (gross weight) from [REDACTED] (Shipment No. 3).
- Purchase of 126,775 grams of gold (gross weight) from [REDACTED] (Shipment No. 4).
- Purchase of 99,843 grams of gold (gross weight) from [REDACTED] (Shipment No. 5).

16. The foregoing shipments have been identified above based on declared *gross* weights (on which Claimant and Respondent agree). However, KML's damages are claimed based on estimated *net* weights, which, as explained below—and for valid reasons—have been slightly updated in this memorial.

A. Adverse inferences against Peru

17. In this case, KML has alleged and introduced direct evidence showing that (1) KML has never been investigated in Peru in connection with the five shipments of gold relevant for this arbitration; (2) all such gold was owned by KML; and (3) all the five shipments of gold are currently in possession of Peru.² Peru's own legal expert, lawyer Joaquín Missiego (Peru's Legal Expert), made clear that KML is not an *inculpado* in the relevant investigations,³ and that the gold was owned by KML (or at least not owned by the *inculpados*).⁴

18. KML requested the production of the following documents evidencing the foregoing, and Peru failed to produce them in spite of a direct order from the Tribunal:

KML's Redfern request number	Document	Order of the Tribunal
13.	Exhibits of the File (<i>Carpeta Fiscal</i>) No. [REDACTED]-[REDACTED], issued by the 1° <i>Fiscalía Supraprovincial a cargo de los Delitos</i>	Granted.

² Safekeeping certificates of KML's gold, issued by the *Banco de la Nación*, **C-0127-SPA**. See also, Civil attachment measure against Shipment 5, issued by the *Trigésimo Tercer Juzgado Civil de Lima*, June 18, 2014, **C-0141-SPA**.

³ **Expert Report-Joaquín Missiego-Respondent's Counter-Memorial-SPA**, at ¶¶ 17, 26, 75.

⁴ *Id.*, at ¶¶ 100, 102, 134.

	<i>de Lavado de Activos y Pérdida de Dominio</i> , dated October 12, 2015.	
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19. Peru did not specify any reasons for the non-production of the foregoing documents, which are directly related to, and form part of, the investigations involving the five shipments of gold relevant in this arbitration.

20. Peru also failed to produce (or to specify the reasons for the non-production of) the following documents, specifically regarding Shipment No. 5:

KML's Redfern request number	Document	Order of the Tribunal
6.	Seizure order of KML's gold (of Shipment 5 from [REDACTED]), issued by the <i>Segunda Fiscalía Supraprovincial a cargo de los Delitos de Lavado de Activos y Pérdida de Dominio</i> , March 25, 2014.	No order necessary. The commitment of the Respondent to conduct a reasonable search "for (i) a request by the <i>Segunda Fiscalía Supraprovincial a cargo de los Delitos de Lavado de Activos y Pérdida de Dominio</i> for the precautionary seizure of Shipment 5 dated 25 March 2014; and (ii) a resolution granted by a Criminal Court concerning the precautionary seizure of Shipment 5 dated 25 March 2014 upon request of the <i>Segunda Fiscalía Supraprovincial a cargo de los Delitos de Lavado de Activos y Pérdida de Dominio</i> " is noted.

7.	Seizure orders of KML's gold (of [REDACTED], [REDACTED] and [REDACTED] purchases) issued by various Peruvian courts on March 11, 2014, March 27, 2014, and May 6, 2014, respectively.	No order necessary. The commitment of the Respondent "to conduct a reasonable search for the documents requested" is noted.
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21. Pursuant to Article 9 of the IBA Rules on the Taking of Evidence, KML requests that the Tribunal make inferences that the above-mentioned documents are adverse to the interests of Peru. The inferences hereby specifically requested by KML are:

- KML was never investigated in Peru in connection with the five shipments of gold relevant in this arbitration. The documents that Peru failed to produce do not mention, and are hence exculpatory, of KML.
- Peru knew that all the gold seized was legitimately owned by KML at least until November 30, 2018. The documents sought by KML relate to the seizure of those five shipments of gold, as KML explained in its Redfern schedule.
- Shipment No. 5, specifically and without limitation, is currently in Peru's possession.
- Peru did not go after or pursue other shipments sold to any other person or company by [REDACTED], [REDACTED], [REDACTED], or [REDACTED]; nor after the money received by those sellers from KML. Those companies were allowed to continue operating in Peru and to keep for themselves any proceeds from their sale of the gold to KML. Peru only pursued shipments of gold (tangible assets) specifically sold to KML, which demonstrates that KML was in practice the real target of Peru's arbitrary and discriminatory actions and omissions. The documents sought by KML relate to those four companies, as KML explained in its Redfern schedule.
- Until the commencement of this arbitration, Peru never invoked Article 94 of Peru's Code of Criminal Procedure in connection with the relevant seizures of gold.

22. The documents that Peru failed to produce, including the seizure orders Peru committed to search (requests Nos. 6 and 7, above) are clearly in the possession of Peru, and are directly related and relevant to this case. Peru has not provided any information on why the documents were not produced.

23. As explained in this memorial, KML has produced competent evidence corroborating the inferences sought; and the documents requested were accessible to Peru as inference opponent.

24. The inferences hereby sought by KML are reasonable, consistent with facts in the record and logically related to the likely nature of the evidence withheld by Peru.

25. KML is hereby putting Peru on notice of Peru's obligation to produce evidence rebutting the adverse inferences sought by KML; including that (1) KML was never investigated in Peru in connection with the five shipments of gold relevant in this arbitration; (2) Peru knew that all such gold was legitimately owned by KML at least until November 30, 2018; (3) all the five shipments of gold are currently in Peru's possession; and (4) until the commencement of this arbitration, Peru never invoked Article 94 of Peru's Code of Criminal Procedure in connection with the seizure of gold.

26. KML very respectfully notes that the Tribunal is formally required to take record of the lack of production by Peru, and its consequences, under ICSID Arbitration Rule 34 (3).⁵

27. The foregoing inferences are supported, among other things, by documents that Peru produced to KML on January 05, 2023 (*i.e.*, a mere eight days before the filing of this memorial):⁶

15.	<i>Informe No.</i> [REDACTED], issued by the <i>dirección de investigación de</i>	Granted.
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⁵ Rule 34 (3) of the ICSID Arbitration Rules: "The parties shall cooperate with the Tribunal in the production of the evidence and in the other measures provided for in paragraph (2). **The Tribunal shall take formal note of the failure of a party to comply with its obligations under this paragraph and of any reasons given for such failure.**" (emphasis added).

⁶ Composite exhibit – documents produced by Peru on January 05, 2023, **C-0161-SPA**.

	<i>lavado de activos – división de investigaciones especiales.</i>	
16.	Documents of the Financial Intelligence Reports (<i>Documentos de los Informes de Inteligencia Financiera</i>) No. [REDACTED] and [REDACTED], issued by the <i>Unidad de Inteligencia Financiera del Peru</i> .	Granted.

28. These latter documents, albeit produced belatedly by Peru, confirm that KML was never involved or accused of wrongdoing, and that Peru started to look for excuses to begin investigations only after the gold had been seized from KML.

B. KML owned the gold seized by Peru

29. When KML terminated all its business activities and operations on November 30, 2018, the following inventory of gold property of KML (initially seized by Peru in 2013 – 2014) had not been returned to KML, nor has it been returned as of this day. Peru never questioned KML's legal title to this gold, until Peru filed its Counter-Memorial on August 05, 2022:

Seller	<i>Net</i> Weight (Grams)
Shipment No. 1: [REDACTED]	103,911
Shipment No. 2: [REDACTED]	92,750
Shipment No. 3: [REDACTED]	36,220
Shipment No. 4: [REDACTED]	117,860
Shipment No. 5: [REDACTED]	97,826
Total in <i>net</i> Grams	448,566

30. KML has proven, and Peru has recognized, that KML effectively paid for at least three of the five shipments of gold:

mistakenly values unrefined gold at the same price as refined gold. Second, Mr. Smajlovic's analysis may require adjustment because KML has not yet paid for some of the shipments. Third,

However, assuming KML does have legal ownership of the gold under Peruvian law, we estimate damages of \$13.6 million as shown in Table 2. This calculation may require adjustment because: (1) KML has not paid for at least some of these purchases (beyond Purchase #5), which would result in a windfall if not properly accounted for; and (2) neither the Claimant nor Mr. Smajlovic

Evidence:

Expert Report-Darell Chodorow and Fabricio Nunez (Brattle)- Respondent's Counter-Memorial-ENG (at ¶¶ 32, 37).

31. Peru, in turn, has alleged that Shipment No. 3 and Shipment No. 5 (regarding [REDACTED] and [REDACTED], respectively) were not the property of KML, because KML did not pay the purchase price to the sellers.⁷ In a commercial world, property changes hands in accordance with the agreed-upon terms, which has no relevance to whether transfer of cash has occurred or is to occur within certain period, normally defined in a contract. Actual payment of the purchase price is not a requisite for the conveyance of legal title regarding movable assets in Peru.⁸

32. [REDACTED] (Shipment No. 3), for instance, expressly acknowledged and stated to the Peruvian government that the gold seized was the property of KML (regardless of payment of the price).⁹ There is no doubt that KML acquired and maintained its property rights over the gold, as [REDACTED] expressly recognized:

⁷ **Expert Report-Darell Chodorow and Fabricio Nunez (Brattle)-Respondent's Counter-Memorial-ENG**, at ¶ 201.

⁸ Second Legal Opinion-Dr. [REDACTED]-Claimant's Reply-SPA, at ¶ 1.2 ("La compraventa requiere del acuerdo en el precio, la cosa específica (bien), y la entrega de la cosa a quien designe el comprador. Al tratarse de un contrato consensual, este se perfecciona (el contrato genera obligaciones para ambas partes) con el cruce de voluntades entre las partes; por tanto, no requiere del pago efectivo del precio.") (emphasis added), **C-0139-SPA**.

⁹ This same situation applied, *mutatis mutandi*, to the fifth shipment (from [REDACTED]) at least until November 30, 2018.

Que este oro fué inmovilizado con fecha 10 de enero del 2014 según acta de inmovilización- incautación N° 316-0300-2014 N°002, cuando ya no era de nuestra propiedad ni se encontraba en nuestra posesión, hecho que esta perjudicando a nuestro cliente KALOTI METALS & LOGISTICS que es propietaria del oro desde su entrega en los almacenes de [REDACTED] en Chorrillos.

Es así que habiendo acreditado el origen legal del oro vendido, con la presentación de las respectivas documentación como productor minero del oro, SOLICITAMOS el levantamiento de la inmovilización a fin que se continúe con el trámite de la exportación del mineral en mención, correspondiendo proseguir con su embarque inmediatamente, [REDACTED]

Evidence:

C-0009-ENG/SPA ([REDACTED] document package, pp. 2).

33. Peru conveniently ignores three things: (1) under Peruvian law, once the parties (buyer and seller) reach an agreement and *traditio* is made, a sale is perfected, therefore the purchaser becomes the legal owner (regardless of payment of the price), unless and until a court of law declares otherwise and the court's decision is not subject to appeal or review;¹⁰ (2) Peruvian court decisions which are posterior to—occurred later than—the expropriation date of November 30, 2018 are irrelevant and inapposite in this arbitration as to the damages owed to KML; and (3) a court decision invoked by Peru purporting to revert a property title on June 14, 2022,¹¹ confirms that, before such decision, KML was

¹⁰ Art. 1352 and 1373 of the Peruvian Civil Code (“**Artículo 1352°.**- Los contratos se perfeccionan por el consentimiento de las partes, excepto aquellos que, además, deben observar la forma señalada por la ley bajo sanción de nulidad.”; “**Artículo 1373°.**- El contrato queda perfeccionado en el momento y lugar en que la aceptación es conocida por el oferente”), **CL-0044-SPA**.

¹¹ Resolution No. 08, Supreme Court of Lima, Court Specialized in Asset Forfeiture of Lima, 14 June 2022, **R-0212**.

the owner of the property (otherwise the lawsuit, and the court decision would not have been needed).

34. Also, KML's Quantum Expert expressly acknowledged that the pending payment of the purchase price for some portions of the gold seized by Peru was reflected as a liability, and considered (*i.e.*, subtracted) in his valuation of KML as a going concern business enterprise:

6.9 In order to prevent double-counting of the KML's inventory I modified my lost profits calculation. I specifically deducted the corresponding value of the KML's inventory (asset) and accounts payable (liability) as reported in KML's financial statements.¹⁴¹ Making these adjustments and separately accounting for the value of inventory does not result in double counting.¹⁴²

Table 8 - Value of Seized Gold (Five Purchases) as of 30 November 2018¹²⁸

Purchase No.	Purchase Date	Seller	Gross Weight (gram)	Pure Weight (gram)	Price of Gold (gram)	Value @ 30 Nov 2018
Purchase No.1	27-Nov-2013	██████	111,545	103,911	\$ 39.34	\$ 4,087,805
Purchase No.2	7-Jan-2014	██████	98,591	92,750	\$ 39.34	\$ 3,648,770
Purchase No.3	7-Jan-2014	██████	38,601	36,220	\$ 39.34	\$ 1,424,870
Purchase No.4	7-Jan-2014	██████	126,775	117,860	\$ 39.34	\$ 4,636,567
Purchase No.5	8-Jan-2014	██████	99,843	97,826	\$ 39.34	\$ 3,848,429
Total			475,356	448,566	\$ 39.34	\$ 17,646,441

6.207. In regard to purchase No.5, despite the fact that KML did not pay cash to ██████ for the value of this purchase, I am once again informed that my calculation should maintain this value. From an accounting and finance standpoint, this transaction is recognized – inventory is recorded, and the corresponding liability has been recorded by KML.⁴⁵⁴ KML has an obligation to pay these suppliers due to the fact that the official transfer of gold has occurred on 7 January 2014 (Purchase No.3) and 8 January 2014 (Purchase No.5).⁴⁵⁵

Evidence:

C-0106-ENG (Expert Report-Almir Smajlovic (Secretariat)-Claimant's Memorial-ENG, at ¶ 6.9).

C-0140-ENG (Second Expert Report-Almir Smajlovic (Secretariat)-Claimant's Reply-ENG, table 8, ¶ 6.207).

35. And, importantly, the reason why KML could not pay ██████ (Purchase No. 3) and ██████ (Purchase No. 5) the purchase price before the expropriation occurred is none other than the fact that KML was not able to resell the gold because of Peru's immobilizations and seizures of that precise gold. In other words, Peru seized the gold and directly obstructed the payment of its price, but Peru now wants to benefit in this arbitration from such lack of payment, despite the fact that nothing (no contract and no statute) required an upfront payment by KML to the sellers.

36. Whether or not KML is currently, or will subsequently be, obligated to make payments to ██████ and ██████ or other creditors (if any), is an issue that cannot reduce the payment of damages by Peru for the expropriation of the gold inventory. Peru must pay full restitution for the damages it caused to KML, and KML must satisfy its valid liabilities.

37. In an interesting effort of mental gymnastics, Peru has claimed that Shipment No. 5 is currently not seized by Peru, and that ██████ (the seller of that gold) is the one currently in control of such gold based on a private lawsuit against KML.¹² But Peru has also said in this arbitration, very clearly, that ██████ will likely be convicted of money-laundering in Peru: such being the reason why Shipment No. 4 (sold to KML by ██████) is currently being held by Peru.¹³

38. In essence, Peru's position seems to be that Peru selectively took one shipment (paid by KML) because the seller is an alleged money-launderer, but chose to leave the same alleged money-launderer in possession of another shipment of gold (not paid by KML), all in order to keep KML from being able to claim its own gold. But, coincidentally,

¹² Peru's **Counter-Memorial**, at ¶¶ 245, 246.

¹³ *Id.*, at ¶¶ 135, 144, 145; **Expert Report-Joaquín Missiego-Respondent's Counter-Memorial-SPA**, at ¶¶ 26, 113, 118, 119.

both shipments (No. 4 and No. 5) were sold by the same alleged money-launderer to KML within 24 hours (January 7 and January 8, 2014).¹⁴

C. Peru is still in physical possession and control of the five shipments of gold; and Peru's anti money-laundering excuses are illogical

39. Shipments No. 1 through No. 4, seized by Peruvian criminal courts were placed in custody of the *Banco de la Nación (PRONABI)*:

28. A la fecha de la presentación de este Informe, los cuatro procesos penales en contra de los Proveedores se mantienen vigentes y han sido tramitados de conformidad con la legislación peruana aplicable. Las medidas cautelares de incautación que afectan los cargamentos No. 1 a No. 4 también se han mantenido vigentes, conforme a las ordenes emitidas por el Poder Judicial en los respectivos procesos.

Rules, Arts. 3(3)(b), 9.2(a)). Kaloti claims that the requested documents are relevant because "Claimant is legally entitled to know with certainty, which orders are alleged to be currently in force". However, Peru has already provided that information. To be clear, each of the Precautionary Seizures regarding Shipments 1 to 4 remains in place today (Counter-Memorial, ¶¶ 203; 205; 207; 209). Peru also

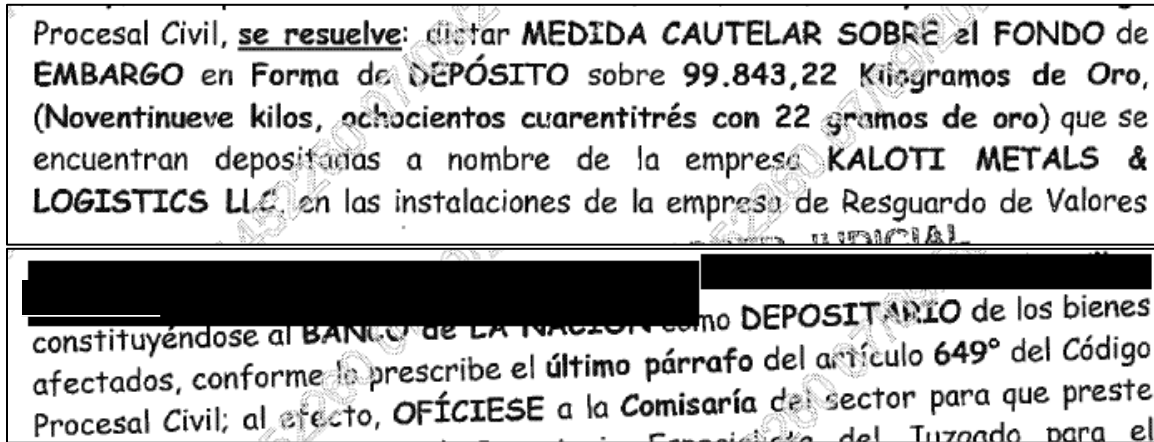
Evidence:

Expert Report-Joaquín Missiego-Respondent's Counter-Memorial-SPA
(at ¶ 28).

Procedural Order No. 2 (Annex 1, pp. 143).

¹⁴ Bundle of KML gold purchase invoices, pp. 7-9 (Shipment 4, January 7, 2014), pp. 12-13 (Shipment 5, January 8, 2014), C-0163-ENG.

40. Shipment No. 5 remains attached by a civil court order, but is also in the custody and control of Peru and *Banco de la Nación*:



Evidence:

C-0141-SPA (Civil attachment measure against Shipment 5, issued by the *Trigésimo Tercer Juzgado Civil de Lima*, June 18, 2014).

41. Peru has alleged in this arbitration that Peru is supposedly entitled to keep KML's gold based on anti money-laundering investigations involving the sellers of such gold (not KML).¹⁵

42. If the sellers of such gold had effected the sales to KML without problems or the Measures by Peru, such sellers would have parted ways with the gold, and received—and kept—the proceeds (payment of the price) from KML. In this arbitration, Peru has alleged that [redacted], [redacted], [redacted] and [redacted] are all potential money launderers.

43. The consequences that Peru wants to impose on such alleged money launderers are that they must part ways with the gold based on the seizures (not any and all gold, but specifically the gold sold to KML), but that they can keep any payments made to them by KML. As such, from an economic standpoint, the alleged money launderers would incur no harm at all. They can, according to Peru, freely enjoy the proceeds from the sale of the gold to KML, and as sellers they would be in the same economic position as if no Measures

¹⁵ **Expert Report-Joaquín Missiego-Respondent's Counter-Memorial-SPA**, at ¶ 155.

had been implemented by Peru. In other words, the sellers (not KML) are suspected of being money launderers, but in practice Peru wants KML to be the only one to suffer an adverse economic consequence.

44. It is noteworthy that Peru did not pursue other shipments sold (to any other person or company) by [REDACTED], [REDACTED], [REDACTED], or [REDACTED]; nor after the moneys received by those sellers from KML. Peru only went after shipments of gold (tangible assets) specifically sold to KML.

45. The documents produced as Exhibits in this arbitration clearly show that Peru has not gone after the money paid to the sellers by KML.¹⁶ In fact, the evidence in this case demonstrates that the sellers (alleged money launderers) have not been subject to any adverse order affecting their gold. As of 2018 (expropriation date) in fact, all those sellers were kept by Peru in the roster of companies authorized to operate in the gold market in Peru.¹⁷

46. To try to compensate or make-up for the absurdity of the foregoing plight, Peru has alleged that KML should sue the sellers for the return of the purchase price to KML.¹⁸ But it is Peru who took KML's gold, and prevented KML from exporting such gold to the United States, after ownership of the gold had legitimately passed to KML. Logically, the sellers would likely be able to defend themselves against KML based on *force majeure*, *hechos del príncipe*, or acts of the State (*causas extrañas no imputables*) if the sellers were (*quod non*) sued by KML. Simply put, KML does not have the legal burden of suing the sellers of gold. Peru caused harm to KML, and it is Peru who is bound to pay for the damages caused to KML.

¹⁶ See, for example, Resolution No. 1: Order Initiating Criminal Proceedings, [REDACTED] Case, 16 March 2015, **R-0139**; Resolution No. 1: Order Initiating Criminal Proceedings, [REDACTED] Case, 14 May 2015, **R-0145**; Resolution No. 1: Order Initiating Criminal Proceedings, [REDACTED] Case, 14 May 2015, **R-0224**; Resolution No. 1: Order Initiating Criminal Proceedings, [REDACTED] Case, 10 March 2015, **R-0150**; Precautionary Seizure against Shipment 1, 21 February 2014, **R-0134**; Precautionary Seizure against Shipment 2, 25 March 2014, **R-0135**; [REDACTED]. Ruling of the Superior Court of Justice of Callao – Permanent Criminal Court, April 30, 2014, **C-0090-SPA**; Precautionary Seizure against Shipment 4, 1 May 2014, **R-0136**; Resolution No. 1, Precautionary Seizure against Shipment 5, 20 March 2015, **R-0210**.

¹⁷ *Registro Especial de Comercializadores y Procesadores de Oro (RECPO)*, **C-0010-SPA**.

¹⁸ Peru's **Counter-Memorial**, at ¶¶ 229, 520.

47. It should be noted that KML is registered and domiciled in the United States. The payments made into Peru (relevant in this arbitration) were originated from bank accounts in the United States. All the gold purchased by KML in Peru was exported to the United States. As such, KML was subject to the anti money-laundering¹⁹ and anti-corruption²⁰ laws, regulations, and enforcement of the United States, which are strong and severe. Yet, KML was never subject to any penalties or sanctions in the United States, whatsoever.

48. Peru, on the other hand, is a country with well documented, and publicly known, government corruption problems.²¹ The President of Peru who was in charge when Peru initially took KML's gold, Mr. Ollanta Humala, has himself been indicted and arrested for corruption.²² Another Peruvian president, Mr. Pedro Castillo, was recently deposed in December of 2022, in the midst of corruption allegations involving how he personally wanted to interfere with Peru's judiciary and Congress.²³ It is not by mere coincidence that Peru has recently been, worldwide, one of the countries most sued in investment arbitration.²⁴

49. KML never participated in corruption in Peru.²⁵ Paradoxically and conveniently, in this arbitration Peru wants to present itself as highly preoccupied with fighting corruption and money-laundering—and KML as a bad actor. The reality is that Peru simply targeted KML's gold arbitrarily and discriminatorily, and has not been concerned with stopping purported money laundering by [REDACTED], [REDACTED], [REDACTED], or [REDACTED], who despite a

¹⁹ Patriot Act of 2001, Pub. L. No. 107-56 (2001), dated October 21, 2001, **CL-0103-ENG**.

²⁰ These US laws would have applied to corruption by KML in Peru (*quod non*). See Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-1, et seq, **CL-0098-ENG**.

²¹ *Sunat: Pérdidas por corrupción equivalen a décima parte de la recaudación tributaria*. Press article published by Gestión, dated November 07, 2016, **C-0124-SPA**; *Peru: corruption places a greater burden on the poor and hampers development*. Press article published by the World Bank Group, dated October 15, 2013, **C-0123-ENG**, *Sunat aprueba política antisoborno e implementa medidas anticorrupción*. Press article published by Actualidad Empresarial, dated August 27, 2019, **C-0125-SPA**.

²² *First Peruvian ex-president on trial for Odebrecht scandal*. Press article published by AP news, dated February 21, 2022, **C-0156-ENG**.

²³ *From president to prisoner: The rapid descent of Peru's Pedro Castillo*. Press article published by NPR, dated December 9, 2022, **C-0157-ENG**; *Castillo jail term extended as Peru protest death toll hits 15*. Press article published by Reuters, dated December 16, 2022, **C-0144-ENG**.

²⁴ *Perú fue el país más demandado del mundo ante el CIADI en 2021*. DF Sud. Perú, January 31, 2022, **C-0145-SPA**.

²⁵ Witness Statement-[REDACTED]-Claimant's Reply-ENG, at ¶ 19, **C-0146-ENG**.

Peruvian “investigation” lasting over 7 years, are still legally allowed to operate in the country.

D. The particular situation of Shipment No. 5

50. Further demonstrating the absurdity of Peru’s position, which implies that KML would be the only one to suffer an adverse economic consequence for the alleged money-laundering supposedly implemented by others, is the particular situation of Shipment No. 5.

51. Peru has alleged that Shipment No. 5, sold to KML by [REDACTED] on January 8, 2014, and comprising 97,826 grams of net declared weight, was not taken by Peru:

- b. Kaloti has attempted to advance an argument that SUNAT immobilized Shipment 5. Peru has demonstrated that this argument is false and that SUNAT did not immobilize Shipment 5, but rather Shipment 5 was made subject to a Civil Attachment in the context of civil proceedings brought against Kaloti by one of its Suppliers.⁶⁸ Bewilderingly, despite Peru’s clear explanation of the relevant facts, Kaloti has maintained its original, erroneous argument—that SUNAT immobilized Shipment 5—in its Redfern Schedule.⁶⁹

Evidence:

C-0121-ENG (Peru’s Reply to Claimant’s Opposition to Peru’s Application for Security for Costs, 26 September 2022, at ¶ 41, b).

52. Peru, at the same time, has alleged that Shipment No. 4, also sold to KML by [REDACTED] and comprising 117,860 grams of net declared weight, is being held by Peru as collateral for the potential civil (monetary) liability of [REDACTED]; and that [REDACTED] is being investigated, and is likely to be convicted, by Peru, as a money-launderer:

66. En los cuatro procesos seguidos contra los Proveedores se cumplió con el estándar requerido por la ley para iniciar la investigación preliminar.⁷⁶ En efecto, los Fiscales a cargo de cada caso analizaron un conjunto de antecedentes que llevaron a concluir que existía sospecha sobre la comisión del delito de lavado de activos. Luego, en el contexto de las investigaciones realizadas por los Fiscales correspondientes, se encontraron aún más antecedentes que confirmaban la posible existencia del delito de lavado de activos, además de indicios razonables y fundados sobre la procedencia ilegal del oro materia de las transacciones investigadas (alcanzado así el estándar de indicios suficientes), razón por la cual en todos los procesos los Fiscales optaron por formular una denuncia fiscal.⁷⁷

119. Así pues, los indicios recién mencionados respecto a cada uno de los Proveedores y/o sus representantes, que fueron omitidos por el experto de la Demandante en su informe, eran más que suficientes para tener por acreditada la estricta necesidad de las medidas cautelares de incautación dictadas en el marco de los cuatro procesos penales, **atendido la alta probabilidad (dada por las evidentes inconsistencias e irregularidades identificadas en las mismas resoluciones) de que fueran bienes derivados del delito que podrían fácilmente desaparecer, frustrando la ejecución de una eventual sentencia.** Como el Experto de la

Evidence:

Expert Report-Joaquín Missiego-Respondent's Counter-Memorial-SPA
(at ¶¶ 66, 119).

53. It is incongruous to pretend that both of those shipments (No. 4 and No. 5) had the same seller (██████), and the same purchaser (KML), but that Peru only went after—and seized—one of the two shipments. That is false. The reality is that Peru seized and issued orders specifically targeting Shipment No. 5:

CUARTO: Que, estando a lo antes expuesto, el Juzgado de Turno Permanente de Lima Sur en aras de una correcta administración de Justicia en amparo de los derechos fundamentales de todos los ciudadanos, considera que debe admitirse lo peticionado en atención a que dicha autorización coadyuvará al acopio de material probatorio para el esclarecimiento del presunto delito de lavado de activos; por ello en ejercicio de las facultades conferidas por el artículo dos, inciso nueve, de nuestra Carta Constitucional, así como lo dispuesto mediante Ley número veintisiete mil trescientos sesenta y nueve - Ley de Procedimiento para adoptar medidas excepcionales de Limitación de Derechos en Investigaciones Preliminares, modificado por el Artículo Único del Decreto Legislativo novecientos ochenta y ocho; **SE RESUELVE DECLARAR: PROCEDENTE la MEDIDA LIMITATIVA DE INCAUTACIÓN** por el plazo de (90) días de las barras de oro con un peso de 99.843KG. de oro en bruto, almacenados en la Garita N° 04 de la [REDACTED] [REDACTED] en la [REDACTED] [REDACTED] (AT)

[REDACTED], que se encuentra detallada en el Acta de Verificación de fecha 25FEB2015, obrante a fojas 34 a 42, bienes que constituirían efectos del delito de Lavado de Activos, proveniente de origen ilícito que deberá ser entregado a la comisión de bienes incautados - CONABI. Diligencia que deberá llevarse a cabo con la presencia del representante del Ministerio Público, quien verificará el desarrollo de la misma y la legalidad; debiendo dar cuenta al juzgado del resultado de la misma con la respectiva nota de atención. **Oficiándose.**

Segundo Juzgado Especializado Penal
San Juan de Miraflores
Corte Superior de Justicia de Lima Sur
PODER JUDICIAL

[REDACTED]
Secretaria
Segundo Juzgado Especializado
San Juan de Miraflores
Corte Superior de Justicia de
PODER JUDICIAL

Evidence:

R-0210 (Resolution No. 1, Precautionary Seizure against Shipment 5, 20 March 2015, at pp. 3) (The weight of the gold in this resolution correlates to that of Shipment No. 5's gross weight of 99,843 grams).

54. There was also a Seizure order of KML's gold (of Shipment No. 5 from [REDACTED]), issued by the *Segunda Fiscalía Supraprovincial a cargo de los Delitos de Lavado de Activos y Pérdida de Dominio*, March 25, 2014. This document was requested by KML in

its Redfern schedule. Peru acknowledged the existence of such document in its relevant response:

Kaloti requests a seizure order of Shipment 5 allegedly issued by the *Segunda Fiscalía Supraprovincial a cargo de los Delitos de Lavado de Activos y Pérdida de Dominio* on 25 March 2014. However, as Peru explained in its Counter-Memorial (¶¶ 188, 218) and Prof. Missiego confirmed in his Expert Report (¶¶ 81, 83), under Peruvian law precautionary measures are issued by the competent court, which may do so upon request of the Prosecutor's Office. Therefore, Kaloti's request concerning a seizure order issued by the Prosecutor's Office is fundamentally flawed, among other reasons, because the requested document (as described in Kaloti's request) is unlikely to exist.

Nevertheless, in the spirit of co-operation and without any admission as to the relevance and/or materiality of the documents requested, or any waiver of applicable rules of privilege or secrecy, Peru agrees to conduct a reasonable search for (i) a request by the *Segunda Fiscalía Supraprovincial a cargo de los Delitos de Lavado de Activos y Pérdida de Dominio* for the precautionary seizure of Shipment 5 dated 25 March 2014; and (ii) a resolution granted by a Criminal Court concerning the precautionary seizure of Shipment 5 dated 25 March 2014 upon request of the *Segunda Fiscalía Supraprovincial a cargo de los Delitos de Lavado de Activos y Pérdida de Dominio*.²⁶

55. Further, Peru's own Exhibit **R-0210** (seizure order of Shipment No. 5) explicitly states and demonstrates that SUNAT made an "intervention" (sic) on January 09, 2014, that actually prevented the export from Peru of such Shipment No. 5 by KML:

ingresos de mercancía valiosas de la [REDACTED] y la información proporcionada por la empresa KALOTI METALS, así como de la manifestación policial de la ex trabajadora de [REDACTED], obrante a fojas 110 a 117, quien señaló que ella con el propio [REDACTED] entregaron estos 99.843 Kilogramos de oro a la Empresa KALOTI, en el interior de la [REDACTED] en Chorrillos y que no se llegó a exportar por la intervención de la SUNAT el día 09ENE2014. Asimismo se tuvo conocimiento que dicho mineral mediante

Evidence:

²⁶ Procedural Order No. 2, at Annex 1, pp. 38-39.

R-0210 (Resolution No. 1, Precautionary Seizure against Shipment 5, 20 March 2015, at pp. 3).

56. Because [REDACTED] (as seller) and KML (as purchaser) subsequently had a legal dispute in a Peruvian court regarding Shipment No. 5, where [REDACTED] demanded full payment, there was a conflict of jurisdiction among Peruvian courts, a civil seizure (issued by the *Trigésimo Tercer Juzgado Civil de Lima*²⁷) temporarily prevailed over the criminal seizure that Peru sought (before the *Juzgado Penal de Turno Permanente de la Corte Superior de Justicia de Lima Sur*²⁸). But, as of today, Peru has never ceased nor desisted in its targeting of Shipment No. 5. And Peru is currently in physical possession of Shipment No. 5.

57. It is simply incongruous and antithetical for Peru to allege, as it has, that [REDACTED] is a money-launderer, and that Shipment No. 5 could not be exported by KML because of purported suspicions of its illegal mining, but at the same time, for the purposes of this arbitration, that [REDACTED] is the legitimate owner (and current possessor) of such shipment, because Peru has not pursued such shipment, and that a Peruvian court recognized [REDACTED]'s property over Shipment No. 5 *in 2022*.²⁹

58. Is Peru admitting that there were no legal or regulatory problems with Shipment No. 5? Or is a Peruvian court (that ruled *in 2022* that [REDACTED] is, in theory, the new purported owner of Shipment No. 5³⁰) allowing [REDACTED] to benefit from illegally mined gold or money laundering? Peru is, proverbially, trying to have the cake and eat it, too.

59. Even if Shipment No. 5 is in the future, *arguendo*, returned to [REDACTED] (*quod non*), the reasons why KML lost its property rights over Shipment No. 5 were, exclusively, the actions and omissions of Peru. Peru issued orders regarding Shipment No. 5.³¹ Had Peru not pursued and targeted Shipment No. 5, KML would have paid [REDACTED] the purchase price

²⁷ Civil attachment measure against Shipment 5, issued by the *Trigésimo Tercer Juzgado Civil de Lima*, June 18, 2014, **C-0141-SPA**.

²⁸ Resolution No. 1, Precautionary Seizure against Shipment 5, 20 March 2015, at pp. 3, **R-0210**.

²⁹ Peru's **Counter-Memorial**, ¶¶ 35, 162 (fn. 274, "(...) Shipment 5, which was the only one not subject to investigation by SUNAT."), 208, 621, 731.

³⁰ Resolution No. 08, Supreme Court of Lima, Court Specialized in Asset Forfeiture of Lima, 14 June 2022, **R-0212**.

³¹ Resolution No. 1, Precautionary Seizure against Shipment 5, 20 March 2015, **R-0210**.

for this shipment, and KML would have been able to resell the gold at a profit. KML never ceased to carry this shipment in KML's financial statements.

E. KML tried to intervene and present defenses in the relevant investigations (requesting the return of the gold to KML), but KML never received any answer from Peru

60. Peru's legal expert painstakingly described all the requests that KML made to Peru asking for the return of the gold:

basa en documentos específicos de únicamente un proceso.¹⁹¹De acuerdo a la documentación que acompaña la demanda de Kaloti en el arbitraje, Kaloti presentó siete escritos solicitando intervenir en las investigaciones y procesos penales seguidos contra los Proveedores. Concretamente, presentó seis escritos en el caso [REDACTED] y un escrito en el caso [REDACTED]. De esos escritos, cuatro fueron presentados ante el Ministerio Público (sobre los cuales el experto de la Demandante no se pronuncia en su informe) y los otros tres restantes ante el Poder Judicial. Sin embargo, como explicaré a continuación, ninguna

Evidence:

Expert Report-Joaquín Missiego-Respondent's Counter-Memorial-SPA
(at ¶ 133).

61. Peru itself confirmed that it received all such requests.³² The lawyers for Peru in this arbitration have explained the responses that, in their view, Peru should—or could—have given to KML, or the reasons why those lawyers now believe that Peru owed no response to KML.³³ Here, however, Peru has not contended that Peru gave those explanations to KML—or any response whatsoever, for that matter—before Peru's Counter-Memorial of August 05, 2022. Peru said nothing at all to KML before this arbitration about all those petitions.

62. In the context of some of KML's requests for the return of the gold, the *Comisión Especial que representa al Estado en Controversias Internacionales de Inversión* at some

³² Peru's **Counter-Memorial**, at ¶¶ 147-154, 217-230.

³³ *Id.*

point asked KML, repeatedly, for additional information, seemingly as a delay tactic.³⁴ But Peru never gave an answer to KML—at all—about the reasons why it did not return the gold to KML. In fact, Peru never stated whether or not it was going to return the gold to KML, nor provided any notice to KML.

63. If, at the appropriate time in the past, Peru was convinced that the petitions filed by or on behalf of KML requesting the return of KML’s gold were groundless, Peru should have responded in writing to KML saying as much, by clear and express means.

64. Peru has described in this arbitration, in an aspirational manner, the legal recourses or avenues which Peru now believes that KML should have used in the past.³⁵ However, Peru and its legal expert, lawyer Joaquín Missiego, have not pointed as to how or why the alleged lack of use of those formalistic recourses could be legally used against KML under Peruvian law. In fact, those were ways or channels that KML could have—in its own discretion—utilized, but they did not constitute affirmative burdens or obligations upon KML:

5.6 Por ende, KML no estaba obligada a ejercer esas vías de defensa, las cuales eran, por su naturaleza, derechos (y no obligaciones) de KML. No puede castigarse ni penalizarse a KML por no haber ejercido esos derechos, considerando, adicionalmente, que la circunstancias demuestran que KML siempre fue prudente y proactiva en hacer saber al Estado peruano que KML era la propietaria del oro.

5.12 Yerra el abogado Joaquín Missiego al sostener en su reporte que KML no recurrió las decisiones judiciales que afectaban su derecho de propiedad, pues los pedidos de KML expresaron su voluntad de que la propiedad afectada por la medida cautelar sea restituida. Con estos escritos, no cabe duda de que el Estado peruano recibió notificación real y efectiva, a tiempo, de que KML era la propietaria legítima del oro. Es de advertir que un presunto incumplimiento de las formas procesales por parte de KML, no imposibilita que el órgano jurisdiccional de respuesta a las peticiones de las partes interesadas: el principio de formalidad no se sobrepone al derecho a la tutela procesal efectiva.

³⁴ Letter No. 019-2017-EF/CE.36 from Special Commission () to , 1 February 2017, **R-0031**; Letter No. 118-2017-EF/CE-36 from Special Commission () to , 14 June 2017, **R-0032**.

³⁵ Peru’s **Counter-Memorial**, at ¶¶ 212-216; *also see*, **Expert Report-Joaquín Missiego-Respondent’s Counter-Memorial-SPA**, at ¶¶ 126-132.

Evidence:

C-0139-SPA (Second Legal Opinion-Dr. [REDACTED]-Claimant's Reply-SPA, at ¶¶ 5.6, 5.12).

65. Peru acknowledged that in fact it received KML's multiple requests for the return of the gold, and that Peru never gave KML a response about such requests before its August 05, 2022, Counter-Memorial.³⁶

F. The investigations in Peru involving KML's gold have not been concluded, and have remained open for more than seven years

66. Each and every one of the criminal proceedings in which KML's gold was seized are still ongoing today. This means that the measures against KML's property are more than 7 years old, and lawyer Joaquín Missiego expressly admits this fact:

537. Turning to the former, Kaloti is correct that the Precautionary Seizures issued by the Criminal Courts with respect to Shipments 1 to 4 remain in place. However, contrary

desde el año 2013."¹⁷⁵ Como hemos señalado, las medidas cautelares pueden mantenerse durante toda la tramitación del procedimiento, siempre y cuando sigan siendo necesarias. Al día de hoy, los cuatro procedimientos penales siguen en curso y las circunstancias que justificaron el otorgamiento de las medidas (no analizadas por el Experto de la Demandante en su informe) no han variado. Si algo, tales circunstancias sólo se han acrecentado.

Evidence:

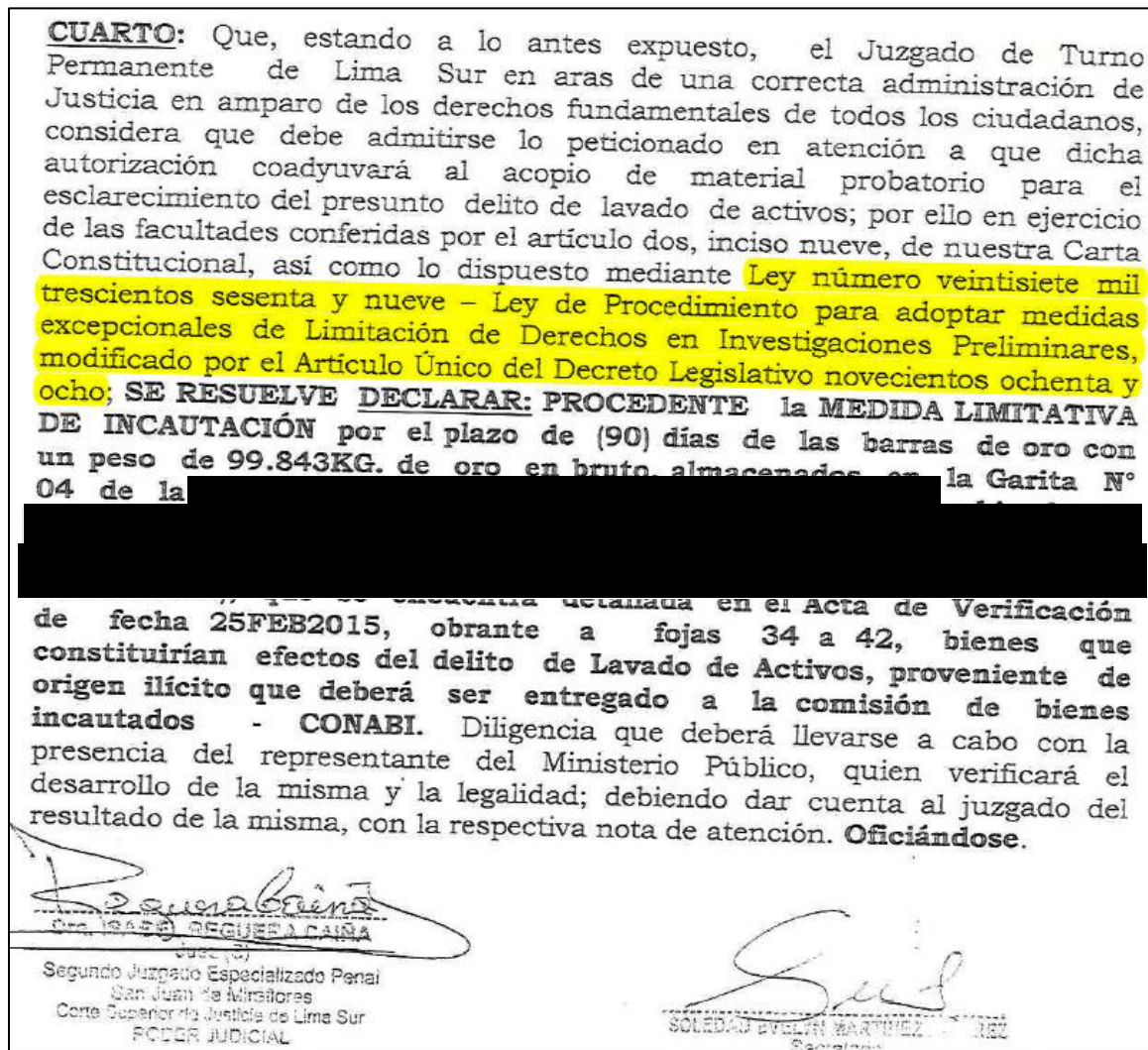
Peru's **Counter-Memorial** (at ¶537).

Expert Report-Joaquín Missiego-Respondent's Counter-Memorial-SPA (at ¶ 122).

67. The evidence also expressly shows that Shipment No. 5 (sold to KML by [REDACTED]) was targeted by Peru in 2015.³⁷

³⁶ Peru's **Counter-Memorial**, at ¶¶ 153-154.

³⁷ *Id.*, at ¶¶ 247, 696.



Evidence:

R-0210 (Resolution No. 1, Precautionary Seizure against Shipment 5, 20 March 2015, at pp. 3).

68. In its Counter-Memorial, Peru made clear that, as of today, the gold is being kept in Peru's possession as a collateral for a potential civil reparation that could perhaps be owed to Peru (in the future) by [REDACTED], [REDACTED], [REDACTED] and [REDACTED]; not by KML, because KML is not a subject (*inculpado*) of the criminal investigations involving the gold.

80. Las **medidas cautelares reales**, por su parte, no guardan relación con un sujeto determinado, sino que éstas recaen sobre objetos. Su finalidad es garantizar el pago de una eventual reparación civil en favor del Estado y evitar también la desaparición de los bienes producto del delito. Dentro de las medidas cautelares reales se encuentra el embargo y la incautación, que, como veremos más adelante, fue la que afectó a los cargamentos No. 1 a No. 4 supuestamente adquiridos por Kaloti.

Evidence:

Expert Report-Joaquín Missiego-Respondent's Counter-Memorial-SPA
(at ¶ 80).

69. Peru has also confirmed that the seizures, as precautionary measures in the relevant criminal proceedings, can only be decreed over goods (assets) of the person indicted (*inculpado*), to cover such person's civil (monetary) liability.

81. De acuerdo a lo establecido en el Artículo 94 del CPP, el Juez Penal al momento de abrir instrucción o durante el desarrollo del proceso puede ordenar que: (i) se trabé embargo preventivo sobre los bienes del inculpado que sean suficientes para cubrir el pago de la reparación civil y (ii) disponer la incautación de los objetos de la infracción penal o los instrumentos con que se hubiere ejecutado así como los efectos, sean éstos bienes, dinero, ganancias o cualquier producto proveniente de la infracción penal, **inclusive cuando se encuentren en poder de terceros**.⁸⁵

Evidence:

Expert Report-Joaquín Missiego-Respondent's Counter-Memorial-SPA
(at ¶ 81).

70. With the foregoing, Peru recognized that the seizures could be extended to goods (assets) of the *inculpado* that are in possession (*poder*) of third parties, which does not mean or equate to goods (assets) actually owned by such third parties. As indicated before, and confirmed by the accounting records and other Exhibits, KML is the ultimate owner of the seized gold.

71. Peruvian laws make clear that third parties can present their ownership over the goods (assets) as a defense against the seizure.³⁸ This should be reciprocally consistent and applied similarly to what the laws of the United States (a party to the US-Peru TPA) provide in connection with the rights of an “innocent owner” in civil forfeitures of assets.³⁹ There is clearly a very well-defined process in the United States for asserting the defense of good-faith parties. Peru, however, has not legally delineated how good-faith third parties (like KML) can or could assert their rights.

72. In this case, [REDACTED], [REDACTED] and [REDACTED] actually received money (payments) from KML for the gold. None of the gold seized by Peru is owned by any of the *inculpados* that are under investigation. In this arbitration, Peru has not claimed that the investigated parties own the gold seized. Peru, also, is paradoxically allowing those sellers to enjoy the fruits (payment of the price) of the allegedly illegal gold.

73. KML’s legal expert, professor Dr. [REDACTED], explained that to maintain or keep in force the seizure over assets (goods) owned by third-parties, such parties need to be subsequently *inculpados* themselves, too.

Según los documentos revisados por mí, específicamente con respecto al oro inmovilizado, no hubo ningún alegato o imputación de la comisión de un hecho punible por parte de KML ni algún elemento de derecho que justificase las medidas de inmovilización e incautación del oro propiedad de KML.

Evidence:

C-0107-SPA (Legal Opinion-Dr. [REDACTED]-Claimant’s Memorial-SPA, pp. 10).

74. The statute and the specific legal provision that the administrative and judicial authorities of Peru invoked as basis to seize KML’s gold (*i.e.*, article 2 of the *Ley N° 27379, de procedimiento para adoptar medidas excepcionales de limitación de derechos en*

³⁸ Art. 94 of the Peruvian Criminal Procedures Code, published on January 16, 1940, **CL-0006-SPA**.

³⁹ General rules for civil forfeiture proceedings, 18 U.S.C. § 983(d), **CL-0104-ENG**.

*investigaciones preliminares*⁴⁰) do not state that assets belonging to third parties (other than the investigated party) could be seized.

75. Peru has made abundantly clear that KML is not an *inculpado* in the relevant investigations.⁴¹ Those investigations relate to potential money laundering by KML's suppliers, *i.e.*, [REDACTED], [REDACTED], [REDACTED] and [REDACTED] (not by KML).

71. Corresponde hacer mención a la alta complejidad de las investigaciones seguidas contra los Proveedores de Kaloti. El delito materia de investigación es lavado de activos, por lo cual la cantidad de diligencias a llevarse a cabo, la coordinación con distintas entidades gubernamentales y el análisis de los activos y posibles desbalances financieros de los investigados importa un grado de complejidad mayor al usual en la investigación de delitos comunes. Además, durante el desarrollo de las investigaciones se podía advertir que la investigación judicial no se encontraba completa, faltando realizarse las diligencias necesarias para el debido esclarecimiento de los hechos imputados, tomando en cuenta que la mayoría de hechos materia de investigación, así como el lugar de supuesta procedencia del oro está localizado en lugares muy alejados del local del juzgado a cargo de la instrucción.

Evidence:

Expert Report-Joaquín Missiego-Respondent's Counter-Memorial-SPA
(at ¶ 71).

76. The foregoing does not necessarily mean that the relevant gold was illegally mined, much less that KML was an accomplice in the potential crimes—as KML has not been *inculpado*.

⁴⁰ Act No. 27379 (Act regarding the procedure to adopt exceptional measures for the limitation of rights in preliminary investigations), dated December 21, 2000, **CL-0004-SPA**; *see also*, Precautionary Seizure against Shipment 1, 21 February 2014, **R-0134**; Precautionary Seizure against Shipment 2, 25 March 2014, **R-0135**; [REDACTED]. Ruling of the Superior Court of Justice of Callao – Permanent Criminal Court, April 30, 2014, **C-0090-SPA**; Precautionary Seizure against Shipment 4, 1 May 2014, **R-0136**; Resolution No. 1, Precautionary Seizure against Shipment 5, 20 March 2015, **R-0210**.

⁴¹ **Expert Report-Joaquín Missiego-Respondent's Counter-Memorial-SPA** (at pp 40-51).

77. As to the supposed normalcy of the duration of the criminal investigations alleged by Peru (for which Peru has produced no actual evidence), it should be noted that Peru’s Legal Expert, lawyer Joaquín Missiego, has explained that the relevant legal process in Peru has four stages or phases:⁴²

- Preliminary investigation
- Instruction (gathering of initial evidence)
- Preparatory acts
- *Juzgamiento* (i.e., the actual trial)

78. The foregoing does not include applicable appeals, nor additional special recourses like *casación*. Of the above-mentioned four stages explained by Peru’s Legal Expert, such expert clarified that in seven years Peru has only concluded, at the most, the first two (and not even in the four investigations).⁴³ That means that the actual trial (*juzgamiento*)—which could potentially lead to convictions—has not even begun.

G. KML has not been indicted (much less convicted) of any wrongdoing

79. In this arbitration, Peru has stated that KML is itself under a different investigation in Peru.⁴⁴ Peru, however, has not stated or alleged that such purported investigation is in any way connected to the five shipments of gold relevant in this arbitration.

80. Paradoxically, Peru has not shown, and cannot produce or point, to absolutely any additional step, document, or action taken in connection with its alleged investigation against KML. In its Counter-Memorial, Peru explained that risk profiles were prepared for each of the companies that were under investigation “in accordance with both its customs control duties under Peruvian law and customary practice.”⁴⁵ But here, in fact, Peru has expressly admitted that Peru did not prepare a risk profile against KML:

⁴² **Expert Report-Joaquín Missiego-Respondent’s Counter-Memorial-SPA** (at pp 22-28).

⁴³ *Id.*, at ¶ 75.

⁴⁴ Peru’s **Counter-Memorial**, at ¶¶ 183, 252.

⁴⁵ *Id.*, at ¶ 133.

Peru confirms that it has conducted a reasonable search and has not found any risk profiles prepared by SUNAT and the INPCFA on Kaloti.

Evidence:

Procedural Order No. 2 (Annex 1, at pp. 106).

81. More importantly, the actual investigations pursuant to which Peru is currently holding and physically controlling possession of the five shipments of gold seized do not involve KML.⁴⁶ Peru apparently is irrationally involving KML in something different altogether.

82. KML has not been indicted, convicted, or cleared of any wrongdoing in Peru. Yet, Peru breached its duty of confidentiality of criminal investigations (otherwise vehemently defended by Peru in its Redfern schedule) to make sure that the entire world knows that KML has been, or was, theoretically subject to a criminal investigation for alleged money-laundering in Peru since, or in, 2014. Peru itself published its Counter-Memorial stating the same without anything to support its contention.⁴⁷

83. Peru's Legal Expert, lawyer Joaquín Missiego, referred to no investigation involving KML, whatsoever. Peru's Legal Expert, however, went to great lengths to try to justify that the criminal investigations, whatever they may be, have remained open for a "normal" period of time of more than 7 years,⁴⁸ and that he is *crystal-ball* certain that someone will be convicted of a crime in Peru.⁴⁹ It is worth noting, that Peru's Legal Expert has not presented any actual evidence of, or even referenced, other similar proceedings that have taken this same amount of time (over 7-8 years), aside from merely stating his belief that this is a "normal duration."

⁴⁶ **Expert Report-Joaquín Missiego-Respondent's Counter-Memorial-SPA**, at ¶¶ 17, 26, 75.

⁴⁷ See https://www.acuerdoscomerciales.gob.pe/En_Vigencia/EEUU/controversias_inversiones.html

⁴⁸ **Expert Report-Joaquín Missiego-Respondent's Counter-Memorial-SPA**, at ¶ 124.

⁴⁹ *Id.*, at ¶¶ 65-66.

75. En dos de los cuatro procesos seguidos contra los Proveedores de Kaloti se ha formulado acusación fiscal [REDACTED], mientras que el proceso de [REDACTED] se encuentra actualmente pendiente de que el Fiscal formule acusación.

123. Finalmente, es importante señalar que (i) los cuatro procedimientos son sumamente complejos, atendida la complejidad del delito investigado, la cantidad de personas involucradas y el alto número de diligencias y (ii) los cuatro procedimientos fueron afectados por la pandemia ocasionada por el COVID-19 lo cual no ha permitido el normal desarrollo de los procesos (de hecho, los plazos judiciales estuvieron suspendidos entre marzo de 2020 y marzo de 2021 en el Perú).

124. Sin perjuicio de lo anterior, estos procesos han tenido una duración normal. En mi experiencia estos procesos tomarían la misma cantidad de tiempo que en cualquier otro país con un sistema jurídico penal similar al del Perú, considerando la complejidad de los delitos investigados, la lejana localidad donde se han llevado a cabo muchas de las diligencias del proceso y el número de imputados. También han tenido una duración normal en comparación a otros procesos similares seguidos en el Perú.

Evidence:

Expert Report-Joaquín Missiego-Respondent's Counter-Memorial-SPA
(at ¶¶ 75, 123, 124).

84. Other than its own allegations, and those of its legal expert (lawyer Joaquín Missiego), Peru has produced absolutely no evidence, support, or comparator to show that it is “normal” for similarly situated anti money-laundering investigations to last as long as the ones relevant here have lasted in their first two phases.⁵⁰

⁵⁰ For an international comparison, KML can state that the normal statute of limitations for money-laundering crimes is approximately five years, for which it is simply absurd to pretend that 7 years is a normal duration for a money-laundering investigation. *See*: United States Internal Revenue Manual (I.R.M.), September 3, 2020, § 9.5.5.2 (5) (five years), **CL-0105-ENG**; Anti-money laundering and fraud in Germany, article written by Park Wirtschaftsstrafrecht, published in Lexology, pp. 14 (“the limitation period for bringing actions in relation to money laundering is five years”), **CL-0106-ENG**; In brief: money laundering offences in France, article written by Spitz Poulle Kannan AARPI, published in Lexology, pp. 5 (“For money laundering, the limitation period is generally six years, **CL-0107-ENG**; In brief: money laundering offences in Japan, article written by Anderson Mōri & Tomotsune, published by Lexology, pp. 4 (“The limitation period governing money laundering prosecutions is three or five years”), **CL-0108-ENG**.

H. KML had a strong compliance and AML program; and was a good-faith purchaser of the gold seized

85. KML bought the gold sized by Peru from [REDACTED], [REDACTED], [REDACTED], and [REDACTED]. Those suppliers were registered and in good standing with the Peruvian government when KML purchased gold from them.⁵¹ KML also conducted independent compliance due diligence reviews on each of them,⁵² in accordance with KML's robust compliance and anti money-laundering manual.⁵³

86. KML collected from the gold suppliers, in addition to their *Registro Especial de Comercializadores y Procesadores de Oro* (RECPO) registration, a plethora of data, including ID's, gold mining licenses, etc.⁵⁴ In addition, KML periodically trained its personnel on Anti Money Laundering and Combating the Financing of Terrorism (AML/CFT) compliance procedures.⁵⁵

87. It gave great comfort to KML that suppliers (sellers of gold in Peru) needed to be registered and in good standing with the Peruvian government; and that Peru did not pose significant legal obstacles for foreign investors to export gold from Peru.⁵⁶

88. In this arbitration, Peru has alleged that KML did not conduct sufficient due diligence in connection with the purchases of the five shipments of gold seized by Peru.⁵⁷

⁵¹ *Registro Especial de Comercializadores y Procesadores de Oro* (RECPO), C-0010-SPA; and Witness Statement-[REDACTED]-Claimant's Memorial-ENG, at ¶ 30, C-0103-ENG.

⁵² KML compliance department periodic review of suppliers, C-0033-ENG; and Witness Statement-[REDACTED]-Claimant's Memorial-ENG, at ¶¶ 18-19, C-0104-ENG.

⁵³ KML AML/CFT program manual, C-0025-ENG.

⁵⁴ Emails exchanged between KML and [REDACTED] regarding the KYC process performed by KML, C-0128-SPA; Emails exchanged between KML and [REDACTED] regarding the KYC process performed by KML, C-0129-SPA; Due diligence files prepared by KML of [REDACTED], C-0130-SPA; Due diligence files prepared by KML of [REDACTED], C-0131-SPA; Due diligence files prepared by KML of [REDACTED], C-0132-SPA; Due diligence files prepared by KML of [REDACTED], C-0133-SPA; Terms and conditions for Bullion Trading and Related Transactions between KML and [REDACTED], C-0165-SPA; Terms and conditions for Bullion Trading and Related Transactions between KML and [REDACTED], C-0166-SPA; Terms and conditions for Bullion Trading and Related Transactions between KML and [REDACTED], C-0167-SPA; Terms and conditions for Bullion Trading and Related Transactions between KML and [REDACTED], C-0168-SPA; Email from [REDACTED] (KML) to [REDACTED] representatives regarding refining agreement, dated November 04, 2013, C-0169-SPA.

⁵⁵ Slides of KML employee training on AML and CFT, C-0126-SPA.

⁵⁶ Decree No. 1105 which establishes provisions for the formalization process of small-scale and artisanal mining activities, CL-0003-SPA; and the National Plan for the regularization of small-scale mining, C-0044-SPA.

⁵⁷ Peru's Counter-Memorial, at ¶¶ 126, 160, 169.

Paradoxically, Peru did not point to any statute, regulation, or source of law, whatsoever, describing the legal standard that KML should have followed, or that KML missed in its due diligence process—in Peru’s opinion. Before this arbitration, Peru never alluded to any applicable guidelines or best practices, either. Peru has made entirely unsupported allegations in this regard.⁵⁸

89. Peru has not explained how, in its self-serving and untimely opinion, KML purportedly failed to comply with Art. 11 of the Legislative Decree No. 1107,⁵⁹ which delineates the process to verify the origin of the gold (which is a task much more limited, that KML complied with). **Peruvian authorities never mentioned such alleged—but inexistent—failure by KML before this arbitration (not even after their irrationally lengthy investigations).** Such alleged failures cannot be fabricated by Peru in this arbitration, *post hoc*.

90. KML’s compliance and anti money-laundering program was in fact independently audited by a third-party and found to be satisfactory, multiple times.⁶⁰ The impressive extent and content of such program and actual activism by KML have been demonstrated by contemporaneous documents produced in this arbitration.⁶¹

91. Peru has spent over 7 years investigating four of KML’s suppliers to determine whether they have been involved in any wrongdoing, with two suppliers, at this point, not even having been indicted [REDACTED] and [REDACTED].⁶² As such, it follows that Peru expected KML to have had *foresight* or performed similar investigations as part of its due diligence to have kept it from purchasing from such suppliers. The question is: was KML also supposed to spend 7 years—and possibly more—performing due diligence on its suppliers? Peru’s allegation that KML did not perform proper due diligence in this case is utterly

⁵⁸ See Peru’s **Counter-Memorial**, at ¶ 16, which has no support whatsoever.

⁵⁹ Legislative Decree No. 1107, 19 April 2012 (“Illegal Mining Controls and Inspection Decree”), **R-0049**.

⁶⁰ Independent Review of KML’s Anti-Money Laundering & Compliance Program of [REDACTED] (2013, 2014, 2015), **C-0109-ENG**.

⁶¹ For instance: Slides of KML employee training on AML and CFT, **C-0126-ENG**.

⁶² **Expert Report-Joaquín Missiego-Respondent’s Counter-Memorial-SPA**, at ¶ 75.

absurd, and what Peru now conveniently alludes to being proper is commercially unreasonable.

92. For instance, Peru itself, with all the power and might of its highest level of government, was only able to find and produce to KML the following documents on January 05, 2023, even though their production was ordered by the Tribunal more than two months ago.⁶³

- *Informe No. 159-2015-DIRILA-PNP/DIVINES-D4*, issued by the *dirección de investigación de lavado de activos – división de investigaciones especiales*.
- Documents of the Financial Intelligence Reports (*Documentos de los Informes de Inteligencia Financiera*) No.011-2014-DAO-UIF-SBS; 027-2014-DAO-UIF-SBS and 075-2014-DAO-UIF-SBS, issued by the *Unidad de Inteligencia Financiera del Peru*.

93. How could KML have been reasonably expected to know or have found through a due diligence in January 2014 of the facts alleged in those documents, which have still—as of today—not been confirmed by a final determination?

94. Peru’s allegation has been presented to try to convince the Tribunal that KML was not a good faith purchaser of the gold seized by Peru. However, it is an undisputed fact that, still as of today, Peru has not concluded or declared that the gold seized was of illicit origin.

95. Failing to do a due diligence (*quod non*), in and of itself, would not have any legal effect under Peruvian law. If a hypothetical shipment of gold results in being of licit—legitimate—origin (without due diligence), there can be no legally adverse consequence for a purchaser.⁶⁴

⁶³ Composite exhibit – documents produced by Peru on January 05, 2023, **C-0161-SPA**.

⁶⁴ Article 4 of Peru’s General Mining Law, for instance, does not provide for the loss of gold as a legal consequence or liability, and only references purchases from “non-authorized” sellers, that is, those sellers not registered with RECPO; Supreme Decree No. 014-92-EM, General Mining Law, 3 June 1992, **R-0013**.

96. In contrast, in a different hypothetical case involving a purchase of illicit gold, a purchaser is still considered a good-faith purchaser if it conducted sufficient due diligence, justifiably relied on the Peruvian regulatory system, and the purchaser was innocent of wrongdoing. The latter case is applicable to KML, as there are numerous documents in the record regarding this exhaustive due diligence process that KML performed before making any purchase of gold from a given supplier.⁶⁵

97. Peru has been purposefully unclear, in this case, by not stating definitely whether the problem with KML's gold was its illicit origin (*minería ilegal*), or its alleged use as an instrument in money laundering. Illegal mining and money-laundering are different crimes (gold legally mined can be used to launder money; conversely, a non-money launderer can pay with clean money for gold illegally sourced).⁶⁶ Even if KML's suppliers had been convicted of money-laundering in Peru (which has not happened) that would not have necessarily implied that the gold purchased by KML was illegal.

98. KML qualified as a good-faith purchaser of the gold seized by Peru:

⁶⁵ [REDACTED] document package, **C-0006-ENG/SPA**, pp. 16-17, 22, 35-50, 69; [REDACTED] document package, **C-0007-ENG/SPA**, pp. 5-8, 21-48, 50-51; [REDACTED] document package, **C-0008-ENG/SPA**, pp. 37-57, 61-62; [REDACTED] document package, **C-0009-ENG/SPA**, pp. 3-5, 17-27; Due diligence files prepared by KML of [REDACTED], **C-0130-SPA**; Due diligence files prepared by KML of [REDACTED], **C-0131-SPA**; Due diligence files prepared by KML of [REDACTED], **C-0132-SPA**; Due diligence files prepared by KML of [REDACTED], **C-0133-SPA**; Terms and conditions for Bullion Trading and Related Transactions between KML and [REDACTED], **C-0165-SPA**; Terms and conditions for Bullion Trading and Related Transactions between KML and [REDACTED], **C-0166-SPA**; Terms and conditions for Bullion Trading and Related Transactions between KML and [REDACTED], **C-0167-SPA**; Terms and conditions for Bullion Trading and Related Transactions between KML and [REDACTED], **C-0168-SPA**; Email from [REDACTED] (KML) to [REDACTED] representatives regarding refining agreement, dated November 04, 2013, **C-0169-SPA**.

⁶⁶ **Expert Report-Joaquín Missiego-Respondent's Counter-Memorial-SPA**, at ¶¶ 35, 41. Lawyer Joaquín Missiego states that illegal mining and money-laundering can sometimes be related or connected, but acknowledges that they are different crimes.

3. *¿Qué elementos deben mediar para que un comprador sea considerado adquirente posterior de buena fe (subsequent good faith purchaser)? ¿Existe alguna ley peruana que otorgue derechos de propiedad a un comprador de buena fe? ¿Las circunstancias según los hechos del memorial protegen a KML como comprador de buena fe con derechos de propiedad en los cargamentos de oro?*

Respuesta corta: bajo el derecho peruano, la transmisión de bienes muebles a *non domino* se ampara principalmente en el artículo 948 del CC: es necesario poseer buena fe y reputarse propietario. Las circunstancias narradas tanto en el memorial

de KML como en el memorial de Perú de fecha 05 de agosto de 2022, y los documentos que he revisado, me permiten concluir que en 2013 y 2014, KML calificó como comprador de buena fe con plenos derechos de propiedad sobre los cinco cargamentos de oro, bajo la ley peruana.

Evidence:

C-0139-SPA (Second Legal Opinion-Dr. [REDACTED]-Claimant's Reply-SPA, at ¶¶ 5.6, 5.12).

99. The foregoing conclusion is based on the fact that:

- Peru never accused KML of not being a good-faith purchaser, except as a *post-hoc* justification belatedly presented by Peru in this arbitration.
- The gold seized by Peru has never been declared the object or fruit of a crime (no prosecutor has been otherwise notified by Peru; and no eminent domain has been commenced by Peru).
- KML has never been charged with any crime or wrongdoing in Peru.
- KML had a strong anti money-laundering program (as explained above); and conducted extensive due diligence specifically on the sellers of the gold.⁶⁷

⁶⁷ [REDACTED] document package, **C-0006-ENG/SPA**, pp. 16-17, 22, 35-50, 69; [REDACTED] document package, **C-0007-ENG/SPA**, pp. 5-8, 21-48, 50-51; [REDACTED] document package, **C-0008-ENG/SPA**, pp. 37-57, 61-62; [REDACTED] document package, **C-0009-ENG/SPA**, pp. 3-5, 17-27; Due diligence files prepared by KML of [REDACTED], **C-0130-SPA**; Due diligence files prepared by KML of [REDACTED], **C-0131-SPA**; Due diligence files prepared by KML of [REDACTED], **C-0132-SPA**; Due diligence files prepared by KML of [REDACTED], **C-0133-SPA**; Terms and conditions for Bullion Trading and Related Transactions between KML and [REDACTED], **C-0165-SPA**; Terms and conditions for Bullion Trading and Related Transactions between KML and [REDACTED], (continued...)

- KML reviewed and confirmed the documentation regarding the origin of the gold before the relevant purchases.⁶⁸

100. Peru has made, *post hoc*, a number of allegations regarding purported due diligence failures by KML.⁶⁹ Those alleged failures, first, are false (and have hence not been proven by Peru); second, were never communicated to KML before Peru's Counter-Memorial; and third, are being made here by Peru to try to confuse the Tribunal with irrelevant details of local Peruvian laws.

101. Peruvian law must be consistent with Peru's international law obligations. If it is not, then the existence of Peruvian-law provisions does not save Peru's actions for purposes of this arbitration. Complying with domestic law provisions that violate international investment protection standards do not absolve Peru of liability.

102. Peru has alleged a number of breaches or red flags that Peru has purportedly caught regarding KML's suppliers, like, for instance, an internal SUNAT email stating that [REDACTED] had been flagged for tax evasion.⁷⁰ Peru even made completely conclusory statements without support, including that SUNAT had reasons to be suspicious of Shipments No. 2 and 3;⁷¹ and in other instances referred to information provided to SUNAT by other Peruvian government entities.⁷²

103. The fact is, however, that no reasonable due diligence by KML, or anyone for that matter, would have detected those alleged issues (supposed red flags), untimely brought by Peru in this arbitration (and never before notified to KML). No due diligence can produce

C-0166-SPA; Terms and conditions for Bullion Trading and Related Transactions between KML and [REDACTED], **C-0167-SPA**; Terms and conditions for Bullion Trading and Related Transactions between KML and [REDACTED], **C-0168-SPA**; Email from [REDACTED] (KML) to [REDACTED] representatives regarding refining agreement, dated November 04, 2013, **C-0169-SPA**.

⁶⁸ *Id.*

⁶⁹ See, for instance, Peru's **Counter-Memorial**, at ¶ 95. The reality is that KML fully complied with the verification of the gold's origin, as evidenced by exhibits **C-0006-ENG/SPA** ([REDACTED] document package), **C-0007-ENG/SPA** ([REDACTED] document package), **C-0008-ENG/SPA** ([REDACTED] document package) and **C-0009-ENG/SPA** ([REDACTED] document package).

⁷⁰ Peru's **Counter-Memorial**, at ¶ 134; *also see*, Email from SUNAT ([REDACTED]) to [REDACTED] ([REDACTED], et al.), 29 November 2013, **R-0080**.

⁷¹ Peru's **Counter-Memorial**, at ¶ 136, fn. 205.

⁷² *Id.*, at ¶¶ 140, 156.

a bulletproof or absolute certainty of a result. Furthermore, no applicable laws relevant in this arbitration impose a strict liability on purchasers of movable assets (including gold) — otherwise there would be no legal room for a good-faith purchaser defense.

104. None of the conclusions that Peru has alleged here that SUNAT reached regarding requests for release of KML's gold were ever notified or informed to KML before this arbitration.⁷³ This is another example of *post hoc* justifications being made up by Peru, and of the extreme information asymmetry, and lack of transparency by Peru, which kept KML in the dark.

105. Here, the Arbitral Tribunal should not be put in a position to adjudicate and verify in detail whether KML complied with due diligence requirements (in 2013 and 2014) for purposes of Peruvian laws (which KML, in any case, fully did). For purposes of this arbitration the relevant issues are that (1) under or for purposes of international law, Peru unreasonably prolonged temporary seizures of KML's gold (without a final legal determination), and (2) Peru never provided KML with any explanation, notice or a meaningful opportunity to defend itself before KML's investments lost all value on November 30, 2018.

I. Any and all measures affecting KML's gold are inherently, under Peruvian laws, strictly interim or temporary

106. KML and Peru agree that, under Peruvian law, the measures affecting KML's gold inventory are strictly interim or temporary.

- *Second, as explained in Sections II.C and IV.A.3, the precautionary seizures ordered by the Peruvian courts are merely temporary. If the courts end up determining that no crime has been committed in connection with the seized gold, such gold shall be returned to its lawful owner(s).*

⁷³ Peru's Counter-Memorial, at ¶¶ 148-154.

Al término del proceso penal existe la posibilidad de que el oro incautado sea decomisado, regresando al dominio del Estado. Ello no implica que las medidas cautelares tengan un carácter permanente, pues únicamente estarán vigentes durante la tramitación del proceso penal en el cual fueron emitidas, siendo la temporalidad una característica esencial de la medida cautelar.

Evidence:

Peru's **Counter-Memorial** (at ¶ 651).

Expert Report-Joaquín Missiego-Respondent's Counter-Memorial-SPA
(at ¶ 14).

107. The measures in question, be them immobilizations or seizures, are—or were—meant to last or serve for a limited time. They were done, made or appointed for the particular purpose of creating a period of time between events. Under Peruvian law, they were not meant to be permanent or irreversible.

108. Under Peruvian law, such measures could have concluded—ceased—with the permanent forfeiture (eminent domain) of the gold, which would have opened distinct legal avenues or additional recourses or appeals, or the return of the gold to KML.⁷⁴ Under the US-Peru TPA, Peru's actions effectively resulted in the creeping expropriation (permanent loss of value) of KML's gold inventory, and going concern business enterprise, in 2018.

109. Peru never told KML (before this arbitration) that the gold seized by Peru was never going to be returned to KML.

J. KML operated for seven years in Peru

110. The analysis—made by a qualified, independent Quantum Expert⁷⁵—established a financial track record for KML as a going concern business for at least seven years. Peru has not disputed that KML effectively continued to purchase gold in Peru until late 2018.

⁷⁴ If art. 94 of the Peruvian Criminal Procedures Code, published on January 16, 1940 (CL-0006-SPA) is applicable, as alleged by Peru. Also, *see* Peru's **Counter-Memorial**, at ¶¶ 181, 242.

⁷⁵ Expert Report-Almir Smajlovic (Secretariat)-Claimant's Memorial-ENG, C-0106-ENG.

111. KML's share of the Peruvian gold market and its profits were expected to grow; and this is clearly supported by the contemporaneous documents provided by KML. Plans to invest more in Peru were critical for KML's future outlook, based in part on the increasing commercial demand by [REDACTED] ([REDACTED] [REDACTED]) for KML to buy more gold in Peru and other countries.⁷⁶ KML's expectations (and actual positive results) were also grounded on its research of the Peruvian market, KML's continuing success in building new networks, and KML's prior performance in other markets.⁷⁷

112. KML's legitimate expectations and due diligence regarding its investments in Peru have been proven in this arbitration, among other things, by contemporaneous documents prepared *tempore non suspecto*, including:

- Analysis of the Peruvian gold market and growth potential, **AK-0002-ENG**.
- Letter dated April 08, 2013, regarding the decision of KML to expand to include a refinery operation inside Peru, **C-0049-ENG**.
- Letter from [REDACTED] committing to finance the purchase of 45,000 tons of gold per year, **C-0047-ENG**.
- Letters from [REDACTED] regarding interest rates and increases in volume by KML, **C-0136-ENG** and **C-0137-ENG**.

113. KML has submitted ample evidence of all the gold actually purchased by KML in Peru between 2012 and 2018.⁷⁸

⁷⁶ Witness Statement-[REDACTED]-Claimant's Memorial-SPA, at ¶ 23, **C-0105-SPA**; and [REDACTED] letter to KML dated September 10, 2013, **C-0047-ENG**.

⁷⁷ Expert Report-Almir Smajlovic (Secretariat)-Claimant's Memorial-ENG, at ¶3.20, **C-0106-ENG**.

⁷⁸ See KML transaction summary of all purchases between 2012 and 2018, **C-0030-ENG**.

114. The testimony of [REDACTED],⁷⁹ [REDACTED],⁸⁰ [REDACTED]⁸¹ and [REDACTED]⁸² is entirely consistent with the foregoing.

K. The seizures of KML's gold in Peru affected KML's ability to operate

115. There is no question that Peru physically took, and is currently in possession of, the gold relevant in this arbitration,⁸³ with the exception of Peru's antithetical arguments about Shipment No 5.

116. As explained by Mr. Almir Smajlovic (KML's Quantum Expert), the measures taken by Peru adversely affected KML's operations in many ways.⁸⁴ First, they affected the average cost per unit of gold bought, because of the increases of its operating expenses (while the percentages may look fairly close, due to magnitude of the gold processed, from an economic standpoint those changes were material).

10.6 As demonstrated in my Appendix 3 (**AS-0007-ENG**), "3.4 Income Statement - Actual", and as presented in Figure 21 which follows, subsequent to 2013, KML's operating expenses as a percentage of revenues increased and similarly, its average cost per units increased after the onset of the Measures.²⁸⁰

⁷⁹ Second Witness Statement-[REDACTED]-Claimant's Reply-ENG, **C-0147-ENG**.

⁸⁰ Witness Statement-[REDACTED]-Claimant's Memorial-SPA, **C-0105-SPA**.

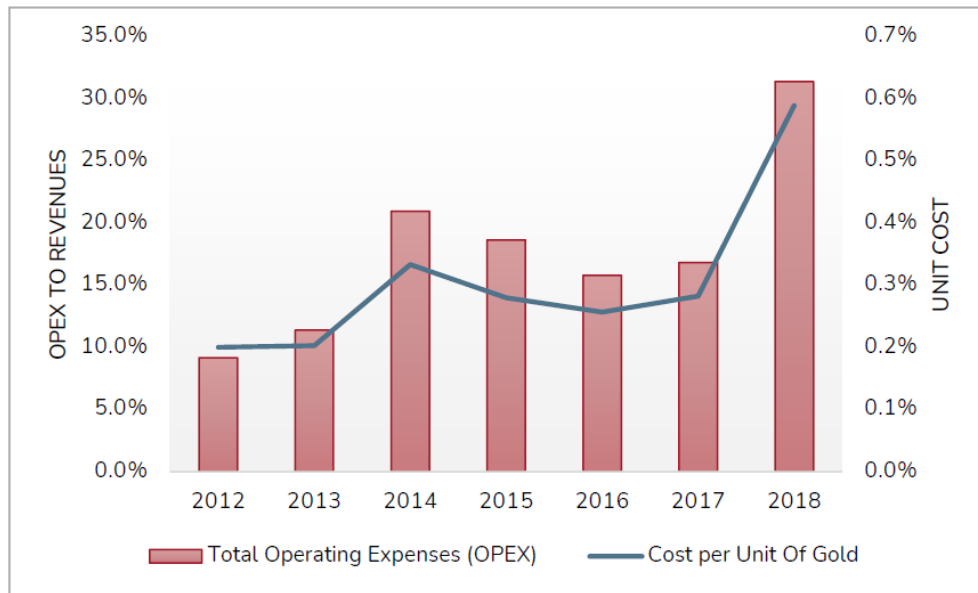
⁸¹ Witness Statement-[REDACTED]-Claimant's Memorial-ENG, **C-0104-ENG**.

⁸² Witness Statement-[REDACTED]-Claimant's Reply-ENG, **C-0146-ENG**.

⁸³ Precautionary Seizure against Shipment 1, 21 February 2014, **R-0134**; Precautionary Seizure against Shipment 2, 25 March 2014, **R-0135**; [REDACTED]. Ruling of the Superior Court of Justice of Callao – Permanent Criminal Court, April 30, 2014, **C-0090-SPA**; Precautionary Seizure against Shipment 4, 1 May 2014, **R-0136**; Civil attachment measure against Shipment 5, issued by the *Trigésimo Tercer Juzgado Civil de Lima*, June 18, 2014, **C-0141-SPA**.

⁸⁴ Expert Report-Almir Smajlovic (Secretariat)-Claimant's Memorial-ENG, at Annex 1, pp.70-73, **C-0106-ENG**.

Figure 21 - KML's Actual Opex to Revenues Ratio and Unit Cost



10.7 This is not surprising considering that the total quantity of products turned by KML materially decreased starting in 2014.

Evidence:

C-0106-ENG (Expert Report-Almir Smajlovic (Secretariat)-Claimant's Memorial-ENG, at ¶¶ 10.6-10.7, figure 21).

117. The measures also increased the financing costs of KML's operations. As explained in Claimant's Memorial,⁸⁵ KML financed the gold purchases through a finance agreement with [REDACTED], at a variable interest rate which was tied to the level of the debt outstanding. Being that KML was unable to pay this loan due to its inability to resell the gold, it was forced to pay higher interest rates.⁸⁶

⁸⁵ **Claimant's Memorial**, at ¶¶ 22, 146, 152.

⁸⁶ Letters from [REDACTED] regarding interest rates, **C-0136-ENG**; [REDACTED] letter dated November 14, 2018, **C-0137-ENG**.

Higher Cost of Financing

10.8 As a result of the Measures, financing costs for KML have increased as well. I note during 2013 and 2014 KML made physical payments for the purchases of its inventory in the amount of US \$11.9 million, which was financed through a financing arrangement with KMP, pursuant to which KML was required to pay a variable interest rate. As a result of not receiving this inventory and maintaining a loan balance that continuously exceeded \$8 million per month, KML was forced to incur a higher financing cost in the form of paying a higher interest rate.

10.10 Because Kaloti Metals was unable to obtain its inventory, which was already paid for by KML, and sell the gold to a refinery, KML was compelled to raise additional funds and incur additional interest which it would not have incurred absent Respondent's seizures of its gold in 2013 and 2014.

Evidence:

C-0106-ENG (Expert Report-Almir Smajlovic (Secretariat)-Claimant's Memorial-ENG, at ¶¶ 10.8, 10.10).

118. Ultimately, the measures taken by the Peruvian government targeting KML affected its working capital, which is determined based on the difference between current assets and current liabilities. Mr. Smajlovic explains that a significant portion of the net working capital was unwillingly attached to raw materials (gold) that were seized by the Peruvian courts and thus became unavailable to KML, increasing the company's inventory in the actual world, and placing KML in a negative net working capital position:

- 6.96. As it will be discussed next, the Measures (especially seizure of KML's inventory) have had a significant negative impact on KML's working capital. In particular, partial cash payments were advanced, inventory levels grew significantly, and accounts receivable collections deteriorated which resulted in a significant amount of cash to be taken out of circulation.²⁹⁹ Tying cash to significant amount of seized inventory, had the most negative effect on the KML's working capital.³⁰⁰
- 6.97. Figure 30 below reflects KML's actual (i.e., unadjusted) inventory days, accounts receivable days and accounts payable days in the actual world.³⁰¹ As Figure 30 below depicts, negative impact of the inventory buildup on KML's working capital is the most prominent of all. As such, I confirm that in addition to the significant loss of revenues – which are the main source of the lost profits – the most visible impact of the Measures is represented in the deteriorating working capital, followed by incremental cost of financing tied to the Measures.

Evidence:

C-0140-ENG (Second Expert Report-Almir Smajlovic (Secretariat)-
Claimant's Reply-ENG, at ¶¶ 6.96, 6.97).

L. Peru caused damages to KML

119. KML actually operated until 2018⁸⁷ and bought gold in Peru until, and including, such year.⁸⁸ In 2018, however, due to (1) the ruinous financial condition caused by KML's inability to monetize the gold temporarily seized by Peru in 2013 and 2014, (2) the reputational harm caused by adverse news about investigations, which were arbitrarily prolonged and extended by Peru, and (3) the fact that KML had to, but could not, repay substantial debts to [REDACTED], KML became *de facto* insolvent and was forced to terminate all operations on November 30, 2018.

120. If Peru had concluded its ongoing investigations and returned the gold to KML before November 30, 2018, KML would have been able to sell such gold at a profit (at prices higher than when the gold was seized in 2013 and 2014). Also, KML would have been able to reinvest, as it was KML's ordinary course of business in Peru, in even more

⁸⁷ Witness Statement-[REDACTED]-Claimant's Memorial-ENG, at ¶ 57, **C-0103-ENG**.

⁸⁸ KML transaction summary of all purchases between 2012 and 2018, **C-0030-ENG**.

purchases and resales of gold, more than making up (financially) in excess for the accounting profits lost in prior years.⁸⁹

2.30. Second, I have been instructed to assume that the seized inventory was the legitimate property of KML, and that the same inventory remains in physical possession of Peru. From a purely economic and financial standpoint, I confirm that had KML received its inventory of gold (in 2018) KML could have remained a going concern. The loss of such inventory was itself sufficient to directly cause the insolvency of KML.

Evidence:

C-0140-ENG (Second Expert Report-Almir Smajlovic (Secretariat)-Claimant's Reply-ENG, ¶ 2.30)

121. Until the end of its operation in November 2018, KML had a legitimate expectation that the seized gold was going to be, as it should have been, returned by Peru.⁹⁰ Peru never decided, notified, or communicated to KML (before this arbitration) that the gold seized by Peru was never going to be returned to KML.

122. When KML's damages crystalized in 2018, and as compared to prior years, KML was affected by: (1) lower quantities of gold purchased (loss of market share) in Peru and worldwide, (2) higher cost on a per unit basis, (3) higher financing cost, and (4) costlier and less effective working capital.⁹¹ The Quantum Expert retained by KML in this arbitration has confirmed, from his independent economic analysis, that on November 30, 2018, the measures by Peru (explained below) resulted in a permanent and irreversible economic loss for KML, as such date corresponds to KML's *de facto* insolvency and the end of its operations.⁹²

⁸⁹ Otherwise, had Peru timely concluded (*quod non*) investigations with a *pérdida de dominio* (eminent domain) of the gold, that would have opened legal avenues for KML to exercise its property rights over the gold before KML's investments lost all value on November 30, 2018.

⁹⁰ Legal Opinion-Dr. ██████████-Claimant's Memorial-SPA, question N° 9, **C-0107-SPA**; Witness Statement-██████████-Claimant's Memorial-SPA, at ¶ 29, **C-0105-SPA**; and Witness Statement-██████████-Claimant's Memorial-ENG, at ¶ 57, **C-0103-ENG**.

⁹¹ Expert Report-Almir Smajlovic (Secretariat)-Claimant's Memorial-ENG., at ¶6.3, **C-0106-ENG**.

⁹² Second Expert Report-Almir Smajlovic (Secretariat)-Claimant's Reply-ENG, at ¶ 5.104, **C-0140-ENG**.

123. In 2018, the fair market value of all assets owned by KML became significantly lower than total liabilities, and KML was unable to pay off its debts. There were no feasible means to continue KML's operation. On November 30, 2018, KML's equity as depicted in its balance sheet turned to negative US\$ 13,649,821.⁹³

124. The facts in this case prove a clear unbreakable linkage on the continuing character of the acts and omissions by Peru, and therefore the composite nature of Peru's breaches of the TPA, which imply that the totality of acts by Peru must be considered in the aggregate as a unity that climaxed on November 30, 2018.⁹⁴

125. The five shipments of gold (inventory) owned by KML, as referenced above, were temporarily immobilized by Peru in late 2013 and early 2014.⁹⁵ This initial act of immobilizing the shipments of gold was carried out by Peru under the guise or excuse of

⁹³ *Id.* at ¶6.12.

⁹⁴ See ILC Articles on Responsibility of States for Internationally Wrongful Acts (ILC Articles), **CL-0040-ENG**. Art. 15 thereof, provides the following criteria for composite acts:

"Article 15. Breach consisting of a composite act

1. The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.

2. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation."

Art. 15.1 defines the moment when the composite act is deemed to occur and Art. 15.2 the date and extension in time of the breach. The composite act is deemed to occur when the action or omission happens which, taken together with the previous actions or omissions, is sufficient to constitute the wrongful act. And the breach starts with the date of the first act of the series of the composite act, and extends over the entire period.

The Commentary to the ILC Articles contains the following explanation: *"Article 15. Breach consisting of a composite act*

Commentary

(8) Paragraph 1 of article 15 defines the time at which a composite act "occurs" as the time at which the last action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act, without it necessarily having to be the last in the series.

[...]

(10) Paragraph 2 of article 15 deals with the extension in time of a composite act. Once a sufficient number of actions or omissions has occurred, producing the result of the composite act as such, the breach is dated to the first of the acts in the series. The status of the first action or omission is equivocal until enough of the series has occurred to constitute the wrongful act; but at that point, the act should be regarded as having occurred over the whole period from the commission of the first action or omission. If this were not so, the effectiveness of the prohibition would thereby be undermined."

⁹⁵ KML completed its due diligence and compliance review before making these five purchases of gold, and confirmed that all the sellers were in good standing with the Peruvian government. Witness Statement-[REDACTED]-Claimant's Memorial-ENG, at ¶ 18, **C-0104-ENG**.

investigating the origin of the gold purchased by KML; and was later continued (prolonged) based on anti money-laundering investigations against third parties. As isolated, in and of themselves, the initial immobilizations by SUNAT, and the subsequent temporary seizures by Peruvian courts, did not rise to the level of a breach of the TPA by Peru.

126. As of today, Peru has not made a final determination about the origin of any of the five shipments of gold identified above, or any permanent legal consequence affecting the mineral seized. But, KML's investments lost all value on November 30, 2018.

127. After the foregoing five temporary immobilizations, Peru allowed KML to continue purchasing gold, which KML did until 2018.⁹⁶ No other relevant immobilizations of additional KML gold were ever initiated by Peru after 2014. This means, implicitly but undoubtedly, that KML was not found guilty of any wrongdoing, and that Peru did not impose formal sanctions against KML.

No obstante, cabe reconocer la posibilidad de que KML se encuentre incluida como persona jurídica investigada ante la 1° fiscalía supraprovincial corporativa especializada en delitos de lavado de activos y pérdida de dominio - Primer Despacho (investigación fiscal acumulada N° 01-2014 y 078-2015). La documentación que hemos tenido a disposición no permite reconocer que aquella investigación haya generado la incautación del oro propiedad de KML, ni que KML haya sido acusada o condenada por hechos.

2.8 De los documentos revisados para la preparación de este informe, se evidencia que KML, sus dueños (como el señor [REDACTED]), y sus empleados no han sido inculcados en Perú por delito alguno.

2.9 Tanto así, que las infracciones penales alegadas por Perú se refieren a supuestas infracciones de otras partes en cuanto a lavado de dinero (en general). Lo que ha sido alegado (mas no demostrado) es el posible lavado de dinero (pero no por parte de KML).

Evidence:

C-0107-SPA (Legal Opinion-Dr. [REDACTED]-Claimant's Memorial-SPA, question N° 8).

⁹⁶ KML transaction summary of all purchases between 2012 and 2018, **C-0030-ENG**.

C-0139-SPA (Second Legal Opinion-Dr. [REDACTED]-Claimant's Reply-SPA, at ¶¶ 2.8, 2.9).

128. Peru unnecessarily and unreasonably prolonged the temporary seizures of KML's gold. Surprisingly, Peru's Legal Expert stated these proceedings have had a "normal duration," and that in any other country with a legal system similar to the Peruvian one, they would take the same amount of time.⁹⁷ Peru has not produced any evidence in connection with such an audacious statement.

123. Finalmente, es importante señalar que (i) los cuatro procedimientos son sumamente complejos, atendida la complejidad del delito investigado, la cantidad de personas involucradas y el alto número de diligencias y (ii) los cuatro procedimientos fueron afectados por la pandemia ocasionada por el COVID-19 lo cual no ha permitido el normal desarrollo de los procesos (de hecho, los plazos judiciales estuvieron suspendidos entre marzo de 2020 y marzo de 2021 en el Perú).

124. Sin perjuicio de lo anterior, estos procesos han tenido una duración normal. En mi experiencia estos procesos tomarían la misma cantidad de tiempo que en cualquier otro país con un sistema jurídico penal similar al del Perú, considerando la complejidad de los delitos investigados, la lejana localidad donde se han llevado a cabo muchas de las diligencias del proceso y el número de imputados. También han tenido una duración normal en comparación a otros procesos similares seguidos en el Perú.

Evidence:

Expert Report-Joaquín Missiego-Respondent's Counter-Memorial-SPA
(at ¶¶ 123-124).

129. To the very limited extent that KML was allowed by Peru, KML through its repeated requests for return of the gold cooperated with Peru's investigations by providing

⁹⁷ **Expert Report-Joaquín Missiego-Respondent's Counter-Memorial-SPA**, at ¶¶ 123-124.

documents.⁹⁸ Furthermore, KML was entitled to rely on Peru's legal system of registration of gold producers and distributors, RECPO.⁹⁹

93.	Importantly, MINEM does not verify, authenticate or guarantee the veracity of the information provided in the RECPO registration form, let alone the lawfulness of the gold being traded by registered entities. RECPO was established as an initial, interim step to promote formalization of the mining activities of small and artisanal miners, and to provide the State with a database to "identify the agents involved in the sale and purchase and/or refining of gold, being conceived as a complementary and temporary measure until a certification procedure of environmental quality and origin of the gold had been implemented." ¹¹⁰ However, such certification proceeding
	has not yet been established.
94.	Contrary to Kaloti's arguments, the Suppliers' registration with RECPO did <i>not</i> in any way guarantee — or even imply, or suggest — that the Suppliers were in "good standing with the Peruvian government." ¹¹¹ Anybody could register with RECPO. In fact, the State has expressly confirmed that "the RECPO does not have interoperability with other State administrative registries, in order to be able to cross-check information held by them." ¹¹² That is, RECPO does not exchange information with other State registries concerning issues such as criminal records or administrative proceedings initiated against entities registered with RECPO.

Evidence:

Peru's **Counter-Memorial** (at ¶¶ 93, 94).

130. Peru seems to be admitting its own incompetence. The RECPO was established by Peru's Ministry of Energy and Mines (MINEM) pursuant to Ministerial Resolution N° 249-2012-MEM/DM published on May 26, 2012.¹⁰⁰ The relevant website states that all natural or legal persons engaged in the sale or refining of gold must register. It further states that

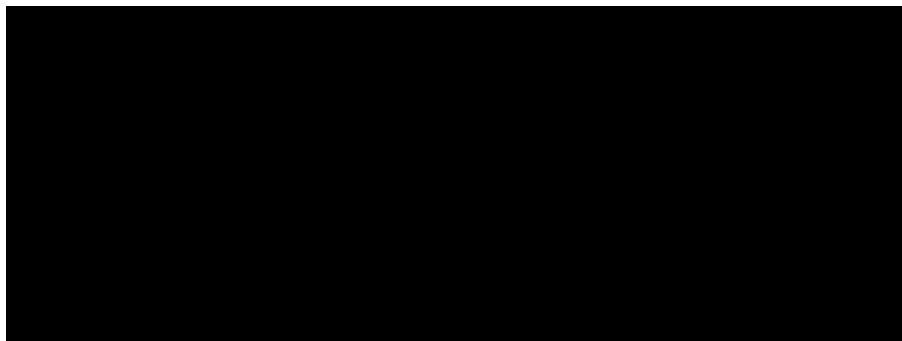
⁹⁸ **Claimant's Memorial**, at ¶ 115.

⁹⁹ Decree No. 1105 which establishes provisions for the formalization process of small-scale and artisanal mining activities, **CL-0003-SPA**; National Plan for the regularization of small-scale mining, **C-0044-SPA**; and *Registro Especial de Comercializadores y Procesadores de Oro* (RECPO), **C-0010-SPA**.

¹⁰⁰ Ministerial Resolution N° 249-2012-MEM/DM, published on May 26, 2012, **C-0148-SPA**.

registered purchasers may purchase mineral from miners who have submitted their *Declaración de Compromiso*.¹⁰¹ KML has not been able to find any formal notice, warning, or advertence indicating that RECPO was not a reliable database, nor that it is simply dysfunctional as Peru suggests.

131. The fact of the matter is that, while Peru in its Counter-Memorial, and its legal expert, lawyer Joaquín Missiego in his report, seem to be very certain that the suppliers (sellers) of gold will be convicted in Peru,¹⁰² as of 2018 those suppliers were still displayed on RECPO, in good standing, and legally able to purchase and sell gold in Peru.



COMPRA/VENTA Y REFINACIÓN DE ORO	Completo
COMPRA/VENTA Y REFINACIÓN DE ORO	Completo
COMPRA/VENTA Y REFINACIÓN DE ORO	Completo
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COMPRA Y VENTA DE ORO	Completo
COMPRA/VENTA Y REFINACIÓN DE ORO	Completo
COMPRA/VENTA Y REFINACIÓN DE ORO	Completo

Evidence:

C-0010-SPA (*Registro Especial de Comercializadores y Procesadores de Oro* (RECPO), at pp. 26, 213, 56, 57).

132. On what basis can Peru be certain, for purposes of this arbitration, that a supplier of gold is going to be convicted in Peru, but still continue to allow that same supplier to be legally able to operate in the gold industry in Peru?

133. It was Peru who—alone—had, and still has, the burden of proving any alleged or suspected illicit origin of gold, or the existence of money laundering or corruption. KML did not, and does not, have the legal burden of proving its innocence, especially since KML was never *inculpada* in the investigations:

¹⁰¹ RECPO official website, **C-0138-SPA**.

¹⁰² **Expert Report-Joaquín Missiego-Respondent's Counter-Memorial-SPA**, at ¶¶ 65-66.

8.10 El hecho de que Perú y su experto, el abogado Joaquín Missiego, justifiquen con indicios la subsistencia de las medidas de incautación que pesan sobre el oro propiedad de KML, así como de los juicios que, en última instancia, afectan los derechos subjetivos ya causados de KML, es, valga la redundancia, un indicio claro de la falta de pruebas para sustentar las acusaciones sobre lavados de activos que ha puesto en marcha Perú desde el 2013. Perú sigue teniendo la carga de plena prueba, que ni siquiera el abogado Missiego ha alegado cumplida.

Evidence:

C-0139-SPA (Second Legal Opinion-Dr. [REDACTED]-Claimant's Reply-SPA, at ¶ 8.10).

134. Tellingly, Peru, and Peru's own legal expert, lawyer Joaquín Missiego, have only referenced alleged *indicia* (suggestive and preliminary indications) of possible money-laundering.¹⁰³ They have even, shockingly, asked the Arbitral Tribunal to serve as a criminal judge in evaluating an alleged preponderance of the evidence;¹⁰⁴ but they have not stated that Peru or its legal authorities have found actual proof or sufficient certainty of money-laundering or illicit mining against KML, or anyone (including [REDACTED], [REDACTED], [REDACTED] and [REDACTED]).

a. Statements and leaks against KML

135. Peru has admitted that reputational harm to KML led to KML's ruin and cease of operations.¹⁰⁵ Even Peru's quantum experts (Brattle) admit this when they state that KML could have simply (in Brattle's view) changed its name in 2018 and continued in business, implicitly acknowledging that KML's name (*i.e.*, reputation) was harmed.¹⁰⁶

¹⁰³ *Id.*, at ¶¶ 13, 20, 52, 66.

¹⁰⁴ Peru's **Counter-Memorial**, at ¶ 375.

¹⁰⁵ *Id.*, at ¶ 261.

¹⁰⁶ **Expert Report-Darell Chodorow and Fabricio Nunez (Brattle)-Respondent's Counter-Memorial-ENG**, at ¶ 173.

136. Peru has argued, however, that KML’s reputation was damaged by investigations in England and Africa against [REDACTED];¹⁰⁷ but—absurdly—not by investigations in Peru.¹⁰⁸

137. The ancillary or supervening investigations in which Peru arbitrarily mentioned KML, starting in 2015,¹⁰⁹ presumably as a way to prolong the immobilization of KML’s gold, had the obviously foreseeable consequence of being replicated by the media.¹¹⁰ The media specifically publicized the investigations, with respect to which Peru itself has claimed a high degree of confidentiality:

Kaloti’s Request Nos. 1, 2, 4, 9, 10, 11, 15, 16, 17, 20, 26, 27, 28, 29 and 30 all seek documents that contain confidential or reserved information, or that were prepared by Peruvian Authorities under the belief that such documents would remain private, either because they were prepared in the context of preliminary investigations and criminal proceedings or they record governmental deliberations subject to deliberative privilege. Moreover, Peruvian Supreme Decree No. 021-2019-JUS (“**Law on Access to Public Information**”) provides under Article 16 that classified or confidential information in the form of police intelligence or operational plans as well as other documents that are part of investigations in the police stage are protected and therefore may not be disclosed. Further, Article 17.1 notes that information containing advice, recommendations, or opinions that arose from the deliberative process prior to the adoption of a governmental decision are confidential unless such information is public. It would be contrary to Article 9.2(b) of the IBA Rules, as well as highly prejudicial, for Peru to be required to produce documents in circumstances where doing so would put it in breach of its own laws.

In this arbitration, Kaloti has formulated serious accusations against Peru, including in relation to the reasons underlying the initiation of the Criminal Proceedings against the Suppliers and the issuance of the Precautionary Seizures over the Five Shipments. As a result, Peru has introduced into the record of the arbitration a narrow and specific category of confidential documents from the Criminal Proceedings to respond to these serious accusations. The submission of such documents by Peru is consistent with

¹⁰⁷ Peru’s **Counter-Memorial**, at ¶¶ 268-280.

¹⁰⁸ *Id.*, at ¶ 282.

¹⁰⁹ Prosecutorial Resolution No. 1, fiscal folder No. 42-2014, of the 1st supra-provincial corporate prosecutor’s office specializing in money laundering and loss of domain crimes, at pp. 3, **C-0052-SPA**; and Prosecutorial Order No. 19, dated January 09, 2017, issued by the 1st supra-provincial corporate prosecutor’s office specializing in money laundering and loss of domain crimes, at pp. 3, **C-0101-SPA**.

¹¹⁰ News articles and books that replicated negative facts unfairly linked to KML by Peru, **C-0051-ENG**.

Article 138.3 of the Criminal Procedure Code. That provision authorizes public authorities to obtain access to specific documents concerning criminal investigations and proceedings in order to satisfy legitimate public interests --such as the State's defense in international arbitration proceedings--, provided that the disclosure of the documents does not hinder the investigations or criminal proceedings and that the rights of third parties are not unreasonably affected.¹¹¹

138. Peru strenuously alleged—in the Redfern schedule—that Peru had a very strict duty of confidentiality regarding criminal investigations. That placed an affirmative duty on Peru to safeguard the contents and extent of the criminal investigations.

(...) Kaloti's Request Nos. 1, 2, 4, 9, 10, 11, 15, 16, 17, 20, 26, 27, 28, 29 and 30 all seek documents that contain confidential or reserved information, or that were prepared by Peruvian Authorities under the belief that such documents would remain private, either because they were prepared in the context of preliminary investigations and criminal proceedings or they record governmental deliberations subject to deliberative privilege. Moreover, Peruvian Supreme Decree No. 021-2019-JUS ("**Law on Access to Public Information**") provides under Article 16 that classified or confidential information in the form of police intelligence or operational plans as well as other documents that are part of investigations in the police stage are protected and therefore may not be disclosed. Further, Article 17.1 notes that information containing advice, recommendations, or opinions that arose from the deliberative process prior to the adoption of a governmental decision are confidential unless such information is public. (...) (emphasis on the original).¹¹²

(...) In particular, Kaloti requests documents from two criminal courts. As Peru explained in its Counter-Memorial (¶ 219), and Prof. Missiego confirmed in his Expert Report (¶ 135), preliminary investigations, as well as the pre-trial stage of criminal proceedings, are confidential under Peruvian Law. Article 73 of the Criminal Procedure Code (Law No. 9024 of 23 November 1939) (Código de Procedimientos Penales) provides that "[t]he pre-trial stage has reserved character" (Ex. R-0223). Likewise, Article 324 of the New Criminal Procedure Code (Legislative Decree No. 957 of 22 July 2004) (Nuevo Código Procesal Penal) establishes that "[t]he investigation has a reserved character. Only the parties may access the content of the investigation, either directly or through their appointed lawyers in the proceedings." (Ex. R-0153). As Prof. Missiego explained, the fact that preliminary investigations, as well as the pre-trial stage of criminal proceedings, have a reserved character has been recognized, for example,

¹¹¹ **Procedural Order No. 2**, Annex 1, at ¶¶ 12-13, pp. 8.

¹¹² *Id.*, at ¶ 12, pp.8.

by the Resolution issued by the Constitutional Court, File No. 02433-2010-PHD/TC, dated 11 October 2010 (Ex. JM-0020). That is, all information related to any documents obtained during an ongoing preliminary investigation or the pre-trial stage of a criminal proceeding are protected as confidential under Peruvian law (unless they have become public).¹¹³

139. Therefore, based on the foregoing, it can be concluded that any leaks about the investigations are, as a matter of law, directly attributable to the fault or negligence (or potential willful misconduct) of Peru, *vis-à-vis* Peru's admitted duty of confidentiality. Peru had an affirmative duty to be vigilant and protect the investigations from leaks. It was certainly not KML who informed the press that KML was being investigated in Peru.

b. Arbitrary and unreasonable extension of the temporary seizures of KML's gold

140. As has been clearly and unequivocally stated by a very reputable, independent Peruvian legal expert, based on Peruvian law, the investigations, and temporary immobilizations of gold (initiated by Peru against KML in 2013-14) far exceed all reasonably acceptable parameters.¹¹⁴

141. Peru has breached an international obligation, stated in the US-Peru TPA, through a series of actions or omissions: the unreasonable extension, without definition, of investigations and immobilizations of gold, which were initially intrinsically temporary in nature.

142. If Peru had finished ongoing investigations and returned the gold to KML within a reasonable timeframe, KML would have been able to sell such gold at a profit, at prices higher than when the gold was seized in 2013 and 2014. Further, KML would have been able to reinvest, as it was KML's ordinary course of business in Peru, in even more purchases and resales of gold, more than making up (financially) in excess for the

¹¹³ *Id.*, pp 31-32.

¹¹⁴ Legal Opinion-Dr. [REDACTED]-Claimant's Memorial-SPA, question N°9, **C-0107-SPA**.

accounting losses of prior years. Before becoming insolvent, KML had a legitimate expectation that the seized gold was going to be, as it should have been, returned by Peru.¹¹⁵

143. Peru has been known to act arbitrarily in connection with the extension and duration of gold immobilizations. In other cases having a resemblance to the situation of KML, some Peruvian courts have adjudicated that SUNAT should return immobilized gold to its legitimate owner.¹¹⁶ Precedents prove, first, that SUNAT can be arbitrary, overzealous and capricious;¹¹⁷ second, that other investors have received a different treatment, more favorable than the one which Peru dispensed to KML; and third, that Peru has the practice of leaking details of confidential criminal investigations, especially in the gold industry, to the media.¹¹⁸

144. The only plausible explanation for Peru holding on to KML's seized gold, based on alleged money laundering investigations, but at the same time Peru allowing KML to continue buying and selling Peruvian gold until 2018, is that Peru was fabricating excuses to keep such seized gold. Why would government authorities reasonably convinced that a company was, or may have been, involved in money laundering allow such company to operate for several years in the same market and activities suspected? This question is applicable to both KML (itself), and to the sellers of the five shipments of gold (██████, ██████, ██████ and ██████).

¹¹⁵ Legal Opinion-Dr. ██████-Claimant's Memorial-SPA, question N° 9, **C-0107-SPA**; Witness Statement-██████-Claimant's Memorial-SPA, at ¶ 29, **C-0105-SPA**; and Witness Statement-██████-Claimant's Memorial-ENG, at ¶ 57, **C-0103-ENG**.

¹¹⁶ Resolution N° 14 of the 20th Specialized Contentious-Administrative Court of Lima (Sub-specialty in tax and customs matters) of the Superior Court of Justice of Lima, file N° 08717-2019-0-1801-JR-CA-20, **C-0111-SPA**; and Resolution No. 21 of the 6th Specialized Court in Administrative Litigation of Lima (Sub-specialty in tax and customs matters) of the Superior Court of Justice of Lima, file No. 8717-2019, **C-0112-SPA**.

¹¹⁷ Arbitral tribunals in the past have recognized the causal connection of damages to investors by SUNAT's temporary or interim measures. *See Mr. Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Award (5 July 2011), at ¶ 270 ("el Tribunal ha declarado la existencia de un nexo causal directo entre las acciones de la SUNAT al trabar las medidas cautelares preventivas y la destrucción de la viabilidad económica de TSG."), **CL-0080-SPA**.

¹¹⁸ "Raúl Linares dice que no está implicado en el caso Cuellos Blancos", article by Peruvian newspaper *Gestión*, **C-0114-SPA**.

145. KML was never indicted or convicted of any wrongdoing in Peru (or anywhere else); and no final determination has been made by Peru as of today (more than eight years after the first temporary immobilization) regarding KML's seized gold. Further, Peru has not made any legally sufficient connection of specific money laundering as to the five purchases of gold seized in 2013-14. Peru had, and has been unable to meet, a clear legal burden of proof.¹¹⁹

146. If there is, *arguendo*, a general suspicion of money laundering, why would a government authority seize some gold, but not touch other gold assets, belonging to the same company? And, if no specific wrongdoing is found within a reasonable period of time, why would the seized gold not be timely returned to its lawful owner?

III. PERU'S STRAW-MAN ARGUMENTS

147. In this arbitration, Peru has presented the Tribunal with multiple straw-man fallacies. Peru has taken KML's arguments or points, distorted them in an extreme way, and then attacked the extreme distortions, as if those were really the claims of KML. Peru has tried giving the impression of refuting KML's arguments, whereas the real subject of KML's arguments was not addressed or refuted, but instead replaced with false ones. Peru built a straw-man to give the appearance that the straw-man was destroyed by Peru.

148. Contrary to what Peru has tried to convey to the Tribunal in this arbitration, here KML has **not** claimed that:

- Peru could not regulate and police the gold market or enact general regulations in connection therewith.¹²⁰
- Peru could not combat illicit mining and money laundering by reasonable means.¹²¹

¹¹⁹ Legal Opinion-Dr. [REDACTED]-Claimant's Memorial-SPA, question N° 7, **C-0107-SPA**.

¹²⁰ Peru's **Counter-Memorial**, at §IV.B.5.

¹²¹ *Id.*, at ¶ 634.

- KML received a particularized or individualized assurance from Peru aimed specifically at KML, like a stabilization or investment agreement with Peru.
- KML legitimately expected never to be investigated in Peru.¹²²
- Peru could not take temporary, physical control of KML's gold to investigate its origin, for a reasonable—and limited—period of time, based on realistic suspicions.¹²³
- All relevant facts pertinent to Peru's treaty breaches occurred after April 30, 2018.¹²⁴
- KML did not know some facts, occurring before April 30, 2018, which are relevant in the causation of the damages consummated on November 30, 2018.¹²⁵

149. The fundamental or underlying claim that KML has presented to the Arbitral Tribunal is that Peru: (1) unreasonably extended and prolonged the temporary taking of KML's gold, (2) under inappropriately leaked investigations (unsubstantiated against KML), and (3) ignored KML's multiple requests for the return of the gold; (4) until such inventory, and KML's going concern business enterprise, were creepingly expropriated by Peru on November 30, 2018, (5) all while KML's investments were unfairly and inequitable treated, and discriminated by Peru.

IV. KML'S FIRST RESPONSE ON JURISDICTION

150. The grounds for jurisdiction under the US-Peru TPA continue to be strong and straightforward in this arbitration.

¹²² *Id.*

¹²³ *Id.*, at ¶ 635.

¹²⁴ *Id.*, at ¶¶ 342, 343, 344, 357.

¹²⁵ *Id.*, at ¶ 397.

A. *Ratione Personae*: KML is a protected investor under the TPA

151. KML’s Memorial of March 16, 2022, explained that KML is an “enterprise” of the U.S. that has made an investment in Peru and thus qualifies as a protected “Investor”¹²⁶ under the TPA.¹²⁷

152. Peru did not object to the Tribunal’s jurisdiction *ratione personae*. This issue is hence settled for purposes of this arbitration.

B. *Ratione Materiae*

a. KML’s claims arise out of its investments that are protected by the TPA

153. This dispute arises out of investments KML made in Peru that are protected under the TPA.

154. At all relevant times of the measures complained of in this arbitration (since the first temporary gold seizure occurred on November 29, 2013, to November 30, 2018), KML directly controlled protected investments, including, but not limited to, tangible movable objects, such as gold, and its infrastructure for testing, processing, and selling gold.

155. KML itself was actually registered in Peru, as a company and ongoing business, with the Peruvian *Superintendencia Nacional de los Registros Públicos (SUNARP)* with number 13174025.¹²⁸

156. Peru has countered that KML did not have any investments in Peru for purposes of the US-Peru TPA.¹²⁹ It is really hard to fathom how gold (a physical asset) owned by KML

¹²⁶ See TPA at Art. 1.3 & Art. 10.28, **CL-0001-ENG**.

¹²⁷ Peru cannot deny KML benefits of the Treaty pursuant to Article 10.12 of the TPA, which sets forth the only and exclusive basis for a denial of benefits. No other legal basis can be imported by Peru into this case for such denial. See *Id.* at Art. 10.12.

¹²⁸ This can still be confirmed, as of today, with a search at: <https://www.sunarp.gob.pe/bus-personas-juridicas.asp>. See: KML record at the *Superintendencia Nacional de Registros Públicos* website, **C-0159-SPA**.

¹²⁹ Peru’s **Counter-Memorial**, ¶ 378.

and seized by Peru inside its territory, would not qualify as an investment for purposes of the Treaty. Peru did not take away KML's ongoing personal rights, or contracts, to purchase gold in Peru; it took away physical inventory of actual gold owned by KML, even after KML disbursed monies to several sellers in Peru.

157. In general, Peru alleges that KML as a going concern enterprise business is not a protected investment. Peru contends that KML did not commit capital, did not have expectations of profit, and did not assume risks.¹³⁰ Peru also states that what KML had in Peru was a mere "business for the export and sale of goods."¹³¹

158. In reality, however, the going concern enterprise of KML in Peru satisfied the positive definition of investment based on the factors initially outlined in *Fedax v. Venezuela*¹³² in 1997, and then *Salini v. Morocco*¹³³ in 2001. Those factors imply a multi-part test to evidence that KML's activities in Peru gave rise to an article 25 (of the ICSID Convention) investment:

- **A certain duration:** KML started operating in Peru in 2012, and operated there until 2018, ceasing operations only because of the creeping expropriation made by Peru. KML did not have a quick *in-and-out* in Peru, nor did KML limit the duration of its operations based on a few specific contracts.
- **A regularity of profit and return:** KML was financially cash-flow positive in 2012, 2013, 2016, and 2017.¹³⁴ KML operated in Peru until 2018 and bought gold in Peru until, and including, such year. Due to the nature of KML's investment and its well-established profit margin, it is reasonable to conclude that absent Peru's measures, KML's continuous activity in Peru would have remained profitable well

¹³⁰ *Id.*, ¶ 331.

¹³¹ *Id.*, ¶ 338.

¹³² *Fedax N.V. v. The Republic of Venezuela*, ICSID case No. ARB/96/3, decision of the tribunal on objections to jurisdiction (July 11, 1997), at ¶ 43, **CL-0109-ENG**.

¹³³ *Salini Costruttori S.P.A. and Italstrade S.P.A. v. Kingdom of Morocco*, ICISID case No. ARB/00/4, decision on jurisdiction (July 16, 2001), at ¶ 52, **CL-0110-ENG**.

¹³⁴ Expert Report-Almir Smajlovic (Secretariat)-Claimant's Memorial-ENG, at ¶ 5.19, **C-0106-ENG**.

after November 30, 2018 (the date on which KML was forced to terminate its operations).

- **Assumption of risk:** as explained above, KML assumed, and in fact faced, an operational or investment risk in Peru. KML established on-the-ground operations, without knowing with certainty what would happen with such operations. KML considered establishing a refinery in Peru.¹³⁵ KML also planned to expand its market share in Peru.¹³⁶
- **A commitment that was substantial:** beyond the real estate rent, salaries, other fixed infrastructure costs, and advertisement investments, KML actually bought 344,421 kg of gold worldwide between 2012 and 2018, from which 161,168 kg of that gold was in Peru (alone).¹³⁷ That amount, in itself, is very significant; and the corresponding prices were paid to sellers inside Peru. KML contributed money and assets inside Peru.
- **Significance for the host State's development:** KML hired personnel in Peru. By buying gold in Peru, KML also helped such State accomplish its goal of developing the mining of the mineral (owned by the State) as strategically planned in the law to fight money laundering,¹³⁸ and the formalization plan.¹³⁹

159. The US-Peru TPA, like the overwhelming majority of investment treaties, defines investments by a non-exhaustive list of protected “assets” (asset-based definition), including movable and immovable property, shares, intellectual property rights, claims to money, etc. The Treaty does not require assets to be linked to an “enterprise” in order to

¹³⁵ Minutes of KML - Granting permission to study the opportunity to establish a gold refinery in Peru, **C-0049-ENG**.

¹³⁶ [REDACTED] letter to KML dated September 10, 2013, **C-0047-ENG**.

¹³⁷ Appendix 3.3 (damages) - Discounted Cash Flow Model and Accompanying Support, **AS-0007-ENG**.

¹³⁸ Decree No. 1106 (Decree Law to fight money laundering and other crimes related to illegal mining and organized crime), published on April 19, 2012, **CL-0008-SPA**.

¹³⁹ Decree No. 1105 which establishes provisions for the formalization process of small-scale and artisanal mining activities, **CL-0003-SPA**.

qualify for protection (enterprise-based definition), nor does it contain an exhaustive list of protected assets.

b. Legal authorities distorted by Peru (*ratione materiae*)

160. Peru cites to several cases in attempts to support its contention that KML's investments in Peru did not qualify as such under the TPA. However, a review of such cases confirms that they are inapposite, and very different from the facts of this case.

161. Peru invoked the arbitral award in *Seo Jin Hae*,¹⁴⁰ and asserted that one should start reviewing the term investment based on the three characteristics. However, Peru failed to explain that this was true in *Seo Jin Hae*, because the drafters of the KORUS FTA found them to be concurrently applicable. In any event, KML did meet the three characteristics: KML did commit "capital or other resources" in Peru, did have "the expectation of gain or profit," and assumed "risks" in its investment in Peru. It is worth noting, as Peru omitted in its Counter-Memorial, that the words "including" and "or" in Article 10.28 of the US-Peru TPA imply that these characteristics are not all imperative or taxative requirements.¹⁴¹ It follows, that by having met one characteristic KML has already met its burden. KML, in fact and as previously noted, met more than one.

162. The *Apotex v. United States*¹⁴² case, invoked by Peru, is inapposite here because Apotex conceded that it did not have offices or a physical presence in the host country (the United States). Peru has made a bad faith analogy quoting *Apotex* out of context. Unlike KML in Peru, all Apotex did in the host country was to enter into commercial contracts for the sale of goods, and the engagement of attorneys as an incident of regulatory requirements. Nothing more.

¹⁴⁰ *Seo Jin Hae v. Republic of Korea*, HKIAC Case No. 18117, Final Award, 27 September 2019, at ¶ 97, **RL-0191**.

¹⁴¹ Peru's **Counter-Memorial**, at ¶ 332.

¹⁴² *Apotex Inc. v. United States of America*, ICSID Case No. UNCT/10/2, Award on Jurisdiction and Admissibility, 14 June 2013, **RL-0202**.

238. Apotex's reliance on *SGS v. Philippines* and *SGS v. Pakistan* is of no assistance here. Apart from the fact that neither case involved an interpretation of the NAFTA, which provides its own definition of "*investment*", in both cases the claimant had established "liaison offices" in the respondent States.¹⁰⁷ Apotex has not alleged any such investments in the United States, but instead conceded that it "*does not reside or have a place of business in the United States.*"¹⁰⁸

Evidence:

RL-0202 (*Apotex Inc. v. United States of America*, ICSID Case No. UNCT/10/2, Award on Jurisdiction and Admissibility, 14 June 2013, at ¶ 238).

163. By contrast, here, KML had an office at [REDACTED] in Lima, foreign and national (Peruvian) personnel, as well as an apartment at Chorrillos, Lima in Peru for expatriate or transient workers. KML even explored the expansion of its physical presence in Peru to further include a refinery operation:

Minutes of Board Meeting of the Board of Shareholder of Kaloti Metals & Logistics LLC ("the Company") held on 08 April 2013

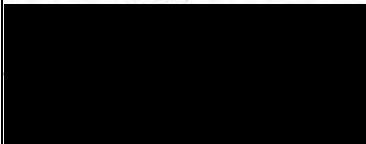
The following shareholders attended:



Resolution:

Given the recent business situation in Peru, the recent increased in the gold purchased quantity and the potential to grow the business further in Peru.

The shareholders of Kaloti Metals & Logistics LLC decided to grant [REDACTED] the permission to studying the opportunity of establishing/building gold refinery and trading house in Lima which will positively expand Kaloti Metals & Logistics LLC foot print in Latin America and offer exceptional services to our client based in Peru and Latin America.



Date: 08 April 2013

Evidence:

C-0049-ENG (Minutes of KML – Granting permission to study the opportunity to establish a gold refinery in Peru).

164. KML had a real operation on the ground inside Peru. Peru, in turn, has alleged that KML was too financially lean, because it did not have, in Peru's view, sufficient risks or costs sunk inside Peru.

165. Peru wants to punish KML for being frugal or cost efficient.¹⁴³ Peru criticizes that KML leased an office¹⁴⁴ (instead of buying it), and that the personnel KML hired in Peru were independent contractors instead of employees for Peruvian labor-law purposes.¹⁴⁵ But, nothing in the US-Peru TPA, the ICSID Convention, or customary international law qualifies the level of risk, or the expectation of an investor, for purposes of defining what constitutes an investment. As stated in *Phoenix v. Czech Republic*, “[i]f there is indeed a real intent to develop economic activities . . . the existence of a nominal price is not a bar to a finding that there exists an investment.”¹⁴⁶

166. Paradoxically, Peru’s own quantum experts state—when it is apparently convenient to Peru—that KML’s business in Peru was much riskier than assessed by KML’s quantum experts.¹⁴⁷ That includes risks assumed by KML inside, and inherent to doing business in the gold sector in Peru, like price-fixing risks and the reliability of sourcing (buying) gold in Peru.

167. When KML decided to commence operations in Peru, [REDACTED] committed his time and resources into studying the market in Peru: he opened up an office at [REDACTED], leased a property to lodge employees, hired Peruvian employees, provided KML’s know-how to train its employees, and purchased equipment to measure and assay in Peru the assets purchased.¹⁴⁸ While [REDACTED] may have been a prudent manager in opening up a small-sized “shop” in Peru, KML is an investor nonetheless, and KML’s operations in Peru constitute an “investment” under the Treaty and the ICSID Convention.

168. KML assumed risks that, in fact, culminated in losing KML’s entire going concern business enterprise (*i.e.*, US\$ 70,136,219¹⁴⁹). If KML had only assumed the risks of “ordinary commercial transactions,” KML would not have had to terminate operations

¹⁴³ Peru’s **Counter-Memorial**, at ¶ 346.

¹⁴⁴ *Id.*, at ¶ 343.

¹⁴⁵ *Id.*, at ¶ 344.

¹⁴⁶ *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, at ¶ 119, **RL-0183**.

¹⁴⁷ **Expert Report-Darell Chodorow and Fabricio Nunez (Brattle)-Respondent’s Counter-Memorial-ENG**, at pp. 57-61.

¹⁴⁸ Witness Statement-[REDACTED]-Claimant’s Memorial-ENG, **C-0103-ENG**.

¹⁴⁹ Second Expert Report-Almir Smajlovic (Secretariat)-Claimant’s Reply-ENG, at Table 1, **C-0140-ENG**.

because of Peru's actions, as KML would have been able to continue with other commercial transactions, in Peru or elsewhere in the world.

169. Peru attempts to paint KML's actions as lacking "commitment." Peru further essentially asserted that "little overhead costs" equate to there not having been sufficient investments. However, it is clear that KML's contribution in terms of know-how, equipment, personnel, physical office, and leased apartment, had an economic value that fell within the meaning of "capital or other resources" and "asset" according to Article 10.28 of the Treaty.

170. Additionally, what KML made in Peru qualified as an "economic contribution" or "commitment of capital" or "resources" for purposes of protection under the Treaty or the ICSID Convention. KML had expectations of "gains or profits" as it was in the business of buying, processing (assaying) and selling gold. It is also undisputed that [REDACTED] had plans for KML to open a refinery and expand its business in Peru.¹⁵⁰

171. Peru cites to *Nova Scotia Power v. Venezuela*¹⁵¹, a 2014 case, wherein the tribunal concluded that a coal supply contract—in which a Venezuelan state company agreed to supply certain quantities of coal at certain prices over the course of four years, and agreed that such coal would be paid when delivery was completed—did not constitute an investment by the claimant. That investment was described by the claimant itself in a very specific and limited manner, as "contractual rights to coal from the Paso Diablo mine":

¹⁵⁰ Witness Statement-[REDACTED]-Claimant's Memorial-ENG, at ¶¶ 11, 25, **C-0104-ENG**.

¹⁵¹ *Nova Scotia Power Inc. (Canada) v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/1, Award, 30 April 2014, **RL-0203**.

90. As an initial matter, it is important that the subject matter and focus of the Tribunal's enquiry be clarified. The Claimant describes the alleged investment at issue in these proceedings as its "contractual rights to coal from the Paso Diablo mine."¹⁵¹ For the Tribunal, these rights are not in place until the 2007 Confirmation Letters have been

entered into.¹⁵² Thus, it is the 2007 Confirmation Letters (and the contractual rights provided for therein, in combination with the incorporated terms of the Coal Supply Agreement) under which [company X] defaulted, which is the alleged investment at issue in these proceedings.

Evidence:

RL-0203 (*Nova Scotia Power Inc. (Canada) v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/1, Award, 30 April 2014, at ¶ 90).

172. *Nova Scotia Power's* contract was clearly different from the investment relevant in this instant case. As broadly explained in both KML's Memorial and in this reply, KML not only invested in Peru by purchasing gold from Peruvian suppliers, but also invested in offices, equipment to assay the gold, hired workers, rented living space for those workers and storage space for the gold purchased. KML did not limit itself to buying gold from Miami (as *Nova Scotia* did by only having contractual rights over coal located in Venezuela) but set up an entire operation in Peruvian territory, and even explored the option of starting a refinery operation there.

173. *Seo Jin Hae v. Korea*¹⁵² was invoked by Peru but is, also, not comparable to the present case. There, the arbitration involved a "relatively modest" residential dwelling, in which the claimant actually resided (*i.e.*, the main purpose of the property was to serve as the home of the claimant), and of which claimant, sporadically, rented out a couple of rooms to tenants. The tribunal quite correctly concluded there that the home acquisition in Korea was not made with the expectation of profits:

¹⁵² *Seo Jin Hae v. Republic of Korea*, HKIAC Case No. 18117, Final Award, 27 September 2019, **RL-0191**.

126. The percentage to which the Property was rented out, as we found above, does not help in determining or inferring the predominant purpose because it is around 50%. However, the Tribunal finds it particularly relevant that for two years after having acquired the Property, the Claimant did not rent out any part of the Two-Story House other than to her parents. Similarly, between 2003 and 2007, only one of the two units not occupied by her parents was rented out. As the Claimant did not suggest that she tried but failed to find tenants during those years, this creates doubt as to whether, at the time the Claimant purchased the Property, and thus committed capital, she had intended the Property to serve as anything but a home to her family. In fact, the Claimant's family moved to the USA in 2004, i.e. the year after the Claimant started renting out the **Two-Story House**. As a result, the Tribunal finds it more likely that the Claimant had first purchased the Property for private dwelling and then decided, given the family's move to the USA, to rent out the rooms that were not occupied by her parents. On that basis, the Tribunal finds that the predominant use of the Property at the time of acquisition by the Claimant was not to serve as an income-generating investment.

Evidence:

RL-0191 (*Seo Jin Hae v. Republic of Korea*, HKIAC Case No. 18117, Final Award, 27 September 2019, ¶ 126).

174. Here, in contrast, it is abundantly clear that KML went into Peru expecting to make profits, and carefully studied the relevant market before making investments in Peru.¹⁵³ As

■■■■ explained:

¹⁵³ See, for instance, Analysis of the Peruvian gold industry, Ex. **AK-0002-ENG**.

18. To get information and market research, I met in person in Peru, among other people, with [REDACTED] (a businessman producing gold mined in Peru), and also people from competitor companies, like [REDACTED]. I have attached to this statement, as Exhibit AK-0002-ENG, an electronic document (which I believe constitutes a translation into English of information I originally obtained in Spanish) explaining the Peruvian gold market data and projections I obtained in 2012 (I believe this translation itself also dates back to 2012). This document (Exhibit AK-0002-ENG) contains data about the gold reserves that Peru had, trustworthy access to suppliers, entry barriers, competitors, and exports. Also, general macroeconomic projections and information about Peru (which was not all particularly relevant for KML, as our plans focused on exporting gold from Peru).

Evidence:

C-0103-ENG (Witness Statement-[REDACTED]-Claimant's Memorial-ENG, at ¶ 18).

175. There is simply no rational basis to assume that KML rented office space in Peru, started a gold assaying facility, rented an apartment for expatriates and transient employees, made local advertisements, contemplated expanding into a refinery, and hired personnel in Peru without the expectation of making profits.

176. Peru invoked *Joy Mining v. Egypt*,¹⁵⁴ which is also irrelevant here. That case only presented the question of whether or not bank guarantees could, in and of themselves, be considered an investment. The issue in that arbitration was simply whether the claimant was entitled to the release of certain guaranties tendered to the host State:

¹⁵⁴ *Joy Mining Machinery Ltd. V. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction, 6 August 2004, **RL-0179**.

47. The Tribunal is not persuaded by this argument either. Even if a claim to return of performance and related guarantees has a financial value it cannot amount to recharacterizing as an investment dispute a dispute which in essence concerns a contingent liability. The claim here is very different from that invoked in *Fedax* where the promissory notes held by the investor were the proceeds of an earlier credit transaction pursuant to which the State received value in exchange for its promise of future payment.¹³ This case will be discussed further below in the context of the Convention.

Evidence:

RL-0179 (*Joy Mining Machinery Ltd. V. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction, 6 August 2004, ¶ 47).

177. The foregoing is extremely distinguishable from KML's situation in Peru.

178. *Romak v. Uzbekistan*¹⁵⁵ is likewise inapposite to the present case. There, all the claimant did in the host country was to sell wheat to the government of Uzbekistan. Nothing else. The claimant did not have operations or offices inside the host State. The claimant even avoided risks by providing for payment by means of a "letter of guarantee" or "letter of credit." The risk assumed there by the claimant was therefore circumscribed to the possible non-payment of the wheat delivery.¹⁵⁶ The tribunal further concluded that the five-month span of wheat deliveries under the contract did not satisfy the "duration" requirement, as it did not reflect a commitment on the part of Romak beyond a *one-off*

¹⁵⁵ *Romak S.A. (Switzerland) v. Republic of Uzbekistan*, UNCITRAL, PCA Case No. AA280, Award, 26 November 2009, **RL-0198-ENG**.

¹⁵⁶ *Id.*, ¶ 231 ("It is clear from the evidence in the record of this arbitration that, at the time it entered into the wheat supply transaction, Romak knew that its exposure was limited to the value of the wheat to be delivered. Indeed, Romak sought to avoid even this risk by providing, in the Romak Supply Agreement, for payment by means of a "letter of guarantee" or "letter of credit." The risk assumed by Romak was therefore circumscribed to the possible non-payment of the wheat delivery, which is the ordinary commercial or business risk assumed by all those who enter into a contractual relationship.").

transaction and was not of the sort normally associated with investments according to the common understanding of the term.¹⁵⁷

179. KML, in contrast, could not be sure of a return when it started operations inside Peru, and did not know the amount KML was going to end up spending, even if all relevant counterparties discharged their obligations. KML simply could not predict the financial outcome of what it did, on the ground, inside Peru. For instance, KML had an office and operations in Peru, but it could not be sure that Peruvian suppliers would sell gold, continuously through the years, to KML. Changes in the price of gold supplies in Peru (over the years) also represented an important risk for KML. Nonetheless, KML continuously purchased gold in Peru from 2012 until 2018.

180. Peru also invoked *Poštová banka*,¹⁵⁸ where a Slovak bank dealt with the acquisition of interests in GGBs (bonds of sovereign debt issued by the government of Greece). *Poštová banka* did not allege the expropriation or mistreatment of a going concern business inside Greece. Because the profits of the bonds were “ascertained” and did not “depend on the success or failure of the economic venture concerned” (which was non-existent) the bonds merely exhibited *commercial* or sovereign risk, and therefore were not investments in the objective sense.¹⁵⁹ Therefore, Peru’s reliance on *Poštová banka* is entirely misplaced.

181. Peru further cites to another very distinguishable case, *Global Trading v. Ukraine*,¹⁶⁰ which solely involved sales contracts for poultry from U.S. exporters *into* Ukraine. The tribunal decided that the supplier’s outlay of money in performing a contract for the transboundary purchase (outside Ukraine) and sale of goods *into* Ukraine did not constitute an ‘investment’ in Ukraine. In that case, the allegation by the claimant was that imports *into* Ukraine had been severely limited, resulting in soaring domestic prices

¹⁵⁷ *Id.*, ¶ 227 (“In light of the facts before it, the Arbitral Tribunal considers that the duration of Romak’s wheat deliveries does not reflect a commitment on the part of Romak beyond a one-off transaction, and is not of the sort normally associated with “investments” according to the common understanding of the term.”).

¹⁵⁸ *Poštová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic*, ICSID Case No. ARB/13/8, Award, 9 April 2015, **RL-0194**.

¹⁵⁹ *Id.*, at ¶¶ 369-371.

¹⁶⁰ *Global Trading Resource Corp. and Globex International, Inc. v. Ukraine*, ICSID Case No. ARB/09/11, Award, 1 December 2010, **RL-0177**.

benefitting domestic poultry producers to the detriment of the Ukrainian consumer.¹⁶¹ It was also alleged that Ukraine failed to pay its contractual obligations for poultry produced *outside* Ukraine.¹⁶² That case involved measures that, in a forward-looking manner, only affected commercial contracts. No tangible (physical) assets were taken from the claimant, and the claimant did not have a physical presence or activities in Ukraine.

182. Here, KML is not alleging that contracts were breached by Peru, or taken away from KML by Peru. KML had physical assets taken from it, amid an ongoing operation that effectively lasted and endured from 2012 until 2018 in Peru.

183. Peru also invoked *Phoenix Action, Ltd. v. Czech Republic*, where it was stated that “[t]he duration criterion generally requires that the investment project be carried out over a period of at least two years.”¹⁶³ The Tribunal in *Phoenix* took into consideration that Phoenix had paid money in 2002 and did not sell its shares until 2008, concluding that the operation taken by Phoenix met the certain duration necessary, and did not bar the qualification of the investment.¹⁶⁴ Here, KML’s operations in Peru started in 2012 and ended in November 2018—that is undisputed (as of today).

184. The reality is that all investments normally involve commercial contracts, in one way or another, even if commercial contracts, alone or isolated, are not investments. All the arbitral awards cited by Peru on this issue demonstrate that the transactions involved in those other cases substantially differed from KML’s operation in Peru, regarding three clear factors:

- **Operational or investment risk:** KML assumed, and in fact faced, an operational or investment risk in Peru, not only the risks of a few isolated transactions of purchase. KML established ground operations to invest in multiple purchases (and the infrastructure required to make such purchases, and to process the gold), over

¹⁶¹ *Id.*, at ¶ 36.

¹⁶² *Id.*, at ¶ 39.

¹⁶³ *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, at ¶ 124 (quoting Respondent’s Memorial on Jurisdiction), **RL-0183**.

¹⁶⁴ *Id.*, at ¶ 125.

an indefinite period of time, without knowing with certainty what would happen with the operation. KML also considered establishing a refinery in Peru,¹⁶⁵ and planned to expand its market share in Peru.¹⁶⁶

- **Value-creating venture:** KML processed and assayed the gold inside Peru. Value was added to the gold itself. Also, KML contributed to the economy of Peru, beyond the purchase of gold, by paying commercial and residential leases (rentals of an office and an apartment),¹⁶⁷ attending marketing events,¹⁶⁸ making advertisements,¹⁶⁹ and hiring local personnel,¹⁷⁰ among other things.
- **Duration:** KML actually operated in Peru from 2012 to 2018 (seven years). This was not based on one or a couple of contracts with such fixed duration, but on multiple transactions (investments), and a track record that has been sufficiently established in this arbitration.¹⁷¹

185. In summary, Peru has quoted several cases (regarding a negative definition of what does not constitute an investment) out of context. Those cases are clearly distinguishable from the facts in this case. As previously described, KML did much more than simply entering into commercial contracts inside Peru. KML's assets in Peru constituted an investment under the TPA.

186. KML is not claiming the frustration or mistreatment by Peru of any particular or individual commercial contract. KML is claiming that Peru mistreated and expropriated

¹⁶⁵ Minutes of KML - Granting permission to study the opportunity to establish a gold refinery in Peru, **C-0049-ENG**.

¹⁶⁶ Witness Statement-[REDACTED]-Claimant's Memorial-ENG, at ¶ 39, **C-0103-ENG**; *see also* Witness Statement-[REDACTED]-Claimant's Memorial-SPA, at ¶ 6, **C-0105-SPA**.

¹⁶⁷ Claimant's Memorial, at ¶ 19; *also see*, KML lease agreement, payment vouchers and picture of apartment in Lima, Peru, **C-0035-ENG/SPA**.

¹⁶⁸ Records of participation of KML in the International Gold & Silver Symposium, **C-0026-ENG**; *also see*, Tweet from KML's official account about its participation in *Expomina Peru* 2014, **C-0099-ENG**.

¹⁶⁹ *Id.*

¹⁷⁰ Employment agreements between KML and [REDACTED], [REDACTED] and [REDACTED], **C-0037-SPA**.

¹⁷¹ KML transaction summary of all purchases between 2012 and 2018, **C-0030-ENG**.

KML's property, and KML itself as a going concern business enterprise. Ultimately, the expropriations occurred *in fact*: what KML had inside Peru, KML no longer has.

c. KML's investments were made in full compliance with Peruvian laws

187. Peru has alleged that KML's investments were made in breach of Peruvian laws. On the legality issue (which Peru itself framed regarding, strictly, KML's going concern expropriation, and lost profit claims¹⁷²) Peru turns back to the alleged illegality of the five shipments of gold.¹⁷³ Peru seems to want to separate or isolate issues when convenient to Peru, but then mix them back again when beneficial to Peru.

188. Peru has not pointed to any specific legal article, or concrete statutory norm, allegedly breached by KML.

189. Peru seems to have a *crystal-ball* certainty in trying to convince the Tribunal that the suppliers (sellers) of the five shipments of gold will be convicted in Peru, based on *indicia*.¹⁷⁴ The fact of the matter, however, is that those investigations were commenced in 2013-14 and as of August 05, 2022 (when Peru submitted its Counter-Memorial) the suppliers had not been convicted. Peru also does not explain why and how allegations of illegality against the sellers (suppliers) of gold *necessarily* means that KML itself acted illegally in any way. KML acted diligently and in good faith, even if, *arguendo*, some suppliers of gold did not.

190. In addition, it is a fact that as of November 08, 2018, those same sellers (suppliers) of gold were active, on the roster (registry) of RECPO,¹⁷⁵ and hence had been allowed to continue dealing in gold transactions in Peru.

191. As KML has demonstrated, *indicia* are not sufficient to convict anyone in Peru:

¹⁷² Peru's Counter-Memorial, at ¶ 328.

¹⁷³ *Id.*, at ¶ 375.

¹⁷⁴ Expert Report-Joaquín Missiego-Respondent's Counter-Memorial-SPA, at ¶¶ 65-66.

¹⁷⁵ Registro Especial de Comercializadores y Procesadores de Oro (RECPO), at pp. 26, 56, 57, 213, C-0010-SPA.

8. *¿Significan los indicios utilizados en las decisiones que incautaron los cinco (05) cargamentos de oro, según lo alegado por el abogado Joaquín Missiego en los párrafos ¶ 107, ¶ 109, ¶ 111 y ¶ 113 de su reporte, que la carga de probar la legalidad del origen del oro se invirtió o revirtió al investigado, supuestamente recayendo en los proveedores de KML?*

Respuesta corta: No. Los indicios referidos en el Informe emitido por el abogado Missiego solo sirven, a lo sumo, para justificar el inicio del trámite de una investigación o el mero inicio un juicio; y nada más. La carga de la prueba sigue recayendo (inclusive después de haberse encontrado indicios) sobre el Estado, que debe probar, **con prueba más allá de toda duda razonable**, la ilegalidad u origen ilícito del oro para tomar una decisión definitiva. **Conforme a la legislación peruana, indicios aislados y con escasa fortaleza son inidóneos para generar convicción respecto a la responsabilidad penal.**

Evidence:

C-0139-SPA (Second Legal Opinion-Dr. [REDACTED]-Claimant's Reply-SPA, at ¶ 8).

192. *Indicia* (in-dish-eeh-yah) is a Latin term meaning “signs,” or “to point out.”¹⁷⁶ For example, certain evidence or documents may indicate that something is probable. By definition, *indicia* are not sufficient for a conviction. The Arbitral Tribunal cannot be asked to make a “balance of probabilities”¹⁷⁷ to conclude that it is possible that perhaps some suppliers who sold gold to KML could be convicted of something in Peru; much less about the effects of such an uncertainty over KML itself.

193. Separately, Peru also alleged that KML is under a different investigation in Peru.¹⁷⁸ Peru has not demonstrated that such other alleged investigation is specifically connected to the five shipments of gold, nor that the investigation has progressed against KML, at all. With no progress in the alleged investigation against KML itself, and the fact that Peru

¹⁷⁶ Legal Information Institute (LII) legal dictionary: <https://www.law.cornell.edu/wex/indicia>.

¹⁷⁷ Peru's **Counter-Memorial**, at ¶¶ 374, 375.

¹⁷⁸ *Id.*, at ¶¶ 183, 252.

allowed KML to continue running its business in Peru until 2018, the only inference that can be made is that KML will not be indicted or convicted of anything in Peru, ever.

194. As of today, KML has not been indicted, much less convicted, of any crime, anywhere in the world. That is an absolute negative fact. All investments made by KML in Peru were made in accordance and in full compliance with Peruvian and international laws. Peru has not proven otherwise.

195. Even assuming that KML's investments were made in breach of Peruvian law (which, again, is not accurate), Peru's assertion that investments made in this manner are not protected by investment treaties or the ICSID Convention is simply not correct, as arbitral tribunals such as in *Bear Creek v. Peru*¹⁷⁹ have held:

319. In this context, the following wording of Article 816 of the FTA is of particular relevance: “*Nothing in Article 803 shall be construed to prevent a Party from adopting or maintaining a measure that prescribes special formalities in connection with the establishment of covered investments, such as a requirement that investments be legally constituted under the laws or regulations of the Party, [...]*.” Thus, Article 816 identifies the legality requirement as a “*special formality*” that the host State is entitled to adopt if it so wishes. Since nowhere in the FTA or otherwise in the record is there an express or implied provision of law to the effect that Peru made use of this option, it can only be concluded that there is no jurisdictional requirement that Claimant's investment was legally constituted under the laws of Peru.
320. The Tribunal agrees with Claimant that under international law, the Tribunal may not import a requirement that limits its jurisdiction when such a limit is not specified by the parties. Indeed, the above considerations distinguish the FTA from the treaties applicable in *Flughafen Zurich*, *Hamester*, *Inceysa*, and *Phoenix Action*, which expressly required compliance with the host State's law. In fact, the wording of the FTA provides further clarity, because not only does it not mention such a limit, but, by the wording cited above, provides that such a limit is considered a *formality* which would have to be expressly included to be effective. Here, no such formality was expressly included.

Evidence:

¹⁷⁹ *Bear Creek Mining Corporation v. Republic of Peru*, ICSID case No. ARB/14/21, Award (November 30, 2017), CL-0111-ENG.

CL-0111-ENG (*Bear Creek Mining Corporation v. Republic of Peru*, ICSID case No. ARB/14/21, Award (November 30, 2017), at ¶¶ 319-320).

196. The US-Peru TPA contains an article that is essentially identical to Art. 816 of the FTA analyzed by the tribunal in *Bear Creek v. Peru*:

Article 10.14: Special Formalities and Information Requirements

1. Nothing in Article 10.3 shall be construed to prevent a Party from adopting or maintaining a measure that prescribes special formalities in connection with covered investments, such as a requirement that investors be residents of the Party or that covered investments be legally constituted under the laws or regulations of the Party, provided that such formalities do not materially impair the protections afforded by a Party to investors of another Party and covered investments pursuant to this Chapter.

Evidence:

CL-0001-ENG (United States-Peru Free Trade Agreement, at art. 10.14.1).

197. There is no evidence either in the US-Peru TPA or in the record of this arbitration that supports Peru's intention to adopt this formality (legal requirement) for a claimant to access the investment protection mechanism contemplated in the US-Peru TPA. It cannot be concluded that KML's investment in Peru had to be made in compliance with Peruvian law in order for this tribunal to have jurisdiction to hear its claim. KML, in any case, fully complied with all applicable Peruvian laws.

198. Peru has simply not pointed to any specific law or regulation allegedly breached by KML itself. **Peru cannot be allowed to make up *post hoc* justifications after this arbitration was commenced by KML.**

C. *Ratione Temporis*

199. KML's Memorial of March 16, 2022, explained that the US-Peru TPA applies, *ratione temporis*, to all the facts and investments made by KML in Peru. Peru did not object to the application of the US-Peru TPA *ratione temporis*. This issue is hence settled for purposes of this arbitration.

200. Peru has, however, alleged that several (but not all) of KML’s treaty claims are time-barred. Peru asserted that the Tribunal does not have jurisdiction over several of KML’s claims, based on the three-year statute of limitations (*prescripción*) set forth in Article 10.18(1) of the TPA.¹⁸⁰

201. Peru has expressly conceded that its statute-of-limitations objections are not applicable to all of KML’s claims:

395. Kaloti submitted its Request for Arbitration on 30 April 2021. That means that the critical date for purposes of the three-year statute of limitations provision was **30 April 2018 (“Cut-off Date”)**. Accordingly, pursuant to Article 10.18.1, Peru has not consented to submit to arbitration any claims concerning an alleged breach of the Treaty if, *before* 30 April 2018, Kaloti already had knowledge—or should have had knowledge—of the relevant alleged breach, and of the alleged fact that it had suffered

loss or damage as a result of that breach. **Kaloti acquired or should have acquired such knowledge before the Cut-off Date in respect of all but one of its claims.**

Evidence:

Peru’s **Counter-Memorial** (at ¶ 395).

202. Peru’s admission is nevertheless misleading, back-handed, and pernicious: KML has not alleged several individualized breaches by Peru of Articles 10.3, 10.5 and 10.7 of the Treaty.

203. In this case, the record as a whole—not isolated events—determines that Peru breached its national treatment and fair and equitable treatment obligations, and performed creeping expropriations. Peru’s breaches resulted from a prolonged series of acts and omissions which, together, resulted in unfair treatment and expropriations of KML’s investments.

¹⁸⁰ TPA, at Art. 10.18(1), **CL-0001-ENG**.

a. KML met its burden of proving jurisdiction *ratione temporis* (statute of limitations)

204. KML complied with the three-year statute of limitations set forth in Article 10.18(1) of the TPA.¹⁸¹ Such article, combined with 10.16(1)(a) of the TPA,¹⁸² makes clear that the statute of limitations started running only when two concurrent conditions were met: (1) KML acquired knowledge that Peru breached the TPA; ***and*** (2) KML incurred loss or damage (*sufrió pérdidas o daños*) as a result of such breach. By its plain text, the TPA makes clear that a breach of such treaty by Peru, without *actual damages* (not only knowledge of *potential damages*), does not trigger the clock for purposes of Article 10.16(1). Then there has to be actual or constructive *knowledge* of such *actual* damages incurred by the claimant.

205. The statute of limitations must necessarily refer to the specific breaches, and the specific damages, claimed in this arbitration;¹⁸³ not to other claims, or different damages, even if some relevant facts overlap or overlay with other damages. The statute of limitations of Article 10.18(1) of the Treaty imposes a severe burden and restriction on KML's rights; hence, such article cannot be interpreted or applied broadly or freely.

206. There has to be a connection between the very specific breach alleged and the damages suffered. Any reference to other breaches, or different damages, even if there is an overlap in or of some facts, has never been found in investment arbitration, to be sufficient for the statute of limitations (*prescripción*) to start running.

207. Under the Treaty, damages can only start prescribing when they are *incurred*. Incurred is the word used in the TPA to define damages for purposes of the statute of limitations. The dictionary defines "to incur" as:

¹⁸¹ TPA, at Art. 10.18(1), **CL-0001-ENG**.

¹⁸² *Id.* at Art. 10.16(1)(a).

¹⁸³ No claim may be submitted to arbitration under this Section if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged under Article 10.16.1 ***and*** knowledge that the claimant (***for claims brought*** under Article 10.16.1(a)) or the enterprise (***for claims brought*** under Article 10.16.1(b)) ***has incurred loss or damage***. Article 10.18(1), Peru TPA (emphasis added).

to become liable or subject to : bring down upon oneself, *incur expenses*¹⁸⁴

208. In the official Spanish version of the Treaty, the relevant word corresponding to *incurred* is *sufrió*, derived from *sufrir*, which means <<*sentir físicamente un daño, un dolor, una enfermedad o un castigo.*>>¹⁸⁵ *Sufrió* refers to something actual and present, not to something potential that may happen in the future.

209. Importantly, Article 10.18(1) of the Treaty does not refer to <<any>> or <<some>> damages, without precision (regardless of their precise quantification). It refers specifically to damages ***for claims brought*** in arbitration (in Spanish: <<*por las reclamaciones entabladas*>>).¹⁸⁶

210. As the Vienna Convention on the Law of Treaties instructs, the US-Peru TPA must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of such treaty in their context and in the light of its object and purpose.¹⁸⁷ There is a contextual relation or association made in, and by, Article 10.18(1) between treaty breaches *and* damages incurred, which plainly requires a relationship in fact between those two concepts. There is no question that the Treaty requires knowledge of *both* for purposes of the statute of limitations, even if the knowledge of damages can be constructive. That the *knowledge* of actual damages by a claimant can be constructive (under the Treaty) does not mean that the damages can, themselves, fail to be actual (*i.e.*, real and incurred) in order to trigger the statute of limitations.

211. KML did not have knowledge of the specific Treaty breaches invoked in this arbitration until November 30, 2018. It was on such date when KML's investments lost all value. Hence, for purposes of the Treaty, damages for such breaches were not incurred before that date. Peru breached its TPA with the United States through violations that became actionable when their economic effects (damages to KML) were incurred as they became irreversible on November 30, 2018.

¹⁸⁴ Merriam-Webster online dictionary: <https://www.merriam-webster.com/dictionary/incur>.

¹⁸⁵ *Diccionario de la lengua española, Real Academia Española.*

¹⁸⁶ Art. 10.18(1), US-Peru TPA (emphasis added), **CL-0001-ENG**.

¹⁸⁷ Article 31(1) of the Vienna Convention on the Law of Treaties.

212. Peru never formally decided nor communicated to KML (before this arbitration) that the gold seized by Peru was not going to be returned to KML. There was simply no objective justification or reason to conclude otherwise before November 30, 2018.

213. Three <<conditions must be fulfilled [for the statute of limitations to start running]: the alleged breach must actually have occurred, the resulting damage must actually have been incurred, and the claimant must know, or be in a position such that it should have known, of these facts.>>¹⁸⁸

214. KML has established, to an objective standard, that it first acquired knowledge of the breaches and losses claimed after April 30, 2018 (the cut-off date). KML has shown that it has three causes of action (or main heads of damage) of which KML first became aware on November 30, 2018, when KML's investments lost all value. Those three claims (one for lost profits, and two for creeping expropriations) are independently justiciable, even if it may be appropriate to consider pre-April 30, 2018 conduct (actions and omissions) by Peru for purposes of determining that there was a subsequent breach by Peru of Treaty obligations.

215. All of KML's claims were timely submitted to arbitration because: (1) Peru's breaches of the Treaty constitute composite acts under international law; (2) KML did not have actual or constructive knowledge of its expropriation and lost-profits claims (Peru's treaty breaches) before November 30, 2018; and, (3) KML did not have actual or constructive knowledge of the specific damages—claimed in this arbitration—before November 30, 2018.

216. With the foregoing, KML has established, *prima facie*, that the statute of limitations did not lapse in this case. It is therefore incumbent upon Peru to demonstrate otherwise. KML cannot be forced to prove negative facts.

¹⁸⁸ *Resolute Forest Products Inc. v. Government of Canada*, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility, 30 January 2018, at ¶ 153, **RL-0137**.

217. KML has not alleged any treaty breaches in this arbitration that would have occurred before, outside, or afoul the statute of limitations.¹⁸⁹ Peru, in turn, has extensively claimed that no treaty breaches occurred, at all.¹⁹⁰ The parties, Claimant and Respondent, are hence in agreement that the US-Peru TPA was not breached before the statute of limitations lapsed. Therefore, in view of such agreement, the Arbitral Tribunal should not establish that a breach occurred before such time for purposes of calculating the statute of limitations. <<An investor cannot be obliged or deemed to know of a breach before it occurs.>>¹⁹¹

218. As other tribunals have stated:

[A]t the jurisdictional stage, a Tribunal must be guided by the case as put forward by the Claimant in order to avoid breaching the Claimant's due process rights. To proceed otherwise is to incur the risk of dismissing the case based on arguments not put forward by the Claimant at a great procedural cost for that party.¹⁹²

[I]t is for the investor to allege and formulate its claims of breach of relevant treaty standards as it sees fit. It is not the place of the Respondent State to recast those claims in a different manner of its own choosing. And the Claimant's claims, accordingly, fall to be assessed on the basis on which they are pleaded.¹⁹³

b. Peru's composite acts

219. It is clear that all of Peru's actions and omissions relevant in this arbitration had a common, very specific denominator (an object): five individualized shipments of gold purchased by KML in Peru, all within the span of just a few months; and the physical

¹⁸⁹ See generally **Claimant's Memorial**.

¹⁹⁰ Peru's **Counter-Memorial**, pp. 213-310. Peru should not be allowed to present a labyrinthine argument that no treaty breach occurred, but that if it did occur, it was before April 30, 2018 (the cut-off date).

¹⁹¹ *Eli Lilly and Company v. Government of Canada*, ICSID Case No. UNCT/14/2, Final Award, March 16, 2017, at ¶ 167, **CL-0134-ENG**.

¹⁹² *Infinito Gold Ltd. v. Costa Rica*, ICSID Case No. ARB/14/5, Decision on Jurisdiction, 4 December 2017, at ¶ 186, **RL-0143**.

¹⁹³ *ECE Projektmanagement v. The Czech Republic*, UNCITRAL, PCA Case No. 2010-5, Award, September 19, 2013, at ¶ 4.743, **CL-0138-ENG**.

possession and control of such gold by Peru. All actions and omissions were taken or incurred by the Republic of Peru itself (not by different territorial entities of that State). And, in this case, there is not one or two events in a series that can be readily or individually identified as those that destroyed the value of KML's investments.

220. All the relevant actions or omissions were incurred by the Republic of Peru (*strictu sensu*). Territorially, Peru is divided in regions, departments, provinces, and districts, all, and in addition to the Republic of Peru, are legal entities with *personalidad jurídica* to sue and be sued (*división o descentralización politico-territorial*), under Peru's Constitution.¹⁹⁴ This is similar to the legal division of the United States in federal, state, and county (territorial entities).

¹⁹⁴ Official English translation of the Political Constitution of Peru, **CL-0002-ENG**.

Article 189

The territory of the Republic is divided into regions, departments, provinces, and districts, in whose boundaries a government is exercised and organized at national, regional, and local levels in the terms defined by the Constitution and the law, preserving the integrity and unity of the State and the Nation.

The regional level of government consists of regions and departments. The local level of government consists of provinces, districts, and villages.

Article 191

Regional governments enjoy political, economic, and administrative autonomy on pertinent matters within their jurisdiction. They coordinate with municipalities without interfering with their functions and authorities.

The basic organic structure of these governments consists of the Regional Council as the regulatory and oversight body, the President as the executive organ, and the Regional Coordination Council formed of provincial mayors and representatives of civil society as a consultative body to coordinate with municipalities, with their functions and authorities set forth in the law.

The Regional Council shall have a minimum of seven (7) members and a maximum of twenty-five (25), with at least one (1) for each province, and the rest, in accordance with the law, determined by a criterion of electoral population.

The president, together with a vice president, is elected by means of direct suffrage for a period of four (4) years and may be reelected. The members of the Regional Council are elected likewise, and for the same term. The mandate of such authorities is, according to law, revocable but non-renounceable, except in the cases provided by the Constitution.

In order to run for the office of President of the Republic, Vice President, member of the National Parliament, or Mayor, the presidents of regional governments must resign their office six (6) months in advance of the respective election.

The law determines the minimum percentages to facilitate representation of women, rural and indigenous communities, and aboriginal peoples in regional councils. The same applies for municipal councils.*

Evidence:

CL-0002-ENG (Official English translation of the Political Constitution of Peru, arts. 189 and 191).

221. Peru has admitted that the following offices or agencies, in addition to SUNAT, participated, in one way or another, in the prolongation of the seizures of KML's gold:

115. In sum, the Prosecutor’s Office, the States Attorney’s Office, and the Criminal Courts are the main State actors in the context of criminal investigations and judicial proceedings.¹⁶⁶

Evidence:

Peru’s **Counter-Memorial** (at ¶ 395).

222. All of those offices or agencies form part of the Republic of Peru (as one and the same legal entity under Peru’s internal laws). Under Peru’s internal laws, they all act on behalf of the Republic of Peru (*strictu sensu*).

223. Even Peru’s own legal expert, lawyer Joaquín Missiego, has admitted and clearly stated that, here, all those offices or agencies acted in a coordinated manner, sharing information and goals, in connection with KML’s gold:

56. El experto de la Demandante aduce la existencia de una supuesta “coordinación previa” entre la SUNAT y el Ministerio Público.⁶⁶ No obstante, dicha afirmación se basa en una mera especulación y carece de fundamento legal alguno. Al respecto es necesario tener en claro que, si bien es cierto cada ente del Estado actúa de manera independiente, ello no significa que no deban informarse una a otra de los hallazgos o elementos que encuentran en el desarrollo de sus competencias. Por tanto, la comunicación entre las autoridades mencionadas no es ilegal ni irregular, sino por el contrario, es necesaria y adecuada para la lucha contra actividades que generan consigo sospechas sobre su legalidad.

57. Como se señaló, la Procuraduría de Lavado de Activos, la UIF, la SUNAT y cualquier entidad pública tienen el deber de remitir al Ministerio Público todos los documentos e información que tengan en su poder con relación a hechos que puedan ser constitutivos de delito⁶⁷. Lo anterior no es una simple recomendación o sugerencia, sino que incluso puede derivar en responsabilidad penal para los funcionarios que no cumplan con este deber, ya que podrían estar inmersos en el delito de Omisión de Denuncia, previsto y penado en el artículo 407 del Código Penal.⁶⁸ En este sentido, y tal como se ha señalado, no es

extraordinario que la SUNAT remitiera información sobre los Proveedores de Kaloti al Ministerio Público.⁶⁹

Evidence:

Expert Report-Joaquín Missiego-Respondent's Counter-Memorial-SPA
(at ¶¶ 56, 57).

224. As explained in Claimant's Memorial, the conduct of those Peruvian agencies and offices of the Peruvian government, together, constituted a composite wrongful act that caused lost profits to KML; and the indirect (creeping) expropriation of (1) KML's gold; and (2) KML's going concern business enterprise.¹⁹⁵

225. The tribunal in *Carlos Ríos and Fernando Ríos v. Chile*¹⁹⁶ explained the difference between simple wrongful acts and composite wrongful acts:

187. Según los Artículos REHII, un acto internacionalmente ilícito simple es aquel que no tiene un carácter continuo y, por lo tanto, "*occurs at the moment when the act is performed, even if its effects continue*".³¹³ La fecha en que ocurre la medida estatal constitutiva de un ilícito simple determina el momento a partir del cual el sujeto afectado puede adquirir conocimiento del ilícito en cuestión y de los daños resultantes.

189. Conforme a los Artículos REHII, el acto ilícito compuesto es aquel que resulta de una serie de acciones u omisiones estatales que, consideradas en su conjunto, son suficientes para violar una obligación internacional,³¹⁴ independientemente de que cada acción u omisión de la serie pueda asimismo constituir un ilícito respecto de una obligación distinta.³¹⁵ Esto a su vez requiere que el contenido de la obligación internacional implique que su violación sea el producto de una agregación de medidas, y no de un solo acto.³¹⁶ El ilícito compuesto "*'occurs' at the time at which the last action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act, without it necessarily having to be the last in the series*".³¹⁷

190. En caso de ilícitos compuestos, existe una medida estatal que, considerada en conjunto con los actos que la anteceden, consuma la violación de la obligación.³¹⁸ Es esta medida la que determina el momento a partir del cual un sujeto afectado es capaz de adquirir conocimiento de la violación y de los daños resultantes. El hecho de que otras acciones

Evidence:

¹⁹⁵ Claimant's Memorial, at ¶ 130-155.

¹⁹⁶ *Carlos Ríos y Francisco Ríos v. Republic of Chile*, ICSID Case No. ARB/17/16, Award, 11 January 2021, RL-0108.

RL-0108 (*Carlos Ríos y Francisco Ríos v. Republic of Chile*, ICSID Case No. ARB/17/16, Award, 11 January 2021, at ¶¶ 187, 189, 190).

226. The tribunal in *Infinito Gold v. Costa Rica*¹⁹⁷ explained that a three-year statute of limitations can only start running once a treaty breach has occurred, and that such moment (the occurrence of the breach) will vary and depend on the facts of each case. The pertinent factor for the statute of limitation is not when *some* relevant facts occurred, but when a treaty breach was *ultimately consummated*:

220. For the claims to be time-barred, Article XII(3)(c) requires the Claimant to have first acquired both knowledge of the alleged breach and knowledge that it has incurred loss or damage, prior to the cut-off date. The Tribunal notes that the BIT refers to knowledge of the alleged *breach*, and not to knowledge of the *facts* that make up the alleged breach. In other words, the limitations period only starts to run once the breach (as a legal notion) has occurred. While a breach will necessarily have been caused by facts, as discussed below, the moment at which a breach “occurs” will depend on when a fact or group of facts is capable of triggering a violation of international law.

Evidence:

CL-0053-ENG (*Infinito Gold v. Costa Rica*, ICSID case No. ARB/14/5, Award (3 June 2021), at ¶ 220).

227. The tribunal further explained that, for a composite breach to occur, the acts must not separately amount to the same breach as the composite act, and that the first act of the chain cannot amount to a breach by itself:

¹⁹⁷ *Infinito Gold v. Costa Rica*, ICSID case No. ARB/14/5, Award (3 June 2021), **CL-0053-ENG**.

in the measures impugned. The Commentary to ILC Article 15 makes it clear that, to amount to a composite breach, the various acts must not separately amount to the same breach as the composite act (although they could separately amount to different breaches).³²² It also clarifies that the breach cannot “occur” with the first of the acts in the series.³²³ Here, each of the measures could arguably amount separately to the same breach (an expropriation or a violation of FET), and the Claimant expressly alleges that the breach occurred with what it considers to be the first act in the series, namely, the 2011 Administrative Chamber Decision.³²⁴ The Tribunal will thus assess the measures as simple breaches.

Evidence:

CL-0053-ENG (*Infinito Gold v. Costa Rica*, ICSID case No. ARB/14/5, Award (3 June 2021), at ¶ 230).

228. In this case, KML has not alleged that each or some individual action by Peru breached the Treaty. In fact, KML has conceded that Peru could take temporary control of the gold, for a reasonably limited time, while investigations were conducted.¹⁹⁸

229. Here, the omissions and actions incurred by Peru on or before April 30, 2018 (cut-off date), are only sufficient to constitute an international wrongful act when taken, or *combined*, with the other omissions and actions that occurred after such date. The breach in this case is the extension and prolongation of investigations, and of the physical control of KML’s gold by Peru, for eight years (actions and omissions), until KML’s investments lost all value, without affording KML any transparency.

230. Had Peru returned the gold at any point to KML before November 30, 2018, and publicly cleared KML of investigations, the expropriation, and the lost-profits of KML, would not have been irreversible. This is because <<**a State cannot be held responsible for a deprivation of investment’s value or difficulties the investor faced as a consequence of the host State’s actions if such impediments are only temporary in nature and the financial situation of the investor has improved or is bound to**

¹⁹⁸ Claimant’s Memorial, at ¶ 119.

improve.>>¹⁹⁹ Here, KML would have been able to survive as a going concern enterprise business had Peru timely returned the gold any time before such date:

2.30. Second, I have been instructed to assume that the seized inventory was the legitimate property of KML, and that the same inventory remains in physical possession of Peru. From a purely economic and financial standpoint, I confirm that had KML received its inventory of gold (in 2018) KML could have remained a going concern. The loss of such inventory was itself sufficient to directly cause the insolvency of KML.

Evidence:

C-0140-ENG (Second Expert Report-Almir Smajlovic (Secretariat)-Claimant's Reply-ENG, ¶ 2.30).

231. The *raison d'être* of a statute of limitations is to promote legal certainty by avoiding that claimants delay bringing their claims. <<This being so, for the statute of limitations to start running, the claimant must be legally in a position to bring a claim. If a claim cannot be brought for legal reasons (for instance, because the claim is not ripe), it would be fundamentally unfair to find that the statute of limitations has started to run.>>²⁰⁰

232. Because Peru's violation of international law resulted from a composite act, all the breaches of the US-Peru TPA relevant in this arbitration occurred, and became actionable, on November 30, 2018, when KML's investments permanently lost all value.²⁰¹

c. Legal authorities distorted by Peru concerning the statute of limitations

233. Peru has prominently invoked what the United States asserted in *Renco v. Peru*.²⁰² But Peru conveniently omitted that the arbitral tribunal in that case actually held that: <<the three-year prescription period pursuant to Article 10.18.1 began to run [...] insofar as the

¹⁹⁹ Sanja Djajic, Petar Djundic, *Creeping Expropriation: In Search for a More Comprehensive Approach*, (2012), pp. 276, **CL-0133-ENG**.

²⁰⁰ *Infinito Gold v. Costa Rica*, ICSID case No. ARB/14/5, Award (3 June 2021), at ¶ 247, **CL-0053-ENG**.

²⁰¹ A creeping expropriation is a paradigmatic example of a composite act. See *Siemens v. Argentina*, Award, at ¶ 263-64, **CL-0018-ENG**.

²⁰² *The Renco Group, Inc. v. Republic of Peru [III]*, PCA Case No. 2019-46, Decision on Expedited Preliminary Objections, 30 June 2020, **RL-0145**.

Claimant's claim rests on [an] asserted breach>>. For purpose of the statute of limitations, there has to be a direct factual connection between an actual breach and the actual damages derived from such breach:

206. The Tribunal notes that the earliest breach asserted by the Claimant in this case is MEM's refusal on 10 March 2009 to grant an extension for the completion of the Claimant's sixteenth (and last) PAMA obligation. Accordingly, as the Claimant accepts that it acquired knowledge of the breach

on that day,²⁶³ the three-year prescription period pursuant to Article 10.18.1 began to run on 10 March 2009 insofar as the Claimant's claim rests on this asserted breach. The Tribunal finds it useful to focus its analysis of the prescription issue on this portion of the claim because, logically, if the first breach alleged by the Claimant is not time-barred under Article 10.18.1, the same holds true for all other breaches asserted in this arbitration.

Evidence:

RL-0145 (*The Renco Group, Inc. v. Republic of Peru [II]*, PCA Case No. 2019-46, Decision on Expedited Preliminary Objections, 30 June 2020, at ¶ 206).

234. The foregoing is consistent with the holding in *Spence International Investments, et al., v. Republic of Costa Rica*:

211. For purposes of Article 10.18.1, the relevant date is when the claimant first acquired knowledge not simply of the breach but also that they incurred *loss or damage* as a result thereof. The Tribunal agrees with the observation of the tribunal in *Corona Materials* that “knowledge of the breach in and of itself is insufficient to trigger the limitation period’s running; subparagraph 1 requires knowledge of breach *and* knowledge of loss or damage.”¹⁶³ While the text of Article 10.18.1 does not state in terms that the loss or damage in question must be as a consequence of the breach that is alleged, the Tribunal considers that this necessarily follows. It is a trite observation that a tribunal established under Chapter Ten of the CAFTA does not have competence to award monetary damages other than in respect of a breach that comes within its jurisdiction. It follows that the apprehension of loss or damage required by Article 10.18.1 concerns loss or damage that is incurred as a result of an alleged breach that falls within the tribunal’s jurisdiction. This point has a wider relevance as the converse necessarily follows, namely, that a tribunal does not have competence to award damages arising from a breach in respect of which it does not have jurisdiction. This is relevant in time-bar circumstances in which a series of associated actions may be divided up into those that meet the time-bar requirement, and are thus justiciable, and those that do not meet the time bar requirement, and are thus not justiciable. In such cases, the Tribunal considers that its jurisdiction to award damages will be necessarily linked to and constrained by the breach of which it is seised and over which it has jurisdiction.

Evidence:

RL-0138 (*Spence International Investments, et al., v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (Corrected), 30 May 2017, at ¶ 211).

235. Peru has alleged that nothing specifically attributable to Peru actually occurred on November 30, 2018;²⁰³ and made a bad-faith distorted reference to the *Spence* award (quoted above).²⁰⁴ However, in the most paradigmatic international case regarding indirect

²⁰³ Peru’s **Counter-Memorial**, at ¶ 446.

²⁰⁴ Peru has claimed that the <<words>> of the *Spence* tribunal suggested that the alleged <<termination of operations>> are not <<a distinct and legally significant event that is capable of founding [an expropriation] claim in its own right>>; Peru’s **Counter-Memorial**, at ¶ 423. However, the *Spence* tribunal made no analysis whatsoever about the significance of termination of operations, at all (*Spence International Investments, et al., v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (Corrected), 30 May 2017, **RL-0138**).

(creeping) expropriations, *Fearn Int'l, Inc. vs. Somalia*²⁰⁵ (decided in the context of the OPIC in 1973), it was recognized that an indirect expropriation crystalized when a <<**plant manager finally shut down operations**, and upon confirmation from the United States Department of State's representatives in Somalia, that no profit-making enterprise could continue under the circumstances>> (emphasis added).²⁰⁶ It has been stated that in <<[c]reeping expropriations, no obvious overt markers will exists to enable a tribunal to set the moment of valuation at some point before the **investor's contemporaneous conclusion** that it had been expropriated>> (emphasis added).²⁰⁷ Also, that <<where a slow accretion of interferences with the investor's management or control of the foreign enterprise results in the inability of the project to continue, determining the date of which "an action" created that result is an absurd exercise.>>²⁰⁸

236. It has been recognized that <<[i]f the 'State administration' measure is one that originally was conceived as only 'temporary' (and truly custodial) [like Peru itself has admitted its actions or measures to be in this case], then the diacritical date should commence as of the time the measure is determined to have ripened into a 'taking'>> (*i.e.*, an expropriation).²⁰⁹ In this case, such date is November 30, 2018, when KML became irreversibly damaged.²¹⁰ When <<temporary>> seizures are implemented by a State, a treaty breach is consummated when the investment's <<value [is] permanently destroyed.>>²¹¹

²⁰⁵ Pablo M. Zylbergait, *Opic's Investment Insurance: The Platypus of Governmental Programs and its Jurisprudence*, 25 Law & Pol'y Int'l Bus. 359, pp. 9, **CL-0112-ENG**.

²⁰⁶ Vance R. Koven, *Expropriation and the Jurisprudence of OPIC*, 22 HARV. INT'L. L. J. 269 (1981), pp. 291, **CL-0113-ENG**.

²⁰⁷ Indirect Expropriation and its valuation in the BIT Generation. W. Michael Reisman & Robert D. Sloane. Boston University School of Law (2004), at pp. 133-34, **CL-0071-ENG**. Also, in *Resolute v. Canada* the tribunal gave deference to the date when an investor closed an operation in Canada por purposes of establishing when an expropriation was effected, *Resolute Forest Products Inc. v. Government of Canada*, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility, 30 January 2018, at ¶¶ 163-164, **RL-0137**.

²⁰⁸ Indirect Expropriation and its valuation in the BIT Generation. W. Michael Reisman & Robert D. Sloane. Boston University School of Law (2004), at pp. 140, fn. 118, **CL-0071-ENG**.

²⁰⁹ Burns H. Weston, *Constructive Takings under International Law: A Modest Foray into the Problem of Creeping Expropriation*, 16 VA. J. INT'L L. 103 (1975), pp. 170, **CL-0114-ENG**.

²¹⁰ [REDACTED] letter dated November 14, 2018, **C-0137-ENG**.

²¹¹ See *Hydro S.R.L. et al. v. Republic of Albania*, ICSID Case No. ARB/15/28, Award, April 24, 2019, at ¶ 693, **CL-0132-ENG**.

237. The foregoing is consistent with applicable investment-arbitration case law.²¹² It has been held that in cases of creeping expropriations, the date of expropriation (that is, the date of the treaty breach) is the point in time <<when the owner has been *irreversibly* deprived of its property>>.²¹³ It is clear that when a seizure is deemed to be initially temporary, the date of the taking (*i.e.*, indirect expropriation) is that at <<which it is determined that there was no reasonable prospect that the property would ever be returned>>.²¹⁴ <<The gist of an expropriation is the loss of the property in question, as a result of a governmental taking (direct or indirect). Only when the investor is substantially or completely deprived of the attributes of property in an investment can there be an expropriation.>>²¹⁵

238. It is unsound and incongruous, to say the least, that Peru has repeatedly alleged in this arbitration that the seizure of KML's gold is still, as of today, not permanent, but rather interim or temporary (under Peruvian law), but that the right of KML to sue Peru in arbitration for the same seizure lapsed (prescribed) before the *permanent* loss of value, especially when Peru never told KML that KML's gold was not going to be returned:

²¹² For a summary of such case law, see: Doak R. Bishop, James R. Crawford, W. Michael Reisman, *Foreign Investment Disputes: Cases, Materials and Commentary (Second Edition)*, Chapter 8: Violations of Investor Rights Under Customary International Law (2014), pp. 583 – 752; **CL-0130-ENG**.

²¹³ *Rumeli Telekom AS and Telsim Mobil Telekomikasyon Hizmetleri AS v. Kazakhstan*, ICSID Case No. ARB/05/16, Award (21 July 2008), at ¶ 737; **CL-0029-ENG**.

²¹⁴ George C. Christie. *What Constitutes a Taking of Property Under International Law?*. 38 Brit. Y.B. Int'l L. 307-338 (1962), pp. 31; **CL-0131-ENG**.

²¹⁵ *Resolute Forest Products Inc. v. Government of Canada*, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility, 30 January 2018, at ¶ 154, **RL-0137**.

permanent.” As Prof. Missiego explains, a precautionary seizure is an interlocutory measure that may remain in force only during the pendency of preliminary investigations or criminal proceedings.¹⁰⁶⁷ Such measures are therefore, by their very nature, temporary, and is the case with the Precautionary Seizures. The latter remain in place, but would be lifted if the Criminal Courts ultimately determine that the suspected money laundering offenses that form the subject of the relevant criminal proceedings were not committed, and/or that the relevant shipments are not the

proceeds of crime. In that scenario, the assets in Shipments 1 to 4 would be returned to their owners.¹⁰⁶⁸

28. A la fecha de la presentación de este Informe, los cuatro procesos penales en contra de los Proveedores se mantienen vigentes y han sido tramitados de conformidad con la legislación peruana aplicable. Las medidas cautelares de incautación que afectan los cargamentos No. 1 a No. 4 también se han mantenido vigentes, conforme a las ordenes emitidas por el Poder Judicial en los respectivos procesos.

92. La incautación es común en procesos que son complejos y que involucran delitos especialmente graves, como lo es el lavado de activos. Al decretarse esta medida, se produce una limitación temporal a las facultades del dominio (uso, goce y disposición) que corresponden al dueño del objeto incautado. La Corte Suprema ha señalado que la incautación “es un acto de autoridad que limita las facultades del dominio respecto de bienes o cosas relacionadas, de uno u otro modo, con el hecho punible”.⁹⁵ Sin embargo, esta medida no produce el efecto de extinguir el dominio ni tampoco transfiere la propiedad del bien incautado hacia el Estado. Se trata, como hemos dicho, de una limitación temporal a las facultades del dominio que es permitida por el ordenamiento jurídico y considerada proporcional en relación a los fines perseguidos. En este sentido, no es correcta la

Evidence:

Peru’s **Counter-Memorial** (at ¶ 537).

Expert Report-Joaquín Missiego-Respondent’s Counter-Memorial-SPA
(at ¶¶ 28, 92).

239. Investors are not required <<to bring claims for possible future breaches on the basis of potential (and therefore necessarily hypothetical) losses to their investments or the increased risk of such losses.>>²¹⁶ Flexibility is intrinsically required even in fair-and-equitable treatment claims (including for denial of justice) when a State's actions and omissions constitute a composite act; claimants may rely on predicate facts beyond the limitations period as part of a viable claim.²¹⁷

240. Peru and its legal expert, lawyer Joaquín Missiego, seem to have a *crystal ball*, or some special insight, that has convinced them that [REDACTED], [REDACTED], [REDACTED] and [REDACTED] (the Suppliers) will be convicted in Peru.

235. Despite the above, the Criminal Proceedings have continued to advance, and in all four Criminal Proceedings there is now ample evidence of money laundering offenses.⁴⁷⁶

Evidence:

Peru's **Counter-Memorial** (at ¶ 235).

241. The fact is, however, that the Suppliers have, as of today, not been convicted in Peru, which leads to the unavoidable conclusion that, in spite of Peru's *crystal-ball* beliefs, the Suppliers can still be found to be innocent and cleared of any wrongdoing in Peru. Therefore, the seizure of the gold can theoretically be reversed, under Peruvian law, as of today; which does not detract from the fact that KML's investments lost all economic value (for purposes of the Treaty) on November 30, 2018.

²¹⁶ *Eli Lilly and Company v. Government of Canada*, ICSID Case No. UNCT/14/2, Final Award, March 16, 2017, at ¶ 169, **CL-0134-ENG**.

²¹⁷ Pedro J. Martínez Fraga, Joaquín Moreno Pampín, *Reconceptualizing The Statute of Limitations Doctrine in the International Law of Foreign Investment Protection: Reform Beyond Historical Legacies*, 50 N.Y.U. J. Int'l L. & Pol. 789 (2018), pp. 864-865, **CL-0135-ENG**. See also *Société Générale in respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S.A. v. Dominican Republic*, LCIA Case No. UN 7927, Preliminary Objections to Jurisdiction, 19 September 2008, at ¶ 91, **CL-0052-ENG**.

d. Actual or constructive knowledge of Peru's fair and equitable treatment, expropriation, and national treatment breaches

242. It is Peru who has the burden of proving its allegation that KML had knowledge (actual or constructive), before April 30, 2018 (the cut-off date), of the breaches and actual damages relevant in this arbitration. Such alleged knowledge by KML is an affirmative defense presented by Peru.

243. KML never alleged any expropriation, lost-profits, or national treatment claims; nor did it invoke application of Articles 10.3 and 10.7 of the US-Peru TPA in any way, before 2018. Peru did not consummate the relevant breaches of Articles 10.3, 10.5, and 10.7 until November 30, 2018. KML has never stated anything to the contrary.

244. To try to rely on the statute of limitations, Peru has alleged the existence of, and repeatedly referred to, a “First Notice of Intent” in connection with a letter sent to Peru by KML in May 2016.²¹⁸ Such letter, however, could not be “first” notice of intent, because it did not refer to the specific Treaty breaches, or concrete damages, claimed by KML in this arbitration. There is one, and only one, notice of intent relevant in this arbitration: the one dated April 8, 2019.²¹⁹

245. KML has been entirely transparent about what occurred in 2016. Specifically, in its memorial of March 16, 2022, KML acknowledged the existence of a 2016 letter sent by KML to Peru mentioning the US-Peru TPA.²²⁰ This was even mentioned by KML in its request for arbitration registered by ICSID on May 20, 2021.²²¹ KML did not produce a copy of such letter in this arbitration before because KML previously deemed it irrelevant *vis-à-vis* the specific treaty breaches and damages claimed in this arbitration.²²²

246. Peru, on the other hand cited such 2016 letter on many occasions throughout its Counter-Memorial, indicating specific paragraphs and even quoting its contents literally

²¹⁸ Peru's **Counter-Memorial**, at ¶¶ 414-418.

²¹⁹ KML's April 8, 2019, Notice of Intent, **C-0022-ENG**.

²²⁰ **Claimant's Memorial**, at ¶ 136 (“In 2016, KML warned Peru that Peru's actions could potentially become a future expropriation under the TPA (as it eventually happened on November 30, 2018).”).

²²¹ KML Request for Arbitration, dated April 30, 2021, at ¶ 85 and footnote 71 thereto, **C-0001-ENG**.

²²² A truthful copy of the entire 2016 letter is now being filed by KML today as **C-0158-SPA**.

and extensively (albeit selectively).²²³ Peru even included “First Notice of Intent” as a defined term in its Counter-Memorial.²²⁴

247. Conveniently, Peru neither submitted such letter as an exhibit, nor did Peru request the letter at the document production stage of this arbitration. The only logical conclusion that can be drawn is that Peru has been in possession of such letter (from which Peru quoted extensively), but deliberately decided not to produce a copy in this arbitration, because Peru knows that the content omitted by Peru does not favor Peru’s allegations. It is strange and unsettling, to say the least, that Peru failed to file or produce a document on which Peru so heavily purported to rely.

248. The fact is that the 2016 letter (wrongly called by Peru “First Notice of Intent”) contains the following paragraph that very explicitly, and without any room for doubt, made clear that no expropriation had occurred at the time:

67. Específicamente, el Perú:
(b) continúa ejerciendo un trato injusto y arbitrario que tiene el potencial de culminar en la expropiación de la inversión protegida de Kaloti, violando la obligación del Artículo 10.7 del Tratado; y,

Evidence:

C-0158-SPA (Communication addressed to the general office of international economic affairs, with competence in private investment, of the Peruvian Ministry of Economy and Finance, dated May 03, 2016, at ¶ 67 (b)).

249. The foregoing is faithfully translated into English as: <<[Peru] continues exercising an unfair and arbitrary treatment **which has the potential of culminating in the expropriation of the protected investment of Kaloti** in breach of the obligation of Article 10.7 of the Treaty>> (emphasis added).

²²³ Peru’s Counter-Memorial, at ¶¶ 414-418.

²²⁴ *Id.*, at p. ii.

250. The May 2016 letter also mentioned a breach of Article 10.8 of the Treaty, which KML has not alleged in this arbitration.²²⁵ Conversely, this arbitration includes claims for breach of Articles 10.3 and 10.7 of the Treaty, which were not mentioned as breached in the 2016 letter.

251. No expropriation occurred in this case (for purposes of the US-Peru TPA) before April 30, 2018 (the cut-off date). That is a fact consistent with (1) what KML has alleged in this arbitration, and (2) what KML believed and expressly told Peru in May of 2016.

252. The quotes and references made in Peru's Counter-Memorial to the 2016 letter show that, in fact, KML in 2016 only warned Peru that an expropriation *could potentially culminate or occur in the future*, but had *not* occurred in 2016. That is entirely coherent with KML's allegations in this arbitration, *i.e.*, that a creeping expropriation was consummated in 2018. It is clear that KML's claims only ripened on November 30, 2018. If anything, the May 2016 letter in question shows the extreme bad faith in Peru's conduct: KML's express repeated warnings did not stop Peru from actually culminating an expropriation in 2018.

253. In 2016, KML was actively trying to obtain the physical recovery of the actual gold seized by Peru. In fact, what Peru wrongly calls a "First Notice of Intent" is dated May 03, 2016, but KML continued efforts to recover the gold before local Peruvian authorities in the course of the Peruvian investigations, *after* such date:

²²⁵ Communication addressed to the general office of international economic affairs, with competence in private investment, of the Peruvian Ministry of Economy and Finance, dated May 03, 2016, at pp. 18, **C-0158-SPA**.

142. El 29 de abril de 2015, Kaloti presentó un escrito ante el Sexto Juzgado Penal del Callao (Expediente No. 3306-2014).¹⁹⁹ Mediante este escrito, Kaloti solicita la devolución del oro señalando que “[e]l Ministerio Público ha determinado que mi patrocinada [Kaloti] y sus representantes no tienen ningún tipo de responsabilidad”²⁰⁰. Sin embargo, como se ha explicado en el presente Informe, la incautación recaída sobre bienes de tercero no tiene vinculación con la responsabilidad penal de dicho tercero en la investigación o proceso. Como indiqué, esto aplica especialmente en el caso de investigaciones por lavado de activos, ya que normalmente ocurre que los imputados intentan ocultar o hacer desaparecer los bienes mediante el traspaso de los mismos a terceros que no necesariamente están involucrados en los hechos delictivos.
143. Luego, Kaloti presentó dos escritos adicionales, ambos de fecha 25 de mayo de 2016, cuyo contenido era prácticamente idéntico. Uno de esos escritos fue presentado dirigido al Octavo Juzgado Penal del Callao (expediente No. 3306-2014)²⁰¹ y el otro dirigido al Juzgado Penal Transitorio del Callao (expediente No. 3306-2014), de fecha 25 de mayo de 2016.²⁰² Mediante estos escritos Kaloti solicitó la devolución del oro. Sin embargo, Kaloti fundamentó sus pedidos invocando al acuerdo entre Estados Unidos y el Perú, y presentando una copia legalizada de su escrito de intención de someter al Estado Peruano a arbitraje²⁰³. Nuevamente, Kaloti invocó el derecho que no resultaba aplicable a fin de sustentar sus requerimientos.

Evidence:

Expert Report-Joaquín Missiego-Respondent’s Counter-Memorial-SPA (at ¶¶ 142, 143).

254. Peru’s own **Counter-Memorial**, at page 207, contains a chart acknowledging facts that occurred *after* May 2016, which Peru deems relevant in this arbitration. And such chart even conveniently left out multiple other actions and omissions directly attributable to Peru that occurred after May 2016.²²⁶ It is therefore evident that a May 2016 letter could not

²²⁶ See **Claimant’s Memorial** of March 16, 2022, specifically Appendix A thereto: *Summarized (non-exhaustive) chronological table of some relevant facts*.

have referred, mentioned, or demonstrated knowledge of, the composite treaty breaches, and damages, claimed by KML in this arbitration.

255. **There is no document, conduct or omission by, or attributable to, KML, showing that KML considered, or should have considered, its gold inventory permanently lost (legally or financially) before November 30, 2018.** Peru never told KML (before this arbitration) that the gold seized by Peru was never going to be returned to KML.

256. None of the selective quotes and references included by Peru in its Counter-Memorial, regarding the 2016 letter, mention an expropriation, a national treatment claim, or lost profits, at all. Peru's quotes and references show that KML did not claim—and did not know—in 2016 the lost-profit damages specifically claimed in this arbitration, caused by Peru's breach of Article 10.5 of the Treaty. KML never knew, invoked or mentioned lost-profits before April 30, 2018 (the cut-off date). That is an absolute negative fact.

257. Peru also invoked an *amparo* petition filed in Lima on March 11, 2014. However, the specific state actions challenged by that *amparo* referred only to *two* shipments of gold (sold by [REDACTED] and [REDACTED] to KML), and very specific (isolated) temporary immobilizations: *acta de inmovilización* No. 316-0300-2014-000110, and *acta de inmovilización* No. 316-0300-2104-000002, both dated January 10, 2014 –absolutely nothing more.²²⁷ Both of those *actas* were actually lifted, as Peru admitted here.²²⁸ The *amparo* was consequently withdrawn.²²⁹

258. Hence, what had occurred in Peru, until 2014, and was limitedly challenged by the *amparo* under Peruvian laws, did not constitute an expropriation for any purpose (among other things, because the very specific immobilizations then challenged were lifted). The *amparo* was simply only one of the many ways through which KML tried, but failed, to physically recover its gold from Peru –until the gold was finally expropriated in November

²²⁷ Amparo Request, Constitutional Court of Lima, 11 March 2014, **R-0230**.

²²⁸ Peru's **Counter-Memorial**, at ¶ 509.

²²⁹ Resolution No. 1, Approving Withdrawal, 2 June 2014, **R-0237**.

2018. It is simply irrelevant that the *amparo* mentioned the US-Peru TPA as a persuasive argument under which KML tried to convince Peru to return two particular shipments of gold to KML. The expropriation claimed by KML in this arbitration is legally and factually different.

259. The 2014 *amparo* and the 2016 letter did not mean or show that KML knew or should have known of a permanent expropriation or lost profits, since KML continued having hope, and actively pursuing the physical return of the gold by Peru.²³⁰ Such return could have even happened *sua sponte* because of the interim nature of the seizures.

260. More so, the *amparo* did not request or claim payment of damages; only the return of *two* shipments of gold. An *amparo* is an injunctive-relief petition, based on constitutional grounds, and is not an appropriate action under Peruvian law to recover damages from the Republic of Peru, in any way.²³¹ A constitutional injunction petition (*amparo*) that incidentally mentioned the US-Peru TPA without requesting damages did not, and could not, trigger the fork-in-the road provision of such Treaty.²³² KML never submitted its Treaty claims to any court or authority different from the Arbitral Tribunal here. KML's Treaty claims pertain to the recovery of damages (*i.e.*, money).

261. KML has alleged that a series of actions by Peru had an effect equivalent to a direct expropriation of KML's investments, without formal transfer of title or outright final seizure. This is a specific situation that requires a case-by-case, fact-based inquiry that considers, among other factors: (1) the economic impact of the government action; (2) the extent to which Peru's actions interfered with distinct, reasonable investment-backed

²³⁰ Witness Statement-[REDACTED]-Claimant's Memorial-ENG, at ¶ 57, **C-0103-ENG**; Second Witness Statement-[REDACTED]-Claimant's Reply-ENG, at ¶ 23, **C-0147-ENG**; Witness Statement-[REDACTED]-Claimant's Memorial-SPA, at ¶ 29, **C-0105-SPA**; Witness Statement-[REDACTED]-Claimant's Reply-ENG, at ¶ 23, **C-0146-ENG**.

²³¹ See Abad Yupanqui, Samuel B.: *El proceso constitucional de amparo en el Perú: un análisis desde la teoría general del Proceso*, Boletín Mexicano de Derecho Comparado, UNAM, 1996; **CL-0115-SPA**. See also: Abad Yupanqui, Samuel B.: *El proceso de amparo en el Perú: Antecedentes, Desarrollo Normativo y Regulación Vigente*, THĒMIS-Revista de Derecho de la Pontificia Universidad Católica del Perú N°67, pp. 293-307; **CL-0116-SPA**.

²³² Had an expropriation occurred in 2014 (*quod non*), Article 10.18(3) of the US-Peru TPA would have expressly exempted and excluded the *amparo* for purposes of the fork-in-the-road provision of such Treaty, **CL-0001-ENG**.

expectations of KML; and (3) the character of Peru's actions.²³³ In this case, there is not one or two events in a series that can be readily or individually identified as those that destroyed the value of KML's investments.

262. The US-Peru TPA is clear in the fact that an action or series of actions by Peru had an adverse effect on the economic value of KML's investment, standing alone, did not establish that an indirect expropriation, or lost profits, had occurred.²³⁴ Something more was needed: a permanent, irreversible effect on KML's rights.

263. The *Tecmed v. Mexico* tribunal held that state action constitutes an indirect expropriation when it is "irreversible and permanent," and when the assets have been affected in such a way that any form of exploitation has disappeared:

116. In addition to the provisions of the Agreement, the Arbitral Tribunal has to resolve any dispute submitted to it by applying international law provisions (Title VI.1 of the Appendix to the Agreement), for which purpose the Arbitral Tribunal understands that disputes are to be resolved by resorting to the sources described in Article 38 of the Statute of the International Court of Justice¹³² considered, also in the case of customary international law, not as frozen in time, but in their evolution.¹³³ Therefore, it is understood that the measures adopted by a State, whether regulatory or not, are an indirect *de facto* expropriation if they are irreversible and permanent and if the assets or rights subject to such measure have been affected in such a way that "...any form of exploitation thereof..." has disappeared; i.e. the economic value of the use, enjoyment or disposition of the assets or rights affected by the administrative action or decision have been neutralized or destroyed.¹³⁴ Under international law, the owner is also deprived of property where the use or enjoyment of benefits related thereto is exacted or interfered with to a similar extent, even where legal ownership over the assets in question is not affected, and so long as the deprivation is not temporary. The government's intention is less important than the effects of the measures on the owner of the assets or on the benefits arising from such assets affected by the measures; and the form of the deprivation measure is less important than its actual effects.¹³⁵ To determine whether such an expropriation has taken place, the Arbitral Tribunal should not

Evidence:

²³³ Annex 10-B, 3. (a), US-Peru TPA, CL-0001-ENG.

²³⁴ *Id.*, at Annex 10-B.

CL-0022-ENG (*Técnicas Medioambientales Tecmed SA v. Mexico*, ICSID Case No. ARB(AF)/00/2, Award (29 May 2003), IIC 247 (2003), 10 ICSID Reports 134, 191-92, 203 (2006), at ¶ 116).

264. In order to rise to the level of indirect expropriation, the loss of value, deprivation or government's interference with the investor's rights and property must be substantial, significant, or important, having an effect of *permanently* neutralizing or annihilating the control or property rights of the investor. As the *Infinito Gold v. Costa Rica* tribunal explained:

239. The majority of the Tribunal agrees with the Claimant that an expropriation could only have occurred with the 2011 Administrative Chamber Decision. For an expropriation to occur, the taking or substantial deprivation must be *permanent*, or at least not *ephemeral in nature*. More specifically, a judicial expropriation cannot occur through a

Evidence:

CL-0053-ENG (*Infinito Gold v. Costa Rica*, ICSID case No. ARB/14/5, Award (3 June 2021), at ¶ 239).

265. While Peru took some actions against KML prior to November 30, 2018, those did not constitute a permanent and "substantial deprivation" of KML's property until that date, as clearly and repeatedly explained in Claimant's Memorial.²³⁵ Therefore, no indirect expropriation, or lost profits, were incurred by KML, in this case, until November 30, 2018, when KML's investments permanently lost value.

266. Peru argues that KML's gold should have been written-off (for financial accounting purposes) before November 30, 2018, but Peru has not, and could not, argue that in reality the gold was actually written-off before November 30, 2018:

²³⁵ Claimant's Memorial, at ¶¶ 17, 34, 35-37, 158, 163.

Kaloti already argued that Peru had expropriated Shipments 2 and 3.⁹⁰⁷ That means that, based on Kaloti's own account of the facts: (i) it should have written off the value of the Five Shipments from its inventory long before the Cut-off Date; (ii) it had already become impossible for Kaloti repay its loan to [REDACTED] well before the Cut-off Date; and (iii) the alleged expropriation of Kaloti itself (not just of the Five Shipments) also had materialized before the Cut-off Date.

449. Brattle further explains that "KML consistently had a thin equity cushion for each year from 2014 onward (as well as in prior years)".⁹¹⁶ Therefore, and as reflected in **Figure 10** below, "a write-off of the inventories at any time from 2014 onward would have resulted in negative net equity of a magnitude similar to that which Mr. Smajlovic estimates as of November 2018".⁹¹⁷

Evidence:

Peru's **Counter-Memorial** (at ¶¶ 444, 449).

267. If something "would have resulted" it is because, in actual reality it did not result—until November 30, 2018. At the same time, paradoxically and incongruously, Peru argues in parallel that the insolvency of KML did not occur:

454. Finally, Claimant's argument that the expropriation of Kaloti as a company materialized only on 30 November 2018 also lacks merit because, contrary to what Claimant argues, the company did not in fact become insolvent as of that date. As Brattle explains, "the alleged insolvency is not supported by any evidence."⁹²⁴ Kaloti has failed to provide any evidence proving the "actual bankruptcy filing" they invoke,⁹²⁵ or any "contemporaneous documentation of efforts to restructure KML's debt".⁹²⁶ Further, "according to the company's 2018 balance sheet, KML did not take any write-down of the seized inventories" that year.⁹²⁷

Evidence:

Peru's **Counter-Memorial** (at ¶ 454).

268. Therefore, the question is: Is Peru alleging that KML's insolvency occurred well before November 30, 2018, or that it did not occur at all?

e. Actual or constructive knowledge of damages incurred

269. KML did not have actual nor constructive knowledge that the damages specifically claimed in this arbitration were incurred before November 30, 2018. It is important to stress, again, that under the Treaty the *knowledge* of a damage can be actual or constructive, but the damage itself must be actual (*i.e.*, incurred and irreversible) for the statute of limitations to start running.

270. None of the amounts or concepts currently being claimed in this arbitration were known or mentioned by KML before 2018. KML has submitted two very detailed and well substantiated damage reports from Mr. Almir Smajlovic of the consulting firm Secretariat Advisors, LLC (the Quantum Expert), which are self-explanatory. In summary, in this arbitration KML is claiming damages for the following concepts and amounts:

Table 1 – Summary of Damages to KML (Seized Inventory Valued at 18 November 2022)

Summary of Damages to KML			
	Total		Peru Only
Present Value of Lost Profits	\$	27,079,044	\$ 12,671,349
Value of Expropriated Business (Enterprise Value (EV))	\$	70,136,219	\$ 28,365,223
Damages Before Pre-Award Interest and Seized Inventory	\$	97,215,263	\$ 41,036,572
Pre-Award Interest Through December 2023 (LIBOR+4%)	\$	32,903,128	\$ 13,889,091
Total Damages With Pre-Award Interest, Before Inventory	\$	130,118,392	\$ 54,925,663
Value of Seized Inventory (November, 2022)	\$	24,554,340	\$ 24,554,340
Total Damages Including Pre-Award Interest	\$	154,672,731	\$ 79,480,003

Evidence:

C-0140-ENG (Second Expert Report-Almir Smajlovic (Secretariat)-
Claimant's Reply-ENG, table 1).

271. The foregoing damages are based, among other things, on breaches of Articles 10.3, 10.5, and 10.7 of the Treaty. Such damages (concepts and amounts), shown in the table above, are clearly different from the following to which Peru made a reference or quote regarding a 2016 letter from KML, and Articles 10.5 and 10.8 of the Treaty (only):

USD 17 million of immobilized and seized gold, as well as default interest of more than USD 2,498,577.00, loss in the fluctuation of the price of gold of more than USD 1,200,000.00 and legal defense costs and vault rental extension of more than USD 565,593.00.²³⁶

272. If the Treaty breaches invoked by KML in this arbitration had been incurred in 2016 (*quod non*), KML would have become *de facto* insolvent then, and would have sued Peru in investment arbitration sometime in 2017 or 2018. Instead, KML continued operating, and effectively buying gold, in Peru (and elsewhere) until 2018.²³⁷

273. Further, Peru itself has, as a minimum, acknowledged that some actions by Peru forming part of the composite breach alleged by KML, occurred after the cut-off date of April 30, 2018, *e.g.*, a July 2018 ruling of a First Criminal Liquidator Court, and an October 2018 resolution by the Third Civil Chamber of the Superior Court of Lima.²³⁸ At the risk of being repetitive, KML must stress, once again, that knowledge of some facts forming part of, or being conducive to, a subsequent Treaty breach do not amount to actual or constructive knowledge of such Treaty breach or damages actually incurred.

274. In connection with KML's lost profits claim (under Arts. 10.3 and 10.5 of the TPA), which relate to incremental cash flow lost until November 30, 2018, it is irrational and inapposite to pretend, like Peru does—for instance—that damages incurred by KML in 2018, corresponding to the 2017 and 2018 accounting periods, started prescribing in 2016. In fact, none of the lost profit damages incurred by KML (regardless of the year to which

²³⁶ Peru's **Counter-Memorial**, at ¶ 417. The May 2016 letter also made reference to moral damages of \$12 million, which are not being claimed in this arbitration; Communication addressed to the general office of international economic affairs, with competence in private investment, of the Peruvian Ministry of Economy and Finance, dated May 03, 2016, at pp. 18, **C-0158-SPA**.

²³⁷ KML transaction summary of all purchases between 2012 and 2018, **C-0030-ENG**.

²³⁸ Peru's **Counter-Memorial**, chart at the top of page 207.

they correspond for financial accounting purposes) could have started prescribing before they became permanent and irreversible.²³⁹

275. As explained in Claimant's Memorial,²⁴⁰ all damages claimed by KML in this arbitration would have been essentially made up (offset) had Peru returned the seized Gold to KML *before* November 30, 2018.

6.14 The actual triggering event which caused a permanent loss of the inventory value was therefore prompted by the KML's insolvency in November 2018. On or around 30 November 2018 the Company's management was unable to service debt of approximately \$12.6 million.¹⁵⁰ Absent Peru's Measures, KML would have had access to their seized inventory which had a FMV of approximately \$17.7 million on 30 November 2018.¹⁵¹ These funds would have been more than sufficient to settle the Company's debts.¹⁵²

Evidence:

C-0106-ENG (Expert Report-Almir Smajlovic (Secretariat)-Claimant's Memorial-ENG, at ¶ 6.14).

f. No damage or prejudice to Peru

276. The purpose of the statute of limitations set in the US-Peru TPA is to provide legal certainty, by precluding the prosecution of historic (old) claims.²⁴¹ One of the underlying

²³⁹ <<The rationale behind this condition is clear: a State cannot be held responsible for a deprivation of investment's value or difficulties the investor faced as a consequence of the host State's actions if such impediments are only temporary in nature and the financial situation of the investor has improved or is bound to improve.>> Sanja Djajic, Petar Djundic, *Creeping Expropriation: In Search for a More Comprehensive Approach*, (2012), pp. 276, **CL-0133-ENG**. This is the approach and test adopted by the *Infinito* tribunal regarding consummation of a treaty breach, *Infinito Gold v. Costa Rica*, ICSID case No. ARB/14/5, Award (3 June 2021), at ¶ 243 ("the drop [in market capitalization of the Claimant] could have been reverted had the outcome of the cassation remedy been favorable to Infinito"), **CL-0053-ENG**.

²⁴⁰ **Claimant's Memorial**, at ¶ 35.

²⁴¹ *Spence International Investments, et al., v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (Corrected), 30 May 2017, at ¶ 211), ¶ 208, **RL-0138**.

reasons for such preclusion is to assure that evidence is preserved and accessible, and that the respondent State can hence present an adequate defense.²⁴²

277. Here, Peru has been able to present defenses, with evidence. While Peru should lose this case on its merits or substance, Peru has not been prejudiced or adversely affected by the loss of evidence (lack of documents), loss of memory, or any other reason whatsoever related to the passage of time. This case was timely submitted to arbitration by KML.

278. The most relevant elements and documents required to adjudicate this arbitration are all, and have always been, in possession of Peru, not of KML. In fact, KML started this arbitration under a clear disadvantage due to a gross information asymmetry, because (before this arbitration) Peru never communicated to KML the factual and legal status of the gold seized by Peru, and of the relevant Peruvian proceedings.

279. Further, Peru voluntarily chose not to bifurcate this case,²⁴³ and freely decided to plea the statute of limitations joined to the merits of the case. That showed that Peru had internal confidence in its practical ability to present substantive allegations, and purported evidence, on the merits of this arbitration.

g. The most-favored nation clause of Article 10.4 of the Treaty

280. As explained above, KML has established to an objective standard that its claims against Peru were submitted to arbitration within the time limitation of Article 10.18(1) of the US-Peru TPA. However, if Tribunal finds (*quod non*) that the condition of Article 10.18(1) was not met by KML, the Tribunal should then conclude that Article 10.18(1) is not applicable by operation of Article 10.4 of the same Treaty.

²⁴² On the issue of the statute of limitations in investment arbitration, *see generally* Pedro J. Martínez Fraga, Joaquín Moreno Pampín, *Reconceptualizing The Statute of Limitations Doctrine in the International Law of Foreign Investment Protection: Reform Beyond Historical Legacies*, 50 N.Y.U. J. Int'l L. & Pol. 789 (2018), **CL-0135-ENG**.

²⁴³ Peru's letter dated April 15, 2022, stating that they will not be seeking bifurcation in this arbitration, **C-0149-ENG**.

281. Article 10.4 of the US-Peru TPA accorded most-favored treatment to <<the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investment>>²⁴⁴ of foreign investments, and <<the right to have recourse to international arbitration is very much related particularly to investors' maintenance of an investment.>>²⁴⁵

282. The US-Peru TPA is explicit in specifying what the MFN clause of its Article 10.4 excludes: <<Article 10.4 does not encompass dispute resolution mechanisms, such as those in Section B, that are provided for in international investment treaties or trade agreements.>>²⁴⁶ That is the only exclusion set forth by the parties to the Treaty in connection with the MFN clause. Such exclusion, by its own words, does not apply to the entirety of Section B (titled, <<Investor-State Dispute Settlement>>, generally) –it merely prevents a claimant from importing *mechanisms* (like arbitration before different centers or institutions, dispute boards, or appellate bodies) not set forth in the US-Peru TPA.²⁴⁷

283. Here, KML is not trying to import or use a dispute resolution mechanism not provided in the Treaty. KML is using ICSID arbitration, as contemplated in Article 10.16 of the Treaty.²⁴⁸ However, KML is entitled to benefit from the more favorable limitations period contained in the Peru-Australia FTA (42 months),²⁴⁹ the Peru-United Kingdom BIT,²⁵⁰ and the Peru-Italy BIT.²⁵¹ These last two treaties do not contain a limitations period, which means that, in this case, the time that KML took to submit its claims to arbitration

²⁴⁴ Art. 10.4 of the US-Peru TPA, **CL-0001-ENG**.

²⁴⁵ *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentina*, ICSID Case No. ARB/03/19, Decision on Jurisdiction, August 03, 2006, at ¶ 57, **CL-0139-ENG**.

²⁴⁶ US-Peru TPA, at pp. 10-2, fn. 2, **CL-0001-ENG**.

²⁴⁷ That is what a claimant tried to achieve, and a tribunal rejected, in: *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, February 08, 2005, **CL-0140-ENG**. It should also be noted that treaties are explicit when wanting to exclude more than mechanisms from MFN treatment, *see* Article 3(3) of the Argentina–Japan BIT, dated December 1, 2018: “[F]or greater certainty, the treatment referred to in this Article [Most-Favored-Nation Treatment] does not encompass international dispute settlement *procedures* or *mechanisms* under any international agreement” (emphasis added), **CL-0141-ENG**.

²⁴⁸ Art. 10.16 (3) of US-Peru TPA, **CL-0001-ENG**.

²⁴⁹ Art. 8.22, 1., of Peru-Australia FTA, dated February 12, 2018, in force since February 11, 2020, **CL-0120-ENG**.

²⁵⁰ Peru-United Kingdom BIT dated October 04, 1993, **CL-0121-ENG**.

²⁵¹ Peru-Italy BIT dated May 05, 1994, **CL-0119-SPA**.

must be analyzed under a reasonableness standard within an equity framework,²⁵² instead of a rigid three-year period. That would include consideration of the COVID-19 pandemic, that Peru alleged tolled certain periods.²⁵³

284. The clause in Art. 10.4 of the Treaty is broadly worded, and it would be textually and logically insupportable to limit its application to substantive protection matters. The manner in which a right is procedurally exercised is part of its substantive protection, and discrimination with respect to a statute of limitations would result in an unequal treatment of investments, for purposes of KML being able to invoke Articles 10.3 (national treatment), 10.5 (fair and equitable treatment) and 10.7 (expropriation) of the US-Peru TPA. MFN clauses can be used to access preferable procedural rights found in other treaties or avoid onerous procedural requirements in the principal treaty (US-Peru TPA).²⁵⁴

V. LEGAL BASIS FOR KML’S CLAIMS

A. The law applicable to the dispute

285. Under the choice-of-law rules of the ICSID Convention and the Treaty, KML’s claims are governed by the US-Peru TPA, and general international law, and—to the extent not inconsistent with both of the foregoing—by Peruvian law. Peru cannot escape or immunize itself from treaty breaches based on any alleged compliance with Peruvian laws.²⁵⁵

286. **The U.S.-Peru TPA.** The main source of law for the adjudication of KML’s claims is the Treaty. General principles of international law are also applicable to the merits of the

²⁵² Pedro J. Martínez Fraga, Joaquín Moreno Pampín, *Reconceptualizing The Statute of Limitations Doctrine in the International Law of Foreign Investment Protection: Reform Beyond Historical Legacies*, 50 N.Y.U. J. Int’l L. & Pol. 789 (2018), pp. 869-70, **CL-0135-ENG**. See also *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 08/12/2000, at ¶¶ 102-108, **CL-0030-ENG**.

²⁵³ **Expert Report-Joaquín Missiego-Respondent’s Counter-Memorial-SPA**, at ¶ 123.

²⁵⁴ *Emilio Agustín Maffezini v. The Kingdom of Spain*, Icsid Case No. Arb/97/7, Decision of the Tribunal on Objections to Jurisdiction ¶¶38-64 (25 Jan 2000) (Argentine claimant invoked the Chile-Spain BIT to avoid the requirement of bringing the case to a domestic court for eighteen months before submitting to arbitration by contending that the Chilean investors are treated more favorably than the Argentine investors because the Chile-Spain BIT does not contain a similar procedural provision).

²⁵⁵ US-Peru TPA, Article 10.22(1), **CL-0001-ENG**.

dispute, especially as they bear on the interpretation and application of the Treaty and the standards of investment protection that the Treaty sets forth.²⁵⁶ All breaches of the TPA specified in Claimant's memorial of March 16, 2022, must be considered in conjunction with Article 10.4 thereof, which contains a **most favored nation clause**.²⁵⁷

287. **Customary international law.** Customary international law is also applicable to the merits of the dispute, especially as it bears on the interpretation and application of the Treaty in furtherance of the notions of fair and equitable and full protection and security.

288. **Domestic Peruvian law.** Peruvian law, where applicable, provides that Peru had a duty to act reasonably and proportionally.²⁵⁸ This has not been disputed by Peru.²⁵⁹

289. The restatement of Peru's administrative procedure law stresses that administrative authorities must act in accordance with the legitimate expectations of private parties like KML.²⁶⁰ In criminal procedures, Peru has the burden of proving that crimes were actually committed.²⁶¹

290. One of the most relevant sources of Peruvian statutory laws in this arbitration is Article 2 of the *Ley N° 27379, de procedimiento para adoptar medidas excepcionales de*

²⁵⁶ See Vienna Convention on the Law of Treaties (Vienna Convention), at Art. 3, **CL-0043-ENG**.

²⁵⁷ TPA at Art. 10.4 ("[M]ost-Favored-Nation Treatment: [...] Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory. [...] Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments."), **CL-0001-ENG**.

²⁵⁸ Official English translation of the Political Constitution of Peru, at Art. 200, **CL-0002-ENG**; Ruling of the Constitutional Court in case No. 0010-2002-AI-TC, dated January 3, 2003, at ¶ 195, **CL-0012-SPA**; Peruvian Criminal Procedures Code, published on July 29, 2004, at Art. VI of the Preliminary Title and Art. 253.2, **CL-0005-SPA**; and Act N° 27444 (General Administrative Procedure Act) (modified by the legislative decree No. 1029 of 2008), published on April 11, 2001, at Arts. 238.1, 238.2 and IV, 1.4 of the Preliminary Title, **CL-0013-SPA**.

²⁵⁹ Decision of the Peruvian Constitutional Court No. 0592-2005-PA/TC, dated December 1, 2015, **CL-0117-SPA**.

²⁶⁰ See art. 1.15 of the Restatement of Law No. 27444, Law on General Administrative Procedure, approved by Decreto Supremo 004-2019-JUS, published on 25 January 2019 ("Las actuaciones de la autoridad administrativa son congruentes con las expectativas legítimas de los administrados razonablemente generadas por la práctica y los antecedentes administrativos, salvo que por las razones que se expliciten, por escrito, decida apartarse de ellos."), **CL-0118-SPA**.

²⁶¹ See Second Legal Opinion-Dr. [REDACTED]-Claimant's Reply-SPA, at ¶ 8; **C-0139-SPA**.

*limitación de derechos en investigaciones preliminares.*²⁶² Such article does not mention the seizure of assets owned by third parties, nor does it allow the unlimited extension of interim seizures:

²⁶² Act No. 27379 (Act regarding the procedure to adopt exceptional measures for the limitation of rights in preliminary investigations), dated December 21, 2000, **CL-0004-SPA**; *see also*, Precautionary Seizure against Shipment 1, 21 February 2014, **R-0134**; Precautionary Seizure against Shipment 2, 25 March 2014, **R-0135**; [REDACTED]. Ruling of the Superior Court of Justice of Callao – Permanent Criminal Court, April 30, 2014, **C-0090-SPA**; Precautionary Seizure against Shipment 4, 1 May 2014, **R-0136**; Resolution No. 1, Precautionary Seizure against Shipment 5, 20 March 2015, **R-0210**.

Artículo 2°.- Medidas limitativas de derechos

El Fiscal Provincial, en casos de estricta necesidad y urgencia, podrá solicitar al Juez Penal las siguientes medidas limitativas de derechos:

3. Incautación, Apertura e Interceptación de documentos privados, libros contables, bienes y correspondencia. Esta medida se acordará siempre que existan motivos perentorios para ello y resulte indispensable para asegurar las fuentes de prueba pertinentes al objeto de la investigación.

Tratándose de incautación de documentos privados, libros contables y bienes, se requiere además, que exista peligro de que su libre disponibilidad pueda afectar seriamente el éxito de la investigación y que estén vinculados al delito objeto de investigación. El Fiscal los retendrá hasta la culminación de la investigación preliminar o, en todo caso, por un plazo que no excederá de quince días, prorrogables por un plazo igual, previo requerimiento fundamentado del Fiscal Provincial y resolución motivada del Juez Penal.

Para la interceptación e incautación de correspondencia se exige, específicamente, que la medida guarde relación con el delito investigado y que resulte útil e inevitable para su comprobación. Realizada esa diligencia, corresponderá exclusivamente al Fiscal Provincial llevar a cabo la diligencia de apertura y examen de correspondencia, a cuyo efecto se levantará el acta correspondiente. El Fiscal Provincial examinará y leerá para sí el contenido de la correspondencia y si guarda relación con la investigación la retendrá e incorporará a las actuaciones. En caso contrario, mantendrá en reserva su contenido y dispondrá la entrega al destinatario.

El acta que se levante en cada intervención del Fiscal se pondrá inmediatamente en conocimiento del Juez Penal.

Evidence:

CL-0004-SPA (Act No. 27379 (Act regarding the procedure to adopt exceptional measures for the limitation of rights in preliminary investigations), dated December 21, 2000, art. 2.3).

291. All the contemporaneous Peruvian-government documents relating to the seizure of KML's gold were based, solely, on the above-referenced Article 2 of the *Ley N° 27379 de procedimiento para adoptar medidas excepcionales de limitación de derechos en investigaciones preliminares*.²⁶³ No other article or norm whatsoever was ever applied or invoked by Peru specifically in connection with the initial immobilizations, or the prolongation of subsequent seizures of KML's gold by courts.

292. To try to justify something that is unjustifiable, Peru (in its Counter-Memorial) and its legal expert, lawyer Joaquín Missiego, belatedly and untimely invoked in this arbitration Article 94 of Peru's Code of Criminal Procedure.²⁶⁴ Such Article states (as translated into English):

"Article 94.- Garnishment and Seizure At the time of opening an investigation or at any stage of the process, ex officio or at the request of the Prosecutor's Office or the civil party, the Judge:

a) May order a lien to be placed on the assets of the accused that are sufficient to cover the civil reparation. In the event of ordering the arrest of the accused, the Judge must issue such measure immediately.

b) Provided that there are sufficient indicia signs, the Judge may order the seizure of the objects of the criminal offense or the instruments with which the offense has been carried out as well as the effects, whether these are assets, money, profits or any product derived from the criminal offense. Where applicable, the Judge must also proceed in accordance with the special rules on the matter. The seizure of the effects, objects or instruments of the crime or any product derived from the criminal offense will be carried out, even if they are in the possession of natural or legal third parties, saving their rights in accordance with the law.

²⁶³ Act No. 27379 (Act regarding the procedure to adopt exceptional measures for the limitation of rights in preliminary investigations), dated December 21, 2000, **CL-0004-SPA**.

²⁶⁴ **Expert Report-Joaquín Missiego-Respondent's Counter-Memorial-SPA**, pp. 22-28.

c) The Judge shall inform the Provincial Prosecutor on duty of the Criminal Matters of the existence of effects, objects or instruments of the crime or any product arising from the criminal offense, for the purposes provided in the rule regulating the process of loss of ownership, attaching certified copies of the relevant procedural pieces. The measures provided for in the criminal process will remain effective until they are validated or lifted by the Judge of the loss of ownership process. In order not to disturb the evidentiary process in the criminal process under its responsibility, the jurisdictional body may request that the Judge of the loss of ownership process who has assumed competence by virtue of the provisions of the first paragraph of this section to make available the effects, objects or instruments of the crime or any product derived from the criminal offense for the necessary term. Likewise, the Criminal Judge may defer the delivery of the objects, effects or instruments of the crime to the Prosecutor or Judge who is hears the process of loss of ownership as long as they are indispensable for the evidentiary process of the criminal process under his or her responsibility. In all the cases indicated above, the respective notebook will be constituted. The appeal will be processed once the injunctive relief has been executed." (*)

Evidence:

R-0223 (Law No. 9024, Criminal Procedure Code, 23 November 1939, art. 94).

293. Article 94 cannot be used by Peru, *post hoc*, as basis for the past Measures taken over assets not owned by the *inculpados* in the relevant investigations.

294. Here, the only relevance of such article 94 could be, if any, the affirmative obligation of the judge to notify a Provincial Prosecutor of objects or instruments of a crime. That notification has not happened, so the necessary and unavoidable conclusion, which Peru cannot escape, is that no Peruvian judge has deemed that the gold seized was the object or instrument of a crime (otherwise the judge would be in breach of article 94(c)).²⁶⁵ Also, no loss of ownership or *pérdida de dominio* (eminent domain) has been asserted by any Peruvian authority over KML's gold.²⁶⁶ In this arbitration, therefore, Peru has implicitly alleged or posed (albeit *post hoc*) that the gold seized is being held by Peru under Article 94(a), and not under Article 94(b), of Peru's own Code of Criminal Procedure. (In reality, the correct and relevant norm is Article 2 of the *Ley N° 27379 de procedimiento para adoptar medidas excepcionales de limitación de derechos en investigaciones preliminares*, as explained above.)

²⁶⁵ Second Legal Opinion-Dr. [REDACTED]-Claimant's Reply-SPA, at ¶ 3.3, **C-0139-SPA**.

²⁶⁶ *Id.*

295. Peru has not demonstrated, or even alleged, that a judge has communicated to a prosecutor (*fiscal*) the existence of goods (assets) as instruments of a crime. Furthermore, Peru has not demonstrated, or even alleged, that a process of eminent domain (*pérdida de dominio*) of the gold has been commenced in the investigations relevant to this arbitration.

296. As to the gold relevant in this arbitration, which Peru has involved in its investigations, Article 96 of Peru's Code of Criminal Procedure states:

Artículo 96.- El inculpado podrá sustituir el embargo por caución o garantía real, que, a juicio del Ministerio Público, sea suficiente para cubrir su responsabilidad.²⁶⁷

297. Logically, such Article 96 (above) can only operate in connection with article 94(a) of the same Code. It would be incoherent to let an *inculpado* substitute or replace a seizure effected under Article 94(b) over objects or instruments of a crime; or let an *inculpado* receive back an object that such *inculpado* does not own.

298. The above-mentioned articles of Peru's Code of Criminal Procedure, belatedly invoked by Peru's Legal Expert in this arbitration,²⁶⁸ if deemed relevant, would imply that the gold seized by Peru is being held by Peru only for purposes of guaranteeing the civil (monetary) responsibility of the *inculpados* (i.e., [REDACTED], [REDACTED], [REDACTED], [REDACTED]). As has been explained above, however, at least three of those *inculpados* ([REDACTED], [REDACTED] and [REDACTED]) actually received payments (price) for the gold from KML; and the other one ([REDACTED]) communicated to the Peruvian government, in writing, that the gold seized was owned by KML.²⁶⁹

299. What is more important, Article 94 of the Code (if applicable) would require that the assets or goods seized be the property of an *inculpado*. KML is not an *inculpado* in the investigations being conducted by Peru. Hence, KML's property could only be held by Peru if KML was subsequently declared an *inculpado*.²⁷⁰ During the investigations, Peru could

²⁶⁷ Art. 96 of the Peruvian Criminal Procedures Code, published on January 16, 1940, **CL-0006-SPA**.

²⁶⁸ **Expert Report-Joaquín Missiego-Respondent's Counter-Memorial-SPA**, at ¶¶ 81, 94, 99, 120.

²⁶⁹ *Supra*, at ¶ 32.

²⁷⁰ Legal Opinion-Dr. [REDACTED]-Claimant's Memorial-SPA, pp. 10, **C-0107-SPA**.

initially take goods possessed (not owned) by third-parties only if those goods were objects or instruments of crimes, but Peru could not prolong the holding of such goods (as Peru in fact did here) without subsequently making the third-party an *inculpado*.²⁷¹

300. Under Peruvian law, Peru has the legal burden of proving any alleged or suspected wrongdoing by the sellers of gold, KML, or third parties. Such burden can only be met with actual proof (*plena prueba*).

8. *¿Significan los indicios utilizados en las decisiones que incautaron los cinco (05) cargamentos de oro, según lo alegado por el abogado Joaquín Missiego en los párrafos ¶ 107, ¶ 109, ¶ 111 y ¶ 113 de su reporte, que la carga de probar la legalidad del origen del oro se invirtió o revirtió al investigado, supuestamente recayendo en los proveedores de KML?*

Respuesta corta: No. Los indicios referidos en el Informe emitido por el abogado Missiego solo sirven, a lo sumo, para justificar el inicio del trámite de una investigación o el mero inicio un juicio; y nada más. La carga de la prueba sigue recayendo (inclusive después de haberse encontrado indicios) sobre el Estado, que debe probar, con prueba *más allá de toda duda razonable*, la ilegalidad u origen ilícito del oro para tomar una decisión definitiva. **Conforme a la legislación peruana, indicios aislados y con escasa fortaleza son inidóneos para generar convicción respecto a la responsabilidad penal.**

Evidence:

C-0139-SPA (Second Legal Opinion-Dr. [REDACTED]-Claimant's Reply-SPA, at ¶ 8).

301. It is clear that the *indicia* mentioned by Peru and its legal expert are inherently not sufficient for criminal convictions.

302. As to the ongoing (and unfinished) investigations, Peru's Legal Expert, lawyer Joaquín Missiego, explained that the relevant legal process in Peru has four stages or phases:²⁷² (1) preliminary investigation; (2) instruction (gathering of initial evidence); (3)

²⁷¹ *Id.*, at ¶ 6.1.

²⁷² **Expert Report-Joaquín Missiego-Respondent's Counter-Memorial-SPA**, pp. 22-28.

preparatory acts; and (4) *juzgamiento* (i.e., the actual trial). Those four phases do not include applicable appeals, nor additional special recourses like *casación*. In seven years, Peru has only completed the first two of the four phases.²⁷³ That means that the actual trial (*juzgamiento*)—which could potentially lead to convictions (or absolutions)—has not even begun.

303. It is also important that Peru breached its internal laws regarding the confidentiality of the investigations that mentioned KML or involved KML's gold. Peru itself has stated in this arbitration that <<Peruvian Supreme Decree No. 021-2019-JUS ('Law on Access to Public Information') provides under Article 16 that classified or confidential information in the form of police intelligence or operational plans as well as other documents that are part of investigations in the police stage are protected and therefore may not be disclosed.>>²⁷⁴

304. As to the confidentiality, Peru has also invoked here (when convenient to Peru) its own Criminal Procedure Code.²⁷⁵ In Peru's responses to Claimant's Redfern requests, Peru stated that Article 138.3 of its Criminal Procedure Code <<authorizes public authorities to obtain access to specific documents concerning criminal investigations and proceedings in order to satisfy legitimate public interests –such as the State's defense in international arbitration proceedings—, provided that the disclosure of the documents does not hinder the investigations or criminal proceedings and that the rights of third parties are not unreasonably affected.>> Further, Article 139 of the same Code makes very clear that all criminal investigations are confidential:

Artículo 139°. Prohibición de publicación de la actuación procesal.

1. Está prohibida la publicación de las actuaciones procesales realizadas cuando se está desarrollando la Investigación Preparatoria o la Etapa Intermedia. Asimismo, está prohibida la publicación, incluso parcial, de las actuaciones del juicio oral cuando se producen en los supuestos de privacidad de la audiencia.

²⁷³ *Id.*

²⁷⁴ Procedural Order No. 2, Annex 1, at ¶ 12, pp. 8.

²⁷⁵ Peruvian Criminal Procedures Code, published on July 29, 2004, **CL-0005-SPA**.

2. Está prohibida la publicación de las generales de Ley y de imágenes de testigos o víctimas menores de edad, salvo que el Juez, en interés exclusivo del menor, permita la publicación.

3. Cuando los sujetos procesales y demás participantes en las actuaciones procesales infrinjan esta prohibición, el Fiscal o el Juez, según el caso, están facultados a imponerles una multa y ordenar, de ser posible, el cese de la publicación indebida. Rige, en lo pertinente los artículos 110° y 111° del Código Procesal Civil.²⁷⁶

305. The Criminal Procedure Code and the Law on Access to Public Information invoked by Peru set affirmative duties upon Peru regarding the confidentiality of the relevant criminal investigations. Peru had a duty to protect such confidentiality, and to proactively prevent disclosures. The law imposed an affirmative confidentiality duty that Peru was bound to protect diligently.

306. KML did not disclose the existence of investigations in Peru. That is an absolute negative fact. Therefore, the existence of publicized investigation documents and content directly shows that Peru breached its confidentiality duty to protect such information from disclosure.

307. The disclosure of the investigations was an incident of a type that does not generally happen without negligence from Peru's public officials (including prosecutors), as it was caused by an instrumentality solely in Peru's control (the relevant files and dockets).

308. Peru has breached its own internal laws, and consequently caused damages to KML with the relevant breaches.

B. Peru failed to accord fair and equitable treatment to KML

309. In its Counter-Memorial, Peru stated that KML allegedly agreed that only the international minimum standard of treatment is relevant in this case for purposes of KML's lost-profits claim.²⁷⁷ That is grossly and patently false.

²⁷⁶ *Id.*, art. 139.

²⁷⁷ Peru's **Counter-Memorial**, at ¶ 469.

310. KML clearly stated that breaches of the TPA specified in KML's memorial must be considered in conjunction with Article 10.4 thereof, which contains a **most favored nation clause**.²⁷⁸ Annex 10-A of the Treaty does not in any way alter or affect the most favored nation (MFN) clause of the same treaty. The very purpose of an MFN clause is to introduce more favorable standards of treatment than those set out in the US-Peru TPA.

311. Here, Peru did breach the minimum standard of treatment referred in Article 10.5 of the US-Peru TPA. But Peru also breached other more specific or stringent standards of treatment agreed by Peru in other relevant treaties, which are hence applicable in this arbitration, and favor KML.

312. Peru had to observe (but breached with respect to KML's investments), among others, the following substantive standard of treatment stipulated in the Peru-Italy bilateral investment treaty:

Artículo 2 - Promoción y protección de inversiones

1. Ambas partes contratantes alentarán a los inversionistas de la otra parte contratante a invertir en su territorio.

[...]

3. Ambas partes contratantes asegurarán en todo momento un trato justo y equitativo a las inversiones de los inversionistas de la otra parte contratante. Ambas Partes Contratantes asegurarán que la administración, mantenimiento, uso, transformación, goce o asignación de las inversiones efectuadas en sus territorios por inversionistas de la otra Parte Contratante, así como las compañías o empresas en las que estas inversiones han sido efectuadas, no sean en manera alguna sujetas a medidas injustas o discriminatorias.²⁷⁹

²⁷⁸ **Claimant's Memorial**, at ¶ 97; and *see* Art. 10.4, US-Peru TPA ("[M]ost-Favored-Nation Treatment: [...] Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory. [...] Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments."), **CL-0001-ENG**.

²⁷⁹ Peru-Italy BIT dated May 05, 1994, **CL-0119-SPA**.

313. Peru also had to respect, but instead breached *vis-à-vis* KML's investments, the following substantive standard stipulated in the Peru-Australia Free Trade Agreement:

1. Each Party shall accord to covered investments treatment in accordance with applicable customary international law principles, including fair and equitable treatment and full protection and security.

2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligations in paragraph 1 to provide:

(a) "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and

(b) "full protection and security" requires each Party to provide the level of police protection required under customary international law.

3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.

4. For greater certainty, the mere fact that a Party takes or fails to take an action that may be inconsistent with an investor's expectations does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result.

5. For greater certainty, the mere fact that a subsidy or grant has not been issued, renewed or maintained, or has been modified or reduced, by a Party, does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result.²⁸⁰

314. Claimant hereby also relies on the MFN clause of the Treaty to import the fair and equitable standard of the Peru-United Kingdom bilateral treaty. Article 2(2) of the Peru-United Kingdom BIT provides:

²⁸⁰ Art. 8.6 of Peru-Australia FTA, **CL-0120-ENG**.

2. Investments of nationals or companies of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of nationals or companies of the other Contracting Party. [...]²⁸¹

315. In this case, the record as a whole—not isolated events—evidences and determines that Peru breached its fair and equitable treatment obligations. A breach of the fair and equitable standard, in this case, resulted from a composite act; that is, a series of acts and omissions which, on their own, might not constitute a breach of the applicable treaty. KML has not alleged that individual or isolated actions by Peru breached the Treaty.

316. Peru incurred in a creeping violation of the fair and equitable treatment standard (as defined above), which can be described <<as a process of extending over time and comprising a succession or an accumulation of measures which, taken separately, would not breach that standard but, when taken together, do lead to such a result.>>²⁸²

317. Peru has stated that it is investigating four potential money launderers (██████, ██████, ██████, and ██████). The consequences that Peru wants to impose on such alleged money launderers are that they must part ways with the gold inventory sold to a third party (KML), based on the seizures (and not any and all gold, but only specifically the gold sold to KML), but that they can keep any payments made to them by KML. From an economic standpoint, the alleged money launderers would incur no harm at all. They can, according to Peru, freely enjoy the proceeds from the sale of the gold to KML; and as sellers they would be in the same economic position as if no Measures had been implemented by Peru. In other words, the sellers or suppliers (not KML) are suspected of being money launderers, but in practice Peru wants KML to be the only one to suffer an adverse economic consequence.

²⁸¹ Peru-United Kingdom BIT dated October 04, 1993, **CL-0121-ENG**.

²⁸² *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 08/12/2000, at ¶ 95, **CL-0030-ENG**.

318. Peru did not go after other shipments sold (to any other person or company) by [REDACTED], [REDACTED], [REDACTED], or [REDACTED]; nor after the money received by those sellers from KML. Peru only pursued shipments of gold (tangible assets) specifically sold to KML. That has effectively demonstrated that KML was in practice the real target of Peru's arbitrary and discriminatory actions and omissions. **It is not fair and equitable for Peru to make KML bear the adverse economic consequences of the purported and potential, but so far unproven, alleged money laundering of others.**

a. Peru breached its commitment to treat KML fairly and equitably when it denied justice to KML

319. This case goes to the essence of fair and equitable treatment that Peru promised investors; namely, due process, including proper notice, and access to justice. These protections are bedrock foundations of the rule of law and represent the cornerstone of investment protection—impartial and effective judicial remedies are the touchstones through which an investor may protect and assert its property rights.²⁸³

320. Denial of justice can be occasioned by the behavior of a State's non-judicial authorities, not just its courts. According to the *Iberdrola v. Guatemala* tribunal:

Concluye el Tribunal que no solamente hay denegación de justicia en lo que respecta a las actuaciones de los órganos judiciales, sino también, entre otras hipótesis, cuando un Estado le impide a un inversionista el acceso a los tribunales judiciales de ese Estado; en ese supuesto habrá denegación de justicia aun si el acto proviene del poder ejecutivo o del legislativo.²⁸⁴

321. In this context, the *TECO v. Guatemala* tribunal identified denial of justice under the minimum standard of treatment as “a willful disregard of the fundamental principles upon which the regulatory framework is based, a complete lack of candor or good faith on

²⁸³ See, e.g., TPA, at Art. 10-5(2)(a) (highlighting the promise of due process and access to justice as central components of the Treaty's fair and equitable treatment protections), **CL-0001-ENG**.

²⁸⁴ *Iberdrola Energia S.A. v. Republic of Guatemala I*, ICSID Case No. ARB/09/5, Award, 17 August 2012, at ¶ 444, **CL-0050-SPA**.

the part of the regulator in its dealings with the investor, as well as a total lack of reasoning.”²⁸⁵

322. Peru’s measures—in *the aggregate*—culminated in the denial of KML’s due process, including lack of proper notice, and access to justice rights. Specifically, (1) Peru justified its seizure and holding of Claimant’s gold on the basis of *temporary* immobilization orders and temporary judicial seizures, which *effectively* became permanent on November 30, 2108 (when KML’s investments lost all value), thereby depriving KML of its property without due process of law; and (2) the Peruvian investigative and prosecutorial authorities neither charged, nor exonerated, KML with criminal wrongdoing, thereby exposing Claimant to undue delay, and kept KML in a legal black hole in which it could not assert its rights, causing irreversible damage to Claimant’s reputation and investments.

323. Here, the denial of justice, like the indirect expropriation, was the result of composite acts, accumulating over time to bring about a violation of the Treaty:

While normally acts will take place at a given point in time independently of their continuing effects, and they might at that point be wrongful or not, it is conceivable also that there might be situations in which each act considered in isolation will not result in a breach of a treaty obligation, but if considered as a part of a series of acts leading in the same direction they could result in a breach at the end of the process of aggregation, when the treaty obligation will have come into force. This is what normally will happen in situations in which creeping or indirect expropriation is found, and **could also be the case with a denial of justice as a result of undue delays in judging a case by a municipal court.** (emphasis added)²⁸⁶

324. The denial of justice by Peru against KML constitutes an integral and inseparable part of the composite breach by Peru of Article 10.5 of the US-Peru TPA, not an isolated breach.

²⁸⁵ *TECO Guatemala Holdings LLC v. The Republic of Guatemala*, ICSID Case No. ARB/10/17, Award, 19 December 2013, at ¶ 458, **CL-0051-ENG**.

²⁸⁶ *Société Générale in respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S.A. v. Dominican Republic*, LCIA Case No. UN 7927, Preliminary Objections to Jurisdiction, 19 September 2008, at ¶ 91, **CL-0052-ENG**.

a. Peru has permanently deprived KML of its property without due process of law

325. Peru has paid no compensation whatsoever to KML for the deprivation of property regarding the five shipments of gold. There is no Peruvian law stating that Peru can keep property, without compensation, when the actual owner of such property has not been convicted or even *inculpado* of a crime. Notably, KML has not been convicted or *inculpado* of any crime, anywhere in the world.

326. Peru wants to allow [REDACTED], [REDACTED], and [REDACTED] to keep moneys paid to them by KML, but deprive KML (and no one else) of the gold seized. Peru has gone so far as to state that [REDACTED] can keep Shipment No. 5 for itself (based on a court decision of 2022 regarding a civil dispute with KML).²⁸⁷ It seems that, from an economic standpoint and the burden of adverse economic consequences, Peru treats alleged money launderers (like [REDACTED]) better than KML, who has not been *inculpado* of any crime. Is Peru admitting that there were no legal or regulatory problems with Shipment No. 5? Or is a Peruvian court (that ruled *in 2022* that [REDACTED] is, in theory, the new purported owner of Shipment No. 5²⁸⁸) allowing [REDACTED] to benefit from purportedly illegally-mined gold or money laundering?

327. Peru's measures have deprived KML of the use and enjoyment of its gold assets and have destroyed the viability and value of KML's operations. These deprivations amount to the imposition, by Peru, of a criminal sanction (an adverse economic consequence of asset forfeiture) on an investor who was (1) never charged, (2) tried, or (3) convicted of having committed a crime. These measures amount to an elemental denial of due process, without any compensation.

328. *Peru denied Claimant the opportunity to present a good faith buyer defense.* Defendants and third parties whose assets are involved in money laundering investigations generally have the ability to articulate a *bona fide* purchaser (or good faith purchaser)

²⁸⁷ Peru's **Counter-Memorial**, at ¶¶ 35, 245.

²⁸⁸ Resolution No. 08, Supreme Court of Lima, Court Specialized in Asset Forfeiture of Lima, 14 June 2022, **R-0212**.

defense in order to show that they had no hand in the alleged wrongdoing.²⁸⁹ A *bona fide* purchaser defense posits that the buyer acquired the asset without knowledge of any wrongdoing on the part of the seller, and that the assets themselves were not illegally acquired.²⁹⁰

En ese orden de ideas, si el Estado Peruano, a través de la persecución penal a cargo del Ministerio Público, quisiera atribuir al comprador de mineral el delito de minería ilegal tendría que acreditar -más allá de toda duda razonable- no solo que el mineral tendría origen ilícito, sino que el comprador conocía de dicha condición. Esta posibilidad, dada las particularidades del presente caso, sería inviable.

Evidence:

C-0107-SPA (Legal Opinion-Dr. [REDACTED]-Claimant's Memorial-SPA, question N° 7).

329. Peru has not attributed any crime to KML. As to the good faith issue, it is clear that KML qualified as a *bona fide* purchaser:

²⁸⁹ See Arts. 913 and 914 of the Peruvian Civil Code, which set forth the presumption of good faith (Art. 913: “La posesión de un bien hace presumir la posesión de sus accesorios. La posesión de un inmueble hace presumir la de los bienes muebles que se hallen en él”; and Art. 914: “Se presume la buena fe del poseedor, salvo prueba en contrario. La presunción a que se refiere este artículo no favorece al poseedor del bien inscrito a nombre de otra persona”), **CL-0044-SPA**.

²⁹⁰ This should be reciprocally consistent and applied in Peru similarly to what the laws of the United States (a party to the US-Peru TPA) provide in connection with the rights of an “innocent owner” in civil forfeitures of assets. See General rules for civil forfeiture proceedings, 18 U.S.C. § 983(d), **CL-0104-ENG**.

3. *¿Qué elementos deben mediar para que un comprador sea considerado adquirente posterior de buena fe (subsequent good faith purchaser)? ¿Existe alguna ley peruana que otorgue derechos de propiedad a un comprador de buena fe? ¿Las circunstancias según los hechos del memorial protegen a KML como comprador de buena fe con derechos de propiedad en los cargamentos de oro?*

Respuesta corta: la transmisión de bienes muebles a *non domino* se ampara principalmente en el artículo 948 del CC: es necesario poseer buena fe y reputarse propietario. En mi opinión, las circunstancias narradas tanto en el memorial de KML como en el memorial de Perú de fecha 05 de agosto de 2022, y los documentos que he revisado, me permiten concluir que **KML calificó como comprador de buena fe** con plenos derechos de propiedad sobre los cinco cargamentos de oro.

3.1 KML actuó de buena fe. Estimó que los proveedores estaban en regla con base en la lista y documentos que revisó. Además, a ninguno de los proveedores se le había impedido, ni se le impidió posteriormente, continuar con su negocio de compraventa de oro en Perú (según tengo entendido).

3.2 Como tal, la compra del oro por parte de KML fue de buena fe. Si Perú tiene un presunto reclamo de que el oro pertenece a Perú por virtud de haber provenido de una minería ilegal o que el oro fue presuntamente parte de un plan criminal (lavado de dinero), primero, Perú debe comprobar eso con plena prueba; y segundo eso no afectaría, necesariamente, los derechos de propiedad de KML sobre el oro. Como tal, el oro debe entregarse al propietario legítimo con derechos de propiedad superiores. Los documentos que he revisado evidencian que no ha habido alegato de que hubo un delito específicamente en la adquisición de los 5 cargamentos comprados por KML en concreto. No bastaría condenar a los vendedores por lavado de dinero en general. Además, no he visto alegato de que KML entregó dinero o capital a los vendedores para lavar ese dinero, ni que el oro fue adquirido (por quien lo vendió a KML) con dinero sucio.

Evidence:

C-0139-SPA (Second Legal Opinion-Dr. [REDACTED]-Claimant's Reply-SPA, at ¶¶ 3, 3.1, 3.2).

330. At no point in time did Peru afford KML the opportunity to present a *bona fide* purchaser defense and thereby secure the release of its gold. KML delivered multiple petitions to Peru, which were appropriate and sufficient to put Peru on actual notice about the ownership of the gold seized:

5.12 Yerra el abogado Joaquín Missiego al sostener en su reporte que KML no recurrió las decisiones judiciales que afectaban su derecho de propiedad, pues los pedidos de KML expresaron su voluntad de que la propiedad afectada por la medida cautelar sea restituida. **Con estos escritos, no cabe duda de que el Estado peruano recibió notificación real y efectiva, a tiempo, de que KML era la propietaria legítima del oro.** Es de advertir que un presunto incumplimiento de las formas procesales por parte de KML, no imposibilita que el órgano jurisdiccional de respuesta a las peticiones de las partes interesadas: el principio de formalidad no se sobrepone al derecho a la tutela procesal efectiva.

Evidence:

C-0139-SPA (Second Legal Opinion-Dr. [REDACTED]-Claimant's Reply-SPA, at ¶ 5.12).

331. Multiple requests made by, or on behalf or for the benefit of KML, were simply *de facto* ignored by Peru,²⁹¹ even though **Peru never actually questioned KML's legal title to the gold seized, until August 05, 2022, when Peru filed its Counter-Memorial.**

332. Peru's lawyers have provided in this arbitration multiple *post hoc* explanations trying to justify that KML was, allegedly, not entitled to receive the gold back from Peru.²⁹² Such explanations, in addition to being incorrect, were never provided to KML before the filing of Peru's Counter-Memorial.

333. Peru has also questioned, belatedly, the procedural propriety of the multiple requests made by KML about the return of the gold.²⁹³ However, all those requests not only put Peru on actual notice about KML being the owner of the gold shipments, but were also appropriate and efficient under Peruvian law:

²⁹¹ See for instance petition before the Sexto Juzgado Penal del Callao, **C-0013-SPA**; Petition before the Octavo Juzgado Penal del Callao, **C-0014-SPA**; Petition before the Juzgado Penal Transitorio del Callao, **C-0015-SPA**.

²⁹² Peru's Counter-Memorial, at ¶¶ 45-47.

²⁹³ **Expert Report-Joaquín Missiego-Respondent's Counter-Memorial-SPA**, at ¶¶ 133-145; *also see*, Peru's Counter-Memorial, at ¶¶ 548-553.

5.6 Por ende, KML no estaba obligada a ejercer esas vías de defensa, las cuales eran, por su naturaleza, derechos (y no obligaciones) de KML. No puede castigarse ni penalizarse a KML por no haber ejercido esos derechos, considerando, adicionalmente, que la circunstancias demuestran que KML siempre fue prudente y proactiva en hacer saber al Estado peruano que KML era la propietaria del oro.

5.10 En mi opinión experta, KML realizó razonablemente los actos destinados a ejercer el derecho a la tutela procesal efectiva y poner fin a la vulneración su derecho de propiedad sobre el oro afectado cautelarmente, pero dichos actos fueron arbitrariamente rechazados por el Ministerio Público y el Poder Judicial, con la referencia genérica de que KML no era parte procesal.

Evidence:

C-0139-SPA (Second Legal Opinion-Dr. [REDACTED]-Claimant's Reply-SPA, at ¶¶ 5.6, 5.10).

334. KML's gold is KML's property, not the property of the suppliers who transferred the gold to KML in exchange (consideration) for a promise of payment. By sanctioning or adversely affecting KML, Peru has punished a third-party with regard to whom the State has never once articulated a rational connection to the investigation and criminal proceedings.

335. Although SUNAT initially seized KML's gold assets under temporary immobilization orders, and courts later issued temporary seizure orders, it has now been more than *eight years* since those orders were issued by a Peruvian authority. By any objective standard, this makes a mockery of the term "temporary." Despite having become *de facto* permanent in 2018 (when KML's investments lost all value), there was never any Peruvian court order or judgment making the seizure *de jure* permanent as a consequence of a conviction.

336. Peru did not even begin an eminent domain (*pérdida de dominio*) process in connection with the gold seized. Further, Peru has not put any prosecutor on notice regarding the gold seized being the object of a crime, as would be required by Article 94 of Peru's Code of Criminal Procedure (if applicable).

b. Peru failed to provide KML with fair and equitable treatment by holding a prosecutorial sword of Damocles over KML's head

337. The unreasonable length of time that Peru has taken to conclude the criminal proceedings and other investigations, and return KML's gold inventory constitutes a violation of the US-Peru TPA's fair and equitable treatment provision, especially as complemented by the MFN clause contained in such Treaty.

338. Peru has expressly stated that KML (itself, as an entity) has been, and continues to be, under investigation in Peru since 2015:

183. Kaloti also complains that Peru mentioned it in investigations concerning alleged money laundering schemes in relation to illegal mining.³³¹ Peru did not simply mention Kaloti in those investigations, but included it as an investigated party. The reference to Kaloti in such investigations was fully justified, because Kaloti had purchased large volumes of gold from multiple suppliers who in turn were suspected of having laundered money through the sale of illegally mined gold. In other words, Kaloti's involvement in those investigations was the result of its own questionable business choices. This is discussed in more detail in Section II.C.7 below.

Evidence:

Peru's **Counter-Memorial** (at ¶ 183).

339. Notwithstanding the foregoing, Peru never notified KML nor submitted here any document whatsoever concerning such investigation, which would have been about 7-8 years old by now, nor explained the progress of the investigation. Further, Peru has not attempted to explain which avenues were offered to KML to clear its name in these purported investigations. Quite the contrary: here, Peru has stated that it did not have reasons to respond to multiple requests and submissions made by KML in other investigations.

551. *Second*, as discussed in **Section II.C.4** above, Kaloti's four requests filed with the Prosecutor's Office—which sought the lifting of the Precautionary Seizures with respect to Shipments 1 to 4 and access to the investigation files with respect to the Suppliers—were not made in accordance with Peruvian law. This was because, *inter alia*: (i) the Prosecutor's Office lacks the legal authority to grant or lift a precautionary seizure that has been imposed by a criminal court;¹⁰⁹⁸ (ii) Peruvian law establishes that only investigated parties may have access to investigation files, and Kaloti was not a party to any of the relevant investigations;¹⁰⁹⁹ and (iii) Kaloti asked the Prosecutor to rely on evidence submitted to it with respect to its alleged ownership of one of the seized shipments, despite the fact that ownership of the gold was irrelevant to the issue of whether such gold was suspected to be connected with criminal activity, and whether a seizure order was justified.¹¹⁰⁰ Thus, as was the case with respect to the requests to SUNAT, there was no basis for the Prosecutor's Office to grant Kaloti's requests.

552. *Third*, Kaloti's requests to the Peruvian Criminal Courts were similarly unfounded. Such requests disregarded Peruvian law insofar as they ignored the specific judicial remedies that are available under Peruvian law to third parties to intervene in criminal proceedings or to assert property rights over seized assets. In other words, Kaloti

invented its own legal remedy, by simply sending letters to the Criminal Courts asking that such courts lift the Precautionary Seizures.

Evidence:

Peru's **Counter-Memorial** (at ¶¶ 551, 552).

340. Peru's own legal expert, lawyer Joaquín Missiego, did not mention any specific actions undertaken by Peru in those supposed investigations against KML. In fact, such expert did not actually mention any investigation about KML itself, whatsoever. KML has never been *inculpada* in the investigations in which Peru's expert stated that [REDACTED], [REDACTED], [REDACTED] and [REDACTED] were *inculpad*os.

341. While KML recognizes that a State has the right to take prudential measures in connection with a criminal investigation, no State is permitted to hold a prosecutorial sword

of Damocles over a party's head indefinitely. *This is especially so where an entity has not been made a defendant in a criminal proceeding*, and where the State has never articulated a clear and rational connection between the entity and the alleged wrongdoing. Peru's act and omissions with respect to Claimant manifestly run afoul of these limits and exceeds all parameters of reasonability and proportionality.²⁹⁴

342. The foregoing must be considered under the guide of Article 3 of Peru-Australia BIT,²⁹⁵ Article 2 of Peru-United Kingdom BIT,²⁹⁶ and Article 2 of Peru-Italy BIT.²⁹⁷

c. Peru denied KML fair and equitable treatment by treating similarly-situated investors differently in judicial proceedings

343. Peru failed to accord KML with fair and equitable treatment by failing to treat Claimant in the same way that it has treated other, similarly-situated investors. Discriminatory conduct is unlawful where "investors in like circumstances are subjected to different treatment without a reasonable justification."²⁹⁸

344. In 2013 and 2014, Peru carried out gold seizures against a number of purchasers in Peru, not just KML.²⁹⁹ No such purchaser affected was a Peruvian national.

345. Among the foreign purchasers was [REDACTED], a company based in Willemstad, Curaçao. Like KML, [REDACTED] also purchased gold from suppliers, and later exported it for re-sale. SUNAT and the Peruvian courts, however, treated [REDACTED] differently from KML.

346. Peru has acknowledged that SUNAT gave an express answer to [REDACTED] ("SUNAT rejected [REDACTED]'s objections").³⁰⁰ But SUNAT and Peru in general, including its courts, never provided any answer whatsoever to KML. Peru stayed silent *vis-à-vis* KML, and left

²⁹⁴ On reasonableness and proportionality, *see Tecmed v. Mexico*, at ¶¶ 122, **CL-0022-ENG**.

²⁹⁵ Art. 8.6 of Peru-Australia FTA, dated February 12, 2018, in force since February 11, 2020, **CL-0120-ENG**.

²⁹⁶ Art. 2 of Peru-United Kingdom BIT dated October 04, 1993, **CL-0121-ENG**.

²⁹⁷ Art. 2 of Peru-Italy BIT dated May 05, 1994, **CL-0119-SPA**.

²⁹⁸ *Muszynianka Spółka z Ograniczoną Odpowiedzialnością v. Slovak Republic*, PCA Case No. 2017-08, Award, 7 October 2020, at ¶ 515, **CL-0054-ENG**.

²⁹⁹ Peru's **Counter-Memorial**, at ¶ 565.

³⁰⁰ *Id.*, at ¶ 669.

KML in limbo. In fact, the first statements ever attempting to explain to KML why Peru did not return the gold to KML were provided to KML in 2022 in Peru's Counter-Memorial.³⁰¹

347. Because ██████ received a response from SUNAT, ██████ was able to file an appeal before a tax tribunal in Peru. KML, in contrast, has had nothing against which to formally appeal before a tax tribunal.

348. That tax tribunal ordered that certain gold be returned to ██████. SUNAT then appealed, but other subsequent decisions mentioned by Peru in its Counter-memorial still favored ██████.³⁰² Several Peruvian courts ordered that the gold be returned to ██████.

349. Peru stated that ██████ is not a similar situated comparator, because ██████'s gold was initially immobilized for the purpose of reviewing some documentation, whereas (according to Peru) KML's gold was seized for alleged money-laundering. That is false. The initial immobilizations of KML's gold were performed by Peru supposedly to check for documents:

³⁰¹ *Id.*, at ¶¶ 45-47.

³⁰² *Id.*, at ¶ 566.

7 DESCRIPCIÓN DE LOS BIENES				
7.1 N°	7.2 CANT.	7.3 U. MED.	7.4 DESCRIPCIÓN	7.5 OBSERVACIONES
01	50.50	Kg	BARRAS DE ORO CON CÓNIGO Y PESO APROXIMADO:	
			8056/1: 10.78 Kg; 8056/2: 10.69 Kg; 8056/3: 5.19 Kg; 8056/4: 5.30 Kg;	
			8056/5: 5.05 Kg; 8056/6: 4.20 Kg; 8056/7: 4.78 Kg; 8056/8: 4.51 Kg	
				CON LBY LAU: 93.80%
				01.02.11
8 OBSERVACIONES:				
9 SERVIDOR ADUANERO		10 MINISTERIO PÚBLICO		11 INTERVENIDO O RESPONSABLE
12 ENTREGA DE MERCANCÍAS AL ALMACÉN				
12.1 FECHA Y HORA:		12.2 NÚMERO DE DOCUMENTO DE RECEPCIÓN:		12.3 CON OBSERVACIÓN
				SI <input type="checkbox"/>
				NO <input type="checkbox"/>
12.3 REGISTRO Y FIRMA DE SERVIDOR QUE ENTREGA		12.4 NOMBRE, REGISTRO Y FIRMA DEL PERSONAL QUE RECIBE		

7 DESCRIPCIÓN DE LOS BIENES				
7.1 N°	7.2 CANT.	7.3 U. MED.	7.4 DESCRIPCIÓN	7.5 OBSERVACIONES
01	49.50	Kg	BARRAS DE ORO CON CÓNIGO Y PESO APROXIMADO:	
			8057-6: 5.25 Kg; 8057-5: 4.34 Kg;	
			8057-7: 5.15 Kg; 8057-8: 4.42 Kg; 8057-10:	
			4.97 Kg; 8057-9: 4.85 Kg; 8057-4: 5.19 Kg;	
			8057-2: 5.37 Kg; 8057-3: 4.85 Kg; 8057-1:	
			5.11 Kg.	
8 OBSERVACIONES:				
9 SERVIDOR ADUANERO		10 MINISTERIO PÚBLICO		11 INTERVENIDO O RESPONSABLE
12 ENTREGA DE MERCANCÍAS AL ALMACÉN				
12.1 FECHA Y HORA:		12.2 NÚMERO DE DOCUMENTO DE RECEPCIÓN:		12.3 CON OBSERVACIÓN
		SUNAT - ADUANAS		SI <input type="checkbox"/>
				NO <input type="checkbox"/>
12.3 REGISTRO Y FIRMA DE SERVIDOR QUE ENTREGA		12.4 NOMBRE, REGISTRO Y FIRMA DEL PERSONAL QUE RECIBE		

Evidence:

C-0040-SPA (Immobilization orders No. 316-0300-2013-001479, 316-0300-2013-001497, 316-0300-2014-000110, 316-0300-2014-000111, 316-0300-2014-000020, 316-0300-2014-000021, 316-0300-2014-000022, 316-0300-2014-000002, pp. 5, 9).

350. Then Peru states that the procedures available to █████ were not legally available to KML.³⁰³ That, in and of itself, is evidence of discriminatory treatment.

351. Peru also claims that Peru began a formal forfeiture (*proceso de extinción de dominio*) which made a formal determination about █████'s gold.³⁰⁴ Even though that determination was adverse to █████, it opened legal avenues for █████ to continue pursuing remedies in Peru. █████ received multiple responses from Peruvian authorities (some favorable and some adverse to █████).

352. In contrast, KML's main complaint in this arbitration is that no determination was ever made about KML's gold in over 7 years, and that KML received no response from Peru, at all. A determination against KML's gold, similar to the one made in █████'s case, would have opened legal avenues and recourses in Peru, of which KML was in practice and *de facto* deprived of by Peru.

353. KML does not know where █████'s gold is today. KML's Memorial of March 16, 2022, did not allege that █████ received its gold back from Peru, as such fact is irrelevant in this arbitration. What is important here is that █████ was given options and legal avenues that Peru denied to KML by *de facto* ignoring KML.

354. Peru, in response, made a mind-blowing argument: that it is actually better to leave KML's gold in limbo as opposed to making a formal (adverse) determination about such gold (that would have opened options of appeals).³⁰⁵ Peru claims that it was <<objectively

³⁰³ *Id.*, at ¶ 574.

³⁰⁴ *Id.*, at ¶ 577.

³⁰⁵ *Id.*, at ¶ 579.

justified in not upholding Kaloti's Intervention Request>>. ³⁰⁶ The problem is that ignoring KML's requests was not the same as not upholding them through formal responses—that were never provided to KML.

355. Instead of denying ██████'s request to intervene in proceedings—as they had done with Claimant here—the Peruvian courts allowed ██████ to assert its rights, which ██████ did. There was no reason for Peru to treat these two investors differently. Both Claimant and ██████ had gold seized under temporary immobilization orders in connection with investigations against certain gold suppliers in Peru. However, as shown above, Peruvian courts have indeed ruled in favor of ██████ in several instances, while KML was never even allowed to participate in the legal proceedings in which its gold was at stake.

d. Peru denied KML fair and equitable treatment by treating domestic (Peruvian) purchasers of gold differently from foreign purchasers

356. Peru also breached Article 10.3 of the TPA. ³⁰⁷ Despite both foreign and international gold buyers being purchasers of gold from the same Peruvian supplier base, Peru treated foreign purchasers much worse than it did the domestic buyers. As ██████ ██████ ██████ has explained, SUNAT only pursued asset seizures against the foreign purchasers, while none of the domestic purchasers had any of their gold seized. ³⁰⁸ In principle, there is no articulable reason for this difference in treatment—both the foreign and domestic (Peruvian) buyers were purchasing gold from the same suppliers.

³⁰⁶ *Id.*, at ¶ 581.

³⁰⁷ TPA, Art. 10.3, ([N]ational Treatment [...] Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory. [...] Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.”), **CL-0001-ENG**.

³⁰⁸ Witness Statement-██████████-Claimant's Memorial-ENG, at ¶ 48, **C-0103-ENG**.

48. I believe that the Peruvian government made sure that the gold was paid by KML first, as it preferred to affect, and accuse, foreign companies like KML, rather than Peruvian parties with local connections. KML did its homework correctly. The suppliers in Peru were paid by wire transfer from U.S. banks in Miami, and SUNAT (part of the Peruvian government) was well aware of that.

Evidence:

C-0103-ENG (Witness Statement- [REDACTED]-Claimant's Memorial-ENG, at ¶ 48).

357. Peru has complained that KML did not provide a comparator for purposes of Article 10.3 of the Treaty. But KML did provide a comparator, evidencing that Peru was grotesque in this breach. The comparator is: all Peruvian-national **purchasers** of mined and scraped gold in Peru in 2013 and 2014 for processing, assaying, and refining. In other words: Peruvian companies that invested or operated in Peru in the same business that KML invested.

358. Peru cannot reasonably claim that all gold produced in Peru between 2013 and 2014 was sold to foreign nationals for subsequent exports. Furthermore, Peru has not identified any Peruvian nationals similarly situated like KML (as purchaser—not seller—of gold in Peru) whose gold has been seized by Peru, because those were not Peru's target.

359. The following exhibits make clear that all of the companies that suffered immobilizations and seizures of gold in Peru in 2013 and 2014 were in fact foreign purchasers (not miners or sellers) of gold:

- News articles and books that replicated negative facts unfairly linked to KML by Peru, Exhibit **C-0051-ENG/SPA**.

- Netflix series *Dirty Money*, *Dirty gold* episode, season 2, episode 4. Documentary directed by Stephen T. Maing and written by Nurkan Aydogan, Exhibit **C-0098-ENG**.

360. The sellers of gold, in all the instances identified by the above-mentioned exhibits, were, naturally, Peruvian companies operating in Peru. But only the gold that such sellers sold to foreign purchasers was seized by Peru. In fact, Peru did not seize any other gold from the exact suppliers of the very same gold relevant in this arbitration (*i.e.*, [REDACTED], [REDACTED], [REDACTED]).³⁰⁹ Peru allowed those suppliers to continue operating in Peru, and did not take any other gold from them, except for, conveniently, the gold sold to foreign nationals like KML.

361. It seems like Peru, and its legal expert, lawyer Joaquín Missiego, consider that [REDACTED], [REDACTED], [REDACTED] and [REDACTED] are, or may be, potential money-launderers for bizarrely limited purposes (*i.e.*, only for Peru to take the gold that those companies sold to KML—and nothing more).

362. In contrast, the United States of America has prosecuted both Peruvian nationals and US nationals for illegal mining and money-laundering out of Peru.³¹⁰ (KML and its principals, as explained above, have never been charged or prosecuted in the United States.)

363. It is therefore clear that Peru breached Article 10.3 of the TPA.

e. Peru refused to engage in good-faith negotiations with KML

364. KML sent the Special Commission representing the State in Investment Disputes a notice of dispute in connection with these claims on April 8, 2019.³¹¹ KML received no

³⁰⁹ Registro Especial de Comercializadores y Procesadores de Oro (RECPO), at pp. 26, 213, 56, 57, **C-0010-SPA**.

³¹⁰ U.S. Attorney's Office, Southern District of Florida. *Four Peruvian Members of Multi-Billion Dollar, International Gold Money Laundering Scheme Indicted*. Article published on January 9, 2018, **C-0150-ENG**.

³¹¹ KML April 8, 2019, Notice of Intent, **C-0022-ENG**.

substantive response from Peru. KML also warned Peru in 2016 that the prolongation of temporary measures by Peru could result in an expropriation of KML's investments.³¹²

365. Peru, in turn, claims that it engaged in negotiations with KML in connection with the Treaty breaches relevant in this arbitration.³¹³ That is false, as will be explained below.

366. Under Article 10.15 of the TPA, the State has an affirmative obligation to engage in substantive discussions with a claimant in relation to a potential dispute. This obligation is all the more relevant here, where organs of the State (SUNAT, courts, and prosecutors) have been acting with virtually no transparency. The duty to negotiate is also implied by the principle of **good faith**, and by the cool-down period stated in Article 10.16(3) of the Treaty, which would have no *effet utile* if read as Peru has proposed here (*i.e.*, without an obligation to negotiate). The US-Peru TPA simply does not contemplate a six-month waiting period, before filing a request for arbitration, just for the sake of waiting.

367. Good faith is a general principle of international law, which in different forms permeates the entirety of international legal order and process. It is considered one of the basic principles governing the creation and performance of all legal obligations.³¹⁴

368. The principle of good faith required meaningful discussions triggered by the warning given to Peru by KML in May of 2016 (about a potential future expropriation), and by the filing of a notice of intent in 2019. Those have the potential to lead to constructive discussions that can help avoid—or narrow the scope of—a dispute. The Special Commission's obligation under the Treaty to engage in such negotiations is part of the commitment of transparency and good faith that Peru has committed to providing as part of the fair and equitable treatment standard of the Treaty, and the MFN clause contained in the Treaty.

³¹² Communication addressed to the general office of international economic affairs, with competence in private investment, of the Peruvian Ministry of Economy and Finance, dated May 03, 2016, **C-0158-SPA**.

³¹³ Peru's **Counter-Memorial**, at ¶ 589.

³¹⁴ *Nuclear Tests Case, Australia v. France*, International Court of Justice, Judgment of 20 December 1974, at ¶¶ 46, 49, **CL-0122-ENG**.

369. The 2013 award in *ConocoPhillips v. Bolivarian Republic of Venezuela*³¹⁵ made clear that the failure to negotiate compensation in good faith represented a breach of an international obligation, including after the respondent State there had received a trigger letter or notice of dispute.

370. Here, Peru has asserted that it engaged in negotiations with KML in 2017 and in 2021. Peru has pointed to **R-0030** and **R-0031** as purported evidence thereof. Again, as explained above, engagements or contacts by Peru with KML before 2018 are relevant in this arbitration only to show that Peru was warned by KML that an expropriation could be consummated in the future, as it was in fact consummated in 2018.³¹⁶ A simple reading of those exhibits show that all Peru did was to request information from KML, and to brush KML off. Peru did not comply with Article 10.15 of the US-Peru TPA.

371. The exhibits produced by Peru clearly evidence that Peru never made an offer of compensation to KML, nor did Peru even ask about amounts that KML would have been willing to accept to avoid litigation (arbitration). Peru only employed dilatory and distracting tactics to tire KML. And finally, on June 22, 2021, Peru through its lawyers told KML that Peru was unwilling to negotiate with KML.³¹⁷

372. From the dictionary: to negotiate is to confer with another so as to arrive at the settlement of some matter, to arrange for or bring about through conference, discussion, and compromise.³¹⁸ Mere talking and sending dilatory correspondence, which is what Peru did here, by definition did not equate to negotiating with KML —nor was it dealing with KML in good faith.

373. Peru's failure to negotiate in good faith with KML has a threefold effect or relevance in this case, as such failure:

³¹⁵ *ConocoPhillips Petrozuata B.V. et al v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Jurisdiction and the Merits, September 3, 2013, **CL-0123-ENG**.

³¹⁶ Peru has referred to what it has wrongly called a "First Notice of Intent" dated 2016; *see* **C-0158-SPA**. Peru stated that it engaged with KML in discussions after such 2016 letter.

³¹⁷ Peru's **Counter-Memorial**, at ¶ 316.

³¹⁸ Merriam-Webster online dictionary: <https://www.merriam-webster.com/dictionary/negotiate>.

- Formed an indivisible part of the creeping breach of the fair and equitable treatment standard provided in Article 10.5 of the Treaty (as combined with the Treaty's MFN clause);
- Furthered the breach of the expropriation provision of Article 10.7 of the Treaty; and
- Evidenced that Peru aggravated the dispute, which must be considered for quantum purposes, and for an order on costs of these proceedings (in the final arbitral award) against Peru.

374. The foregoing breaches of the fair and equitable standard, and related sub standards, specifically caused lost profits to KML, which are qualitatively and quantitatively separable from KML's expropriation claims. As further explained below in Section VI, the lost profits claim has been quantified in US\$ 27,079,044, without pre or post award interest.³¹⁹ Additionally, Peru performed indirect expropriations against KML without compensation.

f. KML's legitimate expectations

375. Peru's internal laws, and Peru's conduct (before the Treaty violations), created reasonable and justifiable expectations for KML to act in reliance of said conduct. The failure by Peru to honor those expectations caused KML to suffer damages. KML had a legitimate expectation that Peru was going to treat KML impartially, fairly, and even-handedly. Based on that, KML had actual, proven plans to purchase 45 tons of gold per year, and start a refinery of gold in Peru.³²⁰

376. KML legitimately expected that Peru was going to comply with its general regulatory framework in place at the time of KML's initial investments in 2012. KML expected that it could rely on buying gold only from sellers (suppliers) registered and in good standing with the Peruvian government, even though Peru now claims that such

³¹⁹ This amount includes value lost profits in 2018; but excludes value of expropriated business, and the value of seized inventory (gold).

³²⁰ [REDACTED] letter to KML dated September 10, 2013, **C-0047-ENG**; Minutes of KML - Granting permission to study the opportunity to establish a gold refinery in Peru, **C-0049-ENG**.

registration of suppliers was, in essence, good for nothing—just a useless piece of paper required by Peruvian laws:

92. Registering with RECPO is a simple and straightforward process: the registrant only needs to fill out a form containing basic information concerning its identity (e.g., name, identification number, address) and the type of commercial activity it conducts (e.g., buying, selling, and/or refining gold).¹⁰⁸ In fact, subsequent legislative proposals to reform RECPO have expressly noted the limitations of RECPO, including the fact that its registration form “does not establish any additional requirement to register in RECPO, nor does it contemplate a report of sale and purchase operations.”¹⁰⁹

94. Contrary to Kaloti’s arguments, the Suppliers’ registration with RECPO did *not* in any way guarantee — or even imply, or suggest — that the Suppliers were in “good standing with the Peruvian government.”¹¹¹ Anybody could register with RECPO. In fact, the State has expressly confirmed that “the RECPO does not have interoperability with other State administrative registries, in order to be able to cross-check information held by them.”¹¹² That is, RECPO does not exchange information with other State registries concerning issues such as criminal records or administrative proceedings initiated against entities registered with RECPO.

Evidence:

Peru’s **Counter-Memorial** (at ¶¶ 92, 94).

377. In 2012, Peru had in its books a stable and—in theory—predictable regulatory framework regarding the gold market, and Peru did not change such framework (KML has not claimed otherwise). KML studied, complied with, and relied on, such legal framework.³²¹ KML had objective expectations, not based on KML’s subjective considerations. However, Peru violated its own framework *vis-à-vis* KML, and applied such framework arbitrarily to KML’s investments in Peru.

³²¹ Witness Statement-██████████-Claimant’s Memorial-ENG, at ¶¶ 17, 18, 20, **C-0103-ENG**; Analysis of the Peruvian gold industry, **AK-0002-ENG**.

378. KML reasonably expected, among other things, that:

- If Peruvian laws provided for the confidentiality of criminal investigations, Peru would respect and guard such confidentiality (proactively avoiding leaks to the press).³²²
- KML would not be held under an apparent investigation, without any notice, resolution, or progress, since 2015 and until today.³²³
- Peru would provide an answer (even if unfavorable) to KML's multiple petitions to the government of Peru for the return of KML's gold.³²⁴
- Peru would finish or end (one way or another), in a timely manner, investigations regarding KML's gold.³²⁵ Such finish or end could have included (but did not include): (1) returning the gold to KML and clearing KML's name, (2) starting an eminent domain (*pérdida de dominio*) process against the gold, or (3) putting a prosecutor on notice that the gold seized was the object of a crime, as would be required by Article 94 of Peru's Code of Criminal Procedure (if applicable as Peru has argued in this arbitration).

379. In sum, KML did not expect to be placed in legal limbo or a black box by Peru, and left indefinitely unable, in practice and in substance, to defend KML's reputation, property and investments in Peru.

C. Peru's actions and omissions constitute an indirect (creeping) expropriation of KML's assets, as well as its business enterprise

380. Peru's actions and omissions resulted in two distinct—but related—indirect expropriations for which Peru owes KML compensation. **First**, Peru's seizure of the five

³²² Art. 16 of the Peruvian Supreme Decree No. 021-2019-JUS, Law N° 27806 (Law on Access to Public Information), dated December 11, 2019, **CL-0124-SPA**; also see, art. 139 of Peruvian Criminal Procedures Code, published on July 29, 2004, **CL-0005-SPA**.

³²³ Peru's **Counter-Memorial**, at ¶ 252.

³²⁴ Petition before the Sexto Juzgado Penal del Callao, **C-0013-SPA**; Petition before the Octavo Juzgado Penal del Callao, **C-0014-SPA**; Petition before the Juzgado Penal Transitorio del Callao, **C-0015-SPA**.

³²⁵ Second Legal Opinion-Dr. [REDACTED]-Claimant's Reply-SPA, at ¶¶ 7, 7.3, **C-0139-SPA**.

gold shipments constitutes an indirect expropriation of certain KML assets—namely, 448,566 net grams of gold. **Second**, the gold seizures triggered a downward spiral in KML’s Peruvian and worldwide business operations—all directly attributable to Peru’s actions and omissions—from which the company never recovered. As a result, Peru’s measures constitute an indirect expropriation of KML’s going concern business enterprise.

381. KML’s two expropriation claims are separably cognizable from KML’s lost profits claim because, under the TPA, the economic impact (lost profits), independently, may not have established that an indirect expropriation had occurred.³²⁶ The indirect expropriation was materialized when KML was forced to terminate operations on November 30, 2018.

382. Conduct by Peru, very similar to the prolonged measures explained in this memorial, has been found to be expropriatory. In *Tza Yap Shum v. Peru*, an ICSID tribunal held that SUNAT indirectly expropriated a Chinese investor’s investment in a Peruvian company by imposing interim measures that froze some of the company’s assets, and substantially impacted its ability to conduct business.³²⁷ Similar to what KML is submitting in this memorial, the arbitral tribunal there found that Peru’s conduct was not in compliance with international laws.

a. The concept of creeping expropriation

383. Article 10.7(1) of the TPA prohibited Peru from depriving investments of economic value without adequate compensation.³²⁸ But here, Peru took a “a series of cumulative steps which, [...] together,” have the effect of substantially depriving the covered investments of their economic value.³²⁹

³²⁶ TPA, Annex 10-B, at ¶ 3(a)(i), **CL-0001-ENG**; and see *LG&E Energy Corp. et al. v. Argentina*, ICSID Case No. ARB/02/1, Decision on Liability (3 October 2006), IIC 152 (2006), at ¶ 200 (holding that to constitute expropriation a deprivation of value has to be permanent and severe), **CL-0021-ENG**.

³²⁷ See *Mr. Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Award (5 July 2011), **CL-0080-SPA**.

³²⁸ See *Saluka Investments BV v. Czech Republic*, Partial Award (17 March 2006), PCA—UNCITRAL, IIC 210 (2006), at ¶ 266, **CL-0025-ENG**; and *Indirect Expropriation and its valuation in the BIT Generation*. W. Michael Reisman & Robert D. Sloane. Boston University School of Law (2004), **CL-0071-ENG**.

³²⁹ Rudolf Dolzer, Christoph Schreuer, *Principals of International Investment Law*, Oxford University Press, 2008, pp. 114, **CL-0137-ENG**.

384. “The relevant focus of the inquiry for this purpose is the effect or result of the measure.”³³⁰ A “creeping expropriation is a particular type of indirect expropriation, which requires an inquiry into the particular facts” and the use of “creeping” to “describe this type of expropriation indicates that the entirety of the measures should be reviewed in the aggregate to determine their effect on the investment rather than each individual measure on its own.”³³¹

b. Peru’s measures constitute an indirect (creeping) expropriation of KML’s gold assets (inventory)

385. Peru’s cumulative measures and omissions over the past *eight years* compel the conclusion that Peru will not return the seized gold to KML, and that the gold has been indirectly expropriated by the State. The following sequence of actions and omissions demonstrate this:

- SUNAT seized five shipments of gold belonging to KML on the pretext that it needed to verify the origin for the gold. This was a baseless reason for the seizure because KML had already presented origin verification documents to SUNAT;³³²
- SUNAT’s justification for the immobilization changed when it sought a court order for the gold shipments *on a different ground*. Later, SUNAT alleged that seizure of the gold was necessary to support a money-laundering investigation involving gold suppliers,³³³ but failed to articulate why KML—the buyer—was under suspicion of any wrongdoing; in the meantime, the temporary and interim holding of gold owned by KML continued (initial immobilizations were morphed into judicial seizures);³³⁴
- Peru later mentioned, and generically included, KML in a supervening anti money-laundering investigation without any rationale (an investigation that has neither

³³⁰ *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic*, ICISID Case No. ARB/09/1, Award, July 21, 2017, at ¶ 948, **CL-0125-ENG**.

³³¹ *Id.*

³³² **Claimant’s Memorial**, at ¶ 40.

³³³ *Id.*

³³⁴ See Act No. 27379 (Act regarding the procedure to adopt exceptional measures for the limitation of rights in preliminary investigations) dated December 21, 2000, at Art. 4, **CL-0004-SPA**; and Legal Opinion-Dr. [REDACTED]-Claimant’s Memorial-SPA, question N°5, **C-0107-SPA**.

- progressed, nor been terminated since 2015),³³⁵ but **Peru has not pointed to any specific legal article, or concrete statutory norm, allegedly breached by KML;**
- The Peruvian press began writing stories about the investigations affecting KML and KML's five shipments, tarnishing Claimant's business reputation in Peru.³³⁶ Given that the alleged money-laundering investigation was strictly confidential, it stands to reason that *the Peruvian Government was the source of these damaging leaks to the press* (this has been Peru's practice in other cases in the gold industry³³⁷). Peru breached its duty to protect the confidentiality of the investigations, set forth, among other sources, in **Article 16 of the Peruvian Law on Access to Public Information, and Articles 138 and 139 of the Peruvian Code of Criminal Procedure;**
 - Despite the judicial seizures of the gold, Peru never notified KML, nor stated specific facts explaining why KML was mentioned in a supervening general investigation starting in 2015. **Peru's Counter-Memorial of August 05, 2022, and the expert report of lawyer Joaquín Missiego state absolutely nothing about the concept or progress of such investigation mentioning KML;**³³⁸
 - Peru never notified or informed KML if, when, or under what circumstances, the five immobilized gold shipments would be returned (or not) to KML;
 - In 2016, KML warned Peru that Peru's actions could potentially become an expropriation in the future under the TPA (as it eventually happened on November 30, 2018);³³⁹

³³⁵ Prosecutorial Resolution No. 1, dated September 20, 2015, issued by the 1st supra-provincial corporate prosecutor's office specializing in money laundering and loss of domain crimes - Prosecution File No. 42-2014 Separation of allegations and further investigation, at pp. 1-18, **C-0052-SPA**; and Prosecutorial Order No. 19, dated January 09, 2017, issued by the 1st supra-provincial corporate prosecutor's office specializing in money laundering and loss of domain crimes, **C-0101-SPA**.

³³⁶ News articles and books that replicated negative facts unfairly linked to KML by Peru, **C-0051-ENG/SPA**.

³³⁷ "*Raúl Linares dice que no está implicado en el caso Cuellos Blancos*", article by Peruvian newspaper *Gestión*, **C-0114-SPA**.

³³⁸ Peru's **Counter-Memorial**; also *see*, **Expert Report-Joaquín Missiego-Respondent's Counter-Memorial-SPA**.

³³⁹ Communication addressed to the general office of international economic affairs, with competence in private investment, of the Peruvian Ministry of Economy and Finance, dated May 03, 2016, at ¶ 67 (b) **C-0158-SPA**.

- When KML tried to intervene in criminal proceedings against certain gold suppliers, the court shut Claimant out, declaring that KML could not assert its rights because it was “not a party” to the criminal proceedings;³⁴⁰
- **Peru never responded (until Peru’s Counter-Memorial of August 05, 2022) to the multiple requests for return of the gold effectively delivered to Peru by KML, which were sufficient under Peruvian law;**³⁴¹
- When KML sent a notice of intent to the Peruvian Government in 2019, it received no substantive response;³⁴²
- **Until the filing of Peru’s Counter-Memorial in 2022, Peru never questioned KML’s ownership of any of the seized gold;**
- **Peru never initiated an eminent domain process (*pérdida de dominio*) in connection with KML’s five shipments of gold; and no prosecutor was put on notice by Peru that the gold seized were the object of a crime, as would be required by Article 94 of Peru’s Code of Criminal Procedure (if applicable).**
- As explained above, the arbitrary, illegal, and unreasonable nature of measures taken by SUNAT has been recognized by Peruvian court decisions in cases similar to KML’s plight;³⁴³ and
- When KML submitted its Request for Arbitration in April 2021,³⁴⁴ it, again, received no response from the Peruvian Government in connection with its request for consultations. Peru has refused to engage in any discussions, negotiations, or consultations with KML.

386. KML’s experience in Peru demonstrates a paradigmatic case of creeping expropriation, in which not one action—by itself—constitutes the expropriation, but taken

³⁴⁰ Decision from the Cuarta Sala Penal Reos Libre, **C-0016-SPA**; and Resolution dated July 23, 2015, issued by the 6th Criminal Court of Callao, responding to KML’s petitions, **C-0100-SPA**.

³⁴¹ Second Legal Opinion-Dr. [REDACTED]-Claimant’s Reply-SPA, at ¶¶ 5, 5.12, **C-0139-SPA**.

³⁴² KML April 8, 2019, Notice of Intent, **C-0022-ENG**.

³⁴³ **Claimant’s Memorial**, at ¶¶ 121-123.

³⁴⁴ KML Request for Arbitration, dated April 30, 2021, **C-0001-ENG**.

together, the cumulative <<steps [...] eventually [had] the effect of an expropriation>> in 2018.³⁴⁵

387. Analyzed against the framework of the Treaty's Annex 10-B,³⁴⁶ Peru's actions and omissions amount to an indirect expropriation. Claimant's gold assets have been seized by—and are in the custody of—Peru since 2014, and permanently lost all value on November 30, 2018.

³⁴⁵ *Siemens v. Argentina*, Award, at ¶ 263, **CL-0018-ENG**.

³⁴⁶ Annex 10-B of the TPA, **CL-0001-ENG**, provides:

1. An action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment.
2. Article 10.7.1 addresses two situations. The first is direct expropriation, where an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure.
3. The second situation addressed by Article 10.7.1 is indirect expropriation, where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.
 - (a) The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors:
 - (i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;
 - (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and
 - (iii) the character of the government action.
 - (b) Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.

CERTIFICADO DE DÉPOSITO EN CUSTODIA

La Sección CAJA y VALORES EN CUSTODIA del BANCO DE LA NACIÓN ha recibido de :

COMISION NACIONAL DE BIENES INCAUTADOS-CONABI-PRESIDENCIA DE CONSEJO DE MINISTROS.

En calidad de DEPÓSITO EN CUSTODIA Por el Valor Contable de S/1.00 (UN Y 00/100 NUEVO SOL), según lo anotado en la descripción

CANTIDAD	DESCRIPCIÓN DE LA CUSTODIA
06	<p>MATERIAL AURIFERO</p> <p>Seis bolsas de plástico transparente lacrados con los precintos N° [REDACTED] que dice contener:</p> <ul style="list-style-type: none"> Material aurifero 111,502.36 Kg. aproximadamente. <p>Según detalle del Acta de Ejecución de la Medida de Procedimientos Especial N° 34-2014-JPTP-CSJCM-ML, Deslacrado, Verificación, Incautación y Entrega de Mercaderías, dispuesto por el Juzgado Penal de Turno Permanente del Callao, investigación seguida contra [REDACTED] representante de la empresa [REDACTED] por el Delito de Lavado de Activos en agravio del Estado.</p> <p>Nota.- Los bienes fueron entregados por el [REDACTED] [REDACTED] personal designado por la Comisión Nacional de Bienes Incautados - CONABI.</p> <p>"EL BANCO NO SE RESPONSABILIZA DE LA AUTENTICIDAD DE LAS ESPECIES INTERNADAS"</p> <p><u>Fe de erratas</u></p> <p>Dice: Material aurifero 111,502.36 Kg. aproximadamente.</p> <p>Debe decir: Material aurifero 111,502.36 gramos aproximadamente.</p>

B.O.P. 172.95.0001



CERTIFICADO DE DEPÓSITO EN CUSTODIA

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**COMISION NACIONAL DE BIENES INCAUTADOS-CONABI- PRESIDENCIA DE CONSEJO
 DE MINISTROS.**

En calidad de **DEPÓSITO EN CUSTODIA** Por el Valor Contable de S/ 1 00 (UN Y 00/100
 NUEVO SOL), según lo anotado en la descripción

CANTIDAD	DESCRIPCIÓN DE LA CUSTODIA
03	<p>MATERIAL AURIFERO</p> <p>Tres bolsas de plástico transparente lacrados con los precintos: Bolsa 1 [REDACTED] Bolsa 2 [REDACTED] y Bolsa 3 [REDACTED] que dice contener</p> <ul style="list-style-type: none"> Material aurífero 98.55 Kg. Aproximadamente (Noventa y Ocho kilos con 550 gramos). <p>Segun detalle del Acta de Ejecución de la Medida de Procedimientos Especial [REDACTED] [REDACTED] Deslacrado Verificación, Incautación y Entrega de Mercaderías, dispuesto por el Juzgado Penal de Turno Permanente del Callao, por la investigación seguida contra [REDACTED] representante de la empresa [REDACTED] por la presunta comisión del Delito de Lavado de Activos en agravio del Estado.</p> <p>Nota.- Los bienes fueron entregados por el [REDACTED] [REDACTED] [REDACTED] personal designado por la Comisión Nacional de Bienes Incautados - CONABI.</p> <p>Oficio [REDACTED] PCM/CONABI-SE de 31.03.2014 Recibido 01.04.2014 Se adjunta Acta de Entrega de fecha 01.04.2014.</p> <p>EL BANCO NO SE RESPONSABILIZA DE LA AUTENTICIDAD DE LAS ESPECIES INTERNAS</p>



CERTIFICADO DE DEPÓSITO EN CUSTODIA

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**COMISION NACIONAL DE BIENES INCAUTADOS-CONABI-PRESIDENCIA DE CONSEJO
 DE MINISTROS.**

En calidad de **DEPÓSITO EN CUSTODIA** Por el Valor Contable de S/ 1.00 (UN Y 00/100
 NUEVO SOL), según lo anotado en la descripción

CANTIDAD	DESCRIPCIÓN DE LA CUSTODIA
02	<p>MATERIAL AURIFERO</p> <p>Dos bolsas de plástico transparente lacrados con los precintos N°s. [REDACTED] y [REDACTED] que dice contener:</p> <ul style="list-style-type: none"> Material aurífero 38.580 Kilogramos aproximadamente (Treinta y Ocho kilos y Quinientos Ochoenta gramos). <p>Según detalle del Acta de Ejecución de Incautación, Deslacrado, Verificación y Entrega de Mercadería, dispuesto por el Juzgado Penal de Turno Permanente del Callao, por la investigación seguida contra [REDACTED] representantes de la Empresa [REDACTED] por la presunta Comisión del Delito de Lavado de Activos, proveniente de la minería ilegal en agravio del Estado.</p> <p>Nota.- Los bienes fueron entregados por el [REDACTED] personal designado por [REDACTED] por la Comisión Nacional de Bienes Incautados - CONABI.</p> <p>- Oficio N° [REDACTED]</p> <p>- Se adjunta Acta de Entrega de fecha 06.05.2014 Recibido 06.05.2014.</p> <p>"EL BANCO NO SE RESPONSABILIZA DE LA AUTENTICIDAD DE LAS ESPECIES INTERNADAS"</p>



F.06.173.89-0001

CERTIFICADO DE DEPÓSITO EN CUSTODIA

La Sección CAJA y VALORES EN CUSTODIA del BANCO DE LA NACIÓN ha recibido de:

COMISION NACIONAL DE BIENES INCAUTADOS-CONABI-PRESIDENCIA DE CONSEJO DE MINISTROS.

En calidad de DEPÓSITO EN CUSTODIA Por el Valor Contable de S/ 1.00 (UN Y 00/100 NUEVO SOL), según lo anotado en la descripción

CANTIDAD	DESCRIPCIÓN DE LA CUSTODIA
04	<p>MATERIAL AURIFERO</p> <p>Cuatro bolsas de plástico transparente lacrados con los precintos: N° [REDACTED] que dice contener:</p> <ul style="list-style-type: none"> Material aurífero 126.78 Kilogramos aproximadamente (Ciento Veintiséis kilos con Setenta y Ocho gramos). <p>Según detalle del Acta de Ejecución de Incautación, Deslacrado, Verificación y Entrega de Mercadería, dispuesto por el Juzgado Penal de Turno Permanente del Callao, por la investigación seguida contra [REDACTED] en su condición de Gerente General de la [REDACTED] por la presunta Comisión del Delito de Lavado de Activos, proveniente de la minería ilegal en agravio del Estado.</p> <p>Nota.- Los bienes fueron entregados por el [REDACTED] personal designado por la Comisión Nacional de Bienes Incautados - CONABI.</p> <p>- Oficio N° [REDACTED] de 13.05.2014.</p> <p>- Se adjunta Acta de Entrega de fecha 14.05.2014. Recibido 14.05.2014.</p> <p>"EL BANCO NO SE RESPONSABILIZA DE LA AUTENTICIDAD DE LAS ESPECIES INTERNADAS"</p>



P. 001-172-96-0001

Evidence:

C-0127-SPA (Safekeeping certificates of KML's gold, issued by the *Banco de la Nación*).

388. Peru's seizure of the gold has indisputably caused an adverse effect on Claimant, which has been entirely deprived of the use and enjoyment of its property during these eight years.³⁴⁷

³⁴⁷ *Id.* at Annex 10-B(3)(a)(1).

389. Moreover, Peru's actions have interfered with KML's distinct, reasonable investment-backed expectations. Under Peruvian laws (including the Peruvian Constitution), and pursuant to the US-Peru TPA, KML had a legitimate expectation that any and all investigations of KML, or KML's property, would be conducted with transparency, and limited to a reasonable period of time. KML also legitimately expected that it would receive notices, and timely responses from Peru about KML's requests for return of the gold, and that KML would be able to appeal or challenge, at appropriate opportunities, any decision potentially adverse to KML in Peru. In sum, KML had an expectation that it could operate, and grow its business in Peru,³⁴⁸ if KML complied—as it did—with Peruvian laws. Peru has not pointed to any specific legal article, or concrete statutory norm, allegedly breached by KML.

390. KML researched the Peruvian market, and its laws, in 2012.³⁴⁹ Thereafter, KML established a business and operated with reasonable care and diligence in Peru.³⁵⁰ Peru may have had a reasonable general policy, and proper laws; but Peru acted arbitrability *vis-à-vis* KML, and breached international law and the Treaty. KML did not need to have an individualized representation or warranty from the government of Peru:

³⁴⁸ [REDACTED] letter to KML dated September 10, 2013, **C-0047-ENG**; y Minutes of KML - Granting permission to study the opportunity to establish a gold refinery in Peru, **C-0049-ENG**.

³⁴⁹ Analysis of the Peruvian gold industry, **AK-0002-ENG**.

³⁵⁰ Second Legal Opinion-Dr. [REDACTED]-Claimant's Reply-SPA, at ¶¶ 4.1, 4.2, **C-0139-SPA**.

179. *Standard for “Arbitrariness”*: As already indicated above, this Tribunal agrees with the *Saluka*,¹³⁷ *AES*,¹³⁸ and *Micula*¹³⁹ tribunals in that a measure will not be arbitrary if it is reasonably related to a rational policy. As the *AES* tribunal emphasised, this requires two elements: “the existence of a rational policy; and the reasonableness of the act of the state in relation to the policy. A rational policy is taken by a state following a logical (good sense) explanation and with the aim of addressing a public interest matter. Nevertheless, a rational policy is not enough to justify all the measures taken by a state in its name. A challenged measure must also be reasonable. That is, there needs to be an appropriate correlation between the state’s public policy objective and the measure adopted to achieve it. This has to do with the nature of the measure and the way it is implemented.”¹⁴⁰ In the Tribunal’s view, this includes the requirement that the impact of the measure on the investor be proportional to the policy objective sought. The relevance of the proportionality of the measure has been increasingly addressed by investment tribunals¹⁴¹ and other

international tribunals, including the ECtHR.¹⁴² The test for proportionality has been developed from certain municipal administrative laws, and requires the measure to be suitable to achieve a legitimate policy objective, necessary for that objective, and not excessive considering the relative weight of each interest involved.¹⁴³

Evidence:

CL-0126-ENG (*Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Award, November 25, 2015, at ¶¶ 155, 179).

391. *First*, KML made hundreds of previous transactions, some with the same suppliers, a fact that had led KML to reasonably believe that it would not encounter any problems with buying, and later selling gold in Peru. *Second*, KML purchased the gold from suppliers who were previously vetted by (or at least registered with) the State, and who appeared in a supplier database maintained by the Peruvian Government.³⁵¹

392. Peru’s actions do not constitute broadly applicable “non-discriminatory regulatory actions [...] designed and applied to protect legitimate public welfare objectives, such as

³⁵¹ **Claimant’s Memorial**, at ¶ 15.

public health, safety, and the environment.”³⁵² To the contrary, Peru’s actions represent discriminatory conduct against one company completely contrary to the rule of law, and without a rational basis.

393. This particular breach by Peru of the TPA caused damages to KML in the amount of US\$ 24,554,340 as explained below in Section V.³⁵³

c. Peru’s measures constitute a creeping expropriation of a going concern enterprise

394. Peru’s prolonged measures and omissions also brought about an indirect creeping expropriation of the entirety of KML’s global business operations. Peru’s drawn-out measures (1) led to a sharp decline in gold suppliers’ willingness to sell to KML; (2) led to a decline in the amount of gold that [REDACTED] was able to buy from KML; and (3) placed an overwhelming debt-servicing burden on KML which eventually caused the company to collapse.

395. In order to understand the financial impact of the gold seizures on Claimant, it is important for the Tribunal to appreciate the precise nature of KML’s business in Peru—how the company made money, and why it was competitive in the industry.

396. Because of its pricing strategy, Claimant’s only option for increasing overall profits was to buy and sell gold in substantial volumes. Critical to this model were (1) suppliers willing to sell large volumes of gold to Claimant; and (2) buyers willing to purchase those same large volumes. KML was fortunate in that it had both: a large number of suppliers in Peru, willing to sell substantial quantities of gold to Claimant, and a voracious buyer in [REDACTED], which essentially agreed to buy as much gold from KML as it could source. These two groups ensured the viability of Claimant’s low-margin, high-volume business model, leading to an increase in KML’s business: in 2013, KML purchased and sold approximately US\$ 1.33 *billion* worth of precious metals.³⁵⁴

³⁵² US-Peru TPA, Annex 10-B, Paragraph 3(b), **CL-0001-ENG**.

³⁵³ Value of seized inventory (gold) close to today’s date.

³⁵⁴ Expert Report-Almir Smajlovic (Secretariat)-Claimant’s Memorial-ENG, at ¶ 5.15, **C-0106-ENG**.

397. KML borrowed money to finance its purchases of gold. It was Claimant’s business model to make a substantial payment to its suppliers at the time of delivery in Peru—not of resale. As such, Claimant itself bore the risk of not being able to recover its investment in a particular purchase, up until the time another subsequent buyer made payment and took possession of the gold outside Peru.³⁵⁵

398. Peru’s seizure of Claimant’s gold torpedoed Claimant’s commercial strategy in Peru, leading eventually to the company’s collapse in 2018 for the following three principal reasons.

399. *Peru’s actions occasioned a sharp decline in KML’s supply of gold.* Peru’s series of gold seizures in 2013 and 2014 were leaked by Peru and reported in both the domestic and international press.³⁵⁶ Because of Peru, these reports painted KML—as well as [REDACTED] himself—in sensationalistic terms, recklessly tying Claimant to an alleged money-laundering activity, even though the Peruvian authorities had never even questioned, much less indicted or put KML on trial for such conduct.

400. KML was diligent, mitigated damages, and sought new suppliers of gold in Peru (after Peru’s initial measures). Exhibit **C-0030-ENG** clearly shows that KML was forced to substantially change suppliers starting in 2015, as compared to 2013-2014. [REDACTED], [REDACTED], [REDACTED] and [REDACTED]—the suppliers of the five shipments seized by Peru—did not supply any more gold to KML after 2014.

401. Because of the ubiquitous nature of these press reports, based on Peru’s leaks of its confidential investigations, many of Claimant’s suppliers became aware of these reports and began decreasing the volume of business they did with Claimant. Colloquially put, these press reports “put a chill” on KML’s ability to purchase large quantities of gold, severely dampening supply. These suppliers had never expressed concerns about alleged investigations from any other place around the world, except for the investigations at the

³⁵⁵ See **Expert Report-Darell Chodorow and Fabricio Nunez (Brattle)-Respondent’s Counter-Memorial-ENG**, at ¶¶ 32, 37.

³⁵⁶ **Claimant’s Memorial**, at ¶ 58; and KML transaction summary of all purchases between 2012 and 2018, **C-0030-ENG**.

time in Peru.³⁵⁷ Consequently, many suppliers discontinued, or flat out refused, doing business with KML, including—for instance—[REDACTED], [REDACTED], and [REDACTED], because of the investigations in Peru.

402. As [REDACTED] has explained:

19. A few notable clients who I recall called me to explain their reluctance to sell gold to KML were (Exhibit C-0030-ENG):

a. [REDACTED], a Bolivian precious metals trading company (seller of gold to KML), discontinued sales to KML in mid-2014 (after their previous commitments to

³⁵⁷ Witness Statement-[REDACTED]-Claimant's Reply-ENG, at ¶ 22, C-0146-ENG.

KML were settled). [REDACTED] called me and expressed that in spite of their personal desire to continue working with KML, they could not risk tarnishing their reputation in the gold industry after the aforementioned events in Peru involving KML.

b. Two companies of the group known as [REDACTED], a large seller of gold in Peru, ceased their dealings and sales of gold to KML after 2014. Their representative, [REDACTED], explained to me that he no longer wanted to sell to KML due to concerns after hearing about KML's gold immobilizations.

c. [REDACTED], an Ecuadorian mining company, ceased their sales to KML in or around 2015. Mr. [REDACTED] mentioned to me that he became aware of newspaper headlines regarding the events involving KML in Peru and did not want to sully [REDACTED]'s image. This company gave KML a chance to have KML's name cleared until 2015, but in 2015 [REDACTED] called me and stated that even though he personally trusted KML's business ethics and due diligence procedures, he could not continue assuming a reputational risk unless KML was expressly cleared of wrongdoing by Peruvian authorities.

d. [REDACTED] was a supplier that followed suit and completely ceased its operations and business dealings with KML. I do not remember the name of the person at [REDACTED] who spoke to me about the situation.

Evidence:

C-0146-ENG (Witness Statement-[REDACTED]-Claimant's Reply-ENG, at ¶ 19).

403. The foregoing is entirely consistent with the testimony of [REDACTED],³⁵⁸
[REDACTED],³⁵⁹ and [REDACTED].³⁶⁰

404. The reaction was logical from the standpoint of the sellers (supplier of gold to KML): they did not want to risk selling large volumes of gold, and having payments delayed—or thwarted completely—in the event that the gold was seized by Peru. As Mr. Smajlovic has shown, the volume of KML’s gold purchased in Peru declined precipitously after the five seizures by SUNAT, dropping to 1.64% of Peru’s gold market from 9.25% during the years 2013-15.³⁶¹

405. Moreover, SUNAT’s widely publicized seizures and investigations of KML’s gold also began to affect KML’s ability to maintain and use bank accounts, further handicapping KML’s ability to do business.³⁶²

406. *Peru’s actions created an overwhelming debt burden for KML.* Consistent with its legitimate general practice, KML financed its purchase of the five gold shipments that SUNAT seized. To purchase the gold, Claimant borrowed US\$ 11.9 million at interest rates that ranged from 4.75% to 7.5%, depending on the amount of the loan,³⁶³ from [REDACTED]
[REDACTED].³⁶⁴

³⁵⁸ Witness Statement-[REDACTED]-Claimant’s Memorial-ENG, at ¶ 54, **C-0103-ENG**.

³⁵⁹ Witness Statement-[REDACTED]-Claimant’s Memorial-SPA, at ¶¶ 33, 34, **C-0105-SPA**.

³⁶⁰ Witness Statement-[REDACTED]-Claimant’s Memorial-ENG, at ¶ 28, **C-0104-ENG**.

³⁶¹ Second Expert Report-Almir Smajlovic (Secretariat)-Claimant’s Memorial-ENG, at ¶ 2.39, **C-0140-ENG**.

³⁶² Witness Statement-[REDACTED]-Claimant’s Memorial-ENG, at ¶ 55, **C-0103-ENG** (“With banks closing KML’s account, it became impossible to continue paying suppliers promptly (faster than our competitors, as we did in 2013). Banks would not lend money to KML if KML’s accounts were being closed. Without U.S. bank accounts, and a global media scandal which Peru unfairly connected to KML, many suppliers (sellers of gold) all over the world did not want to deal with KML.”); *see also*, notice of closure of bank accounts of KML, **C-0027-ENG**.

³⁶³ Expert Report-Almir Smajlovic (Secretariat)-Claimant’s Memorial-ENG, at ¶¶ 10.8, 10.17, **C-0106-ENG**.

³⁶⁴ Revolving line of credit agreement between [REDACTED] and Kaloti Metals & Logistics LLC, dated January 2011, **C-0143-ENG**; Promissory note between Kaloti Metals & Logistics LLC and [REDACTED], dated January 2011, **C-0142-ENG**.

Subject: Rates Amendment for

Dear [REDACTED]

Reference to our letter dated 16 March 2015 on business terms and incentives.

Please note that effective 01 March 2016, we are prepared to offer the following charges on loans / advances for purchasing to KML provided that the monthly volumes shipped to us increase by at least 2 tonnes (gross quantity)

Monthly loan / advances for purchasing	Charges for monthly volumes at 2 tonnes (gross quantity)	Discount on charges for monthly volumes more than 2 tonnes and up to 3 tonnes (gross quantity)	Discount on charges for monthly volumes more than 3 tonnes (gross quantity)
Monthly average loan / advances of up to USD 5 million	4.25%	0.25% to be reduced from 4.25%	0.50% to be reduced from 4.25%
Monthly average loan / advances of more than USD 5 million and up to USD 8 million	5.25%	0.25% reduced from 5.25%	0.50% to be reduced from 5.25%
Monthly average loan / advances of more than USD 8 million and up to USD 15 million	7.00%	0.25% to be reduced from 7.00%	0.50% to be reduced from 7.00%

Moreover, we are prepared to offer the following discounts on refining charges:

1. Reduction in refining charges to USD 2.5/- per ounce instead of USD 3.00/- per ounce;
2. A discount of 20 cents per ounce of net quantity on standard refining charges in case KML's monthly export gross volume to us is more than 2 tonnes and below 3 tonnes; and
3. A discount of 40 cents per ounce of net quantity on standard refining charges in case KML's monthly export gross volume to us exceeds 3 tonnes.

Evidence:

AS-0050-ENG (2015 Interest Rates Charged by [REDACTED] to KML, pp. 2).

TO:



Reference to Our Letter Ref# KJIDMCC/893 ✓

Please note that we will consider changing the funding rate as per sign REVOLVING LINE OF CREDIT AGREEMENT effective January 1, 2014 as follow

- 5.5% per annum for Balance Up to \$ 3 Million
- 6.5% per annum for Balance starting from \$ 3 Million Up to \$ 8 Million
- 8.5% per annum for Balance starting from \$ 8 Million Up to \$ 10 Million
- 10% per annum for Balance starting from \$ 10 Million

Please note that [REDACTED] will study again such pricing in the future and will advise with changes if any.

Thank you for your understanding on the same.

Evidence:

C-0136-ENG (Letters from [REDACTED] regarding interest rates, pp. 4).

407. When Peru prolonged the seizure of Claimants' five gold shipments, it placed Claimant in a financial bind: since KML could not sell the seized gold, it could not repay the loan that it had secured to purchase the gold from its suppliers in the first place. KML did not have other cash-on-hand to pay off the loan independently. As a result, KML had to keep accruing interest on the loan—and is still continuing to accrue debt to this day. These interest amounts are considerable. As Mr. Smajlovic has shown, they amounted to maintaining a loan balance that exceeded \$8 million per month.³⁶⁵ The interest accrual ate

³⁶⁵ *Id.* Annex 1, at pp. 70, ¶¶ 10.8- 10.9.

into a very considerable portion of the Claimant's profits, significantly weakening the long-term viability of its commercial success.

408. As [REDACTED] explains:

55. With banks closing KML's account, it became impossible to continue paying suppliers promptly (faster than our competitors, as we did in 2013). Banks would not lend money to KML if KML's accounts were being closed. Without U.S. bank accounts, and a global media scandal which Peru unfairly connected to KML, many suppliers (sellers of gold) all over the world did not want to deal with KML. The cash-flow of KML was also adversely affected by the impossibility of selling (and turning into cash) the gold unfairly seized by Peru in 2013 and 2014. The worldwide operations of KML were crippled by the actions of Peru. KML could not effectively operate in other markets due to Peru's adverse marketing efforts (attacking KML's reputation) and misinformation against KML.

Evidence:

C-0103-ENG (Witness Statement-[REDACTED]-Claimant's Memorial-ENG, at ¶ 55).

409. Peru's measures also forced KML to suffer adverse effects on working capital and higher cost per unit.³⁶⁶

410. This particular breach by Peru of the TPA caused damages to KML of US\$ 70,136,219, without pre or post award interest, as explained below in Section VI.

³⁶⁶ *Id.* Annex 1, at pp. 60-71, ¶¶ 10.3, 10.6.

VI. DAMAGES AND COMPENSATION

A. Overview and summary

411. KML has made three separate main heads of damages in this arbitration against Peru, which require compensation: (i) lost profits (breach of Articles 10.3 and 10.5 of the TPA); (ii) indirect expropriation of gold inventory (breach of Article 10.7 of the TPA); and (iii) indirect expropriation of KML's enterprise as a going concern business (breach of Article 10.7 of the TPA).

412. In its Memorial of March 16, 2022, KML summarized the damages as follows:

Head of Damage	Substantive breach by Peru	Relation	Quantum Methodology	Amount in US\$
Lost Profits	Arts. 10.3 and 10.5 of the TPA	Incremental cash flow lost <u>until</u> November 30, 2018	Cash flow analysis	13,793,135
Expropriation of gold inventory	Art. 10.7 of the TPA	Physical, tangible assets (gold)	Price of gold	17,674,623 (plus pre-award interest) <i>or</i> 26,099,826 (as of February 2022)
Expropriation of enterprise as a going concern business	Art. 10.7 of the TPA	Cash flow projected <u>after</u> November 30, 2018	Discounted Cash Flow	47,296,862
Pre-award interest			Article 10.7(3) of the TPA	14,234,049 (March 2022)
Tax indemnity (gross-up)	Art. 10.7 of the TPA		Article 10.7(2)(d) of the TPA	25,562,481

413. KML's Quantum Expert made several adjustments to the calculations in order to be more conservative, even incorporating some aspects contended by Peru's quantum expert. As a result, KML's damages can now be summarized as follows:

Head of Damage	Substantive breach by Peru	Relation	Quantum Methodology	Amount in US\$
Lost Profits	Arts. 10.3 and 10.5 of the TPA	Incremental cash flow lost <u>until</u> November 30, 2018	Cash flow analysis	27,079,044 of which 12,671,349 relates to gold sourced inside Peru
Expropriation of gold inventory	Art. 10.7 of the TPA	Physical, tangible assets (gold)	Price of gold	The highest of: 17,646,441 (plus pre-award interest) <i>or</i> 24,554,349 (as of November 2022 –to be updated)
Expropriation of enterprise as a going concern business	Art. 10.7 of the TPA	Cash flow projected <u>after</u> November 30, 2018	Discounted Cash Flow	70,136,219 of which 28,365,223 relates to gold sourced inside Peru
Pre-award interest			Article 10.7(3) of the TPA	38,875,679 (as of November 2022–to be updated) of which 19,861,641 corresponds to

				gold sourced inside Peru
Tax indemnity (gross-up)	N/A	N/A	N/A	Now included in the expropriation of enterprise as a going concern business, and lost profits claims

B. Causation

414. Respondent claims that KML has not provided any evidence of a proximate causal link between the conduct it alleges breached the US-Peru TPA, and the losses suffered by KML, and that there *could* have been several supervening causes of KML’s losses, none of which would be, according to Peru’s lawyers, attributable to Peru.³⁶⁷ Peru mistakenly claims that KML’s detriment was the result of such supervening causes, while at the same time implicitly admitting that KML incurred a legally recognized harm (Peru has questioned the quantum regarding such harm).³⁶⁸

415. Arbitral tribunals have determined that the twin doctrines of “factual” and “legal” causation, which are common to many legal systems, apply in cases arising under investment treaties.³⁶⁹ The former element is generally focused on whether the claimant would have sustained the alleged injury “but for” the respondent’s breach. The latter element operates to filter out harms that were “too remote” from the alleged breach, were “not proximate” to the wrongful act, or, in the formulations of some tribunals, were not “foreseeable.”³⁷⁰

³⁶⁷ Peru’s **Counter-Memorial**, at ¶ 715.

³⁶⁸ See, in general, **Expert Report-Darell Chodorow and Fabricio Nunez (Brattle)-Respondent’s Counter-Memorial-ENG**.

³⁶⁹ See article 31, comm. 10, ILC Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries, 2001, **RL-0022**.

³⁷⁰ *Causation and Injury in Investor-State Arbitration*, Patrick W. Pearsall & J. Benton Heath, at pp. 11, **CL-0127-ENG**.

416. The causation of damages by Peru for the expropriation of KML's gold inventory is plainly and unmistakably self-evident: Peru has admitted in this arbitration that Peru took, and is still maintaining as of today, physical control and actual possession, of at least four shipments of KML's gold seized, without providing compensation to KML. Claimant has demonstrated that Shipment No. 5 was also directly affected by Peru.³⁷¹

157. Immediately after SUNAT lifted the administrative immobilizations, the Prosecutor's Office proceeded to seize Shipments 1 to 4,²⁶² in compliance with the Precautionary Seizures.²⁶³ The gold seized from those shipments was transferred to Peru's National

Bank,²⁶⁴ where seized assets remain under the National Program of Seized Goods (*Programa Nacional de Bienes Incautados*) ("PRONABI").²⁶⁵ PRONABI is a Peruvian State agency under the aegis of the Ministry of Justice and Human Rights, but that operates independently. Its functions are to receive, register, and keep custody of seized assets that are subject to investigations and criminal proceedings.²⁶⁶

Evidence:

Peru's **Counter-Memorial** (at ¶ 157).

417. The foregoing is confirmed by the safekeeping certificates of KML's gold, issued by the *Banco de la Nación*,³⁷² which show that KML's gold is still in the custody of the Peruvian government to this day.

418. Shipment No. 5 was also adversely affected by Peru's measures and is currently in possession of Peru's *Banco de la Nación*.³⁷³ Such shipment was later the subject of a subsequent civil (contractual) dispute as a result of KML's impossibility to pay the purchase price (caused by Peru).³⁷⁴ But for Peru's measures, KML would have exported all five Shipments of gold to the United States.

³⁷¹ Resolution No. 1, Precautionary Seizure against Shipment 5, 20 March 2015, **R-0210**.

³⁷² Safekeeping certificates of KML's gold, issued by the *Banco de la Nación*, **C-0127-SPA**.

³⁷³ Resolution No. 1, Precautionary Seizure against Shipment 5, 20 March 2015, **R-0210**.

³⁷⁴ Civil attachment measure against Shipment 5, issued by the *Trigésimo Tercer Juzgado Civil de Lima*, June 18, 2014, **C-0141-SPA**.

Procesal Civil, se resuelve: dictar **MEDIDA CAUTELAR SOBRE el FONDO de EMBARGO** en Forma de **DEPÓSITO** sobre **99.843,22 Kilogramos de Oro, (Noventinueve kilos, ochocientos cuarentitrés con 22 gramos de oro)** que se encuentran depositadas a nombre de la empresa **KALOTI METALS & LOGISTICS LLC**, en las instalaciones de la empresa de Resguardo de Valores

constituyéndose al **BANCO de LA NACION** como **DEPOSITARIO** de los bienes afectados, conforme lo prescribe el último párrafo del artículo 649° del Código Procesal Civil; al efecto, **OFÍCIESE** a la **Comisaría** del sector para que preste

Evidence:

C-0141-SPA (Civil attachment measure against Shipment 5, issued by the *Trigésimo Tercer Juzgado Civil de Lima*, June 18, 2014).

419. A Peruvian court apparently shifted formal legal title over Shipment No. 5, *in 2022*, back to [REDACTED], something that KML did not know until revealed by Peru in its Counter-Memorial of August 05, 2022.³⁷⁵ **That shows that title over such gold actually belonged to KML on November 30, 2018.**

420. There can be no reasonable question or doubt that the inventory of gold itself qualifies as a tangible asset protected as an investment under the Treaty. **Peru's quantum experts did not question causation regarding the head of damages concerning the expropriation of the gold inventory.**³⁷⁶

421. As to KML's lost-profit and expropriation of going concern enterprise claims, Peru's own quantum experts have recognized that in the *but-for* scenario, the volume of gold processed by KML would have been greater than in the actual scenario. This confirms that causation is attained, as concluded by both parties' quantum experts:

³⁷⁵ Peru's Counter-Memorial, ¶¶ 182, 249, 370.

³⁷⁶ See Expert Report-Darell Chodorow and Fabricio Nunez (Brattle)-Respondent's Counter-Memorial-ENG, at ¶¶ 19-24.

2.6. Despite their own position that the Measures did not, or may not, have caused the declining gold volumes at KML, Brattle's own DCF model assumes KML's gold volumes are (or should have been) higher than the actual volumes from 2014 to 2018 but-for the Measures. However, despite assuming higher but-for gold volumes in 2014 to 2018 than in the actual world, their conclusions still suggest negative damages (i.e., that KML benefitted from the Measures). This is not feasible. As I discuss in **Section 5.B.**, Brattle's conclusions are not reasonable, and are erroneously determined due to an error in the treatment of working capital and inventory.

Evidence:

C-0140-ENG (Second Expert Report-Almir Smajlovic (Secretariat)-
Claimant's Reply-ENG, at ¶ 2.6).

422. Peru, however, has tried to cast doubts as to the causation of damages relating to: (1) KML's lost profits claims (breach of Articles 10.3 and 10.5 of the Treaty); and (2) KML's claim for expropriation of its entire enterprise as a going concern business (Article 10.7 of the Treaty).³⁷⁷ The causation of those very specific damages is supported by two independent premises, either of which—alone—is sufficient to establish such causation:

- The financial difficulties and inherent challenges caused directly by the seizure of the gold inventory by Peru, which: (1) caused KML's insolvency, and (2) prevented KML from turning into cash, and reinvesting in Peru, US\$ 17,646,441 (at 2014 values), which would have permitted KML to service all its outstanding debts by 2018,³⁷⁸ and separately,
- The damage to the reputation caused to KML directly by Peru, which prevented KML from buying more gold from several sellers in Peru, and other countries.

³⁷⁷ Arbitral tribunals in the past have recognized the causal connection of damages to investors by SUNAT's temporary or interim measures. See *Mr. Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Award (5 July 2011), at ¶ 270 (“[E]l Tribunal ha declarado la existencia de un nexo causal directo entre las acciones de la SUNAT al trabar las medidas cautelares preventivas y la destrucción de la viabilidad económica de TSG.”), **CL-0080-SPA**.

³⁷⁸ It has been recognized that causation of loss of an entire company can be established in investment arbitration if temporary seizures have <<the practical effect [...] that the company could not pay its outgoings, leading to the company's value being permanently destroyed>>. *Hydro S.R.L. et al. v. Republic of Albania*, ICSID Case No. ARB/15/28, Award, April 24, 2019, at ¶ 693, **CL-0132-ENG**.

a. Standard and burden of proof

423. The causation of damages cannot, and is not required to, be proven with absolute or mathematical certainty.³⁷⁹ Here, KML has proven with either a *balance of probabilities*, or at the most, *in all probability* or with a *sufficient* degree of certainty, that the decline and subsequent total loss of KML’s business was the result of the measures taken by the Peruvian government.

424. Importantly: it is not necessary to prove that Peru’s actions were the sole cause of KML’s injuries. In cases where there are two or more contributing causes, the Commentary to Article 31 of the ILC Draft Articles, provides that the existence of one contributing cause does not exclude the causality of the other (and vice versa), unless the State’s action is considered too remote.³⁸⁰

425. Other than accusing KML of being “affiliated” with [REDACTED], which Peru alleges—speculates—that contributed to the loss of value of KML’s investments,³⁸¹ Peru has presented no evidence whatsoever to support its alternative theories of causation, nor evidence of self-destructing actions from KML.

b. Impact of the gold seizures on KML’s worldwide operations

426. As explained above, the measures taken by the Peruvian government had a severe impact on KML’s operations, both in Peru and worldwide. By seizing gold shipments for over 8 years, Peru deprived KML of a large amount of liquid assets that KML could not resell, increasing KML’s operating costs (and thus the average cost per unit of gold purchased), and the variable interest rates on [REDACTED] loans; and placing KML in a negative net working capital position.³⁸²

³⁷⁹ *Ioan Micula et al. v. Romania*, ICSID Case No. ARB/05/20, Award, December 11, 2013, at ¶¶ 1006-1010, **CL-0136-ENG**.

³⁸⁰ ILC Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries, 2001, pp. 91-94, **RL-0022**.

³⁸¹ Peru’s **Counter-Memorial**, at ¶ 704.

³⁸² *See supra*, at ¶ 118.

427. It is clear, and a highly qualified expert has confirmed, that the financial difficulties and inherent challenges caused directly to KML by the seizure of the gold inventory by Peru, prevented KML from turning into cash, and reinvesting in Peru, US\$ 17,646,441 (at 2014 values). KML could have used such amount to service all its debts by 2018.³⁸³

428. Peru's quantum experts have incurred in several intrinsic contradictions. For instance, they argue that there was no reason to deem the inventory lost on November 30, 2018, as if to say that KML was not really financially insolvent on November 30, 2018.³⁸⁴ However, the same experts seem to suggest that the inventory should have been written off way before 2018 because <<even a relatively small chance that the inventories would not be returned was more than sufficient to make KML effectively insolvent.>>³⁸⁵

429. The fact of the matter is that Peru's own quantum experts have implicitly admitted and declared, without a doubt, that the seizure of the inventory by Peru led to KML's insolvency, even if such experts disagree about the date when the inventory should have been deemed irreversibly lost:

237. First, it appears that the decision to write off the value of inventories on this 30 November 2018 is arbitrary. We are not aware of any events that occurred on or around 30 November 2018 that would have materially affected the status or expectations about the seized inventories as of this date, and therefore justified a write-off as of that date. Importantly, the impact of the write-off of the seized inventories would have led to the same result no matter when the inventories were written off. As Figure 15 shows KML consistently had a thin equity cushion for each year from 2014 onward (as well as in prior years). As a result, a write-off of the inventories at any time from 2014 onward would have resulted in negative net equity of a magnitude similar to that which Mr. Smajlovic estimates as of November 2018.

Evidence:

**Expert Report-Darell Chodorow and Fabricio Nunez (Brattle)-
Respondent's Counter-Memorial-ENG (at ¶ 237).**

³⁸³ Second Expert Report-Almir Smajlovic (Secretariat)-Claimant's Reply-ENG, at ¶¶ 2.3, 6.5, C-0140-ENG.

³⁸⁴ Expert Report-Darell Chodorow and Fabricio Nunez (Brattle)-Respondent's Counter-Memorial-ENG, at ¶ 237.

³⁸⁵ *Id.*, at ¶ 240.

430. There is, hence, an unquestionably direct causal link between the seizure of the gold inventory by Peru and KML's insolvency (as a going concern business enterprise, globally). Such insolvency would not have occurred *but for* the seizure of the gold inventory. The same is true as to KML's lost profits. The insolvency was caused by, and in, Peru, and directly affected KML's entire operation.

6.5. KML, as a going concern business enterprise, would have most likely survived (from an economic and financial standpoint)¹⁵⁰ if KML had received its inventory of gold (seized by Peru) before 30 November 2018. Brattle has specifically acknowledged that the write-off of such inventory was, by itself, sufficient to directly cause the insolvency of

KML.¹⁵¹ I agree with Brattle on that very particular, specific issue. However, unlike Brattle I do not have sufficient ground to conclude whether the write off should have been done before 30 November 2018.¹⁵²

Evidence:

C-0140-ENG (Second Expert Report-Almir Smajlovic (Secretariat)-
Claimant's Reply-ENG, at ¶ 6.5).

c. Harm to KML's reputation

431. The unfair and unreasonably long cloud of suspicion created by Peru against KML caused financial institutions to stop dealing with KML. There is a clear proximity and connection in time: to begin, *all* of KML's bank account closures occurred *after* Peru seized gold from KML:

- [REDACTED] informed KML of closure of account ending in [REDACTED], by letter dated April 1, 2014, sent by [REDACTED].³⁸⁶
- [REDACTED] informed KML of closure of account ending in [REDACTED]0, by letter dated October 28, 2014, sent by [REDACTED].³⁸⁷

³⁸⁶ Notice of closure of bank accounts of KML, at pp. 8, **C-0027-ENG**.

³⁸⁷ *Id.* at pp. 7.

- [REDACTED] informed KML of closure of account ending in [REDACTED], by letter dated March 23, 2016, sent by [REDACTED].³⁸⁸
- [REDACTED] ([REDACTED]) informed KML of closure of account ending in [REDACTED], by letter dated July 5, 2016, sent by [REDACTED].³⁸⁹
- [REDACTED] informed KML of closure of account ending in [REDACTED], by letter dated December 30, 2016.³⁹⁰
- [REDACTED] informed KML of closure of account ending in [REDACTED], by letter dated March 30, 2017, sent by [REDACTED].³⁹¹
- [REDACTED] informed KML of closure of account ending in [REDACTED], by letter dated May 26, 2017, sent by [REDACTED].³⁹²
- [REDACTED] informed KML of closure of [REDACTED] deposit account ending in [REDACTED], by letter dated August 8, 2018.³⁹³

432. On the other hand, however, news concerning the investigations of [REDACTED] and other parties, started and predated 2013.³⁹⁴ The following is what Peru has alleged that could have supposedly ruined KML's reputation:

- A whistleblower that came forward in **2012** allegedly revealed that [REDACTED] imported "gold" bars from Morocco that the [REDACTED] knew had been coated with silver in a deliberate and illegal attempt to circumvent export restrictions in Morocco.³⁹⁵ **[This had nothing to do with the United States or Peru; and did not result in any indictment or conviction.]**
- In **2011**, the DEA allegedly commenced an investigation into suspicious wire transfers made to the [REDACTED], which indicated that the [REDACTED] was providing financial services for criminal organizations and facilitating money-laundering. The DEA allegedly recommended that the US Treasury designate

³⁸⁸ *Id.* at pp. 6.

³⁸⁹ *Id.* at pp. 5.

³⁹⁰ *Id.* at pp. 4.

³⁹¹ *Id.* at pp. 3.

³⁹² *Id.* at pp. 2.

³⁹³ *Id.* at pp. 1.

³⁹⁴ Suspicious Transaction Report, [REDACTED], 29 October 2012, **R-0128**; Suspicious Transaction Report, [REDACTED], 7 February 2013, **R-0200**.

³⁹⁵ Peru's **Counter-Memorial**, at ¶ 741.

██████████ as a “primary money-laundering concern.”³⁹⁶ **[Such designation never occurred and there is no proof of an actual investigation having taken place.]**

- In **2012**, two managers of one of ██████████’s suppliers, ██████████, were found to be leaders of a 27-strong crime gang who were all convicted and jailed in France for drug trafficking and money laundering.³⁹⁷ **[Those investigations did not involve a “██████████” or anyone named ██████████.] [This had nothing to do with the United States or Peru; and did not end in any indictment or conviction.]**
- Allegations emerged that in **2012** the ██████████ had sourced large volumes of suspected conflict minerals from Sudan and the Democratic Republic of Congo.³⁹⁸ **[These were not even “investigations”.] [This had nothing to do with the United States or Peru; and did not end in any indictment or conviction.]**

433. KML does not actually know if Peru’s foregoing statements are accurate. KML only notes that all of those “investigations,” some of which were mere allegations made by third-parties (without ever resulting in investigations): (1) did not involve KML, who is a United States legal entity; (2) predate Peru’s immobilizations of KML’s gold in 2013 and 2014; and (3) were never allegations previously raised by Peru during Peruvian investigations, until Peru’s Counter-Memorial of 2022.

434. None of KML’s banks closed KML’s accounts after the foregoing “investigations” happened or became known, as Peru alleges and describes in its Counter-Memorial. KML’s bank accounts continued active, and sellers of gold comfortably continued as suppliers of KML, *until* Peru started its actions and omissions against KML.

435. Peru mentioned and involved KML, properly and strictly speaking, in investigations starting in 2014. As such, it can be reasonably concluded that the actions by Peru were the actual and proximate cause of, or at least a very substantial reason for, KML being booted by multiple financial institutions.

³⁹⁶ *Id.*, at ¶ 736.

³⁹⁷ *Id.*, at ¶ 738.

³⁹⁸ *Id.*, at ¶ 742.

436. Without ample access to financial institutions, KML could not continue its legitimate strategy (actually proven to have been successful and effective in 2013) of paying sellers of Peruvian gold very promptly and at prices better than those paid by KML's competitors.

437. Furthermore, suppliers (sellers) of gold in Peru and other Latin American countries were not, and needed not, be concerned with investigations in Europe and Africa about entities different from KML. KML is not only a separate and distinct corporate entity (from those supposedly investigated elsewhere), but also, KML was established in, and is directly subject to the laws, regulations, and supervision of, the United States of America.

438. The United States is a jurisdiction reputed for having strong anticorruption legislation and enforcement, including statutes covering corruption of United States entities and persons in other countries, like Peru (*see* **Foreign Corrupt Practices Act of 1977**, 15 U.S.C., ch. 2B, §78(a) et. Seq., exhibit **CL-0098-ENG**; and **Patriot Act of 2001**, Pub. L. No. 107-56 (2001), exhibit **CL-0103-ENG**). However, Peru publicly made a direct, unfair connection between KML and money laundering. *That* was what spooked sellers of gold in Peru and other countries, and subsequently banking institutions.

439. It is very telling, also, that Peru has admitted in this arbitration that KML is “under investigation,”³⁹⁹ but that such investigation has not progressed in any way whatsoever. There have been no subsequent actions against KML since January 09, 2017. There was not even a “risk profile” prepared by Peru concerning KML:

Peru confirms that it has conducted a reasonable search and has not found any risk profiles prepared by SUNAT and the INPCFA on Kaloti.⁴⁰⁰

440. Unlike with the suppliers of gold, for which lawyer Joaquín Missiego (Peru's expert) seems to have a *crystal ball* that allows him to predict convictions,⁴⁰¹ there is nothing that can be said about any Peruvian investigation against KML, except: to date

³⁹⁹ Peru's **Counter-Memorial**, at ¶¶ 251-252.

⁴⁰⁰ Procedural Order No. 2, Annex 1, at pp. 106.

⁴⁰¹ **Expert Report-Joaquín Missiego-Respondent's Counter-Memorial-SPA**, at ¶ 87.

nothing has been formally alleged or come out of it at all, it has not progressed; but it is, according to Peru, still open as of today, like a blank check or the sword of Damocles.

441. **The evidence in this case clearly demonstrates that the actual loss of suppliers (in Peru and other countries) was due to the actions and omissions of Peru.** There was a campaign against KML (legally traceable to Peru, who breached its own laws regarding the confidentiality of investigations⁴⁰²), tarnishing KML's reputation in Peru and other Latin American countries.⁴⁰³ This further affected KML's and ██████████'s relationship with their suppliers, lowering the amount of gold they were able to purchase, which ultimately resulted in a complete loss of KML's business on November 30, 2018.⁴⁰⁴

442. There is no need for KML to prove that Peru intentionally or purposefully leaked the details of investigations. Peru has asserted in this arbitration, very strongly, that the investigations were confidential:

135. Al respecto, es importante destacar que la etapa de investigación en los procesos penales en el Perú es, de acuerdo a la ley, reservada y para conocimiento de las partes involucradas.¹⁹³ Por regla general, no se permite a ningún tercero acceder al expediente. El carácter reservado del proceso tiene por objeto resguardar la integridad de la investigación y proteger los derechos de los investigados. Este principio de reserva se extiende también las investigaciones fiscales que se llevan a cabo en la etapa de investigación preliminar.¹⁹⁴ Por lo tanto, no es irregular ni mucho menos una infracción que se le niegue acceso al expediente a un tercero, como lo sería Kaloti en las investigaciones y procesos penales seguidos contra los Proveedores

⁴⁰² Art. 16 of the Peruvian Supreme Decree No. 021-2019-JUS, Law N° 27806 (Law on Access to Public Information), dated December 11, 2019, **CL-0124-SPA**; Art 73 of the Peruvian Criminal Procedures Code, published on January 16, 1940, **CL-0006-SPA**; Art. 324 of the Peruvian Criminal Procedures Code, published on July 29, 2004, **CL-0005-SPA**.

⁴⁰³ Witness Statement-██████████-Claimant's Memorial-ENG, at ¶¶ 54, 13, **C-0103-ENG**.

⁴⁰⁴ *Id.* at ¶ 57.

219. On 16 April 2014, Kaloti filed the *first* written submission, requesting (i) that the Prosecutor’s Office give Kaloti “access to the record” of the [REDACTED] Investigation so that Kaloti could “read it and submit briefs and motions”; and (ii) that Kaloti “be served in all matters related to the property right . . . on the gold.”⁴³² However, as Prof. Missiego explains, the Prosecutor’s Office may not grant full access to criminal investigation files to third parties; as in most (if not all) jurisdictions, **in Peru files in criminal investigations are highly confidential**⁴³³ **and often extremely sensitive.**

Evidence:

Expert Report-Joaquín Missiego-Respondent’s Counter-Memorial-SPA
(at ¶ 135).

Peru’s **Counter-Memorial** (at ¶ 219).

443. The foregoing meant that Peru itself (as conductor of the investigations) had an affirmative legal duty to maintain confidentiality and actively protect its investigations against leaks. Nonetheless, details of the relevant investigations were published in the Peruvian press and media. Here, *res ipsa loquitur*: the things speak for themselves, and only one logical conclusion can follow: the Peruvian media published damaging articles about KML because Peru breached its legal duty of confidentiality (be it assertively or by omission).

444. Due to the loss of its established vendor base, bank accounts, and its ruined reputation, KML was never able to return to a position in which it was able to purchase similar quantities of gold as it had acquired in 2013.

17. Throughout 2014, I recall receiving a substantial amount of calls from suppliers (sellers of gold) who expressed their concerns and confusion about what was occurring with KML in Peru. I was continuously asked if KML was itself under investigation or in any trouble, with fear of being associated with the situation. Meanwhile, details published in the media seemed to have been skewed and differed from the documents that KML had received from SUNAT. To the best of my knowledge and belief, KML itself was never under investigation in Peru.

20. My dealings and conversations with suppliers, as explained above, took place over the telephone. Suppliers seemed very reluctant to inform KML in writing, or by email, their decisions, or definite positions of discontinuing their supply of gold to KML.

Evidence:

C-0146-ENG (Witness Statement- [REDACTED] -Claimant's Reply-ENG, at ¶¶ 17, 20).

54. Many local companies and providers would not deal with KML because the company was allegedly involved in corruption in Peru (Exhibit **C-0050-ENG**). Because of the arbitrary actions of Peru, many press articles connected KML to unfounded allegations of money-laundering and corruption, while the case of [REDACTED] (which is unrelated to KML) attracted particular attention in Peru and the United States (Exhibit **C-0051-ENG/SPA**). Many banks and suppliers (sellers of gold) became concerned and reluctant to deal, or be in business, with KML, (Exhibit **C-0027-ENG**) which in practice made it impossible for KML to reach its target of buying 45 tons of gold per year in Peru. The main driver of KML's very safe profits was based on volume of gold and quick resale, mainly to [REDACTED]

57. For several years and until 2018, I remained faithful that the legally owed return of the seized gold by Peru would permit KML to refloat its business to reach the purchase of 45 tons of Peruvian gold per year. Notwithstanding the foregoing, I was finally forced by the ruinous financial situation, and reputational harm, caused by Peru to close all operations of KML on November 30, 2018. Continuing in business became impracticable. November 2018 was the last month that I caused the payroll of KML employees to be paid (Exhibit C-0054-ENG/SPA). In

Evidence:

C-0103-ENG (Witness Statement-[REDACTED]-Claimant's Memorial-ENG, at ¶¶ 54, 57).

34. Luego del escándalo en Perú, las ventas cayeron en picada y las operaciones disminuyeron de gran manera. Los sueldos de cargos como el mío (*head trader*), que en gran parte eran compensados por comisiones, se vieron fuertemente afectados. Mis ingresos se redujeron aproximadamente en un 75%. Nunca se volvió a alcanzar un estado de estabilidad en el cual se lograra encarrilar nuevamente el flujo de transacciones y las proyecciones de crecimiento. Aunque el Sr. [REDACTED] me continuaba presionando para comprar más oro en Perú, muchos proveedores dejaron de suministrar oro a KML, alegando que les preocupaba tratar con KML porque esta estaba investigada por el gobierno de Perú. Específicamente, las empresas [REDACTED] [REDACTED] entre otras, dejaron de vender oro a KML a partir de 2015 (Exhibit C-0050-ENG). Varios bancos cerraron las cuentas de KML (Exhibit C-0027-ENG) y sus representantes me explicaron, aunque oralmente, que eso se debía a las investigaciones relacionadas con Perú.

Evidence:

C-0105-SPA (Witness Statement-[REDACTED]-Claimant's Memorial-SPA, at ¶ 34).

28. KML struggled after it had gold seized by Peru in 2013 and 2014. The reputation of the company was adversely affected through criminal investigations into the suppliers and negative news, both in Peru and around the world, which were tied to KML's name. The negative news surrounding the KML name, especially at a global scale, reached KML suppliers in other countries like Colombia and Ecuador, and caused a direct hit on the company's reputation. However, the company continued to operate for several years while attempting to rebuild its reputation. [REDACTED] always told me that he was faithful that the return of the seized gold by Peru would permit KML to expand its business and investments in Peru. As I mentioned above, KML was never accused of wrongdoing; and duly proved to Peruvian authorities its legitimate ownership of the seized gold.

Evidence:

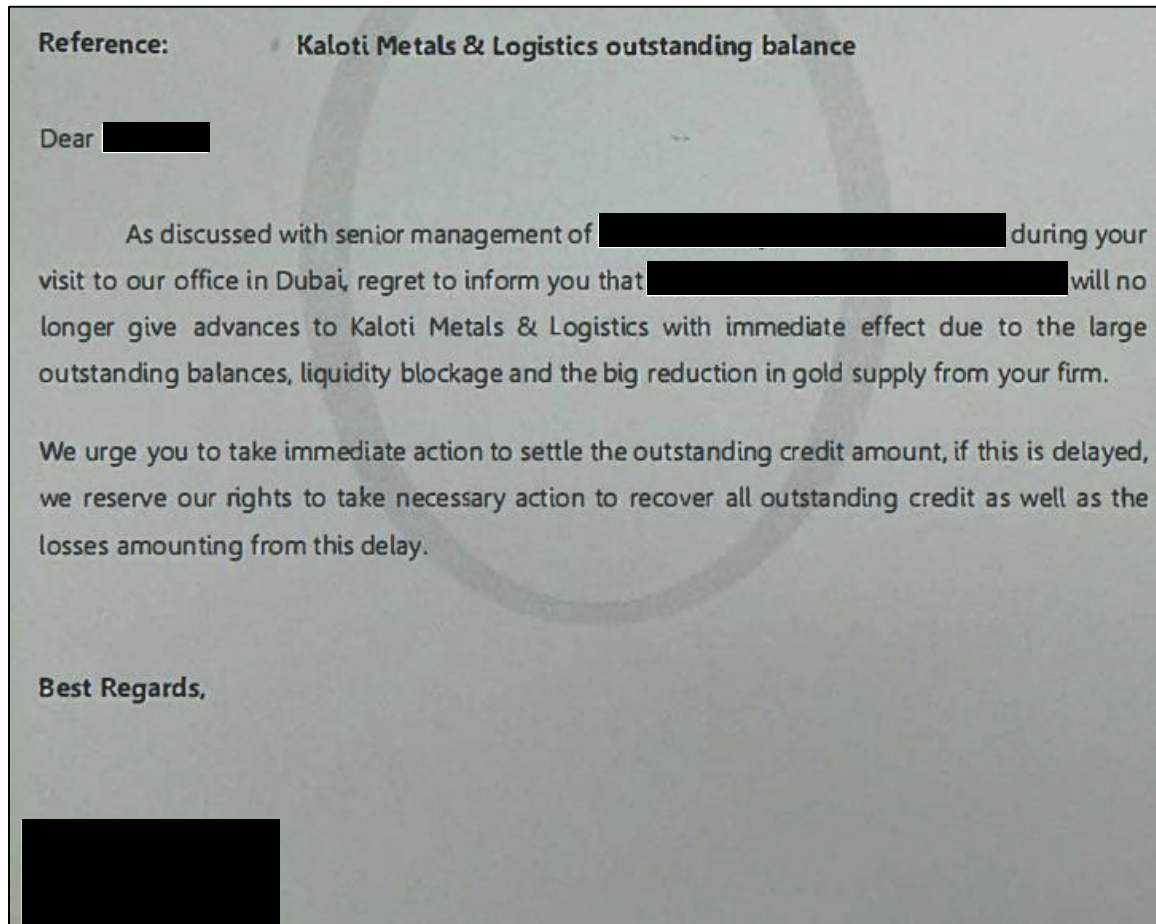
C-0104-ENG (Witness Statement-[REDACTED]-Claimant's Memorial-ENG, at ¶ 28).

445. As mentioned above, KML was diligent, mitigated damages, and sought new suppliers of gold in Peru (after Peru's initial measures). Exhibit **C-0030-ENG** clearly shows that KML had to substantially change suppliers starting in 2015, as compared to 2013-2014. [REDACTED], [REDACTED], [REDACTED] and [REDACTED] (the suppliers of the five shipments seized by Peru) did not supply any more gold to KML after 2014.

446. Further, because of Peru's unduly prolonged interim seizures of gold, a drawn-out loss of access to the significant gold quantities resulted in a greater cost of operating KML's business, carrying greater financing costs, and lower profits.⁴⁰⁵ Additionally, the lengthened inability to sell the inventory of those five shipments—that are still to this date in Peru's possession—caused KML to be unable to access liquid funds; and subsequently, after

⁴⁰⁵ Expert Report-Almir Smajlovic (Secretariat)-Claimant's Memorial-ENG, at ¶¶ 2.5, 6.74, 6.83, **C-0106-ENG**.

exhausting all of its options, KML was forced to shut down its operation due to its insolvency in November 2018.⁴⁰⁶



Evidence:

C-0137-ENG ([REDACTED] letter dated November 14, 2018).

447. Based on the Quantum Expert's analysis, by November 30, 2018, all of the prolonged measures taken, and omissions incurred, by Peru resulted in permanent and irreversible economic losses for KML.⁴⁰⁷ KML's equity turned to negative US\$ 13,649,821 on that date, and KML became *de facto* insolvent after having to deem its gold inventory lost.⁴⁰⁸ November 30, 2018, represents the date that Peru's expropriation of KML's

⁴⁰⁶ *Id.*

⁴⁰⁷ Second Expert Report-Almir Smajlovic (Secretariat)-Claimant's Reply-ENG, at ¶ 5.104, **C-0140-ENG**.

⁴⁰⁸ Expert Report-Almir Smajlovic (Secretariat)-Claimant's Memorial-ENG, at 6.12, **C-0106-ENG**.

investments became permanent and fully irreversible. For that reason, November 30, 2018, is both the date of breach by Peru of the TPA, and the appropriate valuation date (Valuation Date) for the Quantum Expert's analysis throughout his report.⁴⁰⁹

448. It was Peru's actions and omissions that caused KML's financial crisis, an outcome that would not have occurred in the absence of SUNAT's initial actions as combined with subsequent actions and omissions of Peru's prosecutors and criminal courts, up until 2018.

d. Peru's alternative theory of causation

449. Peru has presented an alternate causation of damages theory as a defense in this arbitration: that (1) KML's reputation, and ability to purchase more gold, was damaged by investigations and claims made outside of Peru (and not against KML); and (2) that KML deviated business to [REDACTED]

[REDACTED]. It is Peru who has the burden of proving its own alternate causation theory. However, Peru has only presented innuendo, elucubrations, and speculations regarding purported investigations in England and Africa against companies different from KML.⁴¹⁰ And [REDACTED], as explained below (¶¶ 503-508), did not have commercial operations in 2018, and is not a subsidiary, affiliate or successor of KML.⁴¹¹

450. KML will not fall into the trap, or waste the Tribunal's time, discussing alleged investigations not related to KML, and conducted in places outside of the American continents against third parties.

451. KML will stress, however, that none of the investigations invoked by Peru involved KML, or [REDACTED], and most importantly, none of such investigations resulted in any indictments (much less conviction). In fact, some investigations were effectively closed:

⁴⁰⁹ *Id.* at ¶ 2.16. Also, for issues relating to valuation specifically in indirect expropriations, including the setting of an appropriate valuation date (*vis-à-vis* treaty breach date), *see generally: Indirect Expropriation and its valuation in the BIT Generation*, W. Michael Reisman & Robert D. Sloane, Boston University School of Law (2004), **CL-0071-ENG**.

⁴¹⁰ Peru's **Counter-Memorial**, at ¶¶ 268-280.

⁴¹¹ Second Witness Statement-[REDACTED]-Claimant's Reply-ENG, at ¶¶ 4, 7, **C-0147-ENG**.

The Treasury Department, the Department of Justice and the UAE did not respond to questions about the Kaloti investigation. A spokesperson for the Special Operations Command said it could not comment on specific investigations. The DEA would only say that the case is now closed.

Evidence:

C-0151-ENG (*US Treasury Department abandoned major money laundering case against Dubai gold company*. Press article published by ICIJ, dated September 21, 2020, pp. 4).

452. [REDACTED], and Messrs. [REDACTED], [REDACTED] and [REDACTED], have not been sanctioned by any government, anywhere in the world. For instance, as of today, none of them appear in the OFAC sanctions database that can be accessed at <https://sanctionssearch.ofac.treas.gov/>.

453. Investigations *concluded* without indictments demonstrate (and convey to the world) a message of innocence, not of guilt. Also, as explained above (§§ 135-136, 439, 449), some of the things that Peru presented here were not even investigations, but mere speculations and unsubstantiated allegations. To the best of KML's belief, the alleged investigations mentioning some other companies with the name [REDACTED] involved entities that are still legitimately up and running as of today.

454. **KML is domiciled in, and continues to be legally in good standing with, the state of Florida, United States, as of today,⁴¹² a serious jurisdiction well reputed for having high standards in anti money-laundering and anticorruption regulation and enforcement.** All of KML's Peruvian suppliers of gold were aware of this. United States laws and regulations cover and extend to corrupt practices (including by affiliates) outside the United States.⁴¹³

⁴¹² Certificate of Status No. L10000108565, issued by the Florida Department of State Registry, **C-0116-ENG**.

⁴¹³ Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-1, et seq., **CL-0098-ENG**.

455. All of the gold that KML purchased in Peru (and other Latin American countries) between 2012 and 2018 was exported to the United States. All payments by KML were originated in the United States. No money that flowed from or to sellers of gold touched countries other than the United States and Peru. Hence, sellers (suppliers) of gold, never expressed to KML, and in fact had no, plausible discernable reasons to be concerned or apprehensive regarding any alleged investigations, of other entities and different people, in Europe or Africa.

21. To the best of my recollection, no supplier (seller) of gold ever expressed to me concerns about investigations, media articles, or allegations different from the ones involving KML's gold specifically in Peru.

Evidence:

C-0146-ENG (Witness Statement-[REDACTED]-Claimant's Reply-ENG, at ¶ 21).

456. In contrast, the investigations in Peru, which indeed have specifically mentioned KML itself, remain (according to Peru) open and unconcluded as of today, having been prolonged for more than seven years. Peru has expressly admitted this:

7. *Kaloti was included in criminal investigations due to its close links with companies that were the subject of criminal investigation*

251. Kaloti also alleges that Peru “arbitrarily mentioned KML”⁵⁰⁵ in “generic money laundering investigations, not specifically or directly connected to the temporarily seized gold.”⁵⁰⁶ According to Kaloti, Peru acted in a calculated and unfair manner, motivated by an alleged desire to “extend and prolong the temporary seizures of KML’s gold.”⁵⁰⁷ Kaloti refers, specifically, to investigation under file No. 42-2014 (“Investigation No. 42-2014”)⁵⁰⁸ and investigation under joint files No. 01-2014 and 78-2015 (“Investigation No. 01-2014”),⁵⁰⁹ launched by the Prosecutor’s Office and involving not only Kaloti but several other companies. Kaloti’s allegations and conspiracy theories are—once again—utterly unfounded.
252. Kaloti misrepresents the facts when it argues that it was “mentioned” in money laundering investigations. Kaloti was not simply “mentioned” but was in fact part of the aforementioned investigations, along with several other companies.⁵¹⁰ The facts show that there was nothing arbitrary about the fact that Kaloti was part of those

investigations. Kaloti had purchased gold from, and transferred money to, several companies that were themselves under criminal investigation for money laundering, including [REDACTED] (included in Investigation [REDACTED]) and [REDACTED] (included in Investigation [REDACTED]).

Evidence:

Peru’s **Counter-Memorial** (at ¶¶ 251,252).

457. Peru claims that merely invoking a State measure and establishing that there has been a virtual total loss to an investment are, on their own, insufficient to establish any expropriation, absent proof that the State measure was in fact what caused the loss of value of the investment.⁴¹⁴ But the undue lengthening of the actual, physical taking of KML’s gold, and the prolongation and leaking of related investigations in Peru, by Peru, is what caused the total loss of KML’s investments.

⁴¹⁴ Peru’s **Counter-Memorial**, at ¶ 648.

458. This is not the first time that interim or temporary measures by SUNAT exceeded its authority, and caused an expropriation. The tribunal in *Tza Yap Shum v. Peru* considered that the preventive measures taken by SUNAT caused the expropriation of the claimant's investment, and found Peru liable for those actions and consequent damages:

170. En conclusión el Tribunal considera que las medidas cautelares previas resultaron en la expropiación indirecta de la inversión del Demandante y, dado que el inversionista no fue compensado, dicha expropiación se efectuó en violación del artículo 4 del APPRI.

270. Esos Tribunales consideraron que el valor de las empresas sobre las que se discutía era nulo por causas ajenas a los actos ilícitos llevados a cabo por los Estados. Este Tribunal no ha encontrado circunstancias equiparables en el caso que nos ocupa. Más bien al contrario, el Tribunal ha declarado la existencia de un nexo causal directo entre las acciones de la SUNAT al trabar las medidas cautelares preventivas y la destrucción de la viabilidad económica de TSG. Para asegurar una apreciación realista del entorno

Evidence:

CL-0080-SPA (*Mr. Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Award (5 July 2011), at ¶¶ 170, 270).

C. Three main heads of damage

a. Lost profits caused by Peru

459. The lost profits of KML were caused by Peru's breach of Articles 10.3 and 10.5 of the TPA, including by Peru's unduly prolonging of the *interim* seizure of KML's gold, and failure to prevent the disclosure of its confidential investigations.

460. KML's quantum expert revised the lost-profits calculation (from his first report) as: (1) he no longer applied taxes to the projected earnings as explained below (*i.e.*, hence there is no need for a gross-up) which resulted in greater figures; (2) updates were made to the

working capital calculation which resulted in greater damages (also, there is no double-counting of the inventory); and, (3) pre-award interest is greater since the basis is greater.⁴¹⁵

461. Although lost profits relate to the 2013-18 period, for purposes of the TPA this particular loss was incurred and became actionable (*i.e.*, cognizable in arbitration) on November 30, 2018. This is because the treaty breach by Peru was a series of actions or omissions which only as defined in the aggregate are sufficient to constitute an international wrongful act.⁴¹⁶

462. KML's total lost profits claim became financially irreversible in 2018 when KML collapsed, not merely because Peru initiated investigations about the origin of the seized gold, but rather because Peru arbitrarily extended and prolonged its holding of the gold for too long, and caused reputational harm and other adverse consequences against KML.

463. The compensation for lost profits encompasses the lost net cash flows from the KML enterprise from January 1, 2014, to November 30, 2018 (the Valuation Date), brought forward to their present value as of the Valuation date using an appropriate interest rate. The Quantum Expert initially used March 04, 2022, as the pre-award interest date for the purposes of his analysis (discussed further below).⁴¹⁷ In the second report of the same expert, the interest was calculated through December of 2023.⁴¹⁸

464. Lost profits have been calculated on the basis of actual (now historical) information since January 01, 2014, through November 30, 2018.⁴¹⁹ Actual cash flows received by Claimant, including cash flows resulting from mitigation efforts, were subtracted from the but-for cash flows during the relevant period (as if the enterprise had continued to operate unaffected by Peru's wrongful measures). Lost profits were accounted starting on January 1, 2014, and through November 2018.⁴²⁰ In sum, after analyzing the historical trend in

⁴¹⁵ Second Expert Report-Almir Smajlovic (Secretariat)-Claimant's Reply-ENG, at ¶ 4.1, **C-0140-ENG**.

⁴¹⁶ *Each one isolated*, the initial temporary immobilizations of gold by Peru in 2013 and 2014, and some other subsequent measures—each one alone—, did not, in and of themselves, breach the TPA.

⁴¹⁷ KML expects to produce an updated report from the Quantum Expert at a time closer to the date of the Hearing, and would be prepared to produce a further update at a time approximating that of the Award.

⁴¹⁸ Second Expert Report-Almir Smajlovic (Secretariat)-Claimant's Reply-ENG, at ¶ 8.5, **C-0140-ENG**.

⁴¹⁹ *Id.*, at figure 8, ¶ 5.41.

⁴²⁰ Expert Report-Almir Smajlovic (Secretariat)-Claimant's Memorial-ENG, at ¶ 6.1, **C-0106-ENG**.

growth of KML's revenues and available contemporaneous records for its demand, the Quantum Expert forecasted the but-for revenue based on the estimation of what KML's market share of the gold market would have been, absent Peru's wrongful measures.⁴²¹ Needless to say, after comparing Mr. Smajlovic's volumes with the observed historic trend, it is clear that Mr. Smajlovic chose a conservative approach.

465. KML's Quantum Expert considered actual economic developments such as annual gold production, gold price, taxes, working capital, and other actual economic developments which occurred during this historical period. For conservative reasons, however, he ignored the possibility for any additional gold reserve developments in Peru, thus limiting total volumes that KML could have acquired through 2048. This was his chosen approach to be able to forecast without inherent forecasting errors, an approximate but conservative restitution as close to reality as possible.⁴²²

b. Gold inventory creepingly expropriated by Peru

466. This separate and additional claim (head of damage) also became legally cognizable on November 30, 2018. It is based on the breach by Peru of Article 10.7(1) of the TPA, which was consummated on such date. Because of its particular characteristics, and method of quantification, this claim has been separated from the lost profit claim (above), and the second expropriation claim made (below) by KML (again, carefully avoiding double counting). KML's quantum expert conducted a deep analysis to value the five shipments that were immobilized by Peru's Measures (prolonged actions and omissions).

467. Peru claimed that KML mistakenly valued unrefined gold at the same price as refined gold.⁴²³ That is false.

⁴²¹ *Id.* at ¶ 6.17.

⁴²² *Id.* at ¶ 5.3.

⁴²³ **Expert Report-Darell Chodorow and Fabricio Nunez (Brattle)-Respondent's Counter-Memorial-ENG**, at ¶¶ 199, 222, 232.

- 5.84. Brattle next proposes that the value I assigned to the seized inventory is overstated.¹²⁴ This claim is unsupported. Brattle suggests that the inventory value should be subject to another adjustment. Brattle claims that approximately 0.08% of the total value I assigned to the seized inventory should be deducted to account for the fact that the volumes I used are 'unrefined'.¹²⁵ This is incorrect; the volumes I used already reflect this adjustment.
- 5.85. While my initial estimate weights were on a pure/refined gold basis as reflected in the KML's worksheets, I have been provided with additional invoice-level details in respect of the seized inventory which provides gross weight, and pure weights.¹²⁶ I understand this to be the most reliable source of information. While my initial estimate of weights was on a pure/refined gold basis, I have now updated my calculation of the inventory value. Below I present Table 8 which exhibits my updated calculation of value of each inventory purchase using COMEX gold spot price as of 30 November 2018. Total difference in inventory value based on the updated weight is \$28,183.¹²⁷

Evidence:

C-0140-ENG (Second Expert Report-Almir Smajlovic (Secretariat)
Claimant's Reply-ENG, at ¶¶ 5.84, 5.85).

468. Peru also claimed that KML could not carry as inventory (or be the owner) of shipments for which KML has not effectively paid. Peru's argumentative position is inapposite.⁴²⁴ The actual deal between the relevant parties, and Peruvian law, did not require actual payment of the price in order for ownership of the gold to be transferred to KML:

1.2 La compraventa requiere del acuerdo en el precio, la cosa específica (bien), y la entrega de la cosa a quien designe el comprador. Al tratarse de un contrato consensual, este se perfecciona (el contrato genera obligaciones para ambas partes) con el cruce de voluntades entre las partes; **por tanto, no requiere del pago efectivo del precio.**

Evidence:

⁴²⁴ At least one of the two suppliers to whom KML did not make full payment, [REDACTED], expressly acknowledged and explicitly explained to the Peruvian government that the gold seized was the property of KML (regardless of such actual payment). See [REDACTED] document package, pp. 2, C-0009-ENG/SPA.

C-0139-SPA (Second Legal Opinion-Dr. [REDACTED]-Claimant's Reply-SPA, at ¶ 1.2).

469. A court decision invoked by Peru, dated 2022,⁴²⁵ which purports to transfer ownership of Shipment No. 5 back to [REDACTED], confirms that on November 30, 2018, KML was the legal owner of such gold under Peruvian laws. And in the valuation of KML as a going concern business enterprise, KML adjusted (subtracted) for all the debts of KML, including those owed to [REDACTED] and [REDACTED].⁴²⁶ **Peru cannot use in its favor, in this arbitration, facts that actually occurred after the expropriation date.**

470. In addition, it is important to note the only reason why KML could not actually pay [REDACTED] (for Shipment No. 5) and [REDACTED] (for Shipment No. 3) was precisely because Peru seized the gold, and KML could not turn the gold into cash. And whether—or not—KML will have to make payments to creditors in the future, and for what specific amounts (if any), is an issue external and irrelevant in this arbitration.

471. In this arbitration, KML is entitled to damages (including for the expropriation of five shipments of gold) as if Peru had never seized the gold. The arbitral award will need to, effectively, erase all the economic effects of Peru's actions and omissions, including as to KML's gold inventory, which KML carried in its financial statements until at least 2018.

472. KML has been very clear and consistent throughout this arbitration in specifying the volume (weight) of the gold that Peru seized, in terms of gross weight.

473. In 2013 and 2014, SUNAT temporarily immobilized 448,566 (net) grams of gold from KML. The net grams (which are a conservative estimate) were adjusted by KML's quantum expert from 449,282 in his first report⁴²⁷ to 448,566 in his second report,⁴²⁸

⁴²⁵ Resolution No. 08, Supreme Court of Lima, Court Specialized in Asset Forfeiture of Lima, 14 June 2022, **R-0212**.

⁴²⁶ Second Expert Report-Almir Smajlovic (Secretariat)-Claimant's Reply-ENG, at ¶ 4.1, **C-0140-ENG**.

⁴²⁷ Expert Report-Almir Smajlovic (Secretariat)-Claimant's Memorial-ENG, at table 5, **C-0106-ENG**.

⁴²⁸ Second Expert Report-Almir Smajlovic (Secretariat)-Claimant's Reply-ENG, at table 8, **C-0140-ENG**.

because he has been provided with additional information (invoices)⁴²⁹ that supplied more detailed information about the gross and pure weights of the gold seized.⁴³⁰

474. This indirectly (and progressively) expropriated gold would be valued at **US\$ 24,554,340** (at November 2022 prices).⁴³¹ The Quantum Expert has taken another look – down to the level of each invoice– to establish with reasonable certainty the net weight amount of KML’s seized gold.⁴³² While the amount is slightly different from his first report– as shown in table below – this update did not result in any material changes in the damages claimed.

Table 1 – Summary of Damages to KML (Seized Inventory Valued at 18 November 2022)

Summary of Damages to KML			
	Total		Peru Only
Present Value of Lost Profits	\$	27,079,044	\$ 12,671,349
Value of Expropriated Business (Enterprise Value (EV))	\$	70,136,219	\$ 28,365,223
Damages Before Pre-Award Interest and Seized Inventory	\$	97,215,263	\$ 41,036,572
Pre-Award Interest Through December 2023 (LIBOR+4%)	\$	32,903,128	\$ 13,889,091
Total Damages With Pre-Award Interest, Before Inventory	\$	130,118,392	\$ 54,925,663
Value of Seized Inventory (November, 2022)	\$	24,554,340	\$ 24,554,340
Total Damages Including Pre-Award Interest	\$	154,672,731	\$ 79,480,003

Evidence:

C-0140-ENG (Second Expert Report-Almir Smajlovic (Secretariat)

Claimant’s Reply-ENG, at Table 1).

475. The inventory that was progressively (creeping) expropriated could also be valued at US\$ 17,646,441 as of the Valuation Date (November 30, 2018).⁴³³ This is an

⁴²⁹ Bundle of KML gold purchase invoices, **C-0163-ENG**.

⁴³⁰ Second Expert Report-Almir Smajlovic (Secretariat)-Claimant’s Reply-ENG, at ¶ 5.85, **C-0140-ENG**.

⁴³¹ *Id.* at Table 1.

⁴³² Seized inventory details, **C-0164-ENG**.

⁴³³ Second Expert Report-Almir Smajlovic (Secretariat)-Claimant’s Reply-ENG, at ¶ 5.85, **C-0140-ENG**.

alternative scenario that requires adding pre-award interests to ensure that the damages for the time value of money are properly accounted.

Table 8 - Value of Seized Gold (Five Purchases) as of 30 November 2018¹²⁸

Purchase No.	Purchase Date	Seller	Gross Weight (gram)	Pure Weight (gram)	Price of Gold (gram)	Value @ 30 Nov 2018
Purchase No.1	27-Nov-2013		111,545	103,911	\$ 39.34	\$ 4,087,805
Purchase No.2	7-Jan-2014		98,591	92,750	\$ 39.34	\$ 3,648,770
Purchase No.3	7-Jan-2014		38,601	36,220	\$ 39.34	\$ 1,424,870
Purchase No.4	7-Jan-2014		126,775	117,860	\$ 39.34	\$ 4,636,567
Purchase No.5	8-Jan-2014		99,843	97,826	\$ 39.34	\$ 3,848,429
Total			475,356	448,566	\$ 39.34	\$ 17,646,441

Evidence:

C-0140-ENG (Second Expert Report-Almir Smajlovic (Secretariat)

Claimant's Reply-ENG, at Table 8).

476. Because the expropriation of the inventory was progressive (creeping), and illegal, KML is entitled to be compensated at whatever results *highest*, on the date of the final arbitral award, between: (1) the value of the gold inventory at 2018 prices, plus pre-award interest, or (2) the value of the inventory at the then current prices.⁴³⁴ KML hereby respectfully request compensation on such precise terms.

⁴³⁴ *Quiborax S.A., Non-Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, 16 September 2015, at ¶ 370 ('The [t]ribunal has already held that the standard of compensation in this case is not the one set forth in Article VI(2) of the BIT, but the full reparation principle under customary international law . . . because it is faced with an expropriation that is unlawful not merely because compensation is lacking . . . [T]he majority of the [t]ribunal considers that this requires an ex post valuation.'), **CL-0128-ENG**; see also, *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award, 27 October 2011, at ¶¶ 704–705, **CL-0063-ENG**.

c. Expropriation of KML as a going concern business enterprise

477. This third claim (third main head of damages) also became legally cognizable on November 30, 2018. It is based on the breach by Peru of Article 10.7(1) of the TPA consummated on such date. It requires a valuation approach different from that of the the expropriation of the gold (inventory).

478. KML's quantum expert revised his calculation of this head of damage from his first report: (1) now the enterprise value reflects no tax (and hence cash-flow increased), and (2) updated pre-award interest that reflects an increase in damages.⁴³⁵

479. KML understands that a DCF valuation analysis includes forward-looking assumptions and projections. A forecast cannot be 100% certain—that is impossible in practice. Mathematical certainty is not required here; prior arbitral tribunals have confirmed this.⁴³⁶ However, KML has presented a reasonably logical and conservative valuation, using generally accepted valuation practices and applicable standards, which minimized the risk of overstating KML's revenues and expenses.⁴³⁷

480. Peru's quantum experts did not substantially disagree with the appropriateness and applicability of the discounted cash flow (DCF) methodology proposed and used by KML's Quantum Expert. In fact, Peru's quantum experts presented their own calculation of the damages incurred by using the same DCF method, relying on KML's calculation.⁴³⁸ Peru's quantum experts simply made modifications to account for certain purported differences, alleged errors, or quantitative consequences, all based on assumptions instructed by Peru's lawyers.⁴³⁹

⁴³⁵ Second Expert Report-Almir Smajlovic (Secretariat)-Claimant's Reply-ENG, at ¶ 4.1, **C-0140-ENG**.

⁴³⁶ See generally, José Alberro, George D. Ruttinger, *"Going Concern" as a limiting factor on damages on investor-state arbitrations*, article from The Journal of Damages in International Arbitration (JDIA), Vol:2, No:1, 2015, **CL-0129-ENG**.

⁴³⁷ Expert Report-Almir Smajlovic (Secretariat)-Claimant's Memorial-ENG, at ¶ 6.108, **C-0106-ENG**.

⁴³⁸ **Expert Report-Darell Chodorow and Fabricio Nunez (Brattle)-Respondent's Counter-Memorial-ENG**, at § VIII.

⁴³⁹ *Id.*

481. The main adjustments proposed by Peru are:⁴⁴⁰

- Conflation of KML's loss-profits claim with the expropriation of KML and its inventory.
- The alleged reduction in but-for volumes of gold bought by KML.
- The removal of gold acquired by KML outside of Peru.
- The use of gold futures as of November 30, 2018, and the disregard of global price movements.
- Change in certain income projections and working capital assumptions.
- The use of risk-adjusted discount rate applicable to mining companies in Peru.
- An offset to damages based on book value of property, plant, and equipment (PP&E) of KML.
- A lower pre-award interest rate.

482. KML's Quantum Expert has provided very detailed, in-depth, objective, and independent responses to the above-mentioned issues.⁴⁴¹ KML will highlight, below, the most significant mistakes and misleading approaches posed by Peru's quantum calculations. As a premise, it is noteworthy that Peru's proposed but-for Peruvian gold volumes assigned to KML by Peru's analysis are greater than the actual volumes purchased by KML between 2014 and 2018.⁴⁴² In other words, Peru explicitly has, without wanting, confirmed that KML's volumes were negatively impacted by the actions and omissions of Peru's government.⁴⁴³

483. *Separation of claims.* KML separated its lost profits claim from its expropriation claims, and their relevant quantifications, for two valid reasons:

⁴⁴⁰ *Id.*, at ¶¶ 219-227.

⁴⁴¹ *See*, in general, Second Expert Report-Almir Smajlovic (Secretariat)-Claimant's Reply-ENG, **C-0140-ENG**.

⁴⁴² *Id.*, at ¶ 2.6.

⁴⁴³ **Expert Report-Darell Chodorow and Fabricio Nunez (Brattle)-Respondent's Counter-Memorial-ENG**, at ¶ 220.

- The lost-profits claim is based on Peru's breach of Articles 10.3 and 10.5 of the Treaty; whereas, the two expropriation claims are based on Peru's breach of Article 10.7 of the Treaty.
- The lost-profits claim was calculated on an analysis of cash-flow lost *until* November 30, 2018; whereas, the expropriation claims used two other different methodologies: (1) price value of the gold inventory seized by Peru; and (2) DCF (projections *after* November 30, 2018) for the going concern business enterprise. KML did not engage in double counting.

484. Peru, in contrast, has conflated all of KML's claims for valuation purposes.⁴⁴⁴

485. *Projected volumes.* Peru attacks and disregards KML's customers' demand for 45,000 kilograms of Peruvian gold per year referring to it as a short-term forecast.⁴⁴⁵ For that reason, Peru's modelled volumes remain grossly below the known demand that actually existed at the time (as proven by KML).⁴⁴⁶

486. KML has been very conservative in projections. Per Mr. Smajlovic's conservative methodology, the gold volumes included in KML's damages calculation decline over time (due to the assumed decline in gold production in Peru which is not to be replenished by any new discovery as assumed by Mr. Smajlovic), and additional risk-adjustments. Therefore, the gold volumes projected by KML are conservatively well below the 45,000 kilograms per year that KML proved as actual demand.

⁴⁴⁴ Expert Report-Darell Chodorow and Fabricio Nunez (Brattle)-Respondent's Counter-Memorial-ENG, at ¶¶ 219-228.

⁴⁴⁵ Expert Report-Almir Smajlovic (Secretariat)-Claimant's Memorial-ENG, at ¶¶ 5.24,6.25,6.26, C-0106-ENG.

⁴⁴⁶ [REDACTED] letter to KML dated September 10, 2013, C-0047-ENG.

5.35. Second, Brattle did not provide a single analysis or credible support for their hypothesis, as such, Brattle's proposal is baseless. In terms of potential impact of the competition on KML's market share, Brattle fails to recognize that I have already accounted for this in my calculation. For instance, despite the existing demand for 45,000 kilograms, to account for the potential impact of competition in Peru, my risked gold volumes are significantly lower.⁶⁷ For instance, starting in 2016, when KML purchases the highest amount of gold (which is nowhere near 45,000 kilograms), in every subsequent year I assume that KML's volumes will decline.⁶⁸ I note that in their alternative calculation Brattle has accepted my method of a continuous decline in volumes but has failed to account for all of the future developments of new gold reserves.

Evidence:

C-0140-ENG (Second Expert Report-Almir Smajlovic (Secretariat)
Claimant's Reply-ENG, at ¶ 5.35).

487. Peru, in contrast, has presented unfounded projections that assume that a *status quo* should be maintained from 2013 through 2048 (*i.e.*, 35 years without any growth in market share by KML) using a questionable sub-market.⁴⁴⁷ Peru claims that KML could only pursue gold acquisitions from a small subset of the Peruvian gold market.

488. Needless to say, Peru has not provided any reliable support for its argumentative and unfounded exclusion of the vast majority of the Peruvian gold volumes from KML's access. Peru simply assumed, arbitrarily, that the growth experienced by KML in the initial 15 months of operations in Peru plateaued, and that in the remaining 35 years there would be no growth in market share whatsoever. Peru has presented zero evidence or data evidencing that KML could not buy gold from 71% of the Peruvian gold suppliers (which includes all remaining gold producers other than just artisanal and Other).⁴⁴⁸ Peru's market assessment is limited, arbitrary, and not grounded on any analysis.

⁴⁴⁷ **Expert Report-Darell Chodorow and Fabricio Nunez (Brattle)-Respondent's Counter-Memorial-ENG**, at ¶¶ 26, 93,94. Brattle acknowledges however, that KML was able to compete successively for a period of approximately 15 months before occurrence of the initial set of the Measures. Nevertheless, Brattle assumes that the existing customer base which was primarily driven by artisanal and small would remain unchanged through 2048.

⁴⁴⁸ *Id.*

489. Peru's quantum experts, Brattle, are also not keen in understanding the relevant market; nevertheless, that apparently does not preclude them from dissecting it. Peru's analysis is flawed and it results in a false and speculative interpretation of the overall gold production market in Peru. Further, Peru speculates that a reason for KML's loss of market share could have been due to stronger competition.⁴⁴⁹ Based on such unsubstantiated speculation, specifically for years 2014 and 2015 Peru disregarded any growth in KML's gold purchases (in the absence of Peru's Measures).

490. Claimant has challenged and complained in this arbitration of the actions and omissions by Peru that permanently impacted the value of KML's investment as of November 30, 2018. Therefore, those actions and omissions must be excluded in a 'but-for' damages analysis under a 'full reparation' standard.⁴⁵⁰

491. *Prices.* Peru's damages calculation is strictly based on futures prices starting from November 2018, and does not consider any increases in the subsequent period. KML's prices (used in the quantum calculation) are based on prices from November 2022. Because the expropriation implemented by Peru was illegal (under the US-Peru TPA) KML can actually benefit, and hereby requests, the application of whatever is most favorable to KML between (1) future prices of gold as projected in 2018; or (2) actual prices after 2018, if higher.⁴⁵¹

492. *Double [dis]counting of damages by Peru.* After making adjustment to KML's inventory (five shipments of gold seized by Peru), Peru's quantum experts inappropriately further decreased lost profits by **US\$ 13,038,683** which ultimately results in alleged

⁴⁴⁹ *Id.*, at ¶ 109. In essence, Brattle unreasonably assumes that KML cannot acquire any gold volumes in Peru from producers other than artisanal producers and producers classified as 'Other'.

⁴⁵⁰ *Case Concerning the Factory at Chorzów (Claim for Indemnity) (Germany v. Poland)*, Judgment on the Merits (13 September 1928), Collection of Judgements, 1928 P.C.I.J. (ser. A) No. 16, **CL-0057-ENG**.

⁴⁵¹ *Quiborax S.A., Non-Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, 16 September 2015, at ¶ 370 ('The [t]ribunal has already held that the standard of compensation in this case is not the one set forth in Article VI(2) of the BIT, but the full reparation principle under customary international law . . . because it is faced with an expropriation that is unlawful not merely because compensation is lacking . . . [T]he majority of the [t]ribunal considers that this requires an ex post valuation.'), **CL-0128-ENG**; see also, *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award, 27 October 2011, at ¶¶ 704–705, **CL-0063-ENG**.

negative loss profits.⁴⁵² This adjustment is inappropriate because Peru’s quantum experts already adjusted working capital accounts in which the impact of the Measures was wiped out. Peru double-counted the impact of KML’s inventory, which explains why Peru came up with an **illogical conclusion that KML was allegedly better off with Peru’s Measures.**

493. *Alleged necessary adjustments to inventory.* Peru has alleged that approximately 0.08% of the total value assigned by KML to the inventory seized by Peru should be deducted because volumes used are ‘unrefined.’⁴⁵³ KML has provided invoice-level details with respect to the inventory seized by Peru which provides weights –that is the most reliable source of information.⁴⁵⁴ KML has updated calculations of the inventory value to adopt the lower weights indicated as the pure weight or net weight.

Table 8 - Value of Seized Gold (Five Purchases) as of 30 November 2018¹²⁸

Purchase No.	Purchase Date	Seller	Gross Weight (gram)	Pure Weight (gram)	Price of Gold (gram)	Value @ 30 Nov 2018
Purchase No.1	27-Nov-2013	██████████	111,545	103,911	\$ 39.34	\$ 4,087,805
Purchase No.2	7-Jan-2014	██████████	98,591	92,750	\$ 39.34	\$ 3,648,770
Purchase No.3	7-Jan-2014	██████████	38,601	36,220	\$ 39.34	\$ 1,424,870
Purchase No.4	7-Jan-2014	██████████	126,775	117,860	\$ 39.34	\$ 4,636,567
Purchase No.5	8-Jan-2014	██████████	99,843	97,826	\$ 39.34	\$ 3,848,429
Total			475,356	448,566	\$ 39.34	\$ 17,646,441

Evidence:

⁴⁵² Second Expert Report-Almir Smajlovic (Secretariat)-Claimant’s Reply-ENG, at ¶ 5.66, **C-0140-ENG**.

⁴⁵³ **Expert Report-Darell Chodorow and Fabricio Nunez (Brattle)-Respondent’s Counter-Memorial-ENG**, at ¶ 132 (“According to ██████████, KML purchases unrefined gold at a price equal to 99.2% of the refined gold price. Mr. Smajlovic’s damages from alleged expropriation value unrefined gold at a price for refined gold. Correcting this error on a standalone basis reduces Mr. Smajlovic’s damages from alleged expropriation by 1% (about \$0.5 million).”).

⁴⁵⁴ Bundle of KML gold purchase invoices, **C-0163-ENG**; Seized inventory details, **C-0164-ENG**.

C-0140-ENG (Second Expert Report-Almir Smajlovic (Secretariat)
Claimant's Reply-ENG, at Table 8).

494. Peru's quantum experts proposed to remove Shipment No. 5 (sold to KML by [REDACTED]) from KML's inventory. That is inappropriate for the reasons sufficiently explained above in ¶¶ 50-59.

495. In conclusion, none of the proposed inventory-related adjustments suggested by Peru are appropriate.

496. *Discount rate.* KML was not in the business which engages in the risky exploration, development, and production of mineral properties (mines). As such, it is inappropriate, as Peru proposed,⁴⁵⁵ to solely rely on such information to determine a discount rate (*i.e.*, weighted average cost of capital) for KML.

497. KML's Quantum Expert explained that a discount rate of 4.4%, inclusive of the Peruvian country risk premium, can be supported for KML's DCF valuation.⁴⁵⁶ However, KML has been conservative and posed a 5.19% discount rate in 2018, which is clearly supportable.⁴⁵⁷

D. Taxation and grossed-up damages

498. In its memorial of March 16, 2022, KML requested the Tribunal to order Peru to pay grossed up damages based on the tax implications of the award. That was because Mr. Smajlovic had calculated after-tax damages. Following Brattle's observations, and after confirming that KML did not elect to be taxed as a corporation in the United States, KML's quantum expert has now confirmed that corporate income taxes should not apply to an entity such as KML. As a default rule (absent special tax-treatment elections), LLCs registered in the United States are not subject to corporate taxation; rather, for income tax

⁴⁵⁵ **Expert Report-Darell Chodorow and Fabricio Nunez (Brattle)-Respondent's Counter-Memorial-ENG**, at ¶ 168.

⁴⁵⁶ All else equal, using 4.4 percent discount rate, as opposed to 5.19 percent, would increase damages to KML.

⁴⁵⁷ Expert Report-Almir Smajlovic (Secretariat)-Claimant's Memorial-ENG, at ¶¶ 2.9, 6.74, 6.83, **C-0106-ENG**.

purposes the ultimate liability resides with its members (equity holders). That is the reason why a tax gross-up has been removed as part of Mr. Smajlovic's second report.⁴⁵⁸

499. Notwithstanding the foregoing, KML hereby confirms its request that the arbitral award make clear that damages awarded to KML must be free and clear of any and all Peruvian taxes. As to United States taxes, Peru has claimed that <<KML is a limited liability company (sic) that, under US tax laws, pays no corporate taxes in the US. As such, KML would have no tax liability on any compensation received.>>⁴⁵⁹

500. The methodology without gross-up is qualitatively simpler, and aligned with the LLC structure (applicable in case of KML). KML's Quantum Expert has hence (in his second report) not applied corporate income taxes (originally subtracted from cash flow calculations in his first report).⁴⁶⁰

- I presented damages in accordance with the legal structure of the limited liability company, which is an entity not subject to corporate income tax. As such, I no longer gross-up my damages.

Evidence:

C-0140-ENG (Second Expert Report-Almir Smajlovic (Secretariat)-Claimant's Reply-ENG, at ¶ 4.1).

501. KML agrees that the members (equity holders) of KML <<are legally distinct from the Claimant, and therefore their tax burden should be ignored>> in this arbitration.⁴⁶¹ But the compensation to be awarded to KML should not give rise to any income-tax liability under Peruvian law for which KML is not kept whole.

⁴⁵⁸ Second Expert Report-Almir Smajlovic (Secretariat)-Claimant's Reply-ENG, at ¶¶ 4.1, 6.11, **C-0140-ENG**.

⁴⁵⁹ **Expert Report-Darell Chodorow and Fabricio Nunez (Brattle)-Respondent's Counter-Memorial-ENG**, at ¶ 34.

⁴⁶⁰ Second Expert Report-Almir Smajlovic (Secretariat)-Claimant's Reply-ENG, at ¶ 4.1, **C-0140-ENG**.

⁴⁶¹ **Expert Report-Darell Chodorow and Fabricio Nunez (Brattle)-Respondent's Counter-Memorial-ENG**, at ¶ 34.

502. The compensation determined in the final Award should be calculated, and should be payable, in an amount net (free and clear) of *any* taxes.⁴⁶²

E. No credit to Peru or offset of damages based on [REDACTED]

503. Peru and its quantum experts have alleged that KML contributed to its own demise because, according to Peru, KML deviated or channeled business and commercial transactions towards [REDACTED], a Florida limited liability company founded in 2018 by [REDACTED].⁴⁶³ Peru has the burden of proof regarding its assertion, but Peru has not proven such alleged theory, which in fact never occurred.

504. [REDACTED] is not an affiliate or subsidiary of, and it is not under common control with, KML.⁴⁶⁴ [REDACTED], who founded [REDACTED] is in fact, as regards to voting equity interests, a minority owner of Claimant.⁴⁶⁵ [REDACTED] is not a claimant or a party in this arbitration.

505. More importantly, [REDACTED] did not have any commercial operations or transactions in 2018, or before:

⁴⁶² See *Siemens v. Argentina*, at ¶ 403(11) (declaring “that any funds to be paid pursuant to this decision shall be paid in dollars and into an account outside Argentina indicated by the Claimant and *net of any taxes* and costs”), **CL-0018-ENG**.

⁴⁶³ Peru’s **Counter-Memorial**, at ¶¶ 733, 750-753; **Expert Report-Darell Chodorow and Fabricio Nunez (Brattle)-Respondent’s Counter-Memorial-ENG**, at ¶¶ 171, 172, 173.

⁴⁶⁴ Certificate of Status No. L10000108565, issued by the Florida Department of State Registry, **C-0116-ENG**.

⁴⁶⁵ KML Operating Agreement, **C-0102-ENG**.

October 5, 2022

To Whom It May Concern,

We have been the CPA firm for [REDACTED] since their inception, and currently assist them in matters regarding the revision of accounting information and preparation of all corresponding tax returns.

This letter serves as confirmation that [REDACTED] did not file a tax return with the Internal Revenue Service for the year ended December 31, 2018.

Should you have any questions, or if we may be of further assistance, please do not hesitate to contact our office.

Very truly yours,

[REDACTED]

Evidence:

C-0152-ENG (Letter made by the [REDACTED] accountant, dated October 5, 2022).

506. [REDACTED] was incorporated in 2018, but—contrary to Peru’s allegations⁴⁶⁶—did not have any operational or commercial overlap or overlay with KML, whatsoever. KML ended its operations on November 30, 2018, when its losses crystallized (*i.e.*, when its business was expropriated by Peru).

507. Also, the suppliers of gold that [REDACTED] has been using since 2019 do not present a relevant or material overlap or overlay with the suppliers that sold gold to KML until November 30, 2018. KML has fully disclosed in this arbitration all the suppliers that sold gold to KML between 2013 and 2018.⁴⁶⁷ KML produced to Peru on

⁴⁶⁶ **Expert Report-Darell Chodorow and Fabricio Nunez (Brattle)-Respondent’s Counter-Memorial-ENG**, at ¶¶ 171, 172.

⁴⁶⁷ KML transaction summary of all purchases between 2012 and 2018, **C-0030-ENG**.

October 12, 2022, a list of all the suppliers that sold gold to [REDACTED] [REDACTED] between 2019 and 2022.⁴⁶⁸

508. Whatever [REDACTED] is, and wherever its investments came from, or have been made, such company is in no way a successor or assign of KML. What KML had, it lost entirely and permanently because of Peru's actions and omissions, as explained above.

F. Interest on the compensation awarded

a. Pre-award compound interest

509. Peru and KML agree the Treaty requires that compensation for an expropriation must include interest at a commercially reasonable rate until the date of payment.⁴⁶⁹

510. Article 10.7(3) of the Treaty provides in relevant part that "compensation [...] shall be no less than the fair market value on the date of expropriation, plus interest at a commercially reasonable rate for that currency, accrued from the date of expropriation until the date of payment."⁴⁷⁰

511. Peru has argued, however, that the pre-award interest rate of LIBOR plus 4% claimed by KML is not commercially reasonable; and that the appropriate pre-award interest should reflect the time value of money and risk.⁴⁷¹ Peru's quantum expert does not actually make an economic or independent assessment as to such position, but takes refuge in (*i.e.*, hides behind) an instruction from Peru's lawyers.⁴⁷²

512. Under the TPA and the applicable principles of customary international law, a normal commercial rate includes the compounding of interest. As the tribunal in *Chevron*

⁴⁶⁸ [REDACTED] list of gold suppliers from 2019 to 2020, C-0134-ENG.

⁴⁶⁹ Expert Report-Darell Chodorow and Fabricio Nunez (Brattle)-Respondent's Counter-Memorial-ENG, at § VI.

⁴⁷⁰ TPA, at Art. 10.7(3), CL-0001-ENG.

⁴⁷¹ Expert Report-Darell Chodorow and Fabricio Nunez (Brattle)-Respondent's Counter-Memorial-ENG, at ¶ 208.

⁴⁷² *Id.*, at ¶ 33.

v. *Ecuador* observed in 2010, “the prevailing practice of international tribunals” today is to award compound interest.⁴⁷³ Compound interest, rather than simple interest, is required to compensate a successful claimant for the time value of money and lost earnings opportunities.⁴⁷⁴ **Peru has not disputed that pre-award interest must be compound.**

513. As explained above, the compensation owed by Peru includes (1) Claimant’s historical lost profits until 2018; (2) the indirect expropriation of Claimant’s gold; and, (3) fair market value of KML’s enterprise as a going concern (absent the wrongful measures) from 2018-48. Compound interest at a normal commercial rate must be added to those damages.

514. LIBOR plus four percent closely resembles the normal commercial rate in Peru.⁴⁷⁵ Brattle disagrees with the foregoing, based on their instructions, and suggests two alternative rates.⁴⁷⁶ But the risk-free rate or the Peruvian cost of debt (“COD”), as proposed by Peru, are not appropriate commercial interest rates in this matter.⁴⁷⁷

⁴⁷³ *Chevron Corp. v. Republic of Ecuador*, Ad hoc—UNCITRAL Arb. Rules, Partial Award on the Merits (30 March 2010), IIC 421 (2010), at ¶ 555, (“Regarding the pre-award interest [...] the Tribunal determines that compound interest applies, in accordance with the prevailing practice of international tribunals.”), **CL-0065-ENG**; see also e.g., *El Paso v. Argentina*, at ¶ 746, **CL-0036-ENG**; *Funnekotter v. Zimbabwe*, at ¶ 146, **CL-0024-ENG**; *Continental Casualty Co. v. Argentina*, ICSID Case No. ARB/03/9, Award (5 September 2008), IIC 336 (2008), at ¶¶ 310-313, **CL-0066-ENG**; *Rumeli Telekom AS and Telsim Mobil Telekomikasyon Hizmetleri AS v. Kazakhstan*, ICSID Case No. ARB/05/16, Award (21 July 2008), at ¶ 769, **CL-0029-ENG**; *PSEG Global Inc. and Ilgin Elektrik Uretim Ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award, 4 June 2004, at ¶ 348, **CL-0067-ENG**; *MTD v Chile*, at ¶¶ 215, 251, **CL-0034-ENG**; *Pope & Talbot Inc. v. Canada*, Ad hoc – UNCITRAL Arbitration Rules, Damages Award (31 May 2002), at ¶¶ 89-90, **CL-0068-ENG**; *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award (12 April 2002), 7 ICSID Reports 178 (2005), at ¶ 175, **CL-0069-ENG**; *Metalclad Corporation v. United Mexican States*, at ¶ 128, **CL-0059-ENG**; *Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Award (12 November 2000), 16 ICSID Rev-FILJ 1, 30-31, 5 ICSID Reports 419 (2002), at ¶ 96 (2001), **CL-0070-ENG**.

⁴⁷⁴ See, e.g., John Y. Gotanda, *Awarding Interest in International Arbitration*, 90 Am. J. Int’l L. 40 (1996), at pp. 61 (“In the modern world of international commerce, almost all financing and investment vehicles involve compound, as opposed to simple, interest. If the claimant could have received compound interest merely by placing its money in a readily available and commonly used investment vehicle, it is neither logical nor equitable to award the claimant only simple interest”), **CL-0072-ENG**; F.A. Mann, *Compound Interest as an Item of Damage in International Law*, 21 U.C. Davis L. Rev. 577, 586 (1988) (stating, “compound interest may be and, in the absence of special circumstances, should be awarded to the claimant as damages by international tribunals”), **CL-0073-ENG**.

⁴⁷⁵ Second Expert Report-Almir Smajlovic (Secretariat) Claimant’s Reply-ENG, at ¶ 5.93, **C-0140-ENG**.

⁴⁷⁶ **Expert Report-Darell Chodorow and Fabricio Nunez (Brattle)-Respondent’s Counter-Memorial-ENG**, at ¶¶ 208, 234; also see, Brattle Workpapers A., tab A9, **BR-0012**.

⁴⁷⁷ Second Expert Report-Almir Smajlovic (Secretariat)-Claimant’s Reply-ENG, at ¶ 5.93 **C-0140-ENG**

515. Calculated at a rate of LIBOR plus four percent, compounded annually, pre-award interest associated with damages in this matter totals **US\$ 38,875,679** until November 2022.⁴⁷⁸ The Quantum Expert used LIBOR plus four percent because it approximates Claimant’s short-term commercial borrowing rate for its operations in Peru, which ranged from 4.75% to 7.50%, depending on the amount borrowed. KML’s Quantum Expert selected an annual compound rate of interest.

b. Post-award compound interest

516. KML requests that the Tribunal order Peru to pay post-award interest on the quantum of compensation determined in the Award, accruing from the date of the Award until payment of the compensation in full. For the same reasons stated in the case of pre-award interest, post-award interest should also be compounded in accordance with the prevailing practice of international tribunals.⁴⁷⁹

G. Costs and expenses associated with this proceeding

517. KML requests that the Tribunal award it costs and expenses for the arbitration, including attorneys’ fees, plus interest thereon.⁴⁸⁰ In light of the principle of full reparation and Peru’s breaches of its international obligations, such an award is fully warranted.⁴⁸¹ The Claimant will submit its statement of costs and expenses at the close of this proceeding.

518. Peru made no effort whatsoever to negotiate or even communicate with KML after April 8, 2019 (when the notice of dispute—notice of intent—was delivered to Peru by KML). Peru instead chose to simply wait for KML to hopefully disappear and go away because of a lack of resources to commence arbitration. Such egregious conduct by Peru constitutes, in and of itself, a violation of the TPA; and should also be considered for the

⁴⁷⁸ *Id.*, at Table 20.

⁴⁷⁹ *See, e.g., Chevron v. Ecuador*, at ¶ 7 (awarding post-award compound interest), **CL-0065-ENG**.

⁴⁸⁰ *See* ICSID Convention, at Art. 61(2) (authorizing the Tribunal to “assess the expenses incurred by the parties” in the proceedings and to “decide how and by whom” the costs of the arbitration are paid), **CL-0042-ENG**.

⁴⁸¹ *See, e.g., Siag v. Egypt*, at ¶¶ 621-22 (concluding that prevailing Claimant should recover reasonable legal fees and related expenses), **CL-0028-ENG**; *ADC v. Hungary*, at ¶ 533, **CL-0032-ENG**.

qualitative and quantitative adjudications of all other treaty breaches alleged herein, especially cost and expenses associated with this proceeding.

VII. SECURITY FOR COSTS

519. KML hereby requests that the issue of security for cost be closed by Tribunal with prejudice, with an express and immediate order for costs against Peru. Any unreasonable cloud of doubt posed by Peru on this issue over KML's claims must be removed before the hearing in this case.

520. There is no legal authority permitting an order on security for costs based on the impecuniosity of a claimant alone.⁴⁸² To the contrary, multiple arbitral awards have unanimously, consistently, and expressly stated that *exceptional circumstances* suggesting substantive or procedural fraud, or bad faith, from a claimant—which are all absent in this case—are needed.⁴⁸³ The 'concerns' of Peru are not a relevant standard or element on this legal issue. KML reiterates and hereby incorporates by reference its two prior pleadings on this issue (exhibits **C-0153-ENG** and **C-0154-ENG**).

521. Notwithstanding and without prejudice to the foregoing, in the interest of transparency and cooperation, and as suggested (albeit not required) by Procedural Order No. 3, KML now hereby submits an undertaking regarding costs: exhibit **C-0155-ENG**.

VIII. REQUEST FOR RELIEF

522. For the foregoing reasons, the Claimant respectfully requests that the Tribunal render a final award in favor of Kaloti Metals & Logistics, LLC:

- a. Upholding the claims asserted by Claimant in this proceeding;
- b. Determining that Peru breached the TPA:
 - i. By failing to accord fair and equitable treatment to Claimant's investments; by taking arbitrary or discriminatory measures that impaired

⁴⁸² Claimant's further response in Opposition to Peru's Application for Security for Costs (*cautio judicatum solvi*), dated October 10, 2022, at ¶ 19, **C-0154-ENG**.

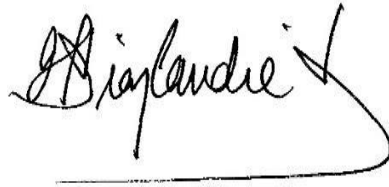
⁴⁸³ *Id.*, at ¶¶ 32-46, Annex A.

- the use and enjoyment of the Claimant's investments; by failing to accord to those investments the same treatment that it provided to nationals or companies of Peru, or third States;
- ii. By wrongfully and creepingly expropriating Claimant's gold without complying with the requirements of the Treaty, including nondiscrimination and payment of prompt, adequate and effective compensation; and
 - iii. By wrongfully and creepingly expropriating Claimant's going concern enterprise business without complying with the requirements of the Treaty, including nondiscrimination and payment of prompt, adequate and effective compensation.
- c. Determining that such breaches have caused damages incurred by Claimant;
 - d. Ordering Peru to pay to Claimant full reparation in accordance with the TPA and customary international law, including:
 - i. Compensation for damages sustained as a result of the discriminatory, unfair, and unequitable treatment; the expropriation of gold; and the expropriation of the enterprise, in an amount to be established in the proceeding;
 - ii. Compound interest thereon (both pre-award and post-award) in accordance with applicable law;
 - iii. Determining that the Claimant shall be protected from taxation of such compensation, in the manner specified in this memorial;
 - iv. Ordering Peru to pay all costs and expenses of this arbitration proceeding, including the fees and expenses of the tribunal, and the cost of legal representation (counsel's fees), plus interest thereon in accordance with applicable law; and
 - v. Such other or additional relief as may be appropriate under the applicable law or may otherwise be just and proper.

Given that Peru is expected to submit a Reply Memorial on Jurisdiction on May 12, 2023, KML hereby respectfully requests leave from the Tribunal for KML to file a brief

Rejoinder on Jurisdiction by June 16, 2023 (before the hearing in this case set for July 2023).⁴⁸⁴ This is required to attain procedural due process in this arbitration.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Hernando Díaz-Candia", with a long horizontal flourish extending to the right.

Hernando Díaz-Candia
Ramón A. Azpúrua-Núñez
Gabriella Hormazabal
Mikel Del Valle
Sebastián Ordoñez

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848 Brickell Ave, suite 1000
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305-988-8002 (telephone)

Counsel for the Claimant

⁴⁸⁴ KML, in good faith, put Peru on notice since August 16, 2022, that this leave was going to be requested by KML. KML counsel email to Peru regarding security for costs timetable and request for rejoinder on jurisdiction, dated August 16, 2022, **C-0160-ENG**.