International Centre for Settlement of Investment Disputes
(ICSID)

Kaloti Metals & Logistics, LLC,
Claimant,

v.

Republic of Peru,
Respondent.

ICSID Case No. ARB/21/29

Republic of Peru's Reply on Jurisdiction and Rejoinder on Merits

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12 May 2023

Arnold & Porter

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GLOSSARY

Term	Description
AML/CFT Manual or **Compliance Manual**	Kaloti's compliance and anti-money laundering manual
Amparo Request	Amparo request filed on 11 March 2014 by Kaloti before the Constitutional Court of Lima, alleging that SUNAT's immobilizations of Shipments 2 and 3 amounted to an indirect expropriation under Treaty Article 10.7
[redacted]	[redacted]
[redacted] **Shipments**	Shipments of gold that [redacted] claimed to have purchased
Asset Forfeiture Decree	Peruvian Legislative Decree No. 1373 of 3 August 2018, regulating asset forfeiture proceedings in Peru
Asset Forfeiture Regulations	Peruvian Regulations of Legislative Decree No. 1373, approved through Supreme Decree No. 007-2019 of 31 January 2019
[redacted]	[redacted] S.A.C., a company owned or controlled by the [redacted] family and [redacted]
Bank Account Closures	Closures of certain bank accounts of Kaloti by U.S.-based banks
Bank Letters	Eight letters sent to Kaloti by U.S.-based banks from 1 April 2014 to 10 August 2018 to communicate the Bank Account Closures
Brattle	Independent damages experts Darrell Chodorow and Fabricio Nuñez of the Brattle Group

Term	Description
[redacted]	[redacted]
Challenged Measures	State measures challenged by Kaloti in this arbitration, referred to in paragraph 136 of the Memorial and paragraph 385 of the Reply
[redacted] **Investigations**	Jointly, the [redacted] Investigation and the [redacted] Investigation
[redacted] **Investigation**	Investigation No. 42-2014 initiated on 23 March 2015 by the Prosecutor's Office to investigate alleged money laundering and illegal mining by [redacted] and other members of the [redacted] family's conglomerate of companies
CIL	Customary international law
Civil Attachment	Attachment ordered on 18 June 2014 by the Civil Court in relation to Shipment 5 in the [redacted] Civil Proceeding as a result of Kaloti's failure to pay [redacted] for Shipment 5
Civil Court	Civil court of Lima (*Trigésimo Tercer Juzgado Especializado Civil*), which ordered the Civil Attachment over Shipment 5
Claimant's Document Production Requests	Document production requests Nos. 6, 7, and 13 of Claimant's Redfern Schedule in the present arbitration
Company Registry Regulation	Regulation No. 200-2001-SUNARP-SN issued by Peru's National Superintendent of Registries (*Superintendente Nacional de los Registros Públicos*)
Constitution	1993 Political Constitution of Peru

Term	Description
Counter-Memorial	Peru's Memorial on Jurisdiction and Counter-Memorial on Merits dated 5 August 2022
Criminal Courts	Criminal courts in the Criminal Proceedings concerning the Suppliers
Criminal Proceedings	Jointly, the [redacted] Criminal Proceeding, [redacted] Criminal Proceeding, [redacted] Criminal Proceeding, and [redacted] Criminal Proceeding
Customs Declaration	Customs declaration submitted to SUNAT that provides the necessary information for the import or export of goods (*Declaración Aduanera de Mercancías ("DAM")*)
Cut-off Date	The date three years before Claimant submitted its claims to arbitration – i.e., 30 April 2018 – which serves as a limit on this Tribunal's jurisdiction *ratione temporis* pursuant to Article 10.18 of the Treaty
[redacted]	[redacted] a company owned or controlled by the [redacted] family and [redacted]
DCF	Discounted cash flow
DEA	United States Drug Enforcement Administration
DIRILA	Directorate for Money Laundering Investigations of Peru's National Police (*Policía Nacional del Perú*)
Expropriation Provision	Treaty Article 10.7

Term	Description
FATF	Financial Action Task Force, an independent inter-governmental anti-money laundering and anti-terrorism body
FATF Recommendations	FATF International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation
FET	Fair and equitable treatment
FinCen	Financial Crimes Enforcement Network, part of the United States Department of the Treasury
Financial Intelligence Unit or UIF	Financial Intelligence Unit of Peru (*Unidad de Inteligencia Financiera*)
First Notice of Intent	Kaloti's notice of intent to submit claims to arbitration under the Treaty dated 3 May 2016
Five Shipments	Jointly, Shipments 1, 2, 3, 4, and 5
FMV	Fair market value
General Customs Law	Peruvian Legislative Decree No. 1053 approving the General Customs Law
General Mining Law	Supreme Decree 014-92-EM, which governs mining activities in Peru
[redacted]	[redacted] a company founded by [redacted] in 2018

Term	Description
Going Concern Claim	Claimant's damages claim for the alleged expropriation of Kaloti "as a going concern enterprise," in the amount of USD 70,136,219
Gold	Gold that comprises the Five Shipments, collectively or individually
[redacted]	[redacted] a company that provided storage and transport services to Kaloti in Peru
IBA Rules	International Bar Association Rules on the Taking of Evidence
ICIJ	International Consortium of Investigative Journalists
ICSID Rules	2006 ICSID Arbitration Rules
ILC	International Law Commission
ILC Articles	International Law Commission Articles on the Responsibility of States for Internationally Wrongful Acts
ILC Commentary	International Law Commission Commentary on the ILC Articles
Illegal Mining Controls and Inspection Decree	Peruvian Legislative Decree No. 1107, which established (inter alia) control and auditing measures for the distribution, transport and trade of machinery and equipment used in illegal mining
INGEMMET	Peru's Metallurgical, Mining and Geological Institute (*Instituto Geológico, Minero y Metalúrgico*)

Term	Description
Inventory Claim	Claimant's damages claim for the alleged value of the Five Shipments, in the amount of USD 17,646,441 as of 30 November 2018, or alternatively USD 24,554,349 as of November 2022
Kaloti or Claimant	Kaloti Metals & Logistics, LLC.
[redacted]	Kaloti, [redacted] (Dubai), and any parent, affiliate or entity that, directly or indirectly, owns, controls or is owned or controlled by, or under common ownership or control with, such companies
[redacted]	[redacted] Kaloti's main customer and financier
[redacted]	[redacted] the Supplier of Shipment 1
[redacted] **Criminal Proceeding**	Criminal proceeding initiated by a Criminal Court against [redacted] and its legal representatives for alleged money laundering offenses connected to illegal mining
[redacted] **Investigation**	Preliminary investigation opened by the Prosecutor's Office against [redacted] and its legal representatives for alleged money laundering offenses connected to illegal mining
KYC	"Know Your Customer/Counterparty," a phrase commonly used to describe the process through which companies verify the identity and other compliance information regarding their new clients
Lost Profits Claim	Claimant's damages claim for alleged lost profits from 1 January 2014 to 30 November 2018, in the amount of USD 27,079,044

Term	Description
Memorial	Claimant's Memorial dated 16 March 2022
MFN Clause	Treaty Article 10.4
MFN Footnote	Footnote 2 to Treaty Article 10.4
MINEM	Ministry of Energy and Mines of the Republic of Peru (*Ministerio de Energía y Minas de la República del Perú*)
Money Laundering Decree	Peruvian Legislative Decree No. 1106, which established a framework for the effective fight against money laundering and other crimes related to illegal mining and organized crime
Money Laundering Regulations	Peruvian Regulations of Law No. 27693 of 12 April 2002
MST	Minimum standard of treatment
MST Provision	Treaty Article 10.5
My Good Luck	*Mi Buena Suerte* gold mine, from which [redacted] claimed to have extracted the 111.5 kilograms of Gold comprising Shipment 1
NAFTA	North American Free Trade Agreement
New Account Application	Application that suppliers filed to open an account with Kaloti

Term	Description
National Treatment Provision	Treaty Article 10.3
OAS	Organization of American States
[redacted]	[redacted] the Supplier of Shipment 2
[redacted] **Criminal Proceeding**	Criminal proceeding initiated by a Criminal Court against [redacted] and its legal representatives for alleged money laundering offenses connected to illegal mining
[redacted] **Investigation**	Preliminary investigation opened by the Prosecutor's Office against [redacted] and its legal representatives for alleged money laundering offenses connected to illegal mining
Peru	Republic of Peru
[redacted]	[redacted] alleged criminal linked to [redacted] and other suppliers of Kaloti
[redacted] **Investigation**	Investigations under joint files No. 01-2014 and 78-2015 originally launched on 18 December 2013 by the Prosecutor's Office, concerning the alleged creation of a criminal organization by [redacted] to launder money from drug trafficking and illegal mining activities through a number of companies, including [redacted]
PO2	Procedural Order No. 2, issued in the present arbitration on 28 September 2022, containing the Tribunal's decisions regarding the Parties' document production requests

Term	Description
Precautionary Seizures	Precautionary seizures ordered by the Criminal Courts in the Criminal Proceedings in relation to Shipments 1 to 4
Preliminary Investigations	Jointly, the [redacted] Investigation, [redacted] Investigation, [redacted] Investigation, and [redacted] Investigation
Preliminary Investigations Law	Peruvian Law No. 27379, which established the Procedure for the Adoption of Exceptional Measures for the Limitation of Rights in Preliminary Investigations
Prosecutor's Office	Office of the prosecutor of Peru (*Ministerio Público*), an autonomous State organ that, amongst other court-related mandates, conducts criminal investigations and prosecutes cases before the Peru's criminal courts
Publications	News articles and book extract that comprise Exhibit C-0051
RECPO	Peru's registry of individuals and companies engaged in the sale and/or process of gold (*Registro Especial de Comercializadores y Procesadores de Oro*)
Reply	Claimant's Counter-Memorial on Jurisdiction and Reply Memorial on the Merits dated 13 January 2023
Requests	Collectively, (i) four written submissions filed by Kaloti before the Prosecutor's Office in connection with Shipments 2 and 3, and (ii) three written submissions filed by Kaloti before the Criminal Court in the [redacted] Criminal Proceeding in connection with Shipment 3, cited by Claimant in paragraph 115 of the Memorial

Term	Description
SAR	Suspicious Activity Report alerting law enforcement to potential instances of money laundering or terrorist financing
[redacted]	[redacted] the Supplier of Shipment 3
[redacted] **Criminal Proceeding**	Criminal proceeding initiated by a Criminal Court against [redacted] legal representatives for alleged money laundering offenses connected to illegal mining
[redacted] **Investigation**	Preliminary investigation opened by the Prosecutor's Office against [redacted] legal representatives for alleged money laundering offenses connected to illegal mining
Second Notice of Intent	Notice of intent to submit claims to arbitration under the Treaty filed by [redacted], and Claimant, dated 8 April 2019
Shipment 1	Shipment of 111.54 kilograms of gold supplied by [redacted]
Shipment 2	Shipment of 98.59 kilograms of gold supplied by [redacted]
Shipment 3	Shipment of 38.61 kilograms of gold supplied by [redacted]
Shipment 4	Shipment of 126.775 kilograms of gold supplied by [redacted]
Shipment 5	Shipment of 99,84 kilograms of gold supplied by [redacted]

Term	Description
Shipment 1 Asset Forfeiture Proceeding	Asset forfeiture proceeding initiated by Peru on 18 August 2022, concerning the Gold in Shipment 1
State Attorney's Office	State Attorney's Office of Peru (*Procuraduría Pública*), which represents and defends the State's rights and legal interests, including when the State has been harmed by the commission of a crime, as in the case of money laundering
[redacted]	[redacted] the Supplier of Shipments 4 and 5
[redacted] **Civil Proceeding**	Civil proceeding initiated by [redacted] against Kaloti based on Kaloti's failure to pay for Shipment 5, resulting in the determination that Kaloti does not have ownership rights over Shipment 5
[redacted] **Criminal Proceeding**	Criminal proceeding initiated by a Criminal Court against [redacted] and its legal representatives for alleged money laundering offenses connected to illegal mining
[redacted] **Investigation**	Preliminary investigation opened by the Prosecutor's Office against [redacted] and its legal representatives for alleged money laundering offenses connected to illegal mining
SUNARP	Peru's National Superintendent of Public Registries (*Superintendencia Nacional de los Registros Públicos*)
SUNAT	Peru's National Customs and Tax Management Agency (*Superintendencia Nacional de Aduanas y de Administración Tributaria*)
SUNAT Immobilizations	SUNAT immobilizations of Shipments 1, 2, 3, and 4

Term	Description
Suppliers	Jointly, [redacted] [redacted] [redacted] and [redacted] which allegedly supplied the Gold contained in the Five Shipments to Kaloti
[redacted]	[redacted] S.A., a private company that provides a wide range of airport services encompassing ground handling services, cargo handling services (including cargo operations and storage), and aircraft maintenance at several airports in Peru, Ecuador, Mexico, and Colombia
Tax Code	Peruvian Supreme Decree No. 133-2013-ET dated 22 June 2013
Temporal Limitations Provision	Treaty Article 10.18.1
[redacted]	[redacted] a company owned or controlled by the [redacted] family and Mr. [redacted]
Trading Terms	"Terms and conditions for bullion trading and related transactions" allegedly agreed between Kaloti and each of the Suppliers
Transaction History	List submitted by Kaloti for purposes of this arbitration that allegedly lists all of Kaloti's transactions with gold suppliers between 2011 and 2018, set forth in **Exhibits C-0030**, **C-0043**, and **C-0050**
Treaty	United States – Peru Free Trade Agreement
Vienna Convention	Vienna Convention on the Law of Treaties

I. INTRODUCTION[1]

1. It is not all that often that the Respondent State in an investment arbitration faces claims as frivolous, distasteful, and abusive as those that have been filed against the Republic of Peru ("**Peru**") in the present arbitration by Kaloti Metals & Logistics, LLC ("**Claimant**" or "**Kaloti**"). Reduced to its essence, this is a case that involves an investor that (i) forms part of a corporate group ("[redacted] that has been implicated in criminal activity; (ii) either knowingly or negligently traded in "dirty gold"—i.e., illegally mined gold; (iii) is claiming an enormous sum in damages under an investment treaty for alleged investments—including the dirty gold—that such investor cannot even prove that it ever owned; (iv) in connection with measures that were reasonably and justifiably adopted by the Peruvian authorities to combat illegal mining and money laundering, both of which are undeniably legitimate policy objectives.

2. Peru recited in its Memorial on Jurisdiction and Counter-Memorial on Merits ("**Counter-Memorial**")[2] the numerous fatal deficiencies that plague Claimant's arguments and claims. In its Counter-Memorial on Jurisdiction and Reply Memorial on the Merits ("**Reply**"),[3] Claimant was utterly unable to dispel such deficiencies or rebut *any* of Peru's arguments. Not only should all of Claimants claims be summarily dismissed, but Claimant should be directed to cover the totality of Peru's costs and expenses, for the simple reason that the claims herein are abusive: this is an arbitration that never should have been commenced at all.

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[1] For the sake of brevity and to avoid unduly burdening this Introduction, only certain citations are included herein. However, the various propositions referenced in this section are fully supported with citations and evidence elsewhere in the submission.

[2] Republic of Peru's Memorial on Jurisdiction and Counter-Memorial on Merits, 5 August 2022 ("**Counter-Memorial**").

[3] Claimant's Counter-Memorial on Jurisdiction and Reply Memorial on the Merits, 13 January 2023 ("**Reply**").

A. Claimant has deliberately ignored the context and legitimate public policy concerns that prompted Peru's measures

3. Over the past 10 to 15 years, Peru and other gold-producing States have experienced dramatic increases in illegal gold mining. In Peru, as in other Andean gold-rich countries, illegal mining has wreaked havoc on local communities and their environments, resulting in the dumping of large quantities of mercury into the rivers of the Amazon. Moreover, it is well-known that the product of illegal mining—i.e., "dirty gold"—is frequently used to facilitate money laundering and other crimes.

4. Pursuant to its rights and its duties as a sovereign State, Peru responded to the emerging crisis in the gold industry by developing and applying a robust legal framework to combat illegal mining and related crimes. Accordingly, Peruvian law (as well as sound business practices) requires all purchasers of gold to conduct due diligence on gold suppliers, and to confirm that the gold being purchased from these suppliers has been legally mined. Kaloti manifestly failed to comply with such legal obligations, as it did not conduct adequate due diligence on its suppliers or on the origin of gold that it claims constitutes its investment and that is the subject of the present arbitration. In fact, Kaloti's purported due diligence of that gold and its suppliers can be fairly and accurately described, at best, as farcical, and, at worst, as deceptive.

5. Kaloti is the Florida-based arm of the [redacted] a Dubai-based precious metals conglomerate, which is owned and operated by the Kaloti family. Both before and after the adoption of the State measures underlying this arbitration, countless articles and investigations by reputable global media outlets and NGOs have detailed sordid practices by Kaloti and the [redacted] These widely reported practices have included forged audit reports, smuggling gold out of several countries, purchasing conflict minerals, funding global criminal organizations, and money laundering on a massive scale.

6. The [redacted] plan was to use Kaloti to supply gold from Peru and other Latin American States to its sister company, [redacted] ("[redacted]

[redacted]"), which is incorporated in Dubai. [redacted] which had been investigated by the DEA and was suspected of money laundering and other criminal activity – needed gold to fund its operations. Eager to supply part of the gold required by its sister company, in 2013 Kaloti linked up with numerous, highly suspect gold suppliers in Peru, including: (i) [redacted] ("[redacted] (ii) [redacted] ("[redacted] (iii) [redacted] ("[redacted] and (iv) [redacted] ("[redacted] (collectively, "**Suppliers**"). Kaloti purportedly acquired five shipments of gold ("**Five Shipments**") from the Suppliers. The evidence reveals that Kaloti was blithely unconcerned about the provenance of the gold contained in the Five Shipments ("**Gold**")[4]. Put simply, Kaloti did not care whether the gold had been illegally mined or was the product of money laundering. Rather, it simply turned a blind eye, paid lip service to its due diligence obligations, and ignored garish red flags that would have suggested to any responsible company that the Suppliers were criminal organizations.

7. The result was both predictable and justified. Acting in accordance with its statutory mandate and regulations, Peru's National Customs and Tax Management Agency (*Superintendencia Nacional de Aduanas y de Administración Tributaria*) ("**SUNAT**") identified indicia of illegal activity on the part of the Suppliers. On that basis, it immobilized four of the Five Shipments ("**SUNAT Immobilizations**"), and notified the prosecutorial authorities of the relevant potentially criminal activity. In light of these immobilizations, Kaloti decided not to export the fifth shipment, which to this day is in the facilities that Kaloti rented in Lima.

8. Following the SUNAT Immobilizations, Peru's prosecutorial authorities initiated criminal investigations into the Suppliers, leading to prosecutions thereof ("**Criminal Proceedings**"). During the course of those proceedings, the prosecutorial authorities sought and obtained precautionary seizures ("**Precautionary Seizures**") over the

[4] Peru uses herein the term "Gold" variously to refer to the gold contained in all five shipments at issue in this arbitration (combined), in some combination thereof, or in a specific individual shipment. The context should render clear in each instance the intended meaning.

Gold that had been immobilized by SUNAT. In sum, in the normal exercise of their regulatory functions, Peruvian authorities identified evidence of illegal activity, and adopted responsive measures that were reasonable, proportionate, and consistent with their mandate and Peruvian law.

B. Claimant has weaved a false and hopeless narrative

9. In the Memorial, dated 16 March 2022 ("**Memorial**"), Claimant had presented a fanciful narrative in which it sought to portray Peru as having improperly targeted Kaloti, allegedly causing its eventual insolvency. However, such narrative was constructed on factual errors, gross mischaracterizations of the evidence and Peruvian law, and glaring omissions.

10. In the Counter-Memorial, Peru provided a thorough and detailed response to each of Claimant's claims. Therein Peru (i) corrected Claimant's many errors and misrepresentations of the evidence; (ii) presented its own evidence in support of its arguments; (iii) addressed the applicable legal standards under both Peruvian law and the United States – Peru Free Trade Agreement ("**Treaty**"), (iv) demonstrated that the Tribunal lacks jurisdiction, *and* (v) showed that all of Claimant's claims lack merit.

11. Moreover, in the Counter-Memorial and during the document production phase that followed, Peru challenged Claimant to produce evidence to support its factual allegations. Yet Claimant was unable to do so, even with respect to fundamental issues. By way of example, all of Claimant's claims rest upon the basic premise that Kaloti at some point in fact purchased and acquired ownership over the Five Shipments of Gold. Peru requested, and the Tribunal ordered, that Claimant produce evidence to support the claim that Kaloti indeed was (or had been) the rightful owner of the Gold. Specifically, Peru had requested production of "[t]he sale and purchase agreements entered into between Kaloti and the Suppliers for the purchase of the assets contained in the Five Shipments."[5] To this day, however, *Claimant has not produced a single purchase agreement for any of the Five Shipments*. It has therefore failed

[5] Procedural Oder No. 2, 28 September 2022, Annex 2, p. 7.

to establish the threshold requirement of proving ownership of the investment that forms the basis of its treaty claims in this arbitration. Similarly, Peru had requested that Claimant produce evidence that Kaloti had conducted due diligence on the Suppliers and the origin of the Gold. However, *Claimant has likewise failed to produce evidence that Kaloti conducted the requisite due diligence*. It has therefore failed to establish that it complied with the applicable requirements under Peruvian law.

12. Further, the evidence on the record strongly suggests that the Gold was illegally mined. All four Suppliers alleged that the entirety of the Gold was extracted from various mines in Peru. However, these mines lacked the required permits to exploit gold, were inoperative, did not belong to the Suppliers, and/or belonged to third parties that have expressly denied having any relationship whatsoever with the Suppliers. Claimant has been utterly unable to explain how the Suppliers could have sourced the Gold from these mines.

13. Lacking evidence to support its claims or to rebut Peru's arguments, in the Reply Claimant simply contented itself with repeating its allegations from the Memorial. In fact, in many instances such repetition is literally verbatim: Peru has identified entire pages of the Reply that were copy-pasted from the Memorial. Claimant's inability (i) to produce evidence to substantiate its claims, and (ii) to engage with Peru's submissions, render it clear that its claims are not only meritless, but frivolous and abusive.

14. In this submission, Peru supplements as appropriate the evidence and arguments from the Counter-Memorial, which explain why Claimant's claims cannot succeed.

1. Claimant misrepresented the facts

15. In **Section II** below, Peru addresses the key facts relevant to the claims. One such critical fact is that *Claimant has failed to prove that Kaloti ever became the owner* of the Gold, which is fatal to every aspect of Claimant's case, including jurisdiction, merits, and damages. Another key fact is that *Kaloti did not conduct adequate due diligence as required by Peruvian law (and sound business practice)* with respect to either the Suppliers

or the provenance of the Gold. This fact, too, is devastating to Claimant's claims, for the reasons explained later in the present submission.

16. In addition, Claimant has mischaracterized the relevant conduct of the Peruvian authorities. Claimant has been vague in its pleadings—either deliberately or negligently—about the specific acts and omissions of which it complains. Nevertheless, it appears that its claims primarily target the SUNAT Immobilizations, the Precautionary Seizures, and Peru's alleged conduct in the Criminal Proceedings ("**Challenged Measures**").[6]

17. The reality, however, is that Peru's conduct was in all respects and at all times entirely reasonable and consistent with both the applicable Peruvian law and the Treaty. In the exercise of its statutory functions, SUNAT uncovered indicia of (i) money laundering on the part of the Suppliers, (ii) links between the Suppliers and criminal organizations, and (iii) the potential role of the Suppliers as front companies for the exportation of dirty gold. On the basis of those indicia, SUNAT immobilized Shipments 1 to 4. Importantly, and contrary to Claimant's narrative, such immobilizations did *not* target Kaloti in any way.

18. While SUNAT immobilized Shipments 1 to 4 on the basis of the aforementioned indicia of illegal activity, Shipment 5 (valued by Claimant at USD 3.84 million) was not immobilized by SUNAT. Rather, such shipment was the subject of an attachment ("**Civil Attachment**") in a civil case initiated by the Supplier of Shipment 5. Such Supplier claimed—and ultimately proved in court—that Kaloti had never paid for that shipment. It is therefore entirely abusive for Claimant to have submitted in this arbitration claims in respect of that shipment, as in effect it is demanding compensation for gold that it never paid for and never owned. It is particularly

[6] As Peru explains in **Sections III** and **IV** below, Claimant does not identify in respect of each of its claims the specific measures of which it complains. Peru's use of the term "Challenged Measures" is therefore without prejudice to the fact that Claimant has failed to identify the particular basis of alleged liability for each of its claims.

inexcusable that Claimant maintained such claims in the Reply, even after Peru provided irrefutable evidence that the claims relating to Shipment 5 are baseless.

19. The evidence on the record also shows that, contrary to Claimant's arguments, the prosecutorial and judicial authorities that conducted the relevant investigations and proceedings did so in full accordance with Peruvian law. Pursuant to its legal mandate, the Office of the Peruvian Prosecutor ("**Prosecutor's Office**") began to investigate and gather evidence with respect to the suspected illegal activities of the Suppliers ("**Preliminary Investigations**"). Based upon that evidence, the Prosecutor's Office sought and obtained the Precautionary Seizures. That type of provisional measure is authorized under Peruvian law for the purpose of preserving evidence and preventing the dissipation of proceeds of suspected criminal activity. The competent criminal courts ("**Criminal Courts**") then conducted Criminal Proceedings against each of the Suppliers.

20. Although Kaloti was a subject of two criminal investigations, it has never been a party to the Criminal Proceedings. Peruvian law nevertheless provided to Kaloti, as a third party, legal remedies to protect its alleged interests in the Criminal Proceedings, including in respect of the Precautionary Seizures regarding the Gold. These remedies required Kaloti to comply with basic but essential procedural requirements, and to demonstrate that it was the owner of the Gold. Kaloti, however, chose not to avail itself of any of those remedies. Instead, it misguidedly sent various individual letters to the Prosecutor's Office and Criminal Courts making meritless requests. None of those letters complied with the applicable procedural rules or demonstrated that Kaloti was the owner of the Gold. Contrary to Claimant's assertions, the Criminal Proceedings (i.e., against the Suppliers) are being conducted reasonably and diligently, and with due regard to the complexity of the suspected criminal activity.

21. Claimant avers that the Challenged Measures caused the eventual demise of Kaloti on 30 November 2018, i.e., some four years after those measures were adopted. That narrative elides certain key facts that belie Claimant's arguments. For example, even after the SUNAT Immobilizations, Kaloti continued to operate freely in the Peruvian

gold market, including by purchasing large volumes of gold from other Peruvian suppliers. Kaloti's operations ceased in 2018 not because of any act or omission by Peru, but rather by virtue of a unilateral decision by Kaloti itself, apparently based on strategic considerations. Tellingly in this regard, a mere two months before Kaloti shuttered its operations, Kaloti founder Mr. [redacted] had created a company called [redacted] ("[redacted] which soon after its constitution inherited Kaloti's business and staff, as well as many of Kaloti's suppliers. Thus, for all intents and purposes, [redacted] carried on Kaloti's business under a new name.

22. After two rounds of written submissions, the evidence on the record of this arbitration demonstrates unequivocally that Claimant's claims are factually unsupported and based on false premises.

2. All of Claimant's claims are barred for lack of jurisdiction

23. In **Section III** below, Peru confirms that this Tribunal lacks jurisdiction. Claimant bears the burden of establishing jurisdiction over each of its claims, and such jurisdiction is limited by the terms of the Treaty and the ICSID Convention. However, Claimant has failed to carry that burden.

24. Indeed, Claimant has even failed to satisfy the most elemental requirement of any investment claim: the existence of a covered investment in the territory of the Respondent State. Claimant first identified as its alleged investment the Five Shipments of Gold, but such shipments manifestly fail to qualify as a covered investment under either the Treaty or the ICSID Convention. That is so for several reasons: (i) the alleged purchase of the Gold is a commercial transaction that does not possess any of the requisite characteristics of an "investment" for purposes of the Treaty and ICSID Convention; (ii) Claimant has been utterly unable to prove that it owned or controlled any of the Five Shipments; and (iii) in any event, even if Kaloti had indeed acquired ownership at some point (quod non), it would have done so in violation of Peruvian law and international public policy.

25. Claimant has also identified as its purported investment its "global business operations"[7] and its "going concern business enterprise."[8] Yet Claimant's global operations or business enterprise, generally, cannot constitute an investment in the territory of Peru.

26. Because Claimant does not have a covered investment, the Tribunal lacks jurisdiction *ratione materiae* over all of Claimant's claims.

27. In addition, nearly all of Claimant's claims fall outside the jurisdiction *ratione temporis* of the Tribunal, because they do not comply with the three-year temporal limitations period set forth in Article 10.18 of the Treaty ("**Temporal Limitations Provision**"). Pursuant to that provision, an investor may not submit a claim more than three years after it first acquired actual or constructive knowledge of (i) the alleged breach, and (ii) the alleged fact that it has incurred loss as a result of that breach. But as Peru had demonstrated in the Counter-Memorial and confirms in **Section III** below, all of Claimant's claims are based on alleged breaches and alleged resulting harm of which Kaloti was already aware before the cut-off date of 30 April 2018 ("**Cut-off Date**").

28. Unable to overcome this jurisdictional hurdle, Claimant blatantly sought to circumvent it. As it had in the Memorial, Claimant insisted in the Reply that all of the alleged acts or omissions by Peru formed a "composite act." Such argument is a manifest attempt to sweep its claims within the three-year limitations period. However, Claimant's thesis is entirely inconsistent with the relevant principles of State responsibility, upon which the international arbitration system is founded. That is so because a "composite act" is a specific—and specifically defined—type of State action under international law; it is not, as Claimant apparently believes, simply a mechanism that enables an investor to cobble together a series of discrete alleged acts, and then point to the last act in such series as purported compliance with the temporal requirements of the Treaty.

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[7] Reply, ¶ 394.

[8] Reply, ¶ 6.

29. In any event, Claimant has provided *no* evidence to support the existence of a composite act here. The International Law Commission Articles on the Responsibility of States for Internationally Wrongful Acts ("**ILC Articles**") and their commentary ("**ILC Commentary**") explain that, to be deemed a composite act, the relevant acts or omissions must be "sufficiently numerous and inter-connected to amount not merely to isolated incidents or exceptions but to a pattern or system."[9] Here, Claimant has not even attempted to demonstrate, let alone succeeded in demonstrating, that the Challenged Measures were inter-connected or comprised a pattern or system.

30. Peru has thus demonstrated that Claimant's claims challenging measures that long pre-dated the temporal limitations period fall outside of the jurisdiction *ratione temporis* of this Tribunal.

3. Peru did not commit any breach of the Treaty

31. Even though it cannot identify either a covered investment or measures falling within this Tribunal's jurisdiction, Claimant has alleged multiple breaches of the Treaty. However, as Peru explains in **Section IV** below, such claims appear to be based on legal standards that are of Claimant's own invention, wholly divorced from the express terms of the Treaty, established principles of customary international law ("**CIL**"), and investment jurisprudence. The application of the proper law to the proven facts reveals Claimant's claims to be meritless.

32. For example, Claimant has alleged that Peru breached Article 10.5 of the Treaty ("**MST Provision**"), which prescribes the minimum standard of treatment ("**MST**") under CIL. Once again relying on the (unproven) notion of a composite act, Claimant argues that Peru's conduct, considered cumulatively or in the aggregate, constituted a denial of justice, was discriminatory, violated Claimant's legitimate expectations, and violated an alleged duty to negotiate after the dispute had arisen. Peru

[9] **RL-0022**, ILC Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries, 2001 ("**ILC Commentary**"), Art. 15, Commentary 5 (*quoting Ireland v. United Kingdom* European Court of Human Rights, Application No. 5310/71, Award, 18 January 1978, ¶ 159).

demonstrated in the Counter-Memorial, and the Reply confirmed, that none of these claims have any merit whatsoever:

a. *Peru did not deny justice to Claimant*. A claimant must satisfy an extremely high bar to establish a denial of justice, including by showing that "the error must be of a kind which no competent judge could reasonably have made,"[10] and that such error reflects the "failure of the whole national system."[11] Claimant cannot satisfy this stringent threshold, because the evidence in fact shows that (i) the relevant Peruvian prosecutorial and judicial authorities complied in all respects with Peruvian law and procedure, and (ii) in any event, Claimant did not even attempt to pursue the legal remedies that were available under Peruvian law in relation to the Challenged Measures.

b. *Peru did not discriminate against Claimant*. Claimant also argued that Peru breached the MST Provision by treating other foreign purchasers of gold better than Kaloti. But that claim is unsubstantiated, as Claimant has been utterly unable to show that any foreign purchaser in like circumstances was treated more favorably than Kaloti.

c. *Legitimate expectations are not protected under the MST, and in any event Peru did not breach any legitimate expectation held by Claimant.* For the first time in the Reply, Claimant argued that Peru violated Kaloti's legitimate expectations. The MST, however, does not protect an investor's legitimate expectations. In any event, Claimant did not identify any legitimate expectations—i.e., expectations

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[10] *See* Counter-Memorial, ¶ 490 (*citing* **RL-0159**, *Pantechniki S.A. Contractors & Engineers (Greece) v. Republic of Albania*, ICSID Case No. ARB/07/21, Award, 28 July 2009 (Paulsson), ¶ 94. *See also* **RL-0219**, Jan Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW (2005), p. 89.

[11] **RL-0155**, *Chevron Corp. and Texaco Petroleum Corp. v. Republic of Ecuador (II)*, PCA Case No. 2009-23, Second Partial Award on Track II, 30 August 2018 (Veeder, Grigera Naón, Lowe) ("***Chevron* (Second Award)**"), ¶ 8.40. *See also* **RL-0157**, *Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/04/6, Award, 16 January 2013 (Lowe, Brower, Stern) ("***Vannessa Ventures* (Award)**"), ¶ 227; **RL-0101**, *OOO Manolium Processing v. Republic of Belarus*, PCA Case No. 2018-06, Final Award, 22 June 2021 (Fernández-Armesto, Alexandrov, Stern) ("***Manolium* (Award)**"), ¶ 539; **RL-0156**, *Flughafen Zürich A.G. and Gestión e Ingenería IDC S.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19, Award, 18 November 2014 (Fernández-Armesto, Alvarez, Vinuesa) ("***Flughafen Zürich* (Award)**"), ¶¶ 639–640.

that are reasonable, and based upon a specific assurance or commitment by a State authority. Instead, it merely regurgitated its generalized and unfounded complaints about Peru's conduct.

d. *Peru had no duty to negotiate with Claimant, but in any event it did so*. The final aspect of Claimant's MST claim is manifestly baseless: that Peru breached the MST Provision by failing to negotiate with Claimant after the dispute had arisen. Claimant itself has struggled to articulate the legal basis of this claim, for the simple reason that there is none. The reality is that neither the Treaty, nor the MST generally, features any such obligation. In any event, as documentary evidence reveals, Peru *did* in fact negotiate with Claimant.

33. Claimant has also alleged the breach of Treaty Article 10.3 ("**National Treatment Provision**"). While Claimant has twice framed this claim as constituting part of its broader claim under the MST Provision, the National Treatment Provision is self-evidently a separate treaty provision and imposes a separate obligation. In any event, Claimant's allegation that Peru treated domestic purchasers of gold more favorably unquestionably remains unproven, for the simple reason that Claimant has not even purported to identify a domestic purchaser in like circumstances, let alone identify differential treatment with respect to any such purchaser.

34. Claimant's final claim is that Peru breached Treaty Article 10.7 ("**Expropriation Provision**") through the alleged creeping expropriation of (i) the Five Shipments of Gold, and (ii) "[Kaloti]'s global business operations."[12] Both claims are meritless, as Claimant has been unable to satisfy *any* of the Treaty's express requirements for an expropriation:

a. The Treaty protects against the expropriation only of a covered investment.[13] However, neither the Five Shipments of Gold (which Kaloti never owned, and which do not possess the characteristics of an investment) nor Kaloti's global

[12] Reply, ¶ 394.

[13] **RL-0001**, Peru - United States Trade Promotion Agreement, signed 12 April 2006, entered into force 1 February 2009 ("**Treaty**"), Art. 10.7.

business operations (which do not amount to an investment in the territory of Peru) qualify as a covered investment.

b. Claimant is also required to establish that the alleged State conduct "interfere[d] with distinct, reasonable investment-backed expectations."[14] However, there is no evidence that Peru did so; in fact, the evidence shows that Peru acted consistently with its legal and regulatory framework in respect of the gold mining sector.

c. Further, Claimant is required to show that Peru caused the total or near total destruction in the value or enjoyment of a covered investment. No such impact has been established here, either with respect to the Five Shipments (which, as noted, Kaloti never owned) or Kaloti's enterprise (which ultimately failed based upon the [redacted] own business decisions).

d. The Treaty makes clear that non-discriminatory regulatory actions in pursuit of a legitimate public welfare objective "do not constitute indirect expropriations."[15] That phrase (viz., non-discriminatory regulatory actions in pursuit of a legitimate public welfare objective) aptly describes the actions taken by Peru's regulatory and judicial authorities, which faithfully applied those aspects of Peru's legal system and regulatory framework that are designed to combat against illegal mining and other criminal activity.

35. In sum, none of Claimant's claims has any merit.

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[14] **RL-0001**, Treaty [*Re-submitted version of CL-0001, with additional pages*], Annex 10-B, Art. 3(a)(ii).

[15] **RL-0001**, Treaty [*Re-submitted version of CL-0001, with additional pages*], Annex 10-B, ¶ 3(b). *See also* **RL-0009**, *Latam Hydro LLC and CH Mamacocha S.R.L. v. Republic of Peru*, ICSID Case No. ARB/19/28, US Non-Disputing Party Submission, 19 November 2021 ("***Mamacocha* (USA Submission)**"), ¶¶ 33, 37 (interpreting this provision of the Treaty, and stating that "where an action is a bona fide, non-discriminatory regulation, it will not ordinarily be deemed expropriatory.").

4. Claimant seeks compensation for alleged losses that were not caused by the alleged breaches, and cannot substantiate the quantum of loss

36. Finally, in **Section V** below, Peru addresses Claimant's damages claims, which inexplicably mushroomed from the Memorial to the Reply. Whereas in the former Claimant had claimed approximately USD 123 in damages, in the latter, it pivoted to demand from Peru more than USD 160 million (which according to Claimant would compensate for Kaloti's alleged lost profits, for the value of Kaloti's collapsed enterprise, and for the Five Shipments of Gold).

37. Even if the Tribunal had jurisdiction over Claimant's claims (quod non), and even if any of the claims had merit (quod non), Claimant would not be entitled to any compensation. As a threshold matter, Claimant bears the burden of proving that the alleged breaches caused the alleged losses. But the requisite causal link does not exist in Claimant's case. Instead, the evidence reveals a series of supervening causes of Kaloti's alleged losses, including inter alia the [redacted] sordid reputation for unlawful activity, and its creation of [redacted] as Kaloti's successor mere weeks before the latter's alleged demise.

38. In any event, Claimant's quantum analysis is speculative, unsubstantiated, and fundamentally flawed, and therefore could not serve as the basis for a damages award.

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39. For the reasons identified above and elaborated further in this Rejoinder, Peru respectfully submits that the Tribunal should (i) dismiss all of Claimant's claims for lack of jurisdiction and/or for inadmissibility; (ii) dismiss for lack of merit any and all claims in respect of which the Tribunal may determine that it has jurisdiction; (iii) reject in its entirety Claimant's request for compensation (in the event that the Tribunal were to reach the quantum issues at all); and (iv) order Claimant to pay all of the costs of the arbitration and all of the legal and expert fees and expenses incurred by Peru in the present arbitration, plus interest until the date of payment.

40. This Rejoinder is accompanied by the following supporting evidence:

a. The second expert report of Professor Joaquín Missiego (a leading expert on Peruvian criminal law and procedure), concerning certain Peruvian law aspects of Kaloti's claims ("**Second Missiego Report**"), accompanied by 24 exhibits;

b. The second expert report of the Brattle Group ("**Brattle**") (a global financial advisory and consulting firm), on quantum issues ("**Second Brattle Report**"), accompanied by 57 exhibits;

c. 140 factual exhibits, numbered Ex. R-0239 to Ex. R-0378; and

d. 56 legal authorities, numbered RL-0235 to RL-0290.

II. FACTS

A. Kaloti is not a bona fide purchaser

41. In both the Memorial and the Reply, Claimant alleged that it is a bona fide purchaser of the gold that comprises the Five Shipments, and that Peru's courts have violated Claimant's purported rights over such Gold.[16] On that basis, Claimant submitted that Peru has committed an internationally wrongful act. As the Party making these claims, Claimant bears the burden of proving that (i) Kaloti is a bona fide purchaser of the Gold under Peruvian law, (ii) Kaloti exercised its rights in local proceedings to attest its condition as a bona fide purchaser, and (iii) the conduct of Peru's courts in those local proceedings "has been so evidently arbitrary, unjust or idiosyncratic"[17] as to constitute an internationally wrongful act under the Treaty. As explained in this Rejoinder, Claimant has utterly failed to prove any of these premises, let alone all three.

42. In this Section, Peru demonstrates that Kaloti does not qualify as a bona fide purchaser of the Gold because Claimant has not proven that Kaloti acquired ownership of the

[16] *See* Reply, ¶¶ 328–330.

[17] **CL-0049**, *Krederi Ltd. v. Ukraine*, ICSID Case No. ARB/14/17, Award, 2 July 2018, ¶ 442.

Gold or that it complied with its due diligence obligations under Peruvian law in relation to the Suppliers and the lawful origin of the Gold.

1. To qualify as a bona fide purchaser under Peruvian law, Claimant must prove that Kaloti (i) acquired ownership over the Gold, and (ii) complied with its due diligence obligations

43. The requirements that a person or company must meet to qualify as a bona fide purchaser under Peruvian law are set out in Article 66 of the Regulations of Legislative Decree No. 1373 ("**Asset Forfeiture Regulations**").[18] Pursuant to that provision, Claimant must prove that Kaloti: (i) acquired ownership and legal title over the Gold;[19] and (ii) in so doing, acted "loyally and honestly"[20] and displayed "a diligent and prudent behavior."[21] The latter requires Claimant to demonstrate cumulatively that:

a. Kaloti followed its own compliance and anti-money laundering manual ("**AML/CFT Manual**");

b. any other person in Kaloti's position would have objectively concluded that the Gold was of lawful origin;[22]

c. when Kaloti acquired ownership over the Gold, it complied with the due diligence obligations applicable to purchasers of mineral resources in Peru;[23] *and*

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[18] **Ex. R-0250**, Regulations of Legislative Decree No. 1373, 31 January 2019 ("**Asset Forfeiture Regulations**"), Art. 66; *see also* **Ex. R-0250**, Asset Forfeiture Regulations, Arts. 5.2–5.3; **Ex. R-0233**, Resolution No. 83, Judgment, Specialized Court in Asset Forfeiture of Lima, 26 January 2022, pp. 56–59.

[19] **Ex. R-0250**, Asset Forfeiture Regulations, Art. 66.2 ("at the time of acquiring the right over the good . . . ").

[20] **Ex. R-0250**, Asset Forfeiture Regulations, Art. 66 ("[H]aving acted with loyalty and righteousness").

[21] **Ex. R-0250**, Asset Forfeiture Regulations, Art. 66 ("[H]as also had a diligent and prudent behaviour").

[22] **Ex. R-0250**, Asset Forfeiture Regulations, Art. 66.1 ("The appearance of validity of the right has to be such that any person would have incurred in the same mistake after examining it").

[23] **Ex. R-0250**, Asset Forfeiture Regulations, Art. 66.2 ("At the time of the acquisition of the right over the good all conditions set forth in the law, regulations and other norms were present.").

d. Kaloti had the conviction that the Suppliers were the legitimate owners of the Gold.[24]

44. Pursuant to Article 66.3(c) of the Asset Forfeiture Regulations, even if Kaloti had met all of the above requirements (quod non), Kaloti would *not* qualify as a bona fide purchaser if false statements were made to conceal the "origin, provenance, destination" or "unlawful nature" of the Gold.[25] As explained in the following sub-sections, Claimant has failed to demonstrate that Kaloti met the cumulative requirements identified above.

2. Claimant has failed to prove that Kaloti acquired legal title and ownership over the Gold

45. Claimant has not adduced the evidence needed to demonstrate that Kaloti ever acquired ownership and legal title over the Gold. Crucially, Claimant has failed to submit a key piece of evidence that could be expected in Kaloti's circumstances: an agreement with the Suppliers for the purchase of the Gold. As a result, even if one or more of such agreements did exist (which has not been established), Claimant also has failed to demonstrate that it complied with whatever conditions may have been imposed by such agreements for the buyer (i.e., Kaloti) to acquire legal title over the Gold. Further, the evidence that is on the record suggests that Kaloti never acquired legal title over the Gold.

a. <u>Claimant has failed to meet its burden of proof</u>

46. In the Counter-Memorial, Peru explained that Claimant had failed to demonstrate that it ever acquired ownership over the Gold, including because it had not submitted the relevant purchase agreements between Kaloti and the Suppliers, or any other

[24] **Ex. R-0250**, Asset Forfeiture Regulations, Art. 66.3 ("Having the belief and conviction that the good was acquired from its legitimate owner . . . ").

[25] **Ex. R-0250**, Asset Forfeiture Regulations, Art. 66.3 ("Provided that the following circumstances do not occur: a) to pretend to give to the act an appearance of legality that it does not have, or to pretend to conceal its true nature. b) To pretend to conceal or hide the legitimate holder of the right. c) To have false statements in relation to the act or contract in order to conceal the origin or destination of the assets or their illegal nature.").

document establishing the conditions under which Kaloti was to acquire ownership over the Gold (e.g., upon payment or physical delivery).[26] During document production, Peru reiterated that these purchase agreements were relevant and material to the jurisdictional, merits and quantum issues in this case, including because the purchase agreements: (i) are critical to determine whether Claimant actually owns or controls the alleged investments underlying its claim; (ii) are the premise of Claimant's argument that Peru expropriated assets *belonging to Kaloti*; and (iii) are necessary to assess the consequences of Kaloti's failure to pay for the Gold related to multiple Shipments.[27] For those reasons, Peru requested that Claimant produce "[t]he sale and purchase agreements entered into between Kaloti and the Suppliers for the purchase of the assets contained in the Five Shipments."[28] Claimant did not object to this request. Nor did it challenge in any way Peru's arguments or the fact that the agreements are material for the outcome of this case. In fact, Claimant agreed to produce the purchase agreements[29] and subsequently admitted that, "[i]n a commercial world, property changes hands in accordance with the **agreed-upon terms . . . normally defined in a contract**" (emphasis added).[30] However, *to this day Claimant has not produced any purchase agreement for the Gold contained in any of the Five Shipments*.

47. Instead, Claimant produced four pro forma "Terms and conditions for bullion trading and related transactions" apparently concluded between Kaloti and the Suppliers (jointly, "**Trading Terms**" or simply "**Terms**"). However, these documents do *not* constitute agreements for the purchase of the Gold. As Claimant's own expert explained, to constitute a purchase agreement under Peruvian law, a contract must at

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[26] Counter-Memorial, ¶ 368.

[27] Procedural Order No. 2, Annex 2, Request for Production of Documents from the Republic of Peru, 19 August 2022 ("**Procedural Order No. 2**"), pp. 10–11.

[28] Procedural Order No. 2, Annex 2, p. 7.

[29] Procedural Order No. 2, Annex 2, p. 7.

[30] Reply, ¶ 31. *See also* Second Expert Report of [redacted] 10 February 2022 ("**Second [redacted] Report**"), ¶ 1.4 (arguing that, under Peruvian law, "to transfer ownership, it is necessary the existence of a title (a legal transaction by which a party undertakes to transfer to its creditor the ownership of a movable object) and a way (*modo*) (the *traditio*).").

a very minimum reflect the parties' agreement on three key issues: "the price, the specific object (good) [to be sold/purchased], and the delivery of the object to the person designated by the buyer."[31] Claimant's expert further explained that a purchase agreement "is perfected (i.e., the contract generates obligations for both parties) upon the meeting of wills (intent) between the parties" in relation to these three issues.[32]

48. However, the Trading Terms do not articulate or reflect any commitment by Kaloti to buy, or by the Suppliers to sell, any gold whatsoever. Rather, the Trading Terms merely delineated general rules that were to govern *potential* future transactions. In fact, under the Trading Terms, Kaloti expressly reserved the right to *not* enter into any transaction with the Suppliers: "**KML at all times . . . retains the right <u>not</u> to enter into any transaction**" (emphasis added).[33] The Trading Terms lack other characteristics that would have been essential to any purchase agreement regarding the Gold. For instance, they do not specify (i) the price to be paid by Kaloti for the Gold; (ii) the date on which the purchase was to take place; (iii) the place or even the country in which the Suppliers were to deliver the Gold to Kaloti; (iv) the timeframe within which Kaloti was to pay for the Gold; (v) the consequences of Kaloti's failure to comply with its payment obligation; or (vi) the conditions pursuant to which Kaloti would acquire ownership over the Gold. Further, the Trading Terms specified that the Parties could enter into generic trading transactions "up to the limit and terms specified in . . . Annex No. 1."[34] Notably, for three of the four Trading Terms, Annex

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[31] Second [redacted] Report, ¶ 1.2.

[32] Second [redacted] Report, ¶ 1.2.

[33] *See, e.g.*, **Ex. R-0307**, Terms and conditions for Bullion Trading and Related Transactions between KML and [redacted] 13 May 2013 [*Re-submitted version of C-0165, with Respondent's translation*], p. 4.

[34] **Ex. R-0307**, Terms and conditions for Bullion Trading and Related Transactions between KML and [redacted] 13 May 2013 [*Re-submitted version of C-0165, with Respondent's translation*], p. 3; **Ex. R-0308**, Terms and conditions for Bullion Trading and Related Transactions between KML and [redacted] 2 October 2013 [*Re-submitted version of C-0166, with Respondent's translation*], p. 3; **Ex. R-0309**, Terms and conditions for Bullion Trading and Related Transactions between KML and [redacted] undated [*Re-submitted version of C-0167, with Respondent's translation*], p. 3; **Ex. R-0310**, Terms and conditions for Bullion Trading and Related Transactions between KML and [redacted] 29 October 2013 [*Re-submitted version of C-0168, with Respondent's translation*], p. 2.

1 was left blank, which further confirms that the Trading Terms do not indicate "specific object (good)" to be sold or purchased.[35] And the Trading Terms concerning [redacted] one of the five Suppliers, are not even dated – it is possible therefore that such Terms were agreed *after* Kaloti allegedly purchased gold from that Supplier.[36]

49. Further, Claimant has not even submitted into the evidentiary record any purchase orders for the Gold. Moreover, while there are a number of invoices on the record that were issued by the Suppliers in relation to various shipments of gold,[37] these invoices fail to prove that Kaloti acquired ownership over the Gold. This is so for multiple reasons, including that an invoice, on its own, does not qualify as a purchase agreement and many of the invoices are not even signed by Kaloti.[38] In fact, not even Claimant has relied on these invoices to prove that Kaloti actually purchased that Gold. Instead, Claimant has relied on the so-called "purchase invoices" contained in Exhibit C-0163. These *do not* constitute invoices for the purchase or sale of gold, for several reasons. *First*, the invoices were issued by the alleged *purchaser* (i.e., Kaloti) itself rather than by the alleged sellers (i.e., the Suppliers), as would normally be the case with an invoice for the sale of goods. *Second*, on their face the documents purport to constitute invoices for *expenses* allegedly incurred by Kaloti (such as "Wire Transfer Fee[s]" and "Shipping/Customs Clearance"[39]), rather than for the actual purchase of

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[35] **Ex. R-0307**, Terms and conditions for Bullion Trading and Related Transactions between KML and [redacted] 13 May 2013 [*Re-submitted version of C-0165, with Respondent's translation*], p. 7; **Ex. R-0308**, Terms and conditions for Bullion Trading and Related Transactions between KML and [redacted] 2 October 2013 [*Re-submitted version of C-0166, with Respondent's translation*], p. 8; **Ex. R-0309**, Terms and conditions for Bullion Trading and Related Transactions between KML and [redacted] undated [*Re-submitted version of C-0167, with Respondent's translation*], p. 7.

[36] **Ex. R-0309**, Terms and conditions for Bullion Trading and Related Transactions between KML and [redacted] undated [*Re-submitted version of C-0167, with Respondent's translation*], pp. 6–7, 9. Likewise, Annex 2 to the [redacted] Terms and Conditions for Bullion Trading is neither dated nor signed. *See* **Ex. R-0310**, Terms and conditions for Bullion Trading and Related Transactions between KML and [redacted] 29 October 2013 [*Re-submitted version of C-0168, with Respondent's translation*], Annex 2, p. 7.

[37] *See, e.g.*, **Ex. R-0295**, Notifications, Immobilization Act, Results of the Requirement for C.G [redacted] S.A., SUNAT, 2013 [*Re-submitted version of C-0006, with Respondent's translation*], pp. 41, 45.

[38] *See, e.g.*, **Ex. R-0295**, Notifications, Immobilization Act, Results of the Requirement for C.G [redacted] S.A., SUNAT, 2013 [*Re-submitted version of C-0006, with Respondent's translation*], p. 45.

[39] **Ex. C-0163**, Bundle of KML gold purchase invoices, 22 November 2013, pp. 3–6.

any gold. Thus, the documents include no reference to the price or the contractual terms and conditions for the purchase of gold. *Third*, in any event, the invoices lack any evidentiary value because they were not signed by either the "Receiver[s]" (i.e., the Suppliers) or Kaloti, and the field "Checked By" is blank.[40]

50. In addition, these invoices raise other red flags regarding Kaloti's practices and the specific transactions concerning the Five Shipments. The alleged "purchase invoices" produced and submitted by Claimant describe the Gold as "Scrap Gold."[41] Unlike gold bullion in bars or ingots, scrap gold is gold that has been previously refined and melted. It is sold for cash by consumers or other supply-chain players, such as jewelry manufacturers,[42] and is often subject to lower due diligence obligations than mined gold.[43] As the Organization of American States ("**OAS**") has explained, "[i]n most countries in Latin America, the sale, export, and import of scrap gold, are less controlled than refined gold . . . Whereas the market for refined gold is controlled and purchases must be declared, when refined gold is passed off or mixed with scrap gold it often escapes detection."[44] In addition, "[s]crap gold is also generally taxed at a much lower rate than gold bullion, in part because most declared scrap gold is 14 karats, or 58.3% pure, compared to the 99.5% purity of gold bullion."[45]

51. Claimant's claims in this arbitration plainly contradict Kaloti's description of the Gold in the purchase invoices as "Scrap Gold." As explained in **Section II.A.3** below, all four Suppliers and Kaloti alleged that the entirety of the Gold was extracted from various mines in Peru, and three of the Suppliers (i.e., [redacted] [redacted] and [redacted]

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[40] **Ex. C-0163**, Bundle of KML gold purchase invoices, 22 November 2013, pp. 1–13.

[41] **Ex. C-0163**, Bundle of KML gold purchase invoices, 22 November 2013, pp. 2-10, 12-13.

[42] **Ex. R-0289**, Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, OECD, November 2012, p. 70.

[43] **Ex. R-0289**, Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, OECD, November 2012, p. 14 ("Metals reasonably assumed to be recycled are excluded from the scope of this Guidance").

[44] **Ex. R-0318**, Typologies and Red Flags Associated to Money Laundering from Illegal Mining in Latin America and the Caribbean, OAS, January 2022, p. 26.

[45] **Ex. R-0318**, Typologies and Red Flags Associated to Money Laundering from Illegal Mining in Latin America and the Caribbean, OAS, January 2022.

claimed to have mined the Gold themselves. Thus, both the Suppliers and Kaloti asserted that the entirety of the Gold was *mined gold*—which, by definition, means that it was *not* scrap gold. In fact, invoices[46] and waybills[47] issued by the Suppliers expressly noted that the Gold was *unrefined mined* gold ("*oro bruto*"), but the expenses invoices issued by Kaloti in relation to the *exact same shipments* describe that Gold as "Scrap Gold."[48]

52. In addition to being false, Kaloti's characterization of the Gold as "Scrap Gold" is yet another red flag and evidence of unlawful activity, because it suggests that Kaloti engaged in a sleight of hand designed to circumvent custom and due diligence requirements in various countries, including Peru, the USA and the UAE. Multiple investigations around the world confirm (i) that a "typical way of attempting to escape scrutiny of high-risk gold is by labelling it as scrap gold when in reality it is mined gold,"[49] because "[s]crap jewellery or origin of gold bars are easy to obscure,"[50] and (ii) that "gold that is recycled [often] comes from sources such as organized crime looking to launder their profits."[51] This practice is particularly prominent among gold traders that intend to sell gold in the UAE. For example, as the reputable Carnegie Institute for Science explains, gold traders that sell gold in Dubai's gold "souk" (i.e., one of the largest gold markets in the world)

> habitually record their purchases of ASGM [artisanal and small-scale gold mining] gold as "scrap," a practice that even some refineries have exhibited. This accounting sleight of hand

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[46] *See*, *e.g.*, **C-0007**, [redacted] Document Package, 13 January 2014, p. 5 (where [redacted] invoiced 42,217.6 grams of gold (gross weight) as "bars of raw gold" ("*barras de oro bruto*"), thus noting that such invoice concerned unrefined gold).

[47] **C-0007**, [redacted] Document Package, 13 January 2014, p. 5 (where [redacted] also referred to the 42,217.6 grams of gold transported as "bars raw gold" ("*barras oro bruto*")).

[48] **Ex. C-0163**, Bundle of KML gold purchase invoices, 22 November 2013, p. 11 (where Kaloti referred to the 42,217.6 grams of gold traded with [redacted] as "Scrap Gold Purchase Bar" rather than as "bars of raw gold" as [redacted] had indicated in the invoice and waybills.).

[49] **Ex. R-0290**, Gold Trade Data, GLOBAL WITNESS, April 2021, p. 7.

[50] **Ex. R-0319**, The Impact of Gold: Sustainability Aspects in the Gold Supply-Chains and Switzerland's Role as a Gold Hub, WWF, 2021, p. 39.

[51] **Ex. R-0319**, The Impact of Gold: Sustainability Aspects in the Gold Supply-Chains and Switzerland's Role as a Gold Hub, WWF, 2021, p. 39.

> completed, souk dealers can then sell this gold to [redacted] [Dubai Multi Commodities Centre] buyers or UAE refineries, having sufficiently clouded its origins to satisfy their auditing requirements.[52]

53. Kaloti's deliberate misclassification of the Gold as "scrap" is consistent with the deceitful practices of other [redacted] companies, including its main buyer of gold. As reported by multiple investigative journalists, an audit conducted by [redacted] in 2013 concluded that "Kaloti [Jewellery]'s serious violations of standards applicable to gold sourcing" included the "misclassification of gold from mines as scrap gold, and failure to exercise due diligence."[53]

54. Claimant also proffered, as purported evidence of the acquisition of the Gold, an email allegedly addressed to [redacted] In this email, Kaloti communicated to an unknown individual – who does not even appear to be either a shareholder or a representative of [redacted][54] – its proposed commercial terms for refining gold.[55] In addition to suffering most of the deficiencies of the Trading Terms identified above, Claimant has not even demonstrated that the recipient of such email consented to the terms proposed by Kaloti. That is, the email in question does not constitute a perfected agreement, let alone an agreement for the purchase of the Gold that Kaloti claims to have bought from [redacted]

55. In short, there is simply no evidence on the record of this arbitration that demonstrates that Kaloti ever acquired ownership over the Gold. Claimant has therefore failed to meet its burden of proving that Kaloti qualifies as a *purchaser* of the Gold under Peruvian law. As Peru already explained in the Counter-Memorial and during

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[52] **Ex. R-0291**, Matthew T. Page and Jodi Vittori, "*Dubai's Role in Facilitating Corruption and Global Illicit Financial Flows*," CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE (2020), p. 52.

[53] **Ex. R-0292**, Switzerland - a Hub for Risky Gold?, SOCIETY FOR THREATENED PEOPLES SWITZERLAND, April 2018, p. 6.

[54] **Ex. R-0312**, Email from KML (P. [redacted] to [redacted] ([redacted] *et al.*), 4 November 2013 [*Re-submitted version of C-0169, with Respondent's translation*] (showing that the email was sent to, *inter alia*, [redacted]

[55] **Ex. R-0312**, Email from KML (P. [redacted] to [redacted] ([redacted] *et al.*), 4 November 2013 [*Re-submitted version of C-0169, with Respondent's translation*].

document production, such failure is fatal for Claimant's case on jurisdiction, merits, and quantum.

b. The evidence suggests that Kaloti never acquired ownership over the Gold

56. Without prejudice to the above arguments and to Claimant's burden of proof in this arbitration, the evidence on the record suggests that Kaloti in fact never acquired ownership over the Gold.

57. The Trading Terms suggest that Kaloti was merely a *broker*. Indeed, the Terms do not even refer to the Suppliers as "sellers." Rather, they refer to them as Kaloti's "Client" or "Costumer."[56] And Kaloti merely had the discretion, but was not required, to provide "gold bullion margin trading services" to such clients or customers.[57]

58. [redacted] explained in his second witness statement that "gold bullion margin trading" works "somewhat similar to when stocks are traded *on margin* in Wall Street."[58] Accordingly, the Trading Terms refer to future potential transactions through which the *Suppliers would borrow money from Kaloti* (i.e., their broker) to trade

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[56] **Ex. R-0307**, Terms and conditions for Bullion Trading and Related Transactions between KML and [redacted] 13 May 2013 [*Re-submitted version of C-0165, with Respondent's translation*], pp. 3, 8; **Ex. R-0308**, Terms and conditions for Bullion Trading and Related Transactions between KML and [redacted] 2 October 2013 [*Re-submitted version of C-0166, with Respondent's translation*], pp. 3, 7; **Ex. R-0309**, Terms and conditions for Bullion Trading and Related Transactions between KML and [redacted] undated [*Re-submitted version of C-0167, with Respondent's translation*], pp. 3, 8; **Ex. R-0310**, Terms and conditions for Bullion Trading and Related Transactions between KML and [redacted] 29 October 2013 [*Re-submitted version of C-0168, with Respondent's translation*], pp. 2, 6.

[57] **Ex. R-0307**, Terms and conditions for Bullion Trading and Related Transactions between KML and [redacted] 13 May 2013 [*Re-submitted version of C-0165, with Respondent's translation*], p. 7; **Ex. R-0308**, Terms and conditions for Bullion Trading and Related Transactions between KML and [redacted] 2 October 2013 [*Re-submitted version of C-0166, with Respondent's translation*], p. 8; **Ex. R-0309**, Terms and conditions for Bullion Trading and Related Transactions between KML and [redacted] undated [*Re-submitted version of C-0167, with Respondent's translation*], p. 7; **Ex. R-0310**, Terms and conditions for Bullion Trading and Related Transactions between KML and [redacted] 29 October 2013 [*Re-submitted version of C-0168, with Respondent's translation*], pp. 2, 5.

[58] Second Witness Statement of [redacted] 10 November 2022 ("**Second** [redacted] **Witness Statement**"), ¶ 30.

precious metals,[59] and—as explained by the U.S. Securities and Exchange Commission—"margin trading" in the context of stocks is the practice of "**borrowing money from your broker** to buy a stock and using your investment as collateral" (emphasis added).[60] Investors in Wall Street "generally use margin to increase their purchasing power so that they can own more stock without fully paying for it."[61] Similarly, through the Trading Terms the Suppliers would borrow money from Kaloti so that they could buy gold in Peru and then sell it through Kaloti to a third party.

59. The potential future transactions described in the Trading Terms apparently were designed to work as follows:

a. The Customer (here, the Supplier) would borrow money from Kaloti to buy precious metals, which in turn became the collateral of the loan:[62]

> KML [Kaloti] will be providing gold bullion margin trading services for hedging purposes, where **the Client [the Supplier] agrees to borrow . . . currency against its [Metal] position** at the prevailing market rates in

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[59] **Ex. R-0307**, Terms and conditions for Bullion Trading and Related Transactions between KML and [redacted] 13 May 2013 [*Re-submitted version of C-0165, with Respondent's translation*], p. 6; **Ex. R-0308**, Terms and conditions for Bullion Trading and Related Transactions between KML and [redacted] 2 October 2013 [*Re-submitted version of C-0166, with Respondent's translation*], p. 7; **Ex. R-0309**, Terms and conditions for Bullion Trading and Related Transactions between KML and [redacted] undated [*Re-submitted version of C-0167, with Respondent's translation*], p. 6; **Ex. R-0310**, Terms and conditions for Bullion Trading and Related Transactions between KML and [redacted] 29 October 2013 [*Re-submitted version of C-0168, with Respondent's translation*], p. 4.

[60] **Ex. R-0293**, "*Margin: Borrowing Money to Pay for Stocks*," U.S. SECURITIES AND EXCHANGE COMMISSION, 17 April 2009, p. 1.

[61] **Ex. R-0293**, "*Margin: Borrowing Money to Pay for Stocks*," U.S. SECURITIES AND EXCHANGE COMMISSION, 17 April 2009, p. 1.

[62] **Ex. R-0307**, Terms and conditions for Bullion Trading and Related Transactions between KML and [redacted] 13 May 2013 [*Re-submitted version of C-0165, with Respondent's translation*], p. 6; **Ex. R-0308**, Terms and conditions for Bullion Trading and Related Transactions between KML and [redacted] 2 October 2013 [*Re-submitted version of C-0166, with Respondent's translation*], p. 7; **Ex. R-0309**, Terms and conditions for Bullion Trading and Related Transactions between KML and [redacted] undated [*Re-submitted version of C-0167, with Respondent's translation*], p. 6; **Ex. R-0310**, Terms and conditions for Bullion Trading and Related Transactions between KML and [redacted] 29 October 2013 [*Re-submitted version of C-0168, with Respondent's translation*], p. 4.

> addition to the margin set by KML [Kaloti] and subject to revision as necessary.[63] (Emphasis added)

b. Prior to executing any transaction, the Customer was required to "deposit cash and/or other assets with KML [Kaloti], to ensure a positive margin balance;"[64]

c. Kaloti would charge interest on the money borrowed by the Customer;[65]

d. Kaloti would trade the precious metals for the Customer "either on a spot, forward or option basis,"[66] for example, by "enter[ing] [into] negotiations for

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[63] **Ex. R-0307**, Terms and conditions for Bullion Trading and Related Transactions between KML and [redacted] 13 May 2013 [*Re-submitted version of C-0165, with Respondent's translation*], p. 6; **Ex. R-0308**, Terms and conditions for Bullion Trading and Related Transactions between KML and [redacted] 2 October 2013 [*Re-submitted version of C-0166, with Respondent's translation*], p. 7; **Ex. R-0309**, Terms and conditions for Bullion Trading and Related Transactions between KML and [redacted] undated [*Re-submitted version of C-0167, with Respondent's translation*], p. 6; **Ex. R-0310**, Terms and conditions for Bullion Trading and Related Transactions between KML and [redacted] 29 October 2013 [*Re-submitted version of C-0168, with Respondent's translation*], p. 4.

[64] *See, e.g.*, **Ex. R-0307**, Terms and conditions for Bullion Trading and Related Transactions between KML and [redacted] 13 May 2013 [*Re-submitted version of C-0165, with Respondent's translation*], p. 2. ("Prior to executing any Transactions under this Agreement, the Customer shall deposit cash/or other assets with KML, being the Margin Account Balance, unless otherwise agreed with KML."). *See also* **Ex. R-0308**, Terms and conditions for Bullion Trading and Related Transactions between KML and [redacted] 2 October 2013 [*Re-submitted version of C-0166, with Respondent's translation*], p. 2; **Ex. R-0309**, Terms and conditions for Bullion Trading and Related Transactions between KML and [redacted] undated [*Re-submitted version of C-0167, with Respondent's translation*], p. 2; **Ex. R-0310**, Terms and conditions for Bullion Trading and Related Transactions between KML and [redacted] 29 October 2013 [*Re-submitted version of C-0168, with Respondent's translation*], p. 1.

[65] **Ex. R-0307**, Terms and conditions for Bullion Trading and Related Transactions between KML and [redacted] 13 May 2013 [*Re-submitted version of C-0165, with Respondent's translation*], p. 6; **Ex. R-0308**, Terms and conditions for Bullion Trading and Related Transactions between KML and [redacted] 2 October 2013 [*Re-submitted version of C-0166, with Respondent's translation*], p. 7; **Ex. R-0309**, Terms and conditions for Bullion Trading and Related Transactions between KML and [redacted] undated [*Re-submitted version of C-0167, with Respondent's translation*], p. 6; **Ex. R-0310**, Terms and conditions for Bullion Trading and Related Transactions between KML and [redacted] 29 October 2013 [*Re-submitted version of C-0168, with Respondent's translation*], p. 4.

[66] **Ex. R-0307**, Terms and conditions for Bullion Trading and Related Transactions between KML and [redacted] 13 May 2013 [*Re-submitted version of C-0165, with Respondent's translation*], p. 2; **Ex. R-0308**, Terms and conditions for Bullion Trading and Related Transactions between KML and [redacted] 2 October 2013 [*Re-submitted version of C-0166, with Respondent's translation*], p. 2; **Ex. R-0309**, Terms and conditions for Bullion Trading and Related Transactions between KML and [redacted] undated [*Re-submitted version of C-0167, with Respondent's translation*], p. 2; **Ex. R-0310**, Terms and conditions for Bullion Trading and Related Transactions between KML and [redacted] 29 October 2013 [*Re-submitted version of C-0168, with Respondent's translation*], p. 1.

the purchase or sale of precious metals" based on the "rates or premiums" that Kaloti had previously communicated to the Customer;[67]

e. If the value of precious metals owned by the Costumer (which also served as collateral) were to decrease below the level indicated in the Terms, Kaloti could "require Customer to provide additional margin to the extent required to bring Customer's Capital to equal the Call Margin;"[68]

f. In the event that the Customer's collateral fell below the "Closing Level," Kaloti could take all actions it deemed appropriate to protect its position, including by using "any account balance margin" to satisfy the Customer's debt towards Kaloti.[69]

60. In other words, pursuant to the Trading Terms, Kaloti was to finance the Suppliers' operations and trade gold on their behalf. However, nothing at all in the Terms indicated that Kaloti would be buying any gold *from* the Suppliers.

61. The fact that Kaloti *was not* the buyer in the transactions described in the Trading Terms is also reflected in an agreement entered into between Kaloti and another of its

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[67] **Ex. R-0307**, Terms and conditions for Bullion Trading and Related Transactions between KML and [redacted] 13 May 2013 [*Re-submitted version of C-0165, with Respondent's translation*], p. 2; **Ex. R-0308**, Terms and conditions for Bullion Trading and Related Transactions between KML and [redacted] 2 October 2013 [*Re-submitted version of C-0166, with Respondent's translation*], p. 2; **Ex. R-0309**, Terms and conditions for Bullion Trading and Related Transactions between KML and [redacted] undated [*Re-submitted version of C-0167, with Respondent's translation*], p. 2; **Ex. R-0310**, Terms and conditions for Bullion Trading and Related Transactions between KML and [redacted] 29 October 2013 [*Re-submitted version of C-0168, with Respondent's translation*], p. 1.

[68] **Ex. R-0307**, Terms and conditions for Bullion Trading and Related Transactions between KML and [redacted] 13 May 2013 [*Re-submitted version of C-0165, with Respondent's translation*], p. 3; **Ex. R-0308**, Terms and conditions for Bullion Trading and Related Transactions between KML and [redacted] 2 October 2013 [*Re-submitted version of C-0166, with Respondent's translation*], p. 3; **Ex. R-0309**, Terms and conditions for Bullion Trading and Related Transactions between KML and [redacted] undated [*Re-submitted version of C-0167, with Respondent's translation*], p. 3.

[69] **Ex. R-0307**, Terms and conditions for Bullion Trading and Related Transactions between KML and [redacted] 13 May 2013 [*Re-submitted version of C-0165, with Respondent's translation*], p. 3; **Ex. R-0308**, Terms and conditions for Bullion Trading and Related Transactions between KML and [redacted] 2 October 2013 [*Re-submitted version of C-0166, with Respondent's translation*], p. 3; **Ex. R-0309**, Terms and conditions for Bullion Trading and Related Transactions between KML and [redacted] undated [*Re-submitted version of C-0167, with Respondent's translation*], p. 3.

suppliers, [redacted] on 12 March 2013.[70] That agreement is *virtually identical* to the Trading Terms, but it also includes as an attachment an invoice for the sale of 3,200 ounces of gold,[71] listing [redacted] as the seller of the gold and [redacted] a Miami-based company, as the buyer. The invoice confirms that, pursuant to Kaloti's standard terms, Kaloti merely played the role of broker. Such was the case with the Suppliers and the Gold.

62. The above is confirmed by other evidence on the record. During document production, Claimant produced a document that details Kaloti's daily operations procedures: Kaloti's "Departments Overview and Job Distribution."[72] That document suggests that Kaloti operated merely as a broker for suppliers that wished to sell precious metals—mainly to entities of the [redacted] based in Dubai. For example, that document states that the responsibilities of Kaloti's "Trade Desk" include (i) "[p]erform[ing] all client trading activities" including "quoting rates, booking trades, and confirming trades posted **with Dubai**," (ii) "[f]ollow **margin** requirements during trading activities for each customer,"[73] and (iii) "[i]nitiat[ing] payment to client as requested **post trade**" (emphasis added).[74] Equally, the responsibilities of Kaloti's Trade Desk include "[p]lac[ing] Stop Loss orders as necessary for selected clients on a daily basis."[75] A stop-loss order "is an order placed with a **broker** to buy or sell a specific [asset] once [it] reaches a certain price" (emphasis added).[76] Further, the

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[70] *See, e.g.,* **Ex. R-0297**, Terms and conditions for Bullion Trading and Related Transactions between KML and [redacted] 12 March 2013.

[71] *See* **Ex. R-0297**, Terms and conditions for Bullion Trading and Related Transactions between KML and [redacted] 12 March 2013, p. 5 (consisting of an invoice issued by [redacted] to [redacted] on 1 March 2013).

[72] **Ex. R-0266**, Departments Overview and Job Distribution, Kaloti Metals & Logistics, undated. Claimant produced this document in response to Peru's Request 10 which asked for "Documents [. . .] contain Kaloti's policies, procedures and training for its staff regarding due diligence on suppliers and the gold purchased from such suppliers." *See* Procedural Order No. 2, Annex 2, Request No. 10, pp. 39–40.

[73] **Ex. R-0266**, Departments Overview and Job Distribution, Kaloti Metals & Logistics, undated, p. 2.

[74] **Ex. R-0266**, Departments Overview and Job Distribution, Kaloti Metals & Logistics, undated, p. 2.

[75] **Ex. R-0266**, Departments Overview and Job Distribution, Kaloti Metals & Logistics, undated, p. 2.

[76] **Ex. R-0294**, "*The Stop-Loss Order – Make Sure You Use It*," INVESTOPEDIA, 6 March 2023, p. 2.

"Departments & Responsibilities" document contains a "Trade Desk Script" that decidedly sounds like a broker's script:

> *The script below is intended to lend some structure to communications with our client . . .*
>
> *2) Client communicates trade request stating the metal, the quantity, and the direction (buy/sell):*
>
> *Client states "Give me a sell price for 100ozs gold."*
>
> *3) Trader repeats metal, quantity, and direction: Trader states "Sell 100ozs gold, please give me a moment to get your quote."*
>
> . . .
>
> *5) Fix or Nix:*
>
> *Client needs to clearly state their confirmation of either before you confirm. If there are any doubts, repeat the questions. Client states either "Fix" or "Nix." If client states "Nix, trader can either refresh the quote, place an order, or advise the client to keep an eye on the market and call back later.*[77] (Emphasis in original)

63. Further suggesting that Kaloti was merely a broker, in the Memorial Claimant itself described Kaloti as a "middlem[a]n"[78] and noted that, "in 2013, [Kaloti's] end-of-the-year total inventory on-hand amounted to less than a day's worth of KML sales."[79] Notably, Claimant also argued that one its "three main sources of income" was "profit on fixing," which Claimant itself described as "a fixed profit margin (similar to **a brokerage fee**)" (emphasis added) on the gold and other metals traded by Kaloti.[80]

64. In addition to the alleged purchase agreements concerning the Gold contained in the Five Shipments, during document production Peru had requested that Claimant produce "any short or long-term commodity purchase agreements, or similar

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[77] **Ex. R-0266**, Departments Overview and Job Distribution, Kaloti Metals & Logistics, undated, pp. 3-4.

[78] Memorial, ¶ 146.

[79] Memorial, ¶ 26.

[80] Memorial, ¶ 33.

contracts, between Kaloti and its suppliers or customers from 2012-2018."[81] In response, Claimant alleged that it "ha[d] already submitted as Exhibits in the arbitration all documents in Claimant's possession, custody, or control regarding this matter."[82] However, as Peru explained, the full extent of Claimant's responsive documents consisted of *one alleged purchase agreement* between Kaloti and a supplier based in Florida. Moreover, such agreement did not contain any commitment to supply specific volumes to Kaloti—in other words, it was not genuinely a "purchase agreement." Remarkably, Claimant alleged that between 2012 and 2018 Kaloti bought gold worth multiple *USD billions*, from hundreds of suppliers based in numerous countries, and yet it failed to produce any purchase agreement proving that.

65. Even if Kaloti had not served merely as a broker, but rather had actually concluded real purchase agreements with the Suppliers, any such purchase agreement would obviously have required that Kaloti pay for the Gold. However, Claimant itself has expressly and repeatedly admitted that, to this date (i.e., more than nine years after the alleged purchase), Kaloti has made no payment whatsoever for the Gold pertaining to Shipments 3 and 5.[83] In fact, a Peruvian court has already concluded that Kaloti's failure to pay for the Gold contained in Shipment 5 means that it does not own that Gold.[84] Further, Peru demonstrated in the Counter-Memorial that Kaloti never paid in full the price of the Gold contained in Shipment 1.[85] Claimant did not rebut this in the Reply. Moreover, Claimant has not demonstrated that it paid in full the price of the Gold contained in Shipment 2. Thus, the evidentiary record shows that Kaloti never actually acquired the Gold contained in Shipments 1, 2, 3 or 5 (i.e., four

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[81] Procedural Order No. 2, Annex 2, Request No. 20, pp. 75–77.

[82] Procedural Order No. 2, Annex 2, Request No. 20, pp. 75–76.

[83] Reply, ¶ 31; **Ex. R-0242**, Kaloti's First Notice of Intent, filed with the General Office of International Economic Affairs, 3 May 2016 [*Re-submitted version of C-0158, with Respondent's translation*], fn. 3 ("It should be noted that, in view of the immobilization and seizure actions that had already taken place at that time, Kaloti agreed that payment for purchases No. 3 and 5 would be made upon arrival at the export destination (Florida)."). **Ex. C-0022**, KML 8 April 2019, Notice of Intent, ¶¶ 33, 42.

[84] **Ex. R-0212**, Resolution No. 08, Lima Court of Appeal, Third Civil Chamber, 14 June 2022, pp. 5, 14–15; **Ex. R-0238**, Resolution No. 46, Judgment, 23 September 2019.

[85] Counter-Memorial, ¶ 369.

out of the five shipments of gold at issue in this arbitration). Set forth below are additional details concerning some of those shipments.

66. In regard to **Shipment 2**, Kaloti has stated several times that the relevant purchase price was USD 3,300,000.[86] Indeed, Kaloti has provided documents showing three wire transfers and the corresponding payment vouchers for USD 3,300,000.[87] Yet, the invoices from [redacted] to Kaloti belie Kaloti's statements, as they show that [redacted] allegedly was to sell the Gold contained in Shipment 2 to Kaloti for USD 3,605,304.30 (i.e., USD 305,304.30 more than the sum Kaloti alleges was the purchase price and that Kaloti supposedly paid).[88] In other words, the wire transfers submitted by Claimant indicate that Kaloti failed to pay for at least part of the Gold contained in Shipment 2.

67. Further, from the evidence provided, the payment of USD 3,300,000 was not just for Shipment 2: the purchase vouchers attached to the three wire transfers reveal that the payment of USD 3,300,000 relates to not just the two invoices of the Gold contained in Shipment 2, but also to two further invoices that are not relevant in this arbitration.[89] It is not clear how much of the USD 3,300,000 relates to the Gold contained in Shipment 2 and how much relates to the other, not-relevant, invoices. But this further confirms that Kaloti did not pay in full for the Gold contained in Shipment 2.

68. In the Reply, Claimant alleged that "the reason why KML could not pay [redacted] [**Shipment 3**] and [redacted] [**Shipment 5**] the purchase price before the expropriation occurred is . . . that KML was not able to resell the gold because of Peru's

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[86] First Notice of Intent, 6 May 2016, p. 8, Table A; *see also* **Ex. R-0030**, Letter from Kaloti ([redacted]) to Special Commission, 22 February 2017, p. 4.

[87] **Ex. C-0007**, [redacted] Document Package, 13 January 2014, pp. 54–59.

[88] **Ex. C-0007**, [redacted] Document Package, 13 January 2014, pp. 5, 7. *See also* **Ex. R-0242**, Kaloti's First Notice of Intent, filed with the General Office of International Economic Affairs, 3 May 2016 [*Re-submitted version of C-0158, with Respondent's translation*], p. 8 (admitting that [redacted] allegedly was to sell the Gold contained in Shipment 2 to Kaloti for USD 3,605,304.30, but Kaloti only paid USD 3,300,000); **Ex. R-0082**, State Attorney Request for the Initiation of [redacted] Preliminary Investigation, 7 March 2014, p 8, ¶¶ 11, 13.

[89] **Ex. C-0007**, [redacted] Document Package, 13 January 2014, pp. 54, 56, 58, showing in the "Description" column that the payments made related to payment "vouchers # 8063, 8064, 8065, 8067." The payment vouchers relevant in this arbitration, and used by Claimant's expert to calculate damages, are nos. 8063 and 8064 (*see* **Ex. C-0007**, [redacted] Document Package, 13 January 2014, pp. 60–61).

immobilizations and seizures of that precise gold."[90] This argument fails for at least four reasons. *First*, Claimant and its own witnesses (i) have repeatedly emphasized that Kaloti had agreed to pay for the Gold upon its inspection in the Lima facilities that Kaloti rented from the transport company [redacted] ("[redacted] and (ii) have admitted that this inspection had already taken place *before* SUNAT (the Peruvian tax authority) inspected and immobilized the Five Shipments. Indeed, Claimant alleged that "KML executed purchases of gold from Peruvian suppliers, who delivered the gold to KML's facilities in Lima" and that, "[a]fter receiving the metals," Kaloti "tested the weight and purity of the metals and prepared them to be exported to the United States."[91] Confirming the above, [redacted] testified that:

> **KML would pay suppliers (sellers of gold) very rapidly as soon as the gold reached our facility in Lima, Peru**; whereas, most competitors would wait to pay suppliers until the gold (purchased by competitors) was actually and physically exported from Peru.[92] (Emphasis added)

69. If, as Claimant and its witnesses argued, Kaloti was supposed to pay for the Gold immediately upon the Gold reaching its alleged Lima facilities (i.e., *before* the Gold was inspected by SUNAT), then it follows *a fortiori* that the SUNAT Immobilizations (all of which took place several days *after* the relevant shipments had reached Kaloti's Lima facilities) cannot have been the reason for which Kaloti failed to pay for the Gold.

70. *Second*, as Peru explained in the Counter-Memorial and during document production, and as it further explains in **Section II.D** below, SUNAT never immobilized Shipment

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[90] Reply, ¶ 35.

[91] Memorial, ¶ 25.

[92] First Witness Statement of [redacted] 8 February 2022 ("**First** [redacted] **Witness Statement**"), ¶ 34. Similarly, Ms. [redacted] has testified that "one of the differentiating elements" of Kaloti's business was the "very fast payment to gold suppliers (paying for the goods before exporting it from Peru and receiving it in Miami)." *See* First Witness Statement of [redacted] 8 February 2022 ("[redacted] **Witness Statement**"), ¶ 22. *See also* [redacted] Witness Statement, ¶ 31 ("The advance payment of gold was one of KML's main letters of introduction and also one of the differentiating elements compared to other operators. KML offered a fairly complete package, on the one hand, **the ease of prepayment** without having received the cargo in Miami." (Emphasis added)); Memorial, ¶ 22.

5.[93] And the court-ordered precautionary attachment concerning Shipment 5 (viz., the Civil Attachment) that remains in force was not ordered in the context of a criminal investigation; rather, that precautionary attachment was issued on 18 June 2014 in a civil proceeding filed by [redacted] against Kaloti, before the Lima Civil Court, on 12 May 2014.[94] That is, the Civil Attachment was ordered months after Kaloti was supposed to have paid for Shipment 5 and, in any event, Peru cannot possibly be held responsible for an attachment ordered in the context of a private commercial dispute between [redacted] and Kaloti.

71. *Third*, Claimant itself has stated that payment for the gold that Kaloti purchased in Peru did not depend on Kaloti's resale of that gold. According to Claimant, Kaloti "borrowed money to finance its purchases of gold" in order to pay its "suppliers at the time of delivery—not resale."[95] Therefore, Claimant's own assertions confirm that Kaloti's inability to resell the Gold of Shipments 3 and 5 does not explain or justify Kaloti's failure to pay for that Gold.

72. *Fourth,* Kaloti itself argued that it paid for at least part of Shipments 1, 2 and 4,[96] despite the fact that those shipments also had been immobilized by SUNAT and were subsequently subject to the Precautionary Seizures. The foregoing fact further confirms that Kaloti's inability to import and resell Shipments 3 and 5 does not justify its failure to pay for these shipments.

73. *Fifth,* and in any event, Claimant cannot blame Peru for the immobilization of the Gold. In the Counter-Memorial, Peru demonstrated that both the SUNAT Immobilizations and the subsequent Precautionary Seizures of the Gold were fully justified by the Suppliers' numerous violations of the regulations concerning money laundering and the trade and export of gold in Peru. Claimant did not rebut Peru's arguments. In fact, in Claimant's own words, "KML has conceded that Peru could

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[93] *See* Counter-Memorial, ¶¶ 117, 244–245.

[94] **Ex. R-0215**, [redacted] Civil Lawsuit against Kaloti, 12 May 2014.

[95] Memorial, ¶ 146; Reply, ¶ 397.

[96] Reply, ¶ 30.

take temporary control of the [G]old, for a reasonably limited time, while investigations were conducted."[97]

74. Claimant also argued that Kaloti acquired ownership over the Gold on the asserted basis that "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)."[98] Claimant's argument fails for at least three reasons. *First,* Claimant itself suggested in the Memorial[99] that the alleged "purchase agreements" for the Gold (which Claimant has failed to submit in this arbitration) are governed not by Peruvian law but rather by the laws of Florida, USA.[100] Moreover, the Trading Terms are expressly governed by laws of Florida.[101] As explained above, the Trading Terms were supposed to apply to all future transactions between Kaloti and the Suppliers, such that it can reasonably be presumed that any future purchase agreements for the sale of gold would likewise be governed by the laws of Florida. Therefore, Claimant's allegations regarding *traditio*, which are based on Peruvian law and not the laws of Florida, are irrelevant even under Claimant's own account of the facts.

75. *Second*, as Claimant itself admitted, the conditions under which "property changes hands" depends on the terms agreed by the seller and the buyer in the relevant

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[97] Reply, ¶ 228.

[98] Reply, ¶ 33.

[99] Memorial, ¶ 115 (mentioning that it submitted a request to the Peruvian courts with an "analysis prepared by [redacted] LLP pertaining to the transfer of property title under Florida law to determine when ownership of the gold acquired by KML was transferred from the suppliers to KML").

[100] Memorial, ¶ 115.

[101] **Ex. R-0307**, Terms and conditions for Bullion Trading and Related Transactions between KML and [redacted] 13 May 2013 [*Re-submitted version of C-0165, with Respondent's translation*], p. 6; **Ex. R-0308**, Terms and conditions for Bullion Trading and Related Transactions between KML and [redacted] 2 October 2013 [*Re-submitted version of C-0166, with Respondent's translation*], p. 6; **Ex. R-0309**, Terms and conditions for Bullion Trading and Related Transactions between KML and [redacted] undated [*Re-submitted version of C-0167, with Respondent's translation*], p. 6; **Ex. R-0310**, Terms and conditions for Bullion Trading and Related Transactions between KML and [redacted] 29 October 2013 [*Re-submitted version of C-0168, with Respondent's translation*], p. 4.

purchase agreement.[102] This is true both under Peruvian law[103] and Florida law.[104] The foregoing means that (i) whether or not Kaloti was to become the legal owner of the Gold upon *traditio* (i.e., upon the Suppliers' delivery of the Gold with the intention of transferring ownership to Kaloti), and (ii) the country and specific location where *traditio* was to take place, would depend on the terms agreed by Kaloti and the Suppliers in any purchase agreement(s) concerning the Gold. But because Claimant has failed to submit any purchase agreement (see discussion above), it has not demonstrated that it ever acquired ownership over the Gold.

76. *Third*, the circumstances and parties' responsibilities with respect to the transport of the Gold also corroborate that, on Claimant's own legal theory, it never acquired ownership of the Gold. According to Claimant, the Suppliers were required to deliver the Gold contained in the Five Shipments at Kaloti's (rented) facilities in Lima and, from that moment onward, Kaloti was to become the legal owner of the Gold. However, the evidence suggests that the Suppliers were required to deliver the Gold *in Miami* rather than at the facilities that Kaloti rented in Lima. And as shown below, the Suppliers supposedly processed, paid and were responsible for the export of the Gold *to Miami*. That would have made no sense under Claimant's theory, since pursuant to that theory, (i) once they had delivered the Gold in Lima, the Suppliers would no longer be the owners thereof; (ii) during the stretch of transport between Lima and Miami, Kaloti would already have been the owner of the Gold; and (iii) it

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[102] Reply, ¶ 31.

[103] **Ex. R-0222**, Legislative Decree No. 295, Civil Code, 24 July 1984, Arts. 900–01, 947 [*Re-submitted version of CL-0044, with Respondent's translation*].

[104] Pursuant to Section 672.401(1) of both the 2013 and 2014 Florida Statutes (i.e. the Florida laws in force at the time Kaloti traded the Five Shipments), "title to goods passes from the seller to the buyer in any manner and **on any conditions explicitly agreed on by the parties**" (emphasis added). In relation to the time and place at which the transfer of title occurs, Section 672.401(2) indicates that "**[u]nless otherwise explicitly agreed** title passes to the buyer at the time and place at which the seller completes her or his performance with reference to the physical delivery of the goods . . . " (emphasis added). Therefore, under Florida law, the terms agreed by the parties are essential to determine when the transfer of title takes place. *See* **Ex. R-0321**, Florida Statute, Section 672.401, Uniform Commercial Code: Sales (2013), Part IV; **Ex. R-0322**, Florida Statute, Section 672.401, Uniform Commercial Code: Sales (2014), Part IV.

therefore stands to reason that Kaloti rather than the Suppliers would have assumed the responsibility and cost of transporting the Gold to Miami. However, as shown below, that was not the case.

77. Multiple documents show that it was the Suppliers rather than Kaloti that were responsible not only for transporting the Gold from Kaloti's rented facilities in Lima to the export facilities operated by [redacted] ("[redacted] *but also* for exporting the Gold from [redacted] facilities to Miami. For example, the waybills (*guías de remisión*) concerning the transport of the Gold from Kaloti's facilities in Lima to the facilities operated by [redacted] were issued not by Kaloti but by the Suppliers.[105] Further, as explained in the Counter-Memorial, the Customs Declarations for the export of Shipments 1 to 4 were all filed by custom brokerage companies acting *on behalf of the Suppliers* rather than of Kaloti.[106] Similarly, it was the Suppliers themselves—and not Kaloti—that appeared as the "Shippers" in the Air Waybills issued for the transport of the Five Shipments from Lima to Miami.[107] Further still, the evidence submitted by Claimant itself shows that it was the Suppliers rather than Kaloti who were responsible for covering the export costs and ensuring that the Gold reached Kaloti's facilities in Miami:

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[105] *See* **Ex. R-0295**, Notifications, Immobilization Act, Results of the Requirement for C.G [redacted] S.A., SUNAT, 2013 [*Re-submitted version of C-0006, with Respondent's translation*], pp. 37, 38, 39, 40; **Ex. C-0007**, [redacted] document package, 13 January 2014, pp. 6, 8; **Ex. C-0008**, [redacted] document package, 10 January 2014, pp. 38, 39, 46, 47, 53, 54; **Ex. C-0009**, [redacted] document package, 21 January 2014, pp. 19-21.

[106] *See* **Ex. R-0070**, Customs Declaration No. 235-2013-40-116367-01-9-00, 27 November 2013 (included in [redacted] Criminal Proceedings); **Ex. R-0071**, Customs Declaration No. 235-2013-40-116370-01-1-00, 27 November 2013 (included in [redacted] Criminal Proceedings); **Ex. R-0072**, Customs Declaration No. 235-2014-40-002241-01-5-00, 9 January 2017 (included in [redacted] Criminal Proceedings); **Ex. R-0298**, Customs Declaration No. 235-2014-40-002515-01-8-00, 9 January 2014; **Ex. R-0074**, Customs Declaration No. 235-2014-40-001919-01-8-00, 8 January 2014 (included in [redacted] Criminal Proceedings); **Ex. R-0075**, Customs Declaration No. 235-2014-40-001920-01-6-00, 8 January 2014 (included in [redacted] Criminal Proceedings); **Ex. R-0076**, Customs Declaration No. 235-2014-40-001921-01-2-00, 8 January 2014 (included in [redacted] Criminal Proceedings).

[107] **Ex. R-0245**, Shipment 1 Air Waybills, 27 November 2013; **Ex. R-0246**, Shipment 2 Air Waybills, 9 January 2014; **Ex. R-0247**, Shipment 3 Air Waybill, 8 January 2014; **Ex. R-0248**, Shipment 4 Air Waybills, 8 January 2014.

> [The Supplier] will be responsible for the cost of exportation and for securing that the material arrives to its destination, in the offices of Kaloti Metals & Logistics, 55 NE 1st Steet, #34, Miami, FL. 33132.[108]

78. Claimant has failed to explain why its Suppliers would have processed, paid and been responsible for the export to Miami of the Gold contained in the Five Shipments (after its alleged delivery in Kaloti's Lima facilities), if – on Claimant's theory – at that point the Suppliers were no longer the owners of the Gold.

79. *Fourth*, it is undisputed that the Suppliers in fact never delivered any of the Gold to Kaloti's Miami offices. This fact means that, under Claimant's own legal theory (which it describes as "*traditio*"), there was no transfer of ownership.

80. The only evidence that Claimant cited in support of its theory is the self-serving statements made by some of the Suppliers when they were attempting to lift the SUNAT Immobilizations of the Gold.[109] However, like Claimant, the Suppliers failed to provide SUNAT with *any* contractual document proving that legal title and ownership of the Gold had in fact transferred to Kaloti upon reaching the latter's facilities in Lima. Importantly also, and as explained in the following sections, the Suppliers (some of whom had criminal records) lied about the origin of the Gold, including by forging multiple documents.[110] Therefore, the Supplier's statements in any event lack credibility and evidentiary weight.

3. *Claimant has failed to prove that it complied with its due diligence obligations under Peruvian law*

81. Even if Claimant had proven that Kaloti acquired ownership of the Gold under the applicable purchase agreements (quod non), Kaloti would *not* qualify as a bona fide purchaser. Claimant admitted that, to be "considered a good-faith purchaser" of mineral resources under Peruvian law and the applicable international trading

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[108] **Ex. R-0312**, Email from KML (P. [redacted] to [redacted] ([redacted] *et al.*), 4 November 2013 [*Re-submitted version of C-0169, with Respondent's translation*], p. 2.

[109] Reply, ¶ 32.

[110] *See infra, e.g.*, Section II.A.3.b.

standards, the purchaser must be "innocent of wrongdoing" and must have "conducted sufficient due diligence" on both its suppliers and the origin of these mineral resources.[111] Yet, as explained below, Claimant is not "innocent of wrongdoing," and it did not "conduct[] sufficient due diligence."

82. Claimant argued that Kaloti "qualifie[s] as a *bona fide* purchaser" of the Gold because, according to Claimant: (i) "Peru [has] not point[ed] 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;"[112] (ii) "KML . . . conducted independent compliance due diligence reviews on each of [the Suppliers], in accordance with KML's . . . [AML/CFT Manual];"[113] and (iii) "KML reviewed and confirmed the documentation regarding the origin of the [G]old."[114] As explained in the following sub-sections, each of these three statements by Claimant is demonstrably false.

83. In the Counter-Memorial,[115] Peru identified the requirements that Kaloti should have met to comply with its obligations to conduct due diligence on the Suppliers and to verify that the origin of the Gold was lawful (**subsection a**). Claimant was under an obligation to keep an updated record demonstrating that it complied with that due diligence process. However, Claimant has failed to prove that it conducted even minimal due diligence on either the Suppliers or the origin of the Gold (**subsection b**). Importantly, Peru has submitted evidence showing that the Gold was *unlawfully* mined,[116] but Kaloti has not addressed—let alone rebutted—any of that evidence.

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[111] Reply, ¶ 96. *See also* Second [redacted] Report, ¶ 4.2.

[112] Reply, ¶ 88.

[113] Reply, ¶ 85.

[114] Reply, ¶ 99.

[115] *See* Counter-Memorial, § II.B.6.

[116] *See* Counter-Memorial, §§ II.B.2–II.B.3, II.B.6, II.C.1, II.C.3.

a. Kaloti was required to conduct due diligence on the Suppliers and to verify the lawful origin of the Gold

84. In the Counter-Memorial,[117] Peru explained that Peruvian law does not include a mechanism for the State to guarantee the lawful origin of mining products.[118] Instead, pursuant to (i) Article 4 of the 1992 General Mining Law[119] (ii) Article 3 of the 2010 Supreme Decree No. 055-2010-EM;[120] and (iii) Article 11 of the 2012 Illegal Mining Controls and Inspection Decree, *for each purchase of mineral resources* "the purchaser is obligated to verify the origin of the mineral resources."[121]

85. Peru also explained that, to allow the State to trace the lawful origin of mining products, transportation of these products must be carried out through pre-established routes proposed by SUNAT and authorized by the Ministry of Transport and Communications through ministerial resolutions.[122] To prove that the mining products have been transported through these mandatory routes, the purchaser must secure and verify the relevant waybills (*guías de remisión*).

86. The Illegal Mining Controls and Inspection Decree expressly requires that the purchaser of mining products: (i) obtain from its suppliers the documentation needed to ascertain the lawful origin of these products; and (ii) verify the authenticity of that

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[117] *See* Counter-Memorial, § II.B.6.

[118] *See* Counter-Memorial, ¶ 86.

[119] **Ex. R-0013**, Supreme Decree No. 014-92-EM, General Mining Law, 3 June 1992 ("**General Mining Law**"), Art. 4 ("The purchaser is obligated to verify the origin of the mineral resources.").

[120] **Ex. R-0005**, Supreme Decree No. 055-2010-EM, 21 August 2010, Art. 3 ("Per the provisions of Article 4 of Consolidated Amended Text of the General Mining Law, the beneficiary plants that acquire the product of the mining activity without processing or as concentrate, melted down, tailing or any other state until before its refining as well as individuals or legal entities exclusively engaged in the purchase and sale of gold and/or raw minerals, must verify their origin and maintain an updated registry in electronic or physical form that includes the following information regarding each purchase of the mineral product.").

[121] **Ex. R-0049**, Legislative Decree No. 1107, 19 April 2012 ("**Illegal Mining Controls and Inspection Decree**"), Art. 11 ("All purchasers of mining products . . . regardless of their condition, whether the acquisition is made temporarily or permanently, must verify the origin of such products, request the corresponding documents and must verify the authenticity of the data recorded in the corresponding information systems.")

[122] **Ex. R-0049**, Illegal Mining Controls and Inspection Decree, Arts. 2, 4, Second Final Supplementary Provision; *see also* **Ex. R-0156**, Ministerial Resolution No. 350-2013-MTC/02, 17 June 2013.

documentation, including by consulting the necessary registries:

> **All purchasers of mining products** . . . regardless of their condition, whether the acquisition is made temporarily or permanently, **must verify the origin of such products**, **request the corresponding documents and verify the authenticity of the data recorded in the corresponding information systems**.[123] (Emphasis added)

87. In that respect, the Illegal Mining Controls and Inspection Decree establishes specific requirements for "the minimum data to be verified"[124] by purchasers of mining products in order to confirm their lawful origin and the identity of the supplier. That minimum data—which Kaloti was required to *obtain and verify*—includes the following:

a. the supplier's national identity document, real address, and Peruvian taxpayer registry (*Registro Único de Contribuyente* or "**RUC**"), which includes general information on companies registered with SUNAT, such as their date of incorporation, economic activities and legal representatives;

b. the identification number of the mining concession from which the mining products allegedly originated;

c. proof that the relevant mining rights of the concession remain in force;

d. the authorization held by the miner to exploit the mining products in question;

e. a detailed description of the mining products to be purchased, including their weight, characteristics and condition;

f. if the supplier has not itself mined the mining products, proof of the payment made by the supplier to a third party for these products;

g. in all cases, proof of the route of the transport of the minerals from the extraction point to the point of trade of those minerals (*guía de remisión*), including *inter alia* detailed information regarding the (i) shipper and recipient

[123] **Ex. R-0049**, Illegal Mining Controls and Inspection Decree, Art. 11.

[124] **Ex. R-0049**, Illegal Mining Controls and Inspection Decree, Art. 11.

of the minerals (e.g., their identification, tax domicile, and RUC, if applicable); (ii) driver and transport vehicle (including driving license, vehicle registration number, and vehicle brand); (iii) departure and delivery addresses; (iv) detailed description of the products transported (e.g., name, characteristics, amount and weight); (v) start date of transport; and (vi) reason for transporting the goods (e.g., sale, purchase, return, import or export).[125]

88. Further, pursuant to the Regulations of Law No. 27693 of 12 April 2002 ("**Money Laundering Regulations**"), any purchaser of precious metals is under an obligation to identify the "ultimate beneficiary" of the supplier of such metals. The Money Laundering Regulations emphasize that the purchaser must comply with this obligation: (i) *before* every transaction, and (ii) in relation to *all suppliers*.[126]

89. Peru also demonstrated in the Counter-Memorial that the applicable Peruvian legal framework requires the purchaser of mining products to keep updated records proving the lawful origin of the products.[127] Accordingly, Claimant (i) was required to keep in its records evidence proving the lawful origin of the Gold for all Five Shipments, and thus (ii) should have been in a position to produce such evidence in this arbitration.

90. In May 2012, MINEM created a registry of individuals and companies engaged in the sale and/or refining of gold, known as the *Registro Especial de Comercializadores y Procesadores de Oro* ("**RECPO**" or simply "**Registry**").[128] Inclusion in the Registry became mandatory for these individuals and companies.[129] Claimant argued that the

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[125] **Ex. R-0249**, Superintendency Resolution No. 000048-2021/SUNAT, Regulation on Payment Vouchers, 21 January 1999, Art. 19.

[126] **CL-0100**, Regulations to Act No. 27693 (Act establishing the Financial Intelligence Unit), 6 October 2017, Arts. 19–21.

[127] **Ex. R-0005**, Supreme Decree No. 055-2010-EM, 21 August 2010, Art. 3 ("[The purchaser] must verify their origin and maintain an updated registry in electronic or physical form that includes the following information regarding each purchase").

[128] **Ex. R-0010**, Supreme Decree No. 012-2012-EM, 8 May 2012, Art. 7; **Ex. R-0009**, Ministerial Resolution No. 249-2012-MEM-DM, 25 May 2012.

[129] **Ex. R-0009**, Ministerial Resolution No. 249-2012-MEM-DM, 25 May 2012.

fact that the Suppliers were inscribed in the Registry gave it "great confidence" that the Suppliers were in "good standing with the Peruvian Government."[130] However, Claimant has failed to identify any statement or regulations that would have led it to believe that the Registry guaranteed the good standing of registered entities. Claimant also claimed that registration with RECPO "enabled KML to trace . . . the origin of minerals,"[131] but did not explain how that was so. Ultimately, Claimant repeatedly relied on the Suppliers' registration with RECPO to argue that Kaloti met its due diligence obligations under the various Peruvian laws and regulations identified by Peru in this arbitration. However, Claimant's arguments fail as a matter of fact and law.

91. Peru pointed out in the Counter-Memorial that Claimant has adduced no evidence showing that Kaloti checked or relied on the Registry *before* it started dealing with its Suppliers in 2013.[132] The list of companies registered in the Registry that Claimant has submitted in this arbitration was retrieved from the Registry in 2020 (more than 6 years *after* Kaloti's alleged purchase of the Gold).[133] Tellingly, Claimant's own evidence shows that Kaloti regularly traded gold for Peruvian suppliers *that were not registered with RECPO*, including for example [redacted] and [redacted] [redacted][134] Therefore, Claimant's argument that it relied on the Registry for its operations in Peru is both unsupported and contradicted by the evidence on the record.

92. In any event, Claimant's reliance on the Registry is misplaced, as Claimant grossly

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[130] Reply, ¶ 87.

[131] Memorial, ¶ 22.

[132] *See* Counter-Memorial, ¶¶ 90–95, 161.

[133] **Ex. C-0010**, *Registro Especial de Comercializadores y Procesadores de Oro* (RECPO), 8 November 2020.

[134] **Ex. C-0030**, KML transaction summary of all purchases between 2012 and 2018, pp. 13, 15; **Ex. C-0010**, *Registro Especial de Comercializadores y Procesadores de Oro* (RECPO), 8 November 2020, p. 188 (whereby Kaloti purchased 241.6 kg of gold from [redacted] in 2015 but said company was not registered in RECPO until 11 April 2018). *See also* **Ex. C-0030**, KML transaction summary of all purchases between 2012 and 2018, pp. 4, 10–13, 15, 18, 21; **Ex. C-0010**, *Registro Especial de Comercializadores y Procesadores de Oro* (RECPO), 8 November 2020 — whereby Kaloti purchased 3470.4 kg from Corporación del Centro between 2012 and 2018 but it does not appear in RECPO.

overstates the purpose and significance of such registry. Between 2013 and 2014, registering with RECPO was a simple and straightforward process: the registrant merely needed to fill out a form, providing basic information concerning its identity (e.g., name, identification number, address) and the type of commercial activity that it conducted (e.g., buying, selling, and/or refining gold).[135] Subsequent legislative proposals to reform the Registry have expressly noted the registry's limitations, including the fact that its registration form did "not establish any additional requirement to register in RECPO, nor d[id] it contemplate a report of sale and purchase operations."[136]

93. Importantly, there is no basis to suggest that MINEM or any other Peruvian State organ verifies, authenticates, or guarantees the veracity of the information contained in RECPO's registration form, or attests to the lawfulness of the gold being traded by entities registered in RECPO. Publicly available information confirms that the Registry (i) was established merely as a first step to assist the regulatory authorities in creating a database to "identify the agents involved in the sale and purchase and/or refining of gold," and (ii) was "conceived as a complementary and temporary measure until a certification procedure of environmental quality and origin of the gold had been implemented."[137]

94. In fact, public sources have warned of the limitations of the Registry, highlighting that information contained in that registry is not cross-checked by other State agencies,

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[135] **Ex. R-0009**, Ministerial Resolution No. 249-2012-MEM-DM, 25 May 2012, p. 2.

[136] **Ex. R-0048**, Statement of Reasons for the Project of Supreme Decree Establishing Regulatory Provisions for the Special Registry Traders and Processors of Gold-RECPO, 30 June 2021, p. 5 ("the aforementioned form does not establish any additional requirement to register in RECPO, nor does it contemplate a report of sale and purchase operations."); *see also* **Ex. R-0061**, Ministerial Resolution No. 190-2021-MINEM-DM, 28 June 2021 (which authorized the publication the Statement of Reasons for the Project of Supreme Decree Establishing Regulatory Provisions for the Special Registry Traders and Processors of Gold-RECPO, 30 June 2021).

[137] **Ex. R-0048**, Statement of Reasons for the Project of Supreme Decree Establishing Regulatory Provisions for the Special Registry Traders and Processors of Gold-RECPO, 30 June 2021, p. 4 (observing that the purpose of the registry was to "identify the agents involved in the sale and purchase and/or refining of gold, being conceived as a complementary and temporary measure while a certification procedure of environmental quality and origin of the gold had not been implemented.'"). The anticipated certification procedure has not yet been established.

including in law enforcement or administrative proceedings.[138] Contrary to Claimant's arguments, the Suppliers' registration with RECPO simply did *not* somehow guarantee—or even suggest—that the Suppliers were in "good standing with the Peruvian government."[139]

95. In addition, the fact that a supplier of gold is in the Registry does not release the purchaser of gold from its obligation to conduct due diligence. To the contrary, the legal instrument that created the Registry (namely, Supreme Decree No. 012-2012-EM), expressly noted that, in accordance with Article 4 of the General Mining Law, purchasers of gold (i) have an *obligation* to verify the lawful origin of the gold that they intend to purchase; and (ii) are *liable* for any failure to comply with that obligation.[140] Accordingly, Peru's courts have repeatedly and expressly confirmed that the fact that a person buys gold from a supplier that is in the Registry does not release that person from its legal obligation to conduct due diligence on both the supplier and the origin of the gold.[141]

96. In the Memorial, Kaloti alleged that, "[b]eginning in 2012, KML significantly researched and conducted its due diligence about the Peruvian gold market,"[142] and that [redacted] himself "learned about . . . the legal and regulatory framework

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[138] **Ex. R-0048**, Statement of Reasons for the Project of Supreme Decree Establishing Regulatory Provisions for the Special Registry Traders and Processors of Gold-RECPO, 30 June 2021, p. 4 ("the RECPO does not have interoperability with other State administrative registries, in order to be able to cross-check information held by them and this allows them to perform their functions more efficiently.").

[139] Memorial, ¶ 18.

[140] **Ex. R-0010**, Supreme Decree No. 012-2012-EM, 8 May 2012, Preamble.

[141] *See, e.g.*, **Ex. R-0233**, Resolution No. 83, Judgment, Specialized Court in Asset Forfeiture of Lima, 26 January 2022, pp. 55 ("[redacted] N.V. did comply with the requirements of Article 4 of Supreme Decree No. 027-2012-EM; in that it verified that [redacted] was registered in the RECPO, per the indicated necessary administrative law for the development of gold marketing activities in the Ananea area. However, [redacted] did not comply with its obligation to verify the origin of the gold, as required by Article 11 of Legislative Decree No. 1107, and Articles 2 and 3 of Supreme Decree No. 027-2012-EM").

[142] Memorial, ¶ 18.

prevailing in Peru,"[143] including by meeting with "local lawyers in Lima."[144] Similarly, in the Reply, Claimant asserted that before allegedly acquiring the Gold, it "studied . . . and relied on" Peru's regulatory framework regarding the gold market, which Claimant described as "stable and . . . predictable."[145] Therefore, Kaloti either knew or should have known that registration with RECPO was not a guarantee: (i) that the Suppliers were in good standing with the Peruvian authorities; or (ii) that the source of any gold purchased by Kaloti from these Suppliers was lawful.

97. Equally, Kaloti knew or should have known that, to qualify as a bona fide purchaser and to comply with Peruvian law, Kaloti was under an obligation to conduct its own due diligence on the Suppliers and on the origin of the Gold, including by: (i) obtaining from the Suppliers the information described in this section; (ii) independently verifying the authenticity of that information by consulting the relevant registries; and (iii) keeping updated records of the verifications conducted by Kaloti.

98. Moreover, Kaloti's own AML/CFT Manual required it to conduct extensive due diligence on the Suppliers and on the origin of the Gold, in accordance with the OECD's guide entitled "Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas." Indeed, Kaloti's own AML/CFT Manual refers to the OECD guide when it identifies "the required documents [that Kaloti] **must collect and verify upon onboarding and during each transaction** while maintaining the OECD guidelines for Responsible Supply Chains and other industry standards" (emphasis added).[146] To that effect, the AML/CFT Manual states that Kaloti must:

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[143] First [redacted] Witness Statement, ¶ 17; *see also* First [redacted] Witness Statement, ¶¶ 18–24.

[144] First [redacted] Witness Statement, ¶ 20.

[145] Reply, ¶ 377.

[146] **Ex. C-0025**, KML AML/CFT Program Manual, January 2018, p. 5, § 2. *See also* **Ex. R-0285**, [redacted] *"Derechos humanos, compliance e industrias extractivas en América Latina,"* EMPRESAS TRANSNACIONALES Y GRAVES VIOLACIONES DE DERECHOS HUMANOS EN AMÉRICA LATINA (2020).

a. obtain from each supplier a trade license, certificate of incorporation, proof of address and "[p]hotos of [its] business/office;"[147]

b. "identify each and every Ultimate Beneficial Owner" of the supplier;[148]

c. carry out "a full web search" of each supplier;[149]

d. conduct "[s]ite visits" to "verify business location and other specific KYC data," "monitor and evaluate the supplier's operational activities and practices," and "assess whether compliance related risks are present;"[150]

e. prepare a "Site Visit Report" to "detail and summarize key site visit issues, findings, and possible recommendations" and, "[i]f necessary, . . . a follow-up plan addressing specific concerns or issues identified during the site visit;"[151]

f. obtain "[d]ocumentation in the form of invoices, contracts, licenses and/or other documentation that provides clear evidence that metals have been procured through legal means;"[152]

g. "apply a comprehensive approach to monitoring supplier account activity in order to ensure that transactions are conducted in accordance with the relevant guidelines related to the proposed business," including by collecting "[e]xportation authorization and supporting documents granted by the appointed government agency in the country of export" and "[s]upplier Internal Purchase (SIP) documentation;"[153]

h. obtain "[d]ocumentation related to supplier's [AML/CGT] program and independent audits;"[154]

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[147] **Ex. C-0025**, KML AML/CFT Program Manual, January 2018, pp. 9–10, § 7.1.b.
[148] **Ex. C-0025**, KML AML/CFT Program Manual, January 2018, p. 10, § 7.1.c.
[149] **Ex. C-0025**, KML AML/CFT Program Manual, January 2018, p. 11, § 7.1.f.
[150] **Ex. C-0025**, KML AML/CFT Program Manual, January 2018, p. 12, § 7.2.a.
[151] **Ex. C-0025**, KML AML/CFT Program Manual, January 2018, p. 12, § 7.2.a.
[152] **Ex. C-0025**, KML AML/CFT Program Manual, January 2018, p. 10, § 7.1.e.
[153] **Ex. C-0025**, KML AML/CFT Program Manual, January 2018, p. 13, § 7.3.a.
[154] **Ex. C-0025**, KML AML/CFT Program Manual, January 2018, p. 11, § 7.1.g.

i. "[a]fter client's approval and onboarding, [perform] daily checks . . . and review[s] to ensure accuracy;"[155] and

j. "[i]n accordance with best practices as well as US Federal Regulations," "retain[] for a period of at least seven (7) years" all "documentation required under KML's AML/CFT Program Manual."[156]

99. As explained in the subsections below, the evidence on the record shows that Kaloti manifestly failed to comply with its due diligence obligations under Peruvian law, as well as with its own AML/CFT Manual, in relation to both the Suppliers and the origin of the Gold.

b. Kaloti failed to conduct appropriate due diligence on the Suppliers and on the origin of the Gold

100. In the Memorial, Claimant relied solely on three one-page, handwritten forms to argue that it had carried out "exhaustive and diligent KYC . . . compliance investigations"[157] on the Suppliers. Claimant's arguments regarding these forms indicate that Kaloti's due diligence did not go beyond the use of an online tool called "World Check."[158] Claimant argued that because that tool "yielded zero results . . . [the] [S]upplier[s] [were] fully compliant."[159]

101. However, as Peru explained in the Counter-Memorial, such alleged "due diligence" fell woefully short of Kaloti's obligations under Peruvian law. As Kaloti's own AML/CFT Manual makes clear, a "World Check" review is only one of the numerous checks that Kaloti was required to conduct before buying the Gold.[160] Further, to this date, Kaloti has not even submitted the actual results that it supposedly obtained from

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[155] **Ex. C-0025**, KML AML/CFT Program Manual, January 2018, p. 11, § 7.1.f.

[156] **Ex. C-0025**, KML AML/CFT Program Manual, January 2018, p. 16, § 9.

[157] First [redacted] Witness Statement, ¶ 30. *See also* First Witness Statement of [redacted] 12 January 2022 ("[redacted] **Witness Statement**"), ¶ 19.

[158] Memorial, ¶ 15; [redacted] Witness Statement, ¶ 19.

[159] **Ex. C-0033**, KML compliance department periodic review of suppliers, 7 February 2014, pp. 2, 4.

[160] *See* Counter-Memorial, ¶ 165; *supra* Section II.A.1.

World Check.[161] Also, the forms submitted by Claimant do not even mention one of the Suppliers ([redacted][162] In addition, all three forms *postdate* Kaloti's alleged purchase of the Gold, such that they cannot prove that Kaloti complied with its obligation to conduct due diligence on the Suppliers *before* allegedly acquiring the Gold, as required by Peruvian law.[163] Importantly, and any event, a World Check review *on the Suppliers* would not have provided any information *on the origin of the Gold*.[164]

102. In the Reply, Kaloti doubled down on its reliance on the same three handwritten forms to argue that it in fact "conducted independent compliance due diligence reviews on each of [the Suppliers]."[165] However, Claimant did not even address—let alone rebut—Peru's arguments regarding those forms.

103. In the Reply, Claimant purported to rely in addition on the Trading Terms referred to in **Section II.A.2** above. But those Terms do not show that Kaloti met its due diligence obligations under Peruvian law, or that it was a "was a good-faith purchaser."[166] The Trading Terms do not even specify the address of the Suppliers, the IDs of their representatives, who their ultimate beneficiaries were, or the mining licenses on the basis of which the Gold was extracted. Nor do the Trading Terms mention the amount of Gold contained in the Five Shipments, or the mining sites from which the Gold emanated.

104. In yet another unsuccessful attempt to prove that Kaloti complied with its due diligence obligations *before* allegedly acquiring the Gold, in the Memorial had Claimant relied on the exact same documents that the Suppliers had submitted to SUNAT. However, such documents were submitted to SUNAT: (i) *after* Kaloti claims to have purchased the Gold; and (ii) *after* the SUNAT Immobilizations had already

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[161] Counter-Memorial, ¶ 164.
[162] Counter-Memorial, ¶ 164.
[163] Counter-Memorial, ¶ 164.
[164] Counter-Memorial, ¶ 165.
[165] Reply, ¶ 85.
[166] Reply, § II.H; *see also* Reply ¶¶ 96, 99.

taken place.[167] In the Reply, Claimant again failed to demonstrate that, *prior* to its alleged purchase of the Gold, Kaloti reviewed or even obtained the documents that the Suppliers later submitted to SUNAT. Thus, as Peru explained in the Counter-Memorial, there is no evidence on the record that Kaloti verified the information contained in those documents *prior* to allegedly purchasing the Gold.

105. Peru also demonstrated (and further explains below) that the documents submitted by the Suppliers to SUNAT in any event do not demonstrate that the Gold was lawfully mined.[168] Quite the opposite: the documents (i) were incomplete; (ii) were riddled with inconsistencies; and (iii) revealed numerous indicia of illegal mining and money laundering.[169]

106. Notably, Claimant has failed to address *any* of the numerous indicia of money laundering and illegal mining that Peru identified in the Counter-Memorial in relation to each of the Suppliers and the Gold contained in the Five Shipments. Instead, Claimant raised a strawman argument, alleging that it could not be expected to conduct investigations similar to those performed by Peru's authorities to determine the criminal liability of the Suppliers, as this would be "commercially unreasonable."[170] Claimant either continues to feign ignorance of, or truly does not understand, what a proper due diligence consists of. As explained in the Counter-Memorial,[171] (i) based on information that was readily available, Kaloti could and should have detected numerous irregularities that required it to conduct

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[167] **Ex. R-0295**, Notifications, Immobilization Act, Results of the Requirement for C.G [redacted] S.A., SUNAT, 2013 [*Re-submitted version of C-0006, with Respondent's translation*]; **Ex. C-0007**, [redacted] document package, 13 January 2014; **Ex. C-0008**, [redacted] document package, 10 January 2014; **Ex. C-0009**, [redacted] document package, 21 January 2014. It is noteworthy that Claimant has not been able to submit any documents regarding the alleged origin and transportation of Shipment 5, which was the only one not subject to investigation by SUNAT.

[168] *See* Counter-Memorial, § II.B.3.

[169] *See* Counter-Memorial, § II.B.3.

[170] Reply, ¶ 91.

[171] Counter-Memorial, § II.B.6.

enhanced due diligence on both the Suppliers and the Gold; and (ii) Kaloti has failed to prove that it conducted even minimal due diligence.[172]

107. During the document production phase of this proceeding, Peru specifically requested that Claimant produce all documents showing that Kaloti had in fact conducted due diligence on the Suppliers and verified the lawful origin of the Gold.[173] However, as explained below, the documents produced by Claimant in response to that request do nothing but confirm that Kaloti manifestly failed comply with its due diligence obligations under Peruvian law and with its own AML/CFT Manual.

108. The following subsections identify some of the main the deficiencies in Kaloti's due diligence with respect to each of the Suppliers and to the origin of the Gold contained in the Five Shipments.

(i) Kaloti failed to conduct appropriate due diligence on the Supplier ([redacted] and Gold involved in Shipment 1

109. Kaloti alleged that on 27 November 2013 it purchased from [redacted] 111.5 kg of Gold comprising Shipment 1.[174] [redacted] in turn, represented to Kaloti—and later alleged before SUNAT—that it had extracted that Gold from the "*Mi Buena Suerte*" ("**My Good Luck**") mine.[175] Claimant alleges that, as of 30 November 2018, the Gold in Shipment 1 was worth USD 4,087,805.[176]

110. The following reasons objectively required Kaloti to conduct—but in fact did not prompt it to conduct—extensive due diligence on both [redacted] and the Gold contained in Shipment 1:

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[172] Counter-Memorial, ¶¶ 166–174.

[173] Procedural Order No. 2, Annex 2, Requests 8–9, pp. 33–38.

[174] Reply ¶ 15 ("Purchase of 111,545 grams of gold (gross weight) from [redacted] ([redacted] (Shipment No. 1)."). *See also* Memorial, ¶ 49 ("Purchase No. 1 (from [redacted] 104.35 (net) / 111.54 (gross) kilograms of gold.").

[175] **Ex. R-0295**, Notifications, Immobilization Act, Results of the Requirement for C.G [redacted] S.A., SUNAT, 2013 [*Re-submitted version of C-0006, with Respondent's translation*], p. 14.

[176] *See* Second Expert Report of Almir Smajlovic, 4 January 2023 ("**Second Smajlovic Report**"), ¶ 5.86.

a. While [redacted] alleged that Kaloti had an "established and continuous" relationship with [redacted][177] Claimant's own evidence indicates that Kaloti had only recently started dealing with [redacted] Indeed, [redacted] submitted its application to open an account with Kaloti ("**New Account Application**") only on 13 May 2013 (i.e., merely six months before Kaloti allegedly bought the Gold contained in Shipment 1).[178] Moreover, as reflected in the publicly available Corporate Registration of [redacted] Mr. [redacted] ([redacted] General Manager who signed the New Account Application) was replaced by [redacted] on 18 July 2013.[179] That means that, when it allegedly purchased the Gold contained in Shipment 1 (*viz.*, on 27 November 2013), Kaloti had known the General Manager of [redacted] for only four months, which hardly can suffice to develop an "established and continuous" relationship;

b. Aware that dealing with artisanal and/or small mining companies involves significant risks and warrants additional due diligence,[180] [redacted] asserted that the "[S]uppliers were not artisanal, but are considered medium-sized suppliers."[181] However, the documentation that Kaloti alleged to have received

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[177] First [redacted] Witness Statement, ¶ 30.

[178] Kaloti claims to have purchased the gold contained in Shipment 1 on 27 November 2013 *See* Memorial, ¶ 39 ("On or about November 27, 2013, KML purchased 111,545.37 grams (gross weight) of gold from [redacted] **Ex. C-0133**, Due diligence files prepared by KML of [redacted] 15 May 2013, Opening Account, pp. 2–9.

[179] **Ex. R-0185**, Corporation Registration of [redacted] retrieved on 25 May 2022, p. 8.

[180] First [redacted] Witness Statement, ¶ 24; **Ex-AK-0002**, Analysis of the Peruvian gold industry, 25 June 1999, pp. 4–5 ("[a]ny project to be carried out must be in accordance with the regulations established by the Peruvian State through the MINEM, the body that regulates mining. . . the studies carried out by MINEM reveal that in Peru there is a significant population of the strata of small and artisanal mining that is informally engaged in the exercise of mining activity as a means of work and subsistence"); **Ex. R-0296**, "*Plan Nacional para la Formalización de la Minería Artesanal*," COMISIÓN TÉCNICA MULTISECTORIAL, 2011 [*Re-submitted version of C-0044, with Respondent's translation*], p. 14 ("Artisanal miners are in a situation of informality due to the fact that they carry out an activity without complying with the legislation governing such activity. Moreover, the most majority of them are also in a situation of illegality, as they carry out this activity violating the property rights of third parties").

[181] Second [redacted] Witness Statement, ¶ 10.

from [redacted] contradicts that statement. For example, such documentation includes a revealing sworn declaration that [redacted] submitted to Peru's authorities on 13 May 2013[182] (i.e., the same day on which [redacted] submitted its New Account Application[183]). Pursuant to Article 4 of Legislative Decree 1105, submission of such sworn declaration is the first of six steps that *small and artisanal miners* must satisfy to formalize their mining activities.[184] In addition to indicating that [redacted] was an artisanal and informal miner when it started dealing with Kaloti, [redacted] sworn declaration indicated that such entity only had a total of 12 workers.[185] That fact shows that [redacted] operation was small even for an artisanal mining company;

c. Despite having only 12 workers, [redacted] informed Kaloti that it expected to mine and deliver 25 kilograms of gold a week.[186] Kaloti should have known that this would be impossible for an artisanal mining company to accomplish with a workforce of only 12 people. By way of example, in 2013 the average production of small-scale gold producers in Peru was only 4 kg per week;[187]

d. Between 23 September and 27 November 2013, [redacted] produced and supplied to Kaloti an average of 187,12 kg per week (i.e., *more than seven times* its anticipated level of production).[188] Kaloti's own AML/CFT Manual identified

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[182] *See* **Ex. C-0133**, Due diligence files prepared by KML of [redacted] 15 May 2013, p. 16.

[183] *See* **Ex. C-0133**, Due diligence files prepared by KML of [redacted] 15 May 2013, p. 2.

[184] *See* **Ex. R-0226**, Legislative No. 1105, 18 April 2012 [*Re-submitted version of CL-0003, with Respondent's translation*], Art. 4.1., 5.

[185] **Ex. C-0133**, Due diligence files prepared by KML of [redacted] 15 May 2013, Declaración de Compromisos, p. 16.

[186] **Ex. C-0133**, Due diligence files prepared by KML of [redacted] 15 May 2013, Opening Account, p. 6.

[187] According to official sources, small-scale mining producers in Peru mined an overall sum of 8,173 kg of gold in 2013, which amounts to 156 kg per week. The number of small-scale mining producers in 2013 is estimated to be 44 producers. *See* **Ex. R-0011**, Mining Annual Report 2020, MINEM, May 2020, p. 69; **Ex. R-0251**, Victor Torres, "*La economía ilegal del oro en el Perú: Impacto socioeconómico*," PENSAMIENTO CRÍTICO (2015), p. 22.

[188] [redacted] submitted to SUNAT invoices indicating that, shortly before it attempted to export of 111,5 kg of Gold contained in Shipment 1 on 26 and 27 November 2013, [redacted] had supplied to Kaloti: (i)

as a red flag the existence of these types of inconsistencies between "the stated production levels of the metal source" and "supplier transactions on a daily, weekly, monthly, and/or yearly basis."[189] [redacted] supply of such large volumes of gold clearly indicated that [redacted] did not mine the gold itself but rather obtained it from illegal sources. Multiple investigations on illegal mining in Peru have described the process as follows:

> [A] trader collects the gold from several ASGM [artisanal small scale gold mining] prospectors in remote areas, buys their gold and sells it collectively to an exporter or another trader at a trading hub. Often the gold is already processed at this point, since, for example, refining steps are carried out to reduce the mercury content of the gold. In these processes, the gold from different sources is mixed, which disguises its origin. Officially, traders are only allowed to buy and sell gold from a certain region, but this is difficult to control and gold from other regions can easily be mixed in . . . Thus, gold from legally operated sources can be mixed with gold from illegal or informal mines.[190]

e. [redacted] gold exports and production had skyrocketed shortly before it attempted to export Shipment 1. [redacted] reported its first ever export in May 2013 (i.e., mere days after [redacted] started dealing with Kaloti), and yet by November 2013 it had exported over USD 73 million in gold (not including the

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three shipments 22 kg, 26.4 kg and 11.8 kg on 24 September 2013; (ii) two shipments of 33.7 kg and 27 kg (net weight) on 25 September 2013; (iii) 13.1 kg (net weight) on 30 September 2013; (iv) 21.8 kg on 7 October 2013; (v) 42.1 kg on 10 October 2013; (vi) 23.6 kg on 15 October 2013; (vii) 27.5 kg on 16 October 2013; (viii) 22.7 kg on 17 October 2013; (ix) 38.3 kg on 18 October 2013; (x) two shipments of 32.7 kg and 32.3 kg on 22 October 2013; (xi) two shipments of 30.8 kg and 24.5 kg on 24 October 2013; (xii) 41.7 kg on 25 October 2013; (xiii) 25,7 kg on 28 October 2013; (xiv) 31,6 kg on 29 October 2013; (xv) two shipments of 13.8 kg and 35,6 kg on 4 November; (xvi) 14,7 kg on 5 November 2013; (xvii) 34,5 kg on 7 November 2013; (xviii) 40.2 kg on 8 November 2013; (xix) 31.7 kg on 12 November 2013; and (xx) 42.8 kg on 14 November 2013; (xxi) 27,3 kg on 18 November 2013; (xxii) 32,1 kg on 19 November 2013; and (xxiii) 22,1 kg on 20 November 2013 (unless otherwise stated, the foregoing amounts refer to the gross weight of the shipments). *See* **Ex. R-0264**, Invoices issued by [redacted] to Kaloti for gold trading, 4 September 2013 to 20 November 2013. *See also* Reply ¶ 15 (claiming that Shipment 1 consisted of 111,545 grams of gold (gross weight)).

[189] **Ex. C-0025**, KML AML/CFT Program Manual, January 2018, p. 14, § 7.3.a.

[190] **Ex. R-0319**, The Impact of Gold: Sustainability Aspects in the Gold Supply-Chains and Switzerland's Role as a Gold Hub, WWF, 2021, pp.44-45.

USD 4.1 million of Gold contained in Shipment 1).[191] Pursuant to the AML/CFT Manual, this lack of industry experience[192] and "sudden increase . . . in production"[193] by the supplier constituted two additional red flags suggesting that [redacted] did not mine the gold itself but rather obtained it from illegal sources;

f. There were multiple inconsistencies in the documents that [redacted] provided to Kaloti. For example, [redacted] New Account Application stated that [redacted] "only trade[d] its own minerals" and that it underwent "external audits to control the minerals and production processes."[194] However, in that same application, [redacted] stated that it was *not* subject to third-party audits.[195] Additionally, [redacted] had communicated to the Registry that it was engaged in the *buying* of gold.[196] This directly contradicted [redacted] representation to Kaloti that it only commercialized gold mined by [redacted] itself;[197]

g. Despite having been incorporated in 1993, [redacted] had not registered with SUNAT until 2007, which indicated that [redacted] had failed to pay taxes during the long stretch between 1993 and 2007.[198] Moreover, [redacted] had failed to confirm its fiscal address with SUNAT, despite being required to do so.[199] Kaloti was aware of the foregoing, which means that it neither reviewed [redacted] RUC nor made any effort to verify the formal address of that

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[191] **Ex. R-0186**, [redacted] 2013 Cumulative Export Activity Report, retrieved on 17 May 2022.

[192] **Ex. C-0025**, KML AML/CFT Program Manual, January 2018, p. 11, § 7.1.i.

[193] **Ex. C-0025**, KML AML/CFT Program Manual, January 2018, p. 12, § 7.2.

[194] **Ex. C-0133**, Due diligence files prepared by KML of [redacted] 15 May 2013, p. 7.

[195] **Ex. C-0133**, Due diligence files prepared by KML of [redacted] 15 May 2013, p. 8.

[196] **Ex. C-0133**, Due diligence files prepared by KML of [redacted] 15 May 2013, p. 18 ("V. CONDICIÓN").

[197] **Ex. C-0133**, Due diligence files prepared by KML of [redacted] 15 May 2013, p. 7.

[198] **Ex. R-0252**, [redacted] Taxpayer Registration, SUNAT, 9 December 2015, p. 1.

[199] For this reason, [redacted] had been given the status of "*no habido*" by SUNAT. The "*no habido*" status is given to those taxpayers who fail to verify their fiscal address with SUNAT. From a commercial point of view, it makes no sense for a company that supposedly paid taxes and did business regularly not to have registered address with the authority in charge of collecting taxes, especially considering that the "*no habido*" status entails important legal consequences and is easily avoided by keeping updated records with SUNAT.

company, in breach of Article 11 of the Illegal Mining Controls and Inspection Decree and the AML/CFT Manual; and

h. The Corporate Registration of [redacted] indicated that, in addition to "mining services," the company had identified a wide and bizarre range of corporate purposes, which were particularly unusual for a small miner claiming to produce its own gold. Thus, according to [redacted] Corporate Registration document, in addition to mining dozens of kilograms of gold per week, the functions of [redacted] 12 employees included: (i) selling and purchasing "all types and kinds of goods consumable and non-consumable by persons,"[200] including agricultural products, musical instruments, real estate assets, and products related to the nuclear industry, (none of which seems particularly related to, or synergistic with, gold mining), as well as (ii) opening casinos, bingos and other gambling businesses[201] (which, like gold mining, is a high-risk industry).

111. Despite these glaring red flags, Kaloti failed to conduct even minimal due diligence on [redacted] or on the Gold that it claims to have bought from that company. This fact was confirmed by Claimant's response to Peru's document production requests for "Documents prepared by or sent to Kaloti, its managing member(s), its shareholders or officers prior to Kaloti's alleged purchase of the Five Shipments (between 2012 and January 2014), regarding any due diligence review performed on the Suppliers."[202] In response to that document request, Kaloti only produced the following:

a. [redacted] *New Account Application*.[203] As explained above, this document raised numerous red flags. Further, this application was not accompanied by the numerous documents that applicants were supposed to provide to Kaloti during their onboarding process, including: (i) proof of the legal good standing

[200] **Ex. R-0185**, Corporation Registration of [redacted] retrieved on 25 May 2022, p. 3.

[201] **Ex. R-0185**, Corporation Registration of [redacted] retrieved on 25 May 2022, p. 3.

[202] Procedural Order No. 2, Annex 2, Request 9, pp. 36–37.

[203] **Ex. C-0133**, Due diligence files prepared by KML of [redacted] 15 May 2013, Opening Account.

of the prospective supplier, such as a certified extract from the commercial registry; (ii) documents to verify the prospective client's operational address, such as a trade license; and (iii) identification of the beneficial owners or shareholders with a controlling interest in the prospective client;[204]

b. *the national identity documents and/or passports of five individuals.* The relevant individuals were [redacted] José Carlos Mazzotti Gartner, and César Javier Jesús Portugal Signori.[205] But a review of such documents reveals various deficiencies. For example, the identification document of Mr. Portugal Signori produced by Claimant had expired in 1999.[206] Kaloti also failed to collect the ID of Mr. Donayre, who was the General Manager of [redacted] at the time that Kaloti allegedly purchased the Gold contained in Shipment 1,[207] and who in fact signed a number of documents related to that shipment;[208] and

c. *an incomplete copy of an application that* [redacted] *had submitted to the Regional Office of Energy and Mining* (*Dirección Regional de Energía y Minas* or "**DREM**") *of the Ica region on 3 December 2012.*[209] [redacted] had apparently initiated by means of this document the process to become a formal artisanal and small-scale miner under Peruvian law.[210] Contrary to Claimant's arguments, however, this application *does not* prove that [redacted] had a valid mining concession or exploitation rights over the mine from which Shipment 1 was allegedly

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[204] *See, e.g.*, **Ex. R-0256**, [redacted] Account Opening Application, Kaloti Metals & Logistics, 30 July 2013, p. 4; **Ex. C-0025**, KML AML/CFT Program Manual, January 2018, p. 9.

[205] **Ex. C-0133**, Due diligence files prepared by KML of [redacted] 15 May 2013, pp. 10–15.

[206] **Ex. C-0133**, Due diligence files prepared by KML of [redacted] 15 May 2013, p. 15.

[207] **Ex. R-0185**, Corporation Registration of [redacted] retrieved on 25 May 2022, p. 8.

[208] For example, Mr. Donayre signed the *guias de remisión* of Shipment 1, as well as several declarations and communications that [redacted] through its customs agent, submitted to SUNAT. *See* **Ex. R-0295**, Notifications, Immobilization Act, Results of the Requirement for C.G [redacted] S.A., SUNAT, 2013 [*Re-submitted version of C-0006, with Respondent's translation*], pp. 13–16, 32–33, 37–38, 40, 42–43, 47.

[209] *See* **Ex. C-0133**, Due diligence files prepared by KML of [redacted] 15 May 2013, pp. 16–17

[210] *See* **Ex. R-0226**, Legislative No. 1105, 18 April 2012 [*Re-submitted version of CL-0003, with Respondent's translation*], Arts. 4.1, 5.

extracted. In any event, [redacted] did not even provide Kaloti a copy of the full application.[211]

112. The documents identified above are the same ones that Claimant has submitted in this arbitration as Exhibit C-0133, which Claimant described as "Due diligence files prepared by KML of [redacted] As explained above, these files do not in any way prove that Kaloti complied with its obligation to conduct due diligence on [redacted] On the contrary, the manifest insufficiency and deficiencies of such documentation confirm that Kaloti traded incredibly large volumes of gold for [redacted] despite not having adequate information about the credentials, practices, mining rights or even identity of that Supplier. Specifically, according to Claimant's own evidence, in 2013 Kaloti traded 992 kg for [redacted] and 332 kg for a likely related company named [redacted] Corp. S.A.C.[213]

113. In response to Peru's request for "Documents . . . exchanged between Kaloti and the Suppliers to show that Kaloti [had] verified the lawful origin of the gold contained in each of the Five Shipments,"[214] Claimant produced the communications contained in Exhibit C-0129.[215] But virtually all of the documents contained therein relate not to the export of Shipment 1 (attempted on 27 November 2013)[216] but rather to a series of *earlier* shipments of gold from Lima to Miami (which had taken place between 22 October and 15 November 2013).[217] Self-evidently, Claimant cannot purport to prove that it verified the origin of the Gold contained in Shipment 1 by reference to documents regarding earlier and unrelated shipments.

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[211] For example, the second page is missing. That page relates to the authorization to commence/restart exploitation, exploration or extraction activities.

[212] S*ee* **Ex. C-0030**, KML transaction summary of all purchases between 2012 and 2018, p. 7.

[213] S*ee* **Ex. C-0030**, KML transaction summary of all purchases between 2012 and 2018, p. 8.

[214] Procedural Order No. 2, Annex 2, Request 8, p. 33.

[215] **Ex. C-0129**, Exchange of emails between KML and [redacted] regarding KYC process conducted by KML, 25 September 2013.

[216] **Ex. C-0129**, Exchange of emails between KML and [redacted] regarding KYC process conducted by KML, 25 September 2013, pp. 30, 33.

[217] **Ex. C-0129**, Exchange of emails between KML and [redacted] regarding KYC process conducted by KML, 25 September 2013, pp. 11–14, 19–20.

114. Rather than show that Kaloti met its due diligence obligations regarding the origin of the Gold in Shipment 1, Exhibit C-0129 confirms Kaloti's reckless behavior. Thus, for example, such exhibit shows that on 22 October 2013, Kaloti processed the export from Lima to Miami of approximately 32 kilograms of gold, worth USD 1.2 million.[218] Only two days later, on 24 October 2013, Kaloti processed the export of 24 kilograms of gold, worth more than USD 1 million.[219] However, in breach of Article 11 of the Illegal Mining Controls and Inspection Decree,[220] the waybills obtained by Kaloti ("*guía de remisión*") for these shipments do not specify the identity of the carriers that transported the gold, or the vehicles that were used for that transport.[221] This is yet another indication that [redacted] regularly clouded the origin of the gold it supplied to Kaloti.

115. The few documents submitted by Claimant in relation to Shipment 1 consist mainly of communications that *postdate* Kaloti's alleged purchase and immobilization of the Gold contained in that shipment. Therefore, such documents do not assist Kaloti's argument that it conducted proper due diligence *prior* to allegedly acquiring the Gold in Shipment 1. Specifically, the documents contained in Exhibit C-0129 include:

a. *an email sent by the Peruvian transport company* [redacted] *to Kaloti* ***on 5 December 2013*** (i.e., a week after Kaloti's alleged purchase of the Gold contained in Shipment 1 and SUNAT's immobilization of that Gold). In that email, [redacted] seemed to suggest that, if [redacted] were to hire [redacted] services, [redacted] would tell Peru's authorities that a few days earlier, on 27 November 2013, [redacted] had transported Shipment 1 from the extraction point (i.e., the "My Good Luck" mine) to Lima. This is a highly suspicious email because in it [redacted] was offering to certify that it had provided transport services for a transport

[218] *See* **Ex. C-0129**, Exchange of emails between KML and [redacted] regarding KYC process conducted by KML, 25 September 2013, pp. 14–15.

[219] **Ex. C-0129**, Exchange of emails between KML and [redacted] regarding KYC process conducted by KML 25 September 2013, pp. 20, 24.

[220] *See* **Ex. R-0049**, Illegal Mining Controls and Inspection Decree, Art. 11.

[221] *See* **Ex. C-0129**, Exchange of emails between KML and [redacted] regarding KYC process conducted by KML, 25 September 2013, pp. 15, 25.

that had already taken place before [redacted] hiring, which suggests that [redacted] was proposing to lie to SUNAT about the identity of the Gold's carrier.[222] As explained further below, [redacted] eventually did tell SUNAT that it was [redacted] that had transported the Gold contained in Shipment 1; however, the vehicle allegedly used for such transport did not belong, and was not otherwise linked, to [redacted] and

b. *an email sent by* [redacted] *to Kaloti* ***on 27 December 2013*** regarding certain actions taken by SUNAT.[223] This email does not assist Kaloti's argument because it was sent a month *after* the immobilization of Shipment 1 and, in any event, it does not prove the lawful origin of the Gold in that shipment.

116. Exhibit C-0129 also contains a series of emails dated 27 November 2013 concerning the transport of the gold of [redacted] and other companies from Lima to Miami. These emails do not support Claimant's position for the simple reason that they are manifestly *unrelated* to the origin of the Gold contained in Shipment 1.[224] In any event, such emails show that, for the transport of the gold and for the customs paperwork required in the US, Kaloti relied on the US company Transvalue, Inc.[225] The Department of Justice of the United States recently announced that the CEO of Transvalue, [redacted] Jr., pled guilty to money laundering related to gold trading in the US, including "submitting false customs documents that hid the true

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[222] **Ex. C-0129**, Exchange of emails between KML and [redacted] regarding KYC process conducted by KML, 25 September 2013, p. 36.

[223] **Ex. C-0129**, Exchange of emails between KML and [redacted] regarding KYC process conducted by KML, 25 September 2013, pp. 38-45.

[224] **Ex. C-0129**, Exchange of emails between KML and [redacted] regarding KYC process conducted by KML, 25 September 2013, pp. 30–35. *See also* **Ex. R-0332**, *United States of America v. Jesus Gabriel Rodriguez*, US District Court for the Southern District of Florida, Case No. 1:21-mj-03160-Reid, William Donaldson Affidavit, 14 June 2021.

[225] **Ex. C-0129**, Exchange of emails between KML and [redacted] regarding KYC process conducted by KML, 25 September 2013, pp. 30–35 (consisting of emails addressed to, or sent by, personnel from Transvalue, Inc.).

origin of gold being imported into Miami."[226]

117. Notably, Mr. [redacted] is not the only individual suspected or convicted of criminal activity with whom Claimant conducted business. As explained in the Counter-Memorial and in the following subsections, Kaloti's Suppliers in Peru and Kaloti's main and virtually sole client ([redacted] have all been investigated for, accused of, and/or convicted of carrying out a wide range of criminal activities in multiple jurisdictions related to the smuggling of gold and money laundering. And yet Claimant expects this Tribunal to believe: (i) that Kaloti did not know anything about this multi-billion, global, criminal scheme of its web of suppliers, clients and service providers; and (ii) that Kaloti always complied with its "strong compliance and AML program."[227]

118. Moreover, in the Reply, Claimant failed to respond to the evidence that Peru had adduced in the Counter-Memorial concerning the unlawful origin of the Gold in Shipment 1, including the following. *First*, although [redacted] claimed to have produced the gold that was being transported in Shipment 1 and in 51 previous gold shipments worth USD 73 million, [redacted] failed to provide to the Peruvian authorities evidence that it had acquired the supplies necessary for the extraction of that gold.[228] Had Kaloti "monitor[ed] and evaluate[d] th[is] [S]upplier's operational activities and practices,"

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[226] **Ex. R-0254**, United States Attorney's Office of the Southern District of Florida, "*CEO of South Florida Armored Transport Company Pleads Guilty to Committing Customs Fraud as Part of a Multimillion Dollar Dirty Gold Money Laundering Conspiracy*," 25 January 2022, p. 1 ("Jesus Gabriel Rodriguez, Jr., 45, former CEO of Transvalue, a South Florida company that transported gold, cash, and other valuables by armored truck, pled guilty yesterday to submitting false customs documents that hid the true origin of gold being imported into Miami as part of a $140 million transnational illicit gold smuggling operation").

[227] Reply, § II.H (entitled "KML had a strong compliance and AML program; and was a good-faith purchaser of the gold seized").

[228] **Ex. R-0140**, SUNAT Report No. 026-2014-SUNAT-3X3200, 15 January 2014 (included in [redacted] Criminal Proceedings), ¶ 2.8 (". . . the company [redacted] has not submitted documents evidencing the purchase of supplies necessary for the production of gold ore for the year 2013, not meeting the request made, however the company has exported gold during the year 2013 (51 exports) with a value of seventy-three (73) million USD according to the attached Annex.").

as required by the AML/CFT manual,[229] it would have detected this clear indicium that [redacted] had in fact *not* mined the Gold in Shipment 1.

119. *Second*, [redacted] indicated to SUNAT (and to Kaloti) that the Gold contained in Shipment 1 had come from the "My Good Luck" mine, with respect to which [redacted] claimed to have concession rights.[230] However, official information from the concession's registry showed that [redacted] did *not* hold the concession over the "My Good Luck" mine.[231] In fact, [redacted] and its legal representative, Mr. Donayre, did not have *any* mining concession rights, exploitation or assignment contract, or links to the "My Good Luck" mining concession at all.[232] Had Kaloti taken the simple step of consulting the status of the "My Good Luck" mine on the online, publicly available registry of Peru's Metallurgical, Mining and Geological Institute ("**INGEMMET**"),[233] it would have realized that [redacted] had no rights whatsoever with respect to the mine from which it claimed to have extracted the Gold.[234] Yet, as confirmed by the absence of documents produced by Claimant in this arbitration, Kaloti did *not* check such website, or otherwise verify [redacted] concession title, mining rights and authorizations to exploit gold from the "My Good Luck" mine. The foregoing

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[229] **Ex. C-0025**, KML AML/CFT Program Manual, January 2018, p. 12, § 7.2.a.

[230] **Ex. R-0295**, Notifications, Immobilization Act, Results of the Requirement for C.G [redacted] S.A., SUNAT, 2013 [*Re-submitted version of C-0006, with Respondent's translation*], pp. 14–15 (noting that "The origin of the gold. . .**is a product of the processing that takes place in our [mining] concession Mi Buena Suerte, located in Palpa ICA**." (Emphasis added)). *See also* **Ex. C-0133**, Due diligence files prepared by KML of [redacted] 15 May 2013, p. 16; **Ex. C-0129**, Exchange of emails between KML and [redacted] regarding KYC process conducted by KML, 25 September 2013, pp. 22, 26.

[231] **Ex. R-0073**, State Attorney's Request for the Initiation of [redacted] Preliminary Investigation for the Crime of Money Laundering, 22 January 2014, p. 4, ¶ 8.

[232] **Ex. R-0139**, Resolution No. 1: Order Initiating Criminal Proceedings, [redacted] Case, 16 March 2015, pp. 4, 12; **Ex. R-0138**, Criminal Complaint No. 169-2014, [redacted] Case, 19 February 2015, pp. 7, 21; **Ex. R-0288**, Report No. 08-2014, Dirección Regional de Energía y Minas of the Ica Region, 10 March 2014, p. 1 ("According to INGEMMET database [redacted] does not appear to have IN THE RECORD any exploitation or concession contract OR any link whatsoever with the MINING CONCESSION *MI BUENA SUERTE*"), p. 6 ("[a]ccording to the database of INGEMMET there are NO RECORDS of [redacted] having any exploitation or concession contract over the MINING CONCESSION *MI BUENA SUERTE*").

[233] *See* **Ex. R-0073**, State Attorney's Request for the Initiation of [redacted] Preliminary Investigation for the Crime of Money Laundering, 22 January 2014, p. 4.

[234] *See* **Ex. R-0349**, "My Good Luck" Mine Status Report, INGEMMET, undated.

constitutes further evidence that Claimant failed abjectly to comply with its obligations under Peruvian law to conduct proper due diligence.[235]

120. *Third*, [redacted] declared to SUNAT that [redacted] had transported the Gold contained in Shipment 1 from the alleged extraction site to [redacted] facilities in Lima. However, the owner of the vehicle used for the alleged transport was neither a [redacted] employee nor otherwise related to [redacted][236] Had Kaloti verified the authenticity of the waybills (*guías de remisión*)—as it was required to do under Article 11 of the Illegal Mining Controls and Inspection Decree[237]—it would have identified this additional indication that the Gold contained in Shipment 1 had in fact *not* been extracted from the "My Good Luck" mine. However, as explained above, Kaloti regularly traded gold for [redacted] without obtaining the information required by Peruvian law in relation to the transport of that gold.

121. *Fourth*, the representative of the concessionaire of the "My Good Luck mine" declared before the Sixth Criminal Court of Callao that he had never signed any contract allowing [redacted] or any other party, to extract or commercialize gold from that mine.[238] Further, the evidence shows that there had not been any mining activity at all

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[235] **Ex. R-0049**, Illegal Mining Controls and Inspection Decree, Art. 11 ("All purchasers of mining products . . . regardless of their condition, whether the acquisition is made temporarily or permanently, must verify the origin of such products, request the corresponding documents and must verify the authenticity of the data recorded in the corresponding information systems.").

[236] **Ex. R-0140**, SUNAT Report No. 026-2014-SUNAT-3X3200, 15 January 2014 (included in [redacted] Criminal Proceedings), ¶ 2.8 ("With respect to the waybills . . . from Saramarca - Ica to the town of Chorrillos, it indicates [redacted] as the transport company. However, the vehicle used to transport the shipment . . . belongs to the natural person Sonia Esther Quintanilla Salvador . . . Likewise, the company CG [redacted] S.A. has not presented the transport waybills that correspond to said commercial operation."). *See also* **Ex. R-0170**, [redacted] Shipping Guides (included in [redacted] Criminal Proceedings), 27 November 2013, p.4 (indicating that the transport company was "[redacted]

[237] **Ex. R-0049**, Illegal Mining Controls and Inspection Decree, Art. 11(c).

[238] **Ex. R-0139**, Resolution No. 1: Order Initiating Criminal Proceedings, [redacted] Case, 16 March 2015, p. 12 ("[T]he brief submitted by [redacted] which expressly states that its representative has NOT ENTERED into any type of mining contract with any person, whether of concession, exploitation, etc., that would allow them to extract and commercialize mineral from the MI BUENA SUERTE mining concession . . . ."); **Ex. R-0138**, Criminal Complaint No. 169-2014, [redacted] Case, 19 February 2015, p. 22.

at "My Good Luck" mine during the relevant period. For example, the report of an on-site inspection conducted at the "My Good Luck" mine from 24 to 26 March 2014 by the General Directorate of MINEM confirmed that: (i) "[t]here [were] no recent tailings or residues resulting from metallurgic processes that could prove any gold treatment in the area;"[239] (ii) "[t]he new equipment found in the area had not been installed;"[240] and (iii) "the gold processing plant . . . [was] inoperative."[241] Had Kaloti conducted a site visit to the "My Good Luck" mine, as required by its own AML/CFT Manual,[242] it would have been able to ascertain that [redacted] had lied when it claimed to have extracted the Gold in Shipment 1 from that mine.

122. In sum, Kaloti manifestly failed to comply with its due diligence obligations in relation to both [redacted] and the Gold contained in Shipment 1, such that it does not qualify as a bona fide purchaser of that Gold.

(ii) Kaloti failed to conduct appropriate due diligence on the Supplier ([redacted] and Gold involved in Shipment 2

123. Kaloti alleges that on 8 January 2014 it bought from [redacted] the Gold comprising Shipment 2. [redacted] in turn, represented to Kaloti and Peru's authorities that it had purchased that Gold on 3 January 2014 from eight miners based in three different regions in Peru.[243] Claimant alleges that, as of 30 November 2018, the Gold in Shipment 2 was worth USD 3,648,770.[244]

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[239] **Ex. R-0139**, Resolution No. 1: Order Initiating Criminal Proceedings, [redacted] Case, 16 March 2015, p. 14 ("There are no recent tailings/residues from metallurgical processes that prove that gold ore has been processed in the inspected area.").

[240] **Ex. R-0139**, Resolution No. 1: Order Initiating Criminal Proceedings, [redacted] Case, 16 March 2015, p. 14 ("New equipment found in the installed area are not installed.").

[241] **Ex. R-0139**, Resolution No. 1: Order Initiating Criminal Proceedings, [redacted] Case, 16 March 2015, p. 14 ("The processing plant located on the right bank of the Viseas River is in an inoperative state . . .").

[242] **Ex. C-0025**, KML AML/CFT Program Manual, January 2018, p.12, § 7.2.a.

[243] *See* **Ex. R-0145**, Resolution No. 1: Order Initiating Criminal Proceedings, [redacted] Case, 14 May 2015, p. 7.

[244] *See* Second Smajlovic Report, ¶ 5.86.

124. As explained below, the documents that Claimant itself has produced in this proceeding, as well information that was publicly available when Kaloti started dealing with [redacted] confirm that Kaloti could and should have detected numerous red flags concerning that Supplier:

a. The RUC of [redacted] that Claimant has submitted in this arbitration shows that [redacted] was incorporated on 11 July 2013 and started operating on 24 July 2013.[245] According to Claimant's own evidence, Kaloti began trading gold for that company merely *one week later*, on 31 July 2013.[246] Given this context, [redacted] statement that Kaloti had an "established and continuous" relationship with [redacted] is self-evidently false.[247] Even Kaloti's own AML/CFT Manual identified as a red flag the fact that a supplier "is new and/or recently established."[248] And that is a red flag because—as Peru explained in the Counter-Memorial[249]—it is common for money launderers to create new companies that engage, over a short period of time, in the trade of significant volumes of illegally mined gold, only to then be quickly dissolved to avoid paying the corresponding taxes. As multiple investigations on illegal mining in Peru have reported, "[t]hese companies are always being renamed or reopened, but often the numbers and infrastructure behind the businesses remain the same;"[250]

b. [redacted] described [redacted] as a "reputable Peruvian precious metals supplier[],"[251] and yet that company had *zero experience* in the supply of

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[245] **Ex. C-0130**, Due diligence files prepared by KML of [redacted] 24 July 2013, pp. 5–6. *See also* **Ex. R-0083**, Corporation Registration of [redacted] retrieved on 25 May 2022, p. 10.

[246] **Ex. C-0128**, Exchange of emails between KML and [redacted] regarding KYC process conducted by KML, 30 July 2013, pp. 5–6.

[247] First [redacted] Witness Statement, ¶ 30.

[248] **Ex. C-0025**, KML AML/CFT Program Manual, January 2018, p. 11, § 7.1.i.

[249] Counter-Memorial, ¶ 133.

[250] **Ex. R-0319**, The Impact of Gold: Sustainability Aspects in the Gold Supply-Chains and Switzerland's Role as a Gold Hub, WWF, 2021, p. 45.

[251] First [redacted] Witness Statement, ¶ 30.

precious metals.[252] Further, [redacted] New Account Application that [redacted] sent to Kaloti showed that the company's representative, [redacted] had only one year of experience in the trade of mineral resources.[253] Had Kaloti carried out proper due diligence, it would have checked Mr. Noriega's background, experience and knowledge of the industry. However, the "Due diligence files prepared by KML of [redacted] that Claimant has submitted in this proceeding show that Kaloti did none of that;[254]

c. [redacted] Corporate Registration information—which Kaloti could and should have obtained (but evidently did not obtain) as part of its due diligence process[255]—showed that [redacted] had minimal share capital, amounting to a paltry USD 2,700 (PEN 10,000).[256] Yet, completely incongruently with such level of share capital, SUNAT's publicly available registry showed that, between July and December 2013, [redacted] had reported exports for *more than USD 101 million*.[257] Claimant's own evidence shows that during that same period, [redacted] exported 2,399 kilograms of gold *to Kaloti alone*.[258] This "sudden increase . . . in production," prior to Kaloti's alleged purchase of the Gold contained in Shipment 2, also constituted an obvious red flag, even pursuant to the guidelines in Kaloti's own AML/CFT Manual.[259] Any bona fide purchaser would have at least asked [redacted] to explain the origin of the financial resources that it had deployed to purchase such an enormous amount

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[252] As noted above, [redacted] was incorporated on 11 July 2013 and started operating on 24 July 2013. [redacted] Cumulative Export Activity Report shows that [redacted] first export took place in August 2013. *See* **Ex. R-0187**, [redacted] 2013 Cumulative Export Activity Report, retrieved on 17 May 2022, p. 1.

[253] *See* **Ex. R-0256**, [redacted] Account Opening Application, Kaloti Metals & Logistics, 30 July 2013, p. 6.

[254] **Ex. C-0130**, Due diligence files prepared by KML of [redacted] 24 July 2013.

[255] *See* **Ex. R-0256**, [redacted] Account Opening Application, Kaloti Metals & Logistics, 30 July 2013, p. 4 ("[c]ertified extract from the Commercial Register").

[256] *See* **Ex. R-0083**, Corporation Registration of [redacted] retrieved on 25 May 2022, p. 3.

[257] *See* **Ex. R-0187**, [redacted] 2013 Cumulative Export Activity Report, retrieved on 17 May 2022.

[258] **Ex. C-0030**, KML transaction summary of all purchases between 2012 and 2018, p. 8.

[259] **Ex. C-0025**, KML AML/CFT Program Manual, January 2018, p. 12, § 7.2.

of gold in its first six months of operations. However, as explained below, Kaloti made no such enquiry;

d. Even [redacted] New Account Application confirmed that company's malpractices. Such application expressly stated that [redacted] did not have any contract or agreement with its gold suppliers. And yet, [redacted] expected to purchase the staggering amount of 15 kg of gold a day from such suppliers.[260] Moreover, there is no evidence on the record suggesting that Kaloti ever requested any information regarding [redacted] contractual arrangements with those suppliers. However, the AML/CFT Manual required Kaloti to obtain "[d]ocumentation in the form of . . . contracts . . . that provide[d] clear evidence that metals have been procured through legal means;"[261]

e. [redacted] New Account Application also indicated that [redacted] did not undergo any independent audits by third parties, and did not even have a website where Kaloti could consult whether [redacted] had in place a compliance program.[262] But Kaloti evidently did not seek to obtain any information from [redacted] on either of these matters, despite the fact that its AML/CFT Manual expressly required it to obtain from its suppliers "[d]ocumentation related to supplier's [compliance] program and independent audits;"[263]

f. [redacted] New Account Application was manifestly incomplete. Notably, that application required [redacted] to provide *inter alia* (i) proof of the legal good standing of the company; (ii) documents to verify the client's operational address; (iii) identification of the beneficial owners or shareholders with a controlling interest in the company; and (iv) the outcome of the supplier's

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[260] *See* **Ex. R-0256**, [redacted] Account Opening Application, Kaloti Metals & Logistics, 30 July 2013, pp. 8, 10.

[261] **Ex. C-0025**, KML AML/CFT Program Manual, January 2018, p. 10, § 7.1.e.

[262] *See* **Ex. R-0256**, [redacted] Account Opening Application, Kaloti Metals & Logistics, 30 July 2013, p. 10.

[263] **Ex. C-0025**, KML AML/CFT Program Manual, January 2018, p. 11, § 7.1.g.

compliance audits.[264] Based on the evidence on the record, [redacted] does not seem to have submitted any of these documents, yet Kaloti nonetheless opened an account with, and traded enormous volumes of gold for, that company;

g. [redacted] New Account Application contained information that Kaloti knew was false. For example, such application indicated that Mr. Noriega was the company's sole shareholder and ultimate beneficiary.[265] Yet [redacted] RUC, which Claimant itself has submitted in this arbitration,[266] showed that [redacted] was also owned by a person named [redacted] As discussed in detail below, email exchanges submitted by Claimant in this arbitration show (i) that Kaloti dealt directly not with Mr. Noriega but with Mr. [redacted] and the latter's brother [redacted] in relation to [redacted] exports of gold; and (ii) that the [redacted] brothers had made clear that they owned and controlled [redacted] as well as other entities with which Kaloti traded tons of gold.[267] Despite these red flags, Claimant has submitted no evidence showing that it tried to identify [redacted] ultimate beneficiaries. That failure by Kaloti shows that it breached the Money Laundering Regulations and Kaloti's own AML/CFT Manual;[268]

h. Claimant's witnesses have alleged in this arbitration that Kaloti conducted background checks on all the shareholders and ultimate beneficial owners of the Suppliers,[269] including by verifying that they had not received adverse media attention[270] (which would constitute a red flag under the AML/CFT

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[264] **Ex. R-0256**, [redacted] Account Opening Application, Kaloti Metals & Logistics, 30 July 2013, pp. 4–5, 10.

[265] *See* **Ex. R-0256**, [redacted] Account Opening Application, Kaloti Metals & Logistics, 30 July 2013, p. 5.

[266] **Ex. C-0130**, Due diligence files prepared by KML of [redacted] 24 July 2013, p. 6.

[267] **Ex. C-0128**, Exchange of emails between KML and [redacted] regarding KYC process conducted by KML, 30 July 2013, pp. 3–14, 41–42.

[268]. **CL-0100**, Regulations to Act No. 27693 (Act establishing the Financial Intelligence Unit), 6 October 2017, Arts. 19–21; **Ex. C-0025**, KML AML/CFT Program Manual, January 2018, p. 10, § 7.1.c.

[269] [redacted] Witness Statement, ¶¶ 18–19.

[270] *See* First [redacted] Witness Statement, ¶ 30.

Manual).[271] However, the above-referenced [redacted] shareholder of [redacted] and Kaloti's contact person at that company—was a notorious individual in Peru,[272] including because he had been the subject of widespread negative press coverage for criminal activities well *before* Kaloti started dealing with him:

i. As widely reported by the press, on 16 November 2006 one of the most popular Peruvian TV shows played a video of [redacted] "[s]hooting in the air in plain sight on the street with a firearm that he took from a police officer just because a friend of his was removed from a nightclub, thus demonstrating his aggressive behavior."[273] In 2011, the press indicated that Mr. [redacted] had been found criminally liable as a result of this incident;[274]

ii. Another popular Peruvian TV show played the video mentioned above again on 8 June 2011, following Mr. [redacted] involvement in another (this time domestic) violent incident. Peru has submitted that video into the record of this arbitration,[275] so that the Tribunal can assess by itself whether the criminal behavior of Mr. [redacted] is that of a "reputable Peruvian supplier[] of gold," which is how both [redacted]

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[271] **Ex. C-0025**, KML AML/CFT Program Manual, January 2018, p. 12, § 7.2.

[272] **Ex. R-0287**, "*Los antecedentes de violencia de su 'ex'*,"PERU21, 9 June 2011.

[273] **Ex. R-0255**, "*Bárbaro la golpeaba y llamaba prostituta*," OJO, 9 June 2011; **Ex. R-0262**, Transcript of "*Bárbara Cayo y su ex pareja* [redacted] *ya tenían antecedentes de violencia física*," YOUTUBE, 8 June 2011.

[274] **Ex. R-0287**, "*Los antecedentes de violencia de su 'ex'*," PERU21, 9 June 2011 ("'A CRIME THAT HAS BEEN PROSECUTED IS A CRIME IN THE PAST.' Sergio Gallo, [redacted] Roman's attorney, admitted that his client had been involved in a violent incident in 2006, adding that such incident would have nothing to do with the current charge against Bárbara Cayo. "If someone is convicted of having killed a person 5 years ago, is that a fact that can be relevant in the present days in front of another criminal complaint? Please! A **crime** that has been already prosecuted is a crime that belongs to the past. **He** ([redacted] **has already received his sentence and served his punishment.**'" (Emphasis added)).

[275] **Ex. R-0262**, Transcript of "*Bárbara Cayo y su ex pareja* [redacted] *ya tenían antecedentes de violencia física*," YOUTUBE, 8 June 2011.

and Claimant have attempted to portray [redacted] and the other Suppliers;[276]

iii. On 9 June 2011, a Peruvian media outlet reported that multiple criminal complaints had been filed against [redacted]

> In addition to the police reports of physical aggression, [redacted] has three criminal charges against him. One in the 8th criminal prosecutor's office for the crime of embezzlement and misappropriation of public funds; in the 26th criminal prosecutor's office he is being investigated for the extortion of Gálvez Ramos y Abogados and the third charge is in the 55th criminal prosecutor's office for illicit enrichment.[277]

125. Based on these glaring red flags, any prudent gold purchaser would have refused to deal with [redacted] and with any other company associated with the [redacted] family. However, Kaloti's own transaction summary ("**Transaction History**") shows that, between 2012 and 2014, Kaloti traded the exorbitant amount of 10,140.5 kg of gold, worth more than USD 500 million,[278] for various companies owned or controlled by the [redacted] family and Mr. Noriega. These companies include [redacted] ("[redacted] [redacted] S.A.C. ("[redacted] [redacted] ("[redacted] and [redacted] itself.[279]

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[276] Memorial, ¶ 15; First [redacted] Witness Statement, ¶ 30.

[277] **Ex. R-0255**, "*Bárbaro la golpeaba y llamaba prostituta*," OJO, 9 June 2011; **Ex. R-0262**, Transcript of "*Bárbara Cayo y su ex pareja* [redacted] *ya tenían antecedentes de violencia física*," YOUTUBE, 8 June 2011.

[278] *See* **Ex. C-0043**, KML's transaction summary of all suppliers and purchases, p. 2 (which shows the price per ounce of gold Kaloti paid on average each month for Peruvian gold) and **Ex. C-0030**, KML transaction summary of all purchases between 2012 and 2018, pp. 4, 7–8, 11 (this figure was calculated using the average price per ounce of gold Kaloti paid over the period 2012-2014, which was USD 1,450.03 an ounce, then by converting the 10.140.5 kg to ounces which equates to 357,699 ounces, and finally multiplying the average price per ounce by the quantity of ounces).

[279] S*ee* **Ex. C-0030**, KML transaction summary of all purchases between 2012 and 2018, pp. 4, 7–8, 11; *see also* **Ex. R-0339**, Prosecutorial Resolution No. 1, First Supra-Provincial Corporate Prosecutor's Office Specializing in Money Laundering and Loss of Domain Crimes, 20 September 2015 [*Re-*

126. The Transaction History also shows that Kaloti continued trading with some of these companies even after SUNAT had immobilized Shipment 2 and the press had exposed the [redacted] family's criminal scheme. In February 2014, the press widely reported that Darshan, [redacted] and [redacted] were part of a group of companies that (i) were involved in money laundering through offshore companies, (ii) had registered suspicious financial transactions, and (iii) had exported outside of Peru many tons of gold of suspicious origin.[280] By then, Shipment 2 (supplied by [redacted] had already been immobilized by SUNAT.[281] Despite these obvious indications that the [redacted] family was involved in illegal activities, Exhibit C-030 shows that in 2014 Kaloti traded more than 300 kg of gold for [redacted] one of the companies controlled by the [redacted] family.[282] Notably, the evidence submitted by Claimant itself in this arbitration shows that Kaloti knew that [redacted] like [redacted] was owned and controlled by the [redacted] brothers. By way of example, on 11 November 2013 [redacted] (i.e., [redacted] brother) sent an email from his [redacted] email account to [redacted] and to Mr. [redacted] (Kaloti's compliance officer), to provide the bank account details of Darshan, [redacted] and [redacted] [redacted] described all three companies as "our companies."[283] In another email sent to [redacted], Mr. [redacted] (Kaloti's Operations Manager) explained that [redacted] had requested that [redacted] the latter's brother [redacted] and the brother's father Alfredo

submitted version of C-0052, with Respondent's translation], p. 28 detailing the connections between the abovementioned companies. *See also* **Ex. R-0346**, Corporation Registration of [redacted] SUNARP, 10 July 2013; **Ex. R-0356**, Corporation Registration of [redacted] SUNARP, retrieved on 10 May 2023; **Ex. R-0357**, Corporation Registration of [redacted] Associates S.A., SUNARP, retrieved on 3 May 2023; **Ex. R-0358**, Corporation Registration of [redacted] S.A.C., SUNARP, retrieved on 3 May 2023; **Ex. R-0359**, Corporation Registration of [redacted] International Corporation, SUNARP, retrieved on 3 May 2023.

[280] *See* **Ex. R-0188**, "*Mitad de exportadoras de oro en la mira por minería ilegal*," OJO PÚBLICO, 12 February 2014, pp. 1–2.

[281] *See* **Ex. R-0093**, SUNAT Immobilization Order No. 316-0300-2014-000110, 10 January 2014 (included in [redacted] Criminal Proceedings) [*Re-submitted legible version of C-0040*].

[282] *See* **Ex. C-0030**, KML transaction summary of all purchases between 2012 and 2018, p. 11.

[283] **Ex. C-0128**, Exchange of emails between KML and [redacted] regarding KYC process conducted by KML, 30 July 2013, p. 41.

Sr. be copied in all communications concerning and [284] Such request further confirmed the links between the family and

127. Inexplicably given the foregoing, Kaloti displayed a willingness to continue trading gold for the family even after 2014. Although it ultimately failed to do so, it was not on account of any of the above red flags or of the seizure of Shipment 2 by the Peruvian authorities, but rather simply because decided to severe his relationship with Kaloti.[285]

128. Despite the above evidence—which Claimant either knew or should have known—Claimant and its witnesses now aver complete ignorance about the multi-hundred-million-dollar criminal enterprise of the family. Claimant and its witnesses also now brazenly assert that they conducted extensive due diligence on and the Gold contained in Shipment 2, and that such alleged due diligence did not reveal any "illegal, suspicious or illegitimate activity."[286] For this proposition, Claimant relied exclusively on Exhibits C-0128 and C-0130.[287] However, neither of these exhibits show that Kaloti conducted even minimal due diligence, for at least the following reasons:

a. The documents contained in Exhibit C-0128 do *not* pertain at all to Shipment 2, but rather concern distinct, earlier in time, and unrelated shipments of gold. Such being the case, those documents do not support Kaloti's assertion that it had verified the lawful origin of the Gold contained in Shipment 2;

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[284] **Ex. C-0128**, Exchange of emails between KML and regarding KYC process conducted by KML, 30 July 2013, p. 12.

[285] First Witness Statement of , 3 November 2022 ("**Witness Statement**"), ¶ 19(b).

[286] Witness Statement, ¶ 16; Memorial, ¶¶ 39–40; Reply, ¶ 96.

[287] **Ex. C-0128**, Exchange of emails between KML and regarding KYC process conducted by KML, 30 July 2013; **Ex. C-0130**, Due diligence files prepared by KML of 24 July 2013.

b. Exhibit C-0128 shows that [redacted] started exporting gold to Kaloti's offices in Miami on 31 July 2013,[288] which was more than two months *before* Kaloti and [redacted] had even entered into the agreement that was supposed to allow [redacted] to open an account with Kaloti for the trade of precious metals (i.e., [redacted] Trading Terms), which [redacted] signed only on 2 October 2013;[289]

c. Exhibit C-0128 also contains an email in which Mr. [redacted] (Kaloti's compliance officer and Claimant's witness in this arbitration) expressly confirmed that, by 11 November 2013—i.e., three months *after* Kaloti had started trading gold for that company and more than a month *after* Kaloti opened [redacted] account—Kaloti still had not obtained basic due diligence information concerning [redacted] For example, Kaloti was yet to receive the contract between [redacted] and the miners from which it allegedly purchased the gold.[290] In the same email, Mr. [redacted] had requested that [redacted] and [redacted] provide *only a sample* of the invoices concerning [redacted] purchase of the gold. Specifically, Mr. [redacted] had requested "3-4 invoices of when [redacted] buys the mineral (**to use as samples**)" (emphasis added).[291] The foregoing shows that Kaloti had no intention of obtaining *all invoices*, which in itself is evidence of Claimant's manifest breach of its obligations under Peruvian law. Moreover, Claimant has not submitted any evidence to show that it ever received in the end either the contract or the "sample" invoices requested by Mr. [redacted]

d. Exhibit C-0130—which Claimant described as the "[d]ue diligence files prepared by KML of [redacted] only contains: (i) a copy of the national identity

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[288] **Ex. C-0128**, Exchange of emails between KML and [redacted] regarding KYC process conducted by KML, 30 July 2013, p. 8. *See also* **Ex. R-0257**, Various Receipts for Gold purchased by [redacted] Kaloti Metals & Logistics, August 2013.

[289] **Ex. R-0308**, Terms and conditions for Bullion Trading and Related Transactions between KML and [redacted] 2 October 2013 [*Re-submitted version of C-0166, with Respondent's translation*], p. 6.

[290] **Ex. C-0128**, Exchange of emails between KML and [redacted] regarding KYC process conducted by KML, 30 July 2013, p. 40.

[291] **Ex. C-0128**, Exchange of emails between KML and [redacted] regarding KYC process conducted by KML, 30 July 2013, p. 40.

card of Mr. Noriega, [redacted] representative; (ii) a copy of the national identity card of Mr. [redacted] and (iii) [redacted] RUC. There is no evidence that Kaloti received these three documents *before* it started dealing with [redacted] and in any event such documents do not even remotely serve to satisfy Kaloti's due diligence obligations under Peruvian law and its own AML/CFT Manual. For example, Claimant *has failed to submit any evidence showing that Kaloti*: (i) verified the identification number of the mining concession(s) for the mine(s) from which the Gold contained in Shipment 2 had been extracted; (ii) confirmed that the relevant mining rights of the concession(s) remained in force; (iii) verified the authorizations held by the miner(s) who extracted the Gold; (iv) obtained and verified the authenticity of the documentation related to the payments made by [redacted] for the gold that it exported (or intended to export) to Kaloti; or (v) verified [redacted] address.

129. In addition, Claimant has completely ignored the evidence of criminal activity that Peru identified in the Counter-Memorial regarding [redacted] and the Gold contained in Shipment 2, including that described below.

130. *First*, [redacted] had issued eight purchase statements (*liquidaciones de compra*) for the acquisition of the Gold, on the exact same date and from the very same checkbook, but in different and distant areas of the country.[292] It would have been virtually impossible for the checkbook holder to have travelled to these various distant locations on the same day. In addition, in breach of Peruvian regulations on tax evasion, [redacted] failed to prove that it had paid for the Gold through bank transactions, even though the total purchase price amounted to more than USD 3.6 million. This suggests that the transactions either were made in cash (which in itself

[292] **Ex. R-0141**, SUNAT Report No. 217-2014-SUNAT-3X3200, 5 March 2014 (included in [redacted] Criminal Proceedings), ¶ 17 ("[T]he dates of issuance 03/01/2014, which appear repeatedly in all the Purchase Statements, the subject of the present case, evidence an apparent incongruence and inconsistency given that said receipts were issued on the same day, but in different areas of the country (Ica-Puno), despite corresponding to a single checkbook, *which is clearly illogical*." (Emphasis added)).

is a red flag) or were fictitious.[293] As previously explained, Article 11 of the Illegal Mining Controls and Inspection Decree required Kaloti to verify the payment made by [redacted] for the Gold that it purportedly acquired from the mining concessionaires.[294] Had Kaloti complied with its legal obligation, it would have identified the above red flags suggesting money laundering and illegal mining.

131. *Second*, not only has Claimant failed to prove that it obtained from [redacted] any evidence (e.g., waybills) concerning the transport of the Gold in Shipment 2 from its alleged places of origin (Puna, Ica, and Pisco) to the storage facilities operated by [redacted] in Lima, but as it happens even [redacted] itself failed to present the relevant waybills to SUNAT.[295] This suggests that no such waybills existed, which in turn confirms that Kaloti failed to comply with its obligation under Article 11 of the Illegal Mining Controls and Inspection Decree to obtain the suppliers' waybills (and to verify their authenticity once obtained).

132. *Third*, even though [redacted] professed to trade and refine gold and other minerals,[296] it was registered at an address that had neither the production nor storage facilities needed for these activities, and moreover the company only had two employees.[297] Had Kaloti "monitor[ed] and evaluate[d] th[is] [S]upplier's operational activities and

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[293] **Ex. R-0141**, SUNAT Report No. 217-2014-SUNAT-3X3200, 5 March 2014 (included in [redacted] Criminal Proceedings), ¶ 18 ("Pursuant to Article 4 of Law No. 28194, financial transactions whose amount is Five Thousand soles or the equivalent of One Thousand five hundred US dollars must be registered in the banking system. This being the case, the company [redacted] **has not evidenced the form of payment of the aforementioned transactions**, therefore, it would be presumed that those transactions were not real . . . " (emphasis in original)).

[294] **Ex. R-0049**, Illegal Mining Controls and Inspection Decree, Art. 11(b).

[295] **Ex. R-0141**, SUNAT Report No. 217-2014-SUNAT-3X3200, 5 March 2014 (included in [redacted] Criminal Proceedings), ¶ 17 (noting that [redacted] "has not legally substantiated the domestic transfer of the gold ore to the city of Lima, specifically from the origin of the gold (Puno, Ica, Pisco) to the facilities of [redacted] temporary storage facility . . ." (emphasis in original)).

[296] **Ex. R-0083**, Corporation Registration of [redacted] 25 May 2022, p. 2.

[297] **Ex. R-0286**, Email from SUNAT ([redacted] to R. Huaytalla, *et al.*, 10 January 2014, p. 1 ("Its tax residence is located in San Isidro and it has no facilities for production, stocking and storing.").

practices," as required by the AML/CFT Manual,[298] it would have detected these additional red flags.

133. *Fourth*, statements from the eight miners that had allegedly supplied the Gold in Shipment 2 to [redacted] confirmed that they had never been involved in the extraction of the relevant gold,[299] and did not know any of [redacted] representatives or employees.[300] [redacted] alleged suppliers also stated that they did not recognize as theirs the fingerprints and signatures that had been included (under their respective names) in a sworn statement submitted by [redacted] to SUNAT as a purported attestation of the lawful origin of Shipment 2.[301] Further, an expert opinion from the Peruvian Police concluded that the fingerprints in such sworn statement did not match the fingerprints of the three alleged suppliers.[302] This confirms that [redacted] did not buy the Gold in Shipment 2 from those suppliers. Kaloti could have uncovered [redacted] lies by obtaining and reviewing evidence regarding [redacted] payment for the Gold as well as the waybills showing that the Gold actually came from [redacted] alleged suppliers.

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[298] **Ex. C-0025**, KML AML/CFT Program Manual, January 2018, p. 12, § 7.2.a.

[299] **Ex. R-0145**, Resolution No. 1: Order Initiating Criminal Proceedings, [redacted] Case, 14 May 2015, pp. 9–10 (Statements of [redacted]

[300] **Ex. R-0145**, Resolution No. 1: Order Initiating Criminal Proceedings, [redacted] Case, 14 May 2015, pp. 9–10 (Statements of [redacted]

[301] **Ex. R-0145**, Resolution No. 1: Order Initiating Criminal Proceedings, [redacted] Case, 14 May 2015, pp. 3, 9 (Statements of [redacted] and [redacted]

[302] **Ex. R-0145**, Resolution No. 1: Order Initiating Criminal Proceedings, [redacted] Case, 14 May 2015, p. 12 ("[I]t is concluded in a technical and scientific manner that there is NO FINGERPRINT IDENTIFICATION that correspond to [redacted] and VICTORIAN ESPINOZA DURAND with the impressions made in the formalization commitment statements, whose originals are in the Regional Directorate of Energy and Mines (DREM) of lea [sic], therefore, THEY DO NOT CORRESPOND TO THE PERSONS MENTIONED, thus proving that the holders have been replaced in order to process before the DREM of Lea [sic] the commitment statements that support or justify -in some way- the legal origin of the seized gold."); **Ex. R-0284**, Expert Opinion on Fingerprint Identity from Rosa C. Venegas Mejia and German E. Mejia, NATIONAL PERUVIAN POLICE, 20 August 2014.

134. *Fifth*, a report issued by the DREM of the Ica region concluded that two of the mines from which [redacted] allegedly sourced the gold (viz., the "Santana 2005" and "Los Astros 1" mines) had no environmental permits, and hence were not authorized to conduct any mining activities.[303] This is a manifest indicium of illegal mining which Kaloti would readily have identified had it complied with its obligation to verify the mining rights and exploitation authorizations of these mines.[304]

135. *Sixth*, a miner that allegedly had extracted the gold from the "Medalid IV" mine (i.e., the third mine from which [redacted] allegedly sourced the Gold in Shipment 2) admitted that, upon the request of one of his relatives, he had falsely stated that he had extracted gold from that mine, but in reality he did not even know [redacted] representatives.[305] In addition, a report issued by the Regional Office of Energy and Mining of the Puno region concluded that the "Medalid IV" mine was "extinct,"[306] such that no gold could possibly have been extracted from that mine. Kaloti could and should have verified such details by conducting site visits to these mines, as its own AML/CFT Manual required it to do.

136. In sum, there were numerous red flags that any responsible gold trader could and should have identified in respect of [redacted] Basic due diligence by Kaloti on [redacted] alleged suppliers —of the sort that the [redacted] and [redacted] himself allege to

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[303] **Ex. R-0145**, Resolution No. 1: Order Initiating Criminal Proceedings, [redacted] Case, 14 May 2015, p. 13 ("[R]egarding the two concessions ["Santana 2005" and "Los Astros 1,"] it is noted that: 'not having an approved environmental impact study implies that the regional mining authorities cannot grant any authorization to start or restart operations'.").

[304] **Ex. R-0049**, Illegal Mining Controls and Inspection Decree, Art. 11(a).

[305] **Ex. R-0145**, Resolution No. 1: Order Initiating Criminal Proceedings, [redacted] Case, 14 May 2015, p. 11 ([redacted] stated that: "[h]is godfather told him they were going to Puno, without telling him why, but he traveled with him and they went to the [DREM] and in said document it reported that I had extracted gold from the mining concession "Medalid IV". . .located in Panayo Kinsa Mayo - ltuata - Carabaya - Puno, which had then been sold to the company [redacted] Gold, stating that I do not know this place. The address was provided to him by his godfather Ornar Diaz Yanapa.").

[306] **Ex. R-0145**, Resolution No. 1: Order Initiating Criminal Proceedings, [redacted] Case, 14 May 2015, p. 13 ("The "Medalid IV" mining concession belongs to the Puno Region, but has EXPIRED in GEOCATMIN and SIDEMCAT.").

have conducted before *every* purchase of gold[307]—would easily have revealed that [redacted] was engaged in illegal mining activities. However, Claimant has failed to demonstrate that Kaloti conducted even rudimentary due diligence on [redacted] or the large volumes of gold that Kaloti traded with that company. The evidence therefore confirms that Kaloti did not act as a bona fide purchaser vis-à-vis [redacted] or the Gold contained in Shipment 2.

(iii) Kaloti failed to conduct appropriate due diligence on the Supplier ([redacted] and Gold involved in Shipment 3

137. Kaloti alleges that on 7 January 2014 it purchased from [redacted] the 38 kg of Gold comprising Shipment 3. [redacted] represented to Kaloti and SUNAT that it had extracted that Gold from the "Emanuel I" mine.[308] Claimant alleges that, as of 30 November 2018, the Gold in Shipment 3 was worth USD 1,424,870.[309]

138. As with the suppliers and gold involved in Shipments 1 and 2, there were numerous red flags in relation to [redacted] and the Gold from Shipment 3. However, Kaloti either failed to identify or willfully ignored such red flags, which include the following:

a. [redacted] RUC, which Claimant itself has submitted in this arbitration, showed that [redacted] had been incorporated in April 2013 and had started operating on 7 June 2013[310]—a mere seven months before Kaloti allegedly purchased the Gold contained in Shipment 3. This made [redacted] a "new and/or recently established" Supplier, which constitutes a red flag under the

[307] First [redacted] Witness Statement, ¶ 30; **Ex. R-0253**, "*Hay gente que trata de vender oro sin tener la documentación apropiada*," LA REPÚBLICA, 3 May 2016; Memorial, ¶ 15.

[308] **Ex. C-0009**, [redacted] document package, p. 23 (stating that the Gold in Shipment 3 was sourced exclusively from the "Virgen del Carmen" mine); **Ex. C-0132**, Due diligence files prepared by KML of [redacted] 14 June 2012, p. 8 (showing a concession title to extract gold from, among others, "Virgen del Carmen 2010"); pp. 10–15 (indicating that the "Virgen del Carmen" mine later changed its name to "Emanuel I").

[309] *See* Second Smajlovic Report, ¶ 5.86.

[310] **Ex. R-0320**, [redacted] Taxpayer Registration, SUNAT, 7 June 2013, p. 1.

AML/CFT Manual.[311] This fact also belies [redacted] statement that Kaloti had "established and continuous relationships"[312] with the Suppliers;

b. The documentation in the possession of Kaloti—and on the record in this arbitration—also shows that, by September 2013, [redacted] had not yet reported any exports or any other type of "international trade activity."[313] SUNAT's public available registry indicated that the company's first ever export took place in December 2013 (i.e., mere *days* before Kaloti allegedly purchased the Gold contained in Shipment 3).[314] These facts contradict Claimant's and [redacted] assertion that [redacted] was a "reputable Peruvian supplier[] of gold."[315] Rather than enjoying good repute in the industry, it was clear that [redacted] lacked "industry/business knowledge," which is another red flag under the AML/CFT Manual.[316] That lack of experience and knowledge was even admitted by [redacted] own representative, who declared to Peru's authorities that the company was "just learning the trading process for exports" of gold;[317]

c. The Corporate Registration and other documents that were in the public domain—and thus available to Kaloti—showed that [redacted] share capital amounted to a paltry USD 5,600 (PEN 20,658).[318] Yet, between December 2013 and January 2014 [redacted] had registered exports of nearly USD 1.2

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[311] **Ex. C-0025**, KML AML/CFT Program Manual, January 2018, p. 11, § 7.1.i.

[312] First [redacted] Witness Statement, ¶ 30.

[313] **Ex. C-0132**, Due diligence files prepared by KML of [redacted] 14 June 2012, p. 15.

[314] **Ex. R-0184**, [redacted] 2013 Cumulative Export Activity Report, retrieved on 17 May 2022; **Ex. R-0219**, [redacted] 2014 Cumulative Export Activity Report, retrieved on 17 May 2022.

[315] Memorial, ¶ 15; First [redacted] Witness Statement, ¶ 30.

[316] **Ex. C-0025**, KML AML/CFT Program Manual, January 2018, p. 11, § 7.1.i.

[317] **Ex. R-0224**, Resolution No. 1: Order Initiating Criminal Proceedings, [redacted] Case, 9 September 2014 [*Re-submitted version of C-0087, with Respondent's translation*], p. 3.

[318] **Ex. R-0181**, Corporation Registration of [redacted] retrieved on 25 May 2022, p. 3; **Ex. R-0320**, [redacted] Taxpayer Registration, SUNAT, 7 June 2013, p. 1.

million,[319] and Shipment 3 alone was allegedly worth approximately USD 1,4 million.[320] This "sudden increase . . . in production" constituted yet another red flag under Kaloti's own AML/CFT Manual.[321] Any bona fide purchaser would have at least asked [redacted] to explain how its shareholders and founders (i.e., [redacted] and [redacted] two young students, aged 22 and 27, respectively)[322] had secured the requisite financial and operational wherewithal to produce and transact such large volumes of gold, in mere months of operation and with no prior experience whatsoever. However, Kaloti made no such enquiry – a fact evidenced by the dearth of documents submitted by Claimant in this arbitration pertaining to its purported due diligence on [redacted] and the Gold in Shipment 3;

d. Kaloti knew or should have known that the two students who formally owned [redacted] were mere figureheads. Indeed, in all likelihood, the true beneficial owner of [redacted] was an individual that acted as General Manager of [redacted][323] because he was also the founding shareholder and/or general manager of other recently-established companies that supplied gold to Kaloti, including Compañía Minera Juan Diego S.A.C.[324] Had Kaloti complied with its obligation to conduct background checks on the ultimate beneficiaries of its Suppliers, it would have detected this red flag. But Kaloti failed to do so, instead gladly trading with [redacted] despite such red flags. In fact, Kaloti continued trading with companies managed by Mr. Soto

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[319] **Ex. R-0184**, [redacted] 2013 Cumulative Export Activity Report, retrieved on 17 May 2022; **Ex. R-0219**, [redacted] 2014 Cumulative Export Activity Report, retrieved on 17 May 2022.

[320] **Ex. C-0009**, [redacted] document package, p. 5.

[321] **Ex. C-0025**, KML AML/CFT Program Manual, January 2018, p. 12, § 7.2.

[322] **Ex. R-0181**, Corporation Registration of [redacted] retrieved on 25 May 2022, p. 2.

[323] **Ex. R-0181**, Corporation Registration of [redacted] retrieved on 25 May 2022, p. 10.

[324] **Ex. R-0324**, Corporation Registration of Compañía Minera Juan Diego S.A.C., SUNARP, retrieved on 25 April 2023, p. 11. *See also* **Ex. R-0224,** Resolution No. 1: Order Initiating Criminal Proceedings, [redacted] Case, 9 September 2014, p. 6 [*Re-submitted version of C-0087, with Respondent's translation*].

Tipacti (the General Manager of [redacted] even after SUNAT had immobilized Shipment 3 on 10 January 2014. For example, Claimant's own transaction summary shows that in 2014 Kaloti traded more than 42 kg for Compañía Minera Juan Diego S.A.C.,[325] a company managed by Mr. Soto Tipacti;[326]

e. The documents that Claimant itself has submitted in this arbitration show that the concessionaire of the "Emanuel I" mine (i.e., the mine from which [redacted] alleged to have extracted the Gold contained in Shipment 3), *was not* [redacted] but rather an individual named [redacted][327] However, the latter was not mentioned in any of [redacted] corporate documents, and did not seem to be legally related to that company in any other way;[328] and

f. A resolution issued by the DREM of the Ica region on 5 February 2013, which Claimant itself has introduced as evidence in this arbitration,[329] expressly stated that the concession title that Mr. [redacted] held over the "Emanuel I" mine did *not* authorize him (or anyone else) to extract minerals from that mine. Rather, that resolution states that, in order to carry out any exploration or exploitation activities in the mine, Mr. [redacted] would first be required to obtain a series of authorizations, environmental permits, and licenses required pursuant to Peruvian law.[330] The evidence

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[325] **Ex. C-0030**, KML transaction summary of all purchases between 2012 and 2018, p. 10. Kaloti also traded gold from Compañía Minera San Carlin S.A.C., another company formally owned by [redacted] who was one of the students that formally owned [redacted] *See* **Ex. C-0030**, KML transaction summary of all purchases between 2012 and 2018, p. 6; **Ex. R-0323**, Corporation Registration of Compañía Minera San Carlín, SUNARP, retrieved on 25 April 2023., p. 1.

[326] **Ex. R-0324**, Corporation Registration of Compañía Minera Juan Diego S.A.C., SUNARP, retrieved on 25 April 2023, p. 11. *See also* **Ex. R-0224,** Resolution No. 1: Order Initiating Criminal Proceedings, [redacted] Case, 9 September 2014, p. 6 [*Re-submitted version of C-0087, with Respondent's translation*].

[327] **Ex. C-0132**, Due diligence files prepared by KML of [redacted] 14 June 2012, pp. 9, 12.

[328] **Ex. R-0181**, Corporation Registration of [redacted] retrieved on 25 May 2022.

[329] **Ex. C-0132**, Due diligence files prepared by KML of [redacted] 14 June 2012, pp. 12–13.

[330] **Ex. C-0132**, Due diligence files prepared by KML of [redacted] 14 June 2012, p. 12.

below shows that Kaloti could and should have known that Mr. [redacted] had in fact *not* obtained such authorizations and permits.[331] Thus, Kaloti could and should have known that the Gold that comprises Shipment 3, acquired from [redacted] was of unlawful origin.

139. Despite the above glaring red flags, Kaloti failed to conduct adequate—or even minimal—due diligence on either [redacted] or the Gold contained in Shipment 3. During document production, Claimant agreed to produce all the documents and communications prepared by or sent to Kaloti regarding its due diligence on [redacted][332] but ultimately produced only the following documents:

a. the IDs of [redacted] shareholders, of that company's general managers, and of Mr. [redacted] which, as explained above, raised multiple red flags. Claimant has not even demonstrated that Kaloti received these documents *before* it decided to acquire the Gold from [redacted][333]

b. [redacted] RUC—which, as explained above, confirmed that (i) the company had been in business for just a few months when it attempted to export Shipment 3, and (ii) at the time that the RUC was issued [redacted] had never yet exported any gold at all;[334] and

c. A number of documents that show that (i) Mr. Valdiviezo (not [redacted] on 14 June 2012 *initiated* the process to become a formal miner; (ii) Mr. Valdiviezo (not [redacted] was the concession holder of the "Emanuel I" mine; and (iii) in any event, to be entitled to extract gold from that mine, Mr. Valdiviezo first would have needed to obtain a series authorizations, environmental permits

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[331] **Ex. R-0283**, Report No. 024-2014, Regional Office of Energy and Mining of the Ica Region, 10 June 2014, p. 6

[332] Procedural Order No. 2, Annex 2, pp. 36–37.

[333] **Ex. C-0132**, Due diligence files prepared by KML of [redacted] 14 June 2012, pp. 2–6

[334] **Ex. C-0132**, Due diligence files prepared by KML of [redacted] 14 June 2012, pp. 16–19.

and licenses—evidence of which Kaloti neither requested from [redacted] nor has submitted in this arbitration.[335]

140. The documents identified in points (a) to (c) above are the same documents contained in Exhibit C-0132, which Claimant describes as "Due diligence files prepared by KML of [redacted] For the reasons explained above, these documents show that Kaloti manifestly failed to conduct adequate due diligence on [redacted] thus breaching its obligations under Peruvian law and its own AML/CFT Manual.

141. Peru had also requested that Claimant produce "[d]ocuments . . . exchanged between Kaloti and the Suppliers to show that Kaloti verified the lawful origin of the gold contained in each of the Five Shipments, and the chain of the transport of such shipments, prior to the alleged purchase of each of the Five Shipments."[336] In response thereto, Claimant produced only the documents contained in Exhibits C-0128 and C-0129,[337] none of which related to Shipment 3. Nor has Claimant submitted any other document in this arbitration that shows that it even attempted to ascertain the lawful origin of the Gold contained Shipments 3. The foregoing constitutes further evidence that Kaloti is not a bona fide purchaser of that Gold.

142. Moreover, in the Reply, Claimant failed to address the evidence that Peru had adduced in the Counter-Memorial pointing to criminal conduct by [redacted] and the unlawful origin of the Gold in Shipment 3. Such evidence included the following. *First*, the official records of the tolls located on the route between the "Emanuel I" mine and [redacted] premises in Chorrillos contradict the shipping documents presented by [redacted] The toll records show that the vehicle identified in the

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[335] **Ex. C-0132**, Due diligence files prepared by KML of [redacted] 14 June 2012, pp. 9, 12–13.

[336] Procedural Order No. 2, Annex 2, Request 8 p. 33.

[337] **Ex. C-0128**, Exchange of emails between KML and [redacted] regarding KYC process conducted by KML, 30 July 2013; **Ex. C-0129**, Exchange of emails between KML and [redacted] regarding KYC process conducted by KML, 25 September 2013.

shipping documents had not transited through that route at the relevant times,[338] suggesting that the Gold had not come from the alleged extraction point. Further, in breach of Peruvian law, the waybills that [redacted] presented to SUNAT in relation to Shipment 3 were incomplete. For example, they lacked critical information regarding the identity of the driver and of the company used to transport the Gold.[339] Kaloti could and should have identified at least part of these irregularities by complying with its obligation to obtain and verify the authenticity of the relevant waybills.

143. *Second,* [redacted] alleged to have produced, itself, the 38 kg of Gold contained in Shipment 3. However, despite SUNAT's request, [redacted] failed to (i) present proof that it purchased any of the necessary gold production supplies, and (ii) report its annual gold production for 2013.[340] This suggests that, contrary to its own AML/CFT Manual, Kaloti did not "monitor and evaluate th[is] [S]upplier's operational activities and practices,"[341] or analyze [redacted] production levels.[342]

144. *Third,* a customs officer visited the alleged site of extraction for the Gold in Shipment 3 and found that such site was a rural, undeveloped area "where there [were] neither

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[338] **Ex. R-0314**, SUNAT Report No. 303-2014-SUNAT-3X3200, 9 April 2014 [*Re-submitted version of C-0084, with Respondent's translation*], ¶ 2.17 ("[T]he use of the SUBARU vehicle with license plate A4B573 and driven by the Manager of the company Mr. José Antonio Soto Tipaci . . . for the transportation of the immobilized gold ore from ICA-LIMA . . . From the foregoing information, it is clear that the aforementioned vehicle **DID NOT TRANSIT AND/OR PASS THROUGH THE TOLL ROADS IN THE MONTHS OF JANUARY, FEBRUARY AND MARCH 2014**" (emphasis in original)); **Ex. C-0009,** [redacted] document package, 21 January 2014, p. 21.

[339] **Ex. R-0314**, SUNAT Report No. 303-2014-SUNAT-3X3200, 9 April 2014 [*Re-submitted version of C-0084, with Respondent's translation*], ¶ 2.15 ("[S]ubmits as evidence for the domestic transfer of the immobilized gold ore from its tax domicile (Miraflores-Lima) to [redacted] temporary storage facility, the waybill . . . with the fields for **("transport vehicle and driver") and ("Transport Company")** left blank . . ." (emphasis in original)); **Ex. C-0009,** [redacted] document package, 21 January 2014, pp. 19–20.

[340] **Ex. R-0314**, SUNAT Report No. 303-2014-SUNAT-3X3200, 9 April 2014 [*Re-submitted version of C-0084, with Respondent's translation*], ¶2.19 ("[redacted] **did not comply with the requirement of the Administration [SUNAT] to submit payment slips for the purchase of supplies and the 2013 monthly Production Report for the immobilized gold** . . . " (emphasis in original)).

[341] **Ex. C-0025**, KML AML/CFT Program Manual, January 2018, p. 12, § 7.2.a.

[342] **Ex. C-0025**, KML AML/CFT Program Manual, January 2018, p. 14, § 7.3.a.

camps nor mines . . . ."[343] Kaloti would have been able to verify this by conducting the site visits mandated by its own AML/CFT Manual.

145. *Fourth*, a report from the DREM of the Ica region confirmed that the mine from which [redacted] gold allegedly came (viz., the "Emanuel I" mine) did "not have an authorization for exploration, exploitation, and/or commercialization of minerals."[344] Kaloti's failure to identify the absence of such authorization confirms that it failed to comply with its obligation to verify that [redacted] had a valid concession, mining rights, and authorizations to exploit gold from the "Emanuel I" mine.

146. *Fifth,* a report from the Municipality of Miraflores in Lima confirmed that (i) [redacted] alleged registered address belonged not to that entity but rather to a lawyer who appears to be unrelated to [redacted] and (ii) the property at that address did not have any authorization to carry out mining activities.[345] Kaloti could and should have identified this irregularity, as Article 11 of the Illegal Mining Controls and Inspection Decree required Kaloti to verify the real address of [redacted] and the AML/CFT Manual similarly required Kaloti to obtain proof of its suppliers' address and even "[p]hotos of [their] business/office."[346]

147. *Sixth,* a report from the Financial Intelligence Unit (i.e., a specialized unit of the Peruvian Regulator for Banks) indicated that (i) the proceeds of [redacted] sales had been withdrawn from the bank by an individual who had no relationship with [redacted] and (ii) [redacted] general managers were linked to two other recently-

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[343] **Ex. R-0313**, State Attorney Request for Initiation of [redacted] Preliminary Investigation, 28 April 2014 [*Re-submitted version of C-0068, with Respondent's translation*], p. 4, ¶ 4.4 ("[R]ural place where there is no presence of mining camps nor mines . . . .").

[344] *See* **Ex. R-0224**, Resolution No. 1: Order Initiating Criminal Proceedings, [redacted] Case, 9 September 2014 [*Re-submitted version of C-0087, with Respondent's translation*], p. 5 ("[T]he aforementioned concession does not yet have the authorization for the exploration, exploitation and/or commercialization of minerals."); **Ex. R-0283**, Report No. 024-2014, Regional Office of Energy and Mining of the Ica Region, 10 June 2014, p. 6.

[345] **Ex. R-0224**, Resolution No. 1: Order Initiating Criminal Proceedings, [redacted] Case, 9 September 2014 [*Re-submitted version of C-0087, with Respondent's translation*], p. 6. ("[T]his property only has an active operating license for professional services (lawyer)."); **Ex. R-0283**, Report No. 289-2014, Municipality of Miraflores, 18 June 2014.

[346] **Ex. C-0025**, KML AML/CFT Program Manual, January 2018, pp. 9–10, § 7.1.b.

created mining companies (both suppliers of Kaloti) which had reported operations for millions of dollars shortly after their creation, despite the fact that their owners did not appear to have the economic wherewithal to make any investment or capital contribution.[347] Had Kaloti complied with its legal obligation to identify the true ultimate beneficiaries of [redacted] it would have identified at least some of red flags identified above concerning [redacted] general managers—but as explained above, Kaloti made no such enquiry.

148. In sum, Kaloti violated Article 11 of the Illegal Mining Controls and Inspection Decree, the Money Laundering Regulations, and its own AML/CFT Manual, by failing inter alia to (i) verify that [redacted] was in fact the concessionaire of the mine from which [redacted] claimed to have extracted the Gold in Shipment 3, (ii) confirm that [redacted] in fact had the right to exploit gold from that mine (e.g., that it held the requisite environmental and other permits to exploit minerals resources), (iii) verify [redacted] real address, (iii) identify [redacted] ultimate beneficiaries, (iv) request any documentation related to [redacted] AML/CFT program or independent audits, (v) conduct a site visit to [redacted] alleged mines; and (vi) require [redacted] to complete a New Account Application and submit the requisite supporting documentation in connection therewith. In these circumstances, Kaloti cannot possibly qualify as a bona fide purchaser of the Gold in Shipment 3.

(iv) Kaloti failed to conduct appropriate due diligence on the Supplier ([redacted] and Gold involved in Shipments 4 and 5

149. Kaloti alleges that on 8 January 2014 it purchased from [redacted] the Gold comprising Shipments 4 and 5.[348] [redacted] represented to Kaloti that it had extracted that Gold from the Alder 3 mine.[349] Claimant alleges that, as of 30 November 2018, the Gold in

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[347] **Ex. R-0224**, Resolution No. 1: Order Initiating Criminal Proceedings, [redacted] Case, 9 September 2014 [*Re-submitted version of C-0087, with Respondent's translation*], p. 6 ("**Compañía Minera "[redacted] is related to Compañía Minera "Juan Diego S.A.C."** and Compañía Minera "San Carlín S.A.C.," likewise the three companies mentioned above are related to fifteen other companies in the same industry and have founding partners in common. . ." (emphasis in original)).

[348] Memorial, ¶ 39.

[349] **Ex. C-0131**, Due diligence files prepared by KML of [redacted] 25 February 2011, pp 4–6.

Shipment 4 was worth USD 4,636,567 and the Gold in Shipment 5 was worth USD 3,848,429.[350]

150. As explained below, any bona fide purchaser would have identified numerous red flags in relation to both [redacted] and the Gold in those two shipments. *First*, [redacted] just like [redacted][351] [redacted][352] and many other suppliers of Kaloti[353] — was a "new and/or recently established"[354] company that lacked experience in the trade of gold. [redacted] had been incorporated on 22 August 2013[355] and had begun operating on 2 September 2013 — i.e., a mere four months before Kaloti claims to have bought the more than 200 kg of Gold contained in Shipments 4 and 5.[356]

151. *Second*, despite having a meager capital of USD 13,400 (PEN 50,000),[357] immediately after it began operations in September 2013, [redacted] supplied approximately 48 kgs of gold to Kaloti, worth more than USD 1.8 million.[358] Then, in January 2014, [redacted] attempted to export Shipments 4 and 5, consisting of more than 200 kgs of gold, worth approximately USD 8.8 million.[359] However, Claimant did not enquire how [redacted] a newly created company that had been co-founded by a 24-year-old secretary named

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[350] *See* Second Smajlovic Report, ¶ 5.86.

[351] *See supra* Section II.A.3.b(ii).

[352] *See supra* Section II.A.3.b(iii).

[353] *See infra* Section II.F.3.

[354] **Ex. C-0025**, KML AML/CFT Program Manual, January 2018, p. 11, § 7.1.i.

[355] **Ex. R-0182**, Corporation Registration of [redacted] retrieved on 25 May 2022, p. 2.

[356] **Ex. C-0131**, Due diligence files prepared by KML of [redacted] 25 February 2011, pp. 6–7.

[357] **Ex. R-0182**, Corporation Registration of [redacted] retrieved on 25 May 2022, p. 2.

[358] **Ex. C-0030**, KML transaction summary of all purchases between 2012 and 2018, p. 8. *See also* **Ex. R-0183**, [redacted] 2013 Cumulative Export Activity Report, retrieved on 17 May 2022.

[359] **Ex. R-0074**, Customs Declaration No. 235-2014-40-001919-01-8-00, 8 January 2014 (included in [redacted] Criminal Proceedings); **Ex. R-0075**, Customs Declaration No. 235-2014-40-001920-01-6-00, 8 January 2014 (included in [redacted] Criminal Proceedings); **Ex. R-0076**, Customs Declaration No. 235-2014-40-001921-01-2-00, 8 January 2014 (included in [redacted] Criminal Proceedings) (showing the declared value of the gold consisting in Shipment 4 as USD 4,685,255.58); *see also* Request for Arbitration, ¶ 44, where Kaloti states it had agreed to pay USD 4,150,000 for Shipment 5.

[redacted][360] and that had no mining experience whatsoever and only a negligible starting capital[361]—could have (lawfully) extracted more than USD 10 million in gold in its first four months of operations. Claimant has not produced any documentation or submitted any evidence in the present arbitration showing that it made any such enquiry, despite the fact that such documentation fell within the scope of Peru's document production requests.[362]

152. *Third*, contrary to what Kaloti argued in its Reply, it would not have been all that difficult—and certainly would not have required "all the power and might of [Peru's] highest level of government," as Claimant alleged[363]—for Kaloti to discover that the alleged owners and managers of [redacted][364] his daughter [redacted][365] and his sister [redacted]—were close relatives of the notorious criminal [redacted] (alias "[redacted][367] They all shared the [redacted] surname. As widely reported in the press, [redacted] (i) had spent time in prison in the late 1990s for charges

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[360] **Ex. R-0182**, Corporation Registration of [redacted] retrieved on 25 May 2022, p. 2.

[361] **Ex. R-0182**, Corporation Registration of [redacted] retrieved on 25 May 2022, p. 2; **Ex. R-0327**, Passport Identification of [redacted] issued by Republic of Peru, 22 March 2013.

[362] Procedural Order No. 2, Annex 2, Request 8, p. 38 ("Documents between 2012 and January 2014 exchanged between Kaloti and the Suppliers to show that Kaloti verified the lawful origin of the gold contained in each of the Five Shipments, and the chain of the transport of such shipments, prior to the alleged purchase of each of the Five Shipments"); Procedural Order No. 2, Annex 2, Request 9, pp. 36–37 ("Documents prepared by or sent to Kaloti, its managing member(s), its shareholders or officers prior to Kaloti's alleged purchase of the Five Shipments (between 2012 and January 2014), regarding any due diligence review performed on the Suppliers and the lawful origin of the Shipments").

[363] Reply, ¶ 92.

[364] [redacted] was [redacted] co-founder, shareholder, and CEO. *See* **Ex. R-0182**, Corporation Registration of [redacted] retrieved on 25 May 2022, p. 4.

[365] [redacted] was [redacted] co-founder and shareholder. *See* **Ex. R-0182**, Corporation Registration of [redacted] retrieved on 25 May 2022, p. 2.

[366] Juana Mirando Pando was [redacted] Chief Financial Officer. *See* **Ex. R-0182**, Corporation Registration of [redacted] retrieved on 25 May 2022, p. 6.

[367] [redacted] confirmed that [redacted] was his cousin, [redacted] was his daughter and [redacted] was his sister. *See* **Ex. R-0151**, Statement of [redacted] 4 June 2014, pp. 1, 10.

related to money laundering, drug trafficking, and tax evasion,[368] and (ii) "in 2011, was considered as the main exporter of illegal gold in [the Peruvian regions of] Madre de Dios, Puno and La Libertad."[369] [redacted] was later the subject of an extradition request from the United States[370] and was suspected of being part of an organized crime group.[371] When Kaloti started trading with [redacted] was regularly being described in the Peruvian press as a "drug trafficker"[372] and as a "registered criminal" ("*prontuariado delincuente*").[373] Basic due diligence by Kaloti at the time would have revealed that [redacted] General Manager, Mr. [redacted], (i) was also the director of [redacted][374] a company owned and founded by [redacted] and (ii) had himself spent time in prison for

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[368] **Ex. R-0189**,"*¿Quién fue* [redacted] *el investigado por narcotráfico y minería ilegal que falleció este sábado?*," RPP NOTICIAS, 26 September 2020, pp. 1–2. *See also* **Ex. R-0221**, "*Una incautación, una demanda y el oro ilegal de Perú*," INSIGHT CRIME, 28 March 2017 [*Re-submitted version of C-0051, with Respondent's translation*], p. 3; **Ex. R-0221**, "*Una incautación, una demanda y el oro ilegal de Perú*," INSIGHT CRIME, 28 March 2017 [*Re-submitted version of C-0051, with Respondent's translation*], p. 2.

[369] **Ex. R-0189**,"*¿Quién fue* [redacted] *el investigado por narcotráfico y minería ilegal que falleció este sábado?*," RPP NOTICIAS, 26 September 2020, p. 4.

[370] **Ex. R-0220**, "*Los pagos bajo sospecha de acopiadora de oro de EE.UU. a empresas peruanas investigadas por lavado y minería ilegal*," EL UNIVERSO, 22 September 2020 [*Re-submitted version of C-0051, with Respondent's translation*], p. 8.

[371] **Ex. R-0189**,"*¿Quién fue* [redacted] *el investigado por narcotráfico y minería ilegal que falleció este sábado?*," RPP NOTICIAS, 26 September 2020, p. 2.

[372] **Ex. R-0258**, "*¿Por qué Maribel Velarde siempre está vinculada a escándalos policiales?*," GENERACCION, 29 February 2012.

[373] **Ex. R-0259**, "*La escandalosa vida de Maribel Velarde*," EL POPULAR, 18 December 2012; **Ex. R-0376**, "*Más implicados de la farándula en el caso Maribel Velarde,*" PERÚ21, 19 December 2012; **Ex. R-0377**, "*Susy Diaz: 'Maribel Velarde compró casa de La Molina con dinero de Cromwell Gálvez',*" DIARIO CORREO, 24 December 2012.

[374] *See* **Ex. R-0326**, Corporation Registration of Business Investment S.A.C., SUNARP, retrieved on 25 April 2023, pp. 2, 4 (showing [redacted] as the co-founder, shareholder and director of [redacted] *See also* **Ex. R-0142**, SUNAT Report No. 239-2014-SUNAT-3X3200, 11 March 2014 (included in [redacted] Criminal Proceedings), p. 8; **Ex. R-0340**, Prosecutorial Order No. 19, First Supra-Provincial Corporate Prosecutor's Office Specializing in Money Laundering and Loss of Domain Crimes, 9 January 2017 [*Re-submitted version of C-0101, with Respondent's translation*], p. 44.

money laundering and drug trafficking,[375] and (iii) had been investigated for multiple other crimes.[376]

153. Despite the above, in the Memorial Claimant misleadingly alleged that Shipment 4 had been seized "based on a preliminary investigation by Peru against **a third party (unrelated to KML or, to the best of KML's knowledge and belief, [redacted] Mr. [redacted]**" (emphasis added).[377] However, as Peru pointed out in the Counter-Memorial,[378] Claimant's own exhibits show that [redacted] cousin, Mr. [redacted], had acted as legal representative of [redacted] before SUNAT.[379] In fact, the few documents disclosed by Claimant during document production show that Mr. [redacted] had signed Kaloti's Trading Terms on behalf of [redacted]

[375] **Ex. R-0150**, Resolution No. 1: Order Initiating Criminal Proceedings, [redacted] Case, 10 March 2015, p. 3. ("[T]he investigated . . . records several investigations and criminal proceedings such as: TI.D.: (Money Laundering), for Swindling, for Manufacture, Supply, Possession of Weapons and Explosives, having even been admitted to the penitentiary of "Luringancho."); *see also* **Ex. R-0151**, Statement of [redacted] 4 June 2014, ¶ 71.

[376] **Ex. R-0150**, Resolution No. 1: Order Initiating Criminal Proceedings, [redacted] Case, 10 March 2015, p. 3.

[377] Memorial, ¶ 49.

[378] Counter-Memorial, ¶ 169.

[379] **Ex. C-0008**, [redacted] document package, 10 January 2014, p. 42.

Figure 1: Signature Block for Trading Terms between Kaloti and [redacted][380]

> **KML** estará proporcionando servicios de margen de comercio de lingotes de oro con fines de cobertura, donde el Cliente se compromete a pedir prestado metal/monedas contra su posición a los precios vigentes del mercado además del margen establecido por **KML** y sujetos a revisión según sea necesario.
>
> **Acordado y aceptado por (signatario autorizado):**
>
> Nombre: [redacted]
>
> Título: GERENTE GENERAL
>
> Fecha: 29/OCT/2013
>
> Firma: [redacted]

154. Thus, Claimant's assertion that Mr. [redacted] is "unrelated" to [redacted] and Kaloti is flatly wrong.

155. In sum, the evidence on the record shows (i) that Kaloti knew and traded directly with Mr. [redacted]; (ii) that Kaloti knew or should have known that Mr. [redacted] was the cousin of the infamous criminal [redacted] (a.k.a. [redacted] and (iii) that Kaloti nonetheless decided to trade more than 273 kgs of gold with [redacted] within that company's first fourth months of operations.

156. [redacted] was not the only supplier of Kaloti that had links with [redacted] For example, according to Claimant's own Transaction History, in 2013 the newly established company [redacted] exported 206.4 kg of gold to Kaloti. The managing director of that supplier was Juan [redacted][381] cousin of [redacted] a.k.a, [redacted][382] Similarly, Claimant's own evidence shows that in 2013 (i) Kaloti traded more than 1,152 kgs of gold for the (also newly established)

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[380] **Ex. R-0310**, Terms and conditions for Bullion Trading and Related Transactions between KML and [redacted] 29 October 2013 [*Re-submitted version of C-0168, with Respondent's translation*], p. 3.

[381] **Ex. R-0362**, Corporation Registration of Empresa [redacted] SUNARP, retrieved on 10 May 2023, p. 7.

[382] **Ex. R-0340**, Prosecutorial Order No. 19, First Supra-Provincial Corporate Prosecutor's Office Specializing in Money Laundering and Loss of Domain Crimes, 9 January 2017 [*Re-submitted version of C-0101, with Respondent's translation*], pp. 145–146.

Peruvian company [redacted][383] and (ii) that company was owned by [redacted] nephew of [redacted] (a.k.a, [redacted][384] In January 2014, [redacted] [redacted] own lawyer publicly admitted that [redacted] was the main investor in [redacted] [redacted][385] The press later reported that

> [A]nother peruvian client of KML was [redacted] [redacted] [redacted] which was linked to the structure of companies that were used by [redacted], also known as '[redacted] a wholesaler who had been prosecuted for money laundering since 2014.
>
> This company, owned by [redacted] a relative of '[redacted] was incorporated in May 2013 and the following month it began exporting to the United Sates almost a ton of gold, for the amount of 205 million dollars. The purchaser of such gold was [redacted] LLC. For its part, Kaloti Metals & Logistic would have also instructed 15 wire transfers for over 10 million dollars.[386]

157. Claimant agreed during the document production phase of this arbitration to produce all "[d]ocuments prepared by or sent to Kaloti, its managing member(s), its shareholders or officers prior to Kaloti's alleged purchase of the Five Shipments (between 2012 and January 2014), regarding any due diligence review performed on the Suppliers."[387] But, in relation to [redacted] Claimant only produced the following documents:

a. the ID of Mr. [redacted] ([redacted] General Manager and cousin of [redacted] [redacted]

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[383] **Ex. C-0030**, KML transaction summary of all purchases between 2012 and 2018, p. 6.

[384] **Ex. R-0299**, Corporation Registration of [redacted] SUNARP, retrieved on 25 April 2023., p. 2. [redacted] also owned another company with [redacted] *see* **Ex. R-0360**, Corporation Registration of Minerals Gold MPP S.A.C., SUNARP, retrieved on 10 May 2023, p. 2.

[385] **Ex. R-0375**, Transcript of "*Cuatro Poder*", YOUTUBE, 20 January 2014, 6:50–7:50.

[386] **Ex. R-0260**, "*Los pagos bajo sospecha de acopiadora de oro de EE.UU. a empresas peruanas investigadas por lavado y minería ilegal*," CONVOCA, 21 September 2020.

[387] Procedural Order No. 2, Annex 2, Request 9, pp. 36–37.

b. the ID of the other shareholder of [redacted] (also related to [redacted] and as noted above, a 24-year-old secretary, lacking in any experience in the trade of mineral resources);[388]

c. [redacted] RUC, which (i) confirms that the company had been in business for only a few weeks before it started dealing with Kaloti and before it attempted to export Shipments 4 and 5, and (ii) disproves [redacted] allegation that [redacted] was a "reputable"[389] company with which Kaloti had an "established and continuous"[390] relationship; and

d. a two-page document entitled "Mining Right Summary," which contained only general information about the "Alder 3" mine, but did not even specify that it was a gold mine, let alone that [redacted] had any right to exploit gold therefrom.[391]

158. Claimant also agreed to produce any documents exchanged between Kaloti and [redacted] showing that Kaloti had verified the lawful origin of the Gold comprising Shipments 4 and 5.[392] However, Claimant failed to produce any exchange or document at all related to Shipments 4 and 5. In fact, Claimant has produced *no exchange whatsoever between Kaloti and* [redacted]

159. In conclusion, Claimant has manifestly failed to show that Kaloti conducted adequate due diligence on [redacted] or the Gold that Kaloti claims to have bought from that company. Contrary to Article 11 of the Illegal Mining Controls and Inspection Decree, the Money Laundering Regulations, and its own AML/CFT Manual, Kaloti failed: (i) to confirm that [redacted] in fact had the right to exploit gold from the Alder 3 mine; (ii) to verify [redacted] real address; (iii) to identify [redacted] ultimate beneficiaries; (iv) to

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[388] *See* **Ex. R-0182**, Corporation Registration of [redacted] retrieved on 25 May 2022, p. 2, where [redacted] is individualized and her profession is listed as "secretary."

[389] Memorial, ¶ 15.

[390] First [redacted] Witness Statement, ¶ 30.

[391] **Ex. R-0281**, Mining Rights Summary of [redacted] S.A.C., INGEMMET, 30 October 2013.

[392] Procedural Order No. 2, Annex 2, Request 8, p. 8.

obtain the ID of [redacted] Chief Financial Officer[393] and a relative of the criminal [redacted] and (v) to conduct any site visit to [redacted] alleged mine – which, as explained below, would have revealed that [redacted] had no right whatsoever with respect to that mine. Claimant has not even provided the New Account Application (and accompanying documentation) that [redacted] was supposed to submit to open its account with Kaloti.

160. Claimant has also failed to address any of the following evidence that points to the unlawful origin of the Gold contained in Shipment 4. *First*, [redacted] did not file with SUNAT the waybills needed to prove the transport of the Gold from the alleged extraction point to Lima, thus breaching its legal obligations.[394] This in turn suggests that such waybills did not exist, and that Kaloti therefore failed to comply with its obligation to obtain and verify the authenticity of the relevant waybills before allegedly buying the Gold contained in Shipment 4.

161. *Second*, as explained above, Mr. [redacted], [redacted] General Manager, had links with [redacted] and [redacted][395] both of whom were being prosecuted for money laundering offenses connected to illegal mining.[396] Both were known to have incorporated companies that, immediately after incorporation,

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[393] **Ex. R-0182**, Corporation Registration of [redacted] retrieved on 25 May 2022, p. 6.

[394] **Ex. R-0142**, SUNAT Report No. 239-2014-SUNAT-3X3200, 11 March 2014 (included in [redacted] Criminal Proceedings), ¶ 2.20 ("[redacted] has failed to submit the Shipper's Waybills and the Carrier's Waybills that would justify the transfer of gold from the production center" (emphasis omitted)).

[395] On 16 October 2008, Mr. [redacted] was appointed manager of [redacted] whose founding shareholder, director and general manager was [redacted] In turn, the corporate address of [redacted] was also that of [redacted] whose founding shareholder and general manager was [redacted] *See* **Ex. R-0084**, State Attorney's Request for the Initiation of [redacted] Preliminary Investigation for the Crime of Money Laundering, 18 March 2014, p. 6, ¶¶ 16–17.

[396] **Ex. R-0084**, State Attorney's Request for the Initiation of [redacted] Preliminary Investigation for the Crime of Money Laundering, 18 March 2014, p. 6, ¶¶ 16, 20.

exported large volumes of illegally mined gold[397]—yet another red flag suggesting illegal mining and money laundering.[398]

162. *Third,* Mr. [redacted] himself (i) had spent time in prison for money laundering and drug trafficking,[399] and (ii) had been investigated for fraud, and for the supply and possession of weapons and explosives.[400]

163. *Fourth*, despite SUNAT's requests—and in a further breach of Peruvian law—[redacted] did not present (i) any shipping documents for the supplies allegedly used for the production of the Gold in Shipment 4,[401] or (ii) any proof that it had actually paid for those supplies.[402] Further, a report issued by the DREM of the Piura region[403] confirmed that (i) the mine from which [redacted] allegedly obtained the Gold in Shipments 4 and 5 (viz., the "Alder 3" mine) produced mainly copper,[404] and (ii) it

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[397] **Ex. R-0084**, State Attorney's Request for the Initiation of [redacted] Preliminary Investigation for the Crime of Money Laundering, 18 March 2014, p. 7, ¶ 20.

[398] **Ex. R-0084**, State Attorney's Request for the Initiation of [redacted] Preliminary Investigation for the Crime of Money Laundering, 18 March 2014, p. 5, ¶ 12, p. 20, ¶ 20.

[399] **Ex. R-0150**, Resolution No. 1: Order Initiating Criminal Proceedings, [redacted] Case, 10 March 2015, p. 3. ("[T]he investigated . . . records several investigations and criminal proceedings such as: TI.D.: (Money Laundering), for Swindling, for Manufacture, Supply, Possession of Weapons and Explosives, having even been admitted to the penitentiary of "Luringancho."); *see also* **Ex. R-0151**, Statement of [redacted] 4 June 2014, ¶ 71.

[400] **Ex. R-0150**, Resolution No. 1: Order Initiating Criminal Proceedings, [redacted] Case, 10 March 2015, p. 3.

[401] **Ex. R-0142**, SUNAT Report No. 239-2014-SUNAT-3X3200, 11 March 2014 (included in [redacted] Criminal Proceedings), ¶ 2.21 ("[[redacted] has failed to submit the shipper's waybills and the carrier's waybills with respect to the supplies and services used in the production process to obtain the immobilized gold bars . . . **in other words, although it has submitted invoices for <u>the purchase of raw materials acquired</u> in the city of Lima, it has not evidenced their transportation . . .**" (emphasis in original)).

[402] **Ex. R-0142**, SUNAT Report No. 239-2014-SUNAT-3X3200, 11 March 2014 (included in [redacted] Criminal Proceedings), ¶ 2.22 ("[[redacted] **has failed to submit a copy of the deposit slip and/or other forms of payment evidencing the settlement of purchase invoices from suppliers**" (emphasis in original)).

[403] **Ex. R-0150**, Resolution No. 1: Order Initiating Criminal Proceedings, [redacted] Case, 10 March 2015, pp. 2, 11; **Ex. R-0280**, Report No. 166-2014, Regional Office of Energy and Mining of the Piura Region, 25 August 2014.

[404] **Ex. R-0150**, Resolution No. 1: Order Initiating Criminal Proceedings, [redacted] Case, 10 March 2015, p. 2 ("[T]he predominant mineral in said location is copper." (Emphasis omitted)); **Ex. R-0280**, Report No. 166-2014, Regional Office of Energy and Mining of the Piura Region, 25 August 2014, p. 7.

would have been simply impossible to extract from that mine the quantities of gold that [redacted] declared had been sourced from that site.[405] Kaloti could and should have verified this by conducting site visits to the "Alder 3" mine and by "monitor[ing] and evaluat[ing] [[redacted]s operational activities and practices," as its own AML/CFT Manual required it to do.[406]

164. *Fifth,* the DREM report also noted that the "Alder 3" mine would have been operating illegally, since it did not have the necessary authorizations to conduct mining activities,[407] which as explained above Kaloti was under an obligation to verify.

* * *

165. In conclusion, Claimant has not met its burden of establishing that Kaloti qualifies as a bona fide purchaser of the Gold, for the reasons summarized below. *First*, Claimant has failed to submit any agreement with the Suppliers for the purchase of the Gold. Even assuming that such agreements existed, Kaloti would have failed to prove that it complied with the conditions set out in any such agreements to acquire legal title over the Gold. Rather, the evidence on the record suggests that Kaloti never acquired ownership, including because it failed to pay for the Gold contained in several of the Shipments. In addition, while Claimant alleged that legal title and ownership of the Gold would have transferred to Kaloti upon delivery of the bullion, the evidence on the record suggests that the Suppliers in fact never delivered to Kaloti *any* of the Gold, from *any* of the Shipments.

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[405] **Ex. R-0150**, Resolution No. 1: Order Initiating Criminal Proceedings, [redacted] Case, 10 March 2015, p. 2 ("[T]he exploitation activities of the two artisanal mining operations inspected are currently paralyzed and it is not possible to have exploited 2,000 MT of ore."); **Ex. R-0280**, Report No. 166-2014, Regional Office of Energy and Mining of the Piura Region, 25 August 2014, p. 7.

[406] **Ex. C-0025**, KML AML/CFT Program Manual, January 2018, p. 12.

[407] **Ex. R-0150**, Resolution No. 1: Order Initiating Criminal Proceedings, [redacted] Case, 10 March 2015, p. 2 ("[T]he DREM PIURA reported that this mining site does not have any authorization to carry out mineral processing activities"); p. 11 ("[T]he aforementioned mining company is not authorized to exploit minerals."); **Ex. R-0280**, Report No. 166-2014, Regional Office of Energy and Mining of the Piura Region, 25 August 2014, p. 7.

166. *Second*, even if Claimant had proven that Kaloti at some point acquired ownership of the Gold (quod non), Kaloti would *not* qualify as a bona fide purchaser. That is so because Claimant has failed to prove that Kaloti complied with its due diligence obligations under Peruvian law or even under its own AML/CFT Manual. Although the [redacted] (which was the alleged ultimate buyer of the Five Shipments) has insisted that it had a policy of complying with due diligence requirements,[408] the evidence on the record shows that this was mere lip-service as far as Kaloti is concerned. Kaloti either failed to conduct even minimal due diligence on the Suppliers and the Gold or, having conducted such due diligence (of which there is no evidence), it willfully and recklessly ignored the garish red flags showing that the Gold had in all likelihood been unlawfully obtained. The words of a Peruvian Criminal Court in relation to Shipment 4 apply to the entirety of the Gold:

> **[Kaloti] has not submitted any documents proving** and/or demonstrating that it has acquired the mineral in question in good faith and **has taken the necessary precautions to avoid being used as a laundering agent**, especially given, as is public knowledge, there are areas in Peru where mineral is extracted illegally and causes considerable damage to the environment.[409] (Emphasis added)

167. In short, Claimant cannot possibly qualify as a bona fide purchaser of the Gold, and therefore its claims that Peru's courts have violated its purported rights as bona fide purchaser over such Gold[410] must be dismissed.

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[408] **Ex. R-0261**, "*Letter from Kaloti Precious Metals in response to Human Rights Watch Letter*," HUMAN RIGHTS WATCH, 4 February 2015.

[409] **Ex. R-0136**, Precautionary Seizure against Shipment 4, 1 May 2014, p. 3 ("[Kaloti] has not submitted any documents proving and/or demonstrating that it has acquired the mineral in question in good faith and has taken the necessary precautions to avoid being used as a laundering agent, especially given, as is public knowledge, there are areas in Peru where mineral is extracted illegally and causes considerable damage to the environment.").

[410] *See* Reply, ¶¶ 328–330.

B. Kaloti was investigated due to its close links with multiple companies that were under criminal investigations

168. As explained in the Counter-Memorial, starting in 2006, Peru experienced an exponential increase in illegal mining, mainly as a result of the global boom in mineral prices.[411] The studies prepared by various Peruvian and international agencies at that time revealed that illegal mining had many adverse effects, including severely hindering the socio-economic development of Peru,[412] fostering organized crime,[413] and harming the country's environment and the health of local communities.[414] In response, and beginning in 2012 (i.e., well before any of the Challenged Measures), Peru strengthened its legal framework to combat illegal mining, money laundering, and related criminal activities.[415] In accordance with the recommendations of various international organizations, Peru criminalized illegal mining, increased money laundering penalties, developed concrete mechanisms to combat these illegal activities, and allocated legal and financial resources to SUNAT, the Prosecutor's Office, and other State agencies to facilitate the enforcement of those mechanisms.[416] In that context, SUNAT increased export controls, and regularly reported indicia of potential money laundering and illegal mining activities to the Prosecutor's Office, which in turn launched multiple criminal investigations to uncover illegal activity related to illegal mining.[417]

169. Kaloti was investigated during the course of two such investigations:[418]

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[411] *See* Counter-Memorial, § II.A.

[412] *See* Counter-Memorial, § II.A.1.

[413] *See* Counter-Memorial, § II.A.2.

[414] *See* Counter-Memorial, § II.A.3.

[415] Counter-Memorial, § II.A.4.

[416] Counter-Memorial, § II.A.5.

[417] Counter-Memorial, § II.A.5.

[418] Counter-Memorial, § II.C.7.

a. Investigation under joint files No. 01-2014 and 78-2015 ("[redacted] **Investigation**"), which was launched on 18 December 2013[419] and concerned the alleged creation by [redacted] who by then was a notorious criminal[420]—of a criminal organization to launder money from illegal mining activities through a number of companies, including [redacted][421] and

b. Investigation No. 42-2014 ("[redacted] **Investigation**"), which was launched on 23 March 2015 to investigate money laundering and illegal mining activities allegedly committed by [redacted] who also had a criminal record[422]—and other members of the [redacted] family's conglomerate of companies, including [redacted][423] (jointly, "[redacted] **Investigations**").

170. The [redacted] Investigations looked into the activities of numerous actors involved in the gold supply chain related to [redacted] and the [redacted] family, including shareholders and representatives of gold traders, alleged concession holders of the mines from which the traders claimed to have sourced gold, and companies that had made substantial bank transfers to the dubious gold traders.[424] Kaloti was one such actor. As explained below, over the course of a short period of

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[419] **Ex. R-0340**, Prosecutorial Order No. 19, First Supra-Provincial Corporate Prosecutor's Office Specializing in Money Laundering and Loss of Domain Crimes, 9 January 2017 [*Re-submitted version of C-0101, with Respondent's translation*], pp. 34-37.

[420] *See supra* Section II.B.

[421] **Ex. R-0340**, Prosecutorial Order No. 19, First Supra-Provincial Corporate Prosecutor's Office Specializing in Money Laundering and Loss of Domain Crimes, 9 January 2017 [*Re-submitted version of C-0101, with Respondent's translation*], pp. 1-3, 33–34, 43, 218.

[422] *See supra* Section II.B.

[423] **Ex. R-0339**, Prosecutorial Resolution No. 1, First Supra-Provincial Corporate Prosecutor's Office Specializing in Money Laundering and Loss of Domain Crimes, 20 September 2015 [*Re-submitted version of C-0052, with Respondent's translation*], pp. 1–2.

[424] *See, e.g.*, **Ex. R-0339**, Prosecutorial Resolution No. 1, First Supra-Provincial Corporate Prosecutor's Office Specializing in Money Laundering and Loss of Domain Crimes, 20 September 2015 [*Re-submitted version of C-0052, with Respondent's translation*], pp. 90–91, showing the range of individuals and companies involved from the complete supply chain; **Ex. R-0340**, Prosecutorial Order No. 19, First Supra-Provincial Corporate Prosecutor's Office Specializing in Money Laundering and Loss of Domain Crimes, 9 January 2017 [*Re-submitted version of C-0101, with Respondent's translation*], pp. 1–3 (showing the range of individuals and companies involved in the investigation).

time (merely a few months) Kaloti had transferred hundreds of millions of dollars to gold traders that were owned, managed, and/or closely connected to [redacted] and the [redacted] family. In this respect, Kaloti's conduct was consistent with the actions of companies involved in money laundering and thus fell within the scope of the [redacted] Investigations.

171. In the Counter-Memorial, Peru adduced evidence demonstrating that the Prosecutor's Office had objective reasons to include Kaloti in the [redacted] Investigations.[425] In the Reply, Claimant did not rebut *any* of that evidence,[426] but it nonetheless insisted that it had been "arbitrarily mentioned" and "irrationally involv[ed]" in those investigations, which according to Claimant were entirely unrelated to the Five Shipments.[427] Claimant also complained in the Reply that Peru had failed to provide enough information about the [redacted] Investigations for Kaloti to exercise its due process rights before Peru's authorities.[428] As shown below, Claimant's allegations are unfounded and in fact contradicted by the evidence on the record.

1. Kaloti was investigated due to its close ties to [redacted] [redacted] and the [redacted] family's conglomerates of companies

172. Contrary Claimant's arguments, the Prosecutor's Office had objective reasons to include Kaloti in the [redacted] Investigations.

173. As already demonstrated in **Section II.A.2** above, Kaloti had close business relations with the main subjects of the [redacted] Investigation, namely: [redacted] [redacted] [redacted] and [redacted] For example, Kaloti was the sole trader of gold sourced by [redacted] and the main trader of the gold sourced by Darshan, [redacted] and

[425] Counter-Memorial, § II.C.7.

[426] *See* Counter-Memorial, § II.C.7.

[427] Reply, ¶ 81.

[428] Reply, ¶ 339.

[redacted][429] all of which were owned and/or controlled by the [redacted] family.[430] The [redacted] Investigation revealed that all four companies, which had started operating between 2012 and 2013 and had a conspicuously low share capital,[431] had exported over *USD 546 million* worth of gold from Peru in a nine-month period.[432] The information gathered by Peru's authorities showed that Kaloti had transferred *more than half* of that sum (viz., USD 322.8 million) to those four nascent suppliers.[433] In other words, Kaloti was the biggest customer of the four main subjects of the [redacted] Investigation.

174. Other companies that were involved in the [redacted] Investigation, such as [redacted] and [redacted] also had traded gold directly with Kaloti.[434] The [redacted] Investigation uncovered that both of these companies had sourced their gold from the high-risk region of Madre de Dios,[435] which was and remains the main source of illegal mining in Peru.[436] In addition to trading gold directly with Kaloti,

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[429] **Ex. R-0339**, Prosecutorial Resolution No. 1, First Supra-Provincial Corporate Prosecutor's Office Specializing in Money Laundering and Loss of Domain Crimes, 20 September 2015 [*Re-submitted version of C-0052, with Respondent's translation*], pp. 103–104.

[430] *See supra* Section II.B.

[431] **Ex. R-0356**, Corporation Registration of [redacted] SUNARP, retrieved on 10 May 2023, p. 2; **Ex. R-0346**, Corporation Registration of [redacted] SUNARP, retrieved on 3 May 2023, 2; **Ex. R-0358**, Corporation Registration of [redacted] S.A.C., SUNARP, 10 October 2012, p. 2; **Ex. R-0083**, Corporation Registration of [redacted] retrieved on 25 May 2022, p. 2.

[432] **Ex. R-0339**, Prosecutorial Resolution No. 1, First Supra-Provincial Corporate Prosecutor's Office Specializing in Money Laundering and Loss of Domain Crimes, 20 September 2015 [*Re-submitted version of C-0052, with Respondent's translation*], pp. 102–103.

[433] **Ex. R-0339**, Prosecutorial Resolution No. 1, First Supra-Provincial Corporate Prosecutor's Office Specializing in Money Laundering and Loss of Domain Crimes, 20 September 2015 [*Re-submitted version of C-0052, with Respondent's translation*], pp. 102–103 (adding up the declared export values for the exports that the investigation identifies as shipments to Kaloti totals to USD 322,825,268.18).

[434] **Ex. C-0030**, KML transaction summary of all purchases between 2012 and 2018, pp. 7–8, 10, 13, 16.

[435] **Ex. R-0339**, Prosecutorial Resolution No. 1, First Supra-Provincial Corporate Prosecutor's Office Specializing in Money Laundering and Loss of Domain Crimes, 20 September 2015 [*Re-submitted version of C-0052, with Respondent's translation*], p. 100.

[436] **Ex. R-0012**, On the Trail of Illicit Gold Proceeds: Strengthening the Fight Against Illegal Mining Finances, OAS, November 2021, p. 19; **Ex. R-0014**, The Reality of Illegal Mining in Amazonian Countries, SPDA, June 2014, p. 190.

both [redacted] and [redacted] had indirectly conducted transactions with Kaloti though agency agreements with [redacted] and [redacted][437] The agency agreements had added an unnecessary extra layer of intermediary companies to carry out commercial operations, which constitutes a red flag for money laundering.[438]

175. Thus, the facts pointed to Kaloti's involvement in the highly suspicious operations that were the subject of the [redacted] Investigation. It was both reasonable and justified for the Peruvian authorities to include Kaloti in that investigation.

176. The relevant Peruvian authorities were likewise justified in considering Kaloti in the context of the [redacted] Investigation. Since at least 2013, Kaloti had traded gold with several companies that were part of [redacted] suspected criminal organization.[439] For example, as explained in **Section II.A.2.b.(iv)** above, (i) according to Claimant's own Transaction History, in 2013 [redacted] the managing director of which was Juan [redacted][440] cousin of [redacted] — had exported 206.4 kg of gold to Kaloti,[442] and (ii) from September to October 2013, Kaloti had transferred USD 6 million to [redacted] the entirety of

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[437] **Ex. R-0339**, Prosecutorial Resolution No. 1, First Supra-Provincial Corporate Prosecutor's Office Specializing in Money Laundering and Loss of Domain Crimes, 20 September 2015 [*Re-submitted version of C-0052, with Respondent's translation*], pp. 100–101, 106, 108.

[438] **Ex. R-0318**, Typologies and Red Flags Associated to Money Laundering from Illegal Mining in Latin America and the Caribbean, OAS, January 2022, p. 25.

[439] **Ex. R-0340**, Prosecutorial Order No. 19, First Supra-Provincial Corporate Prosecutor's Office Specializing in Money Laundering and Loss of Domain Crimes, 9 January 2017 [*Re-submitted version of C-0101, with Respondent's translation*], pp. 1–3, (including: [redacted] All of these companies appear as Kaloti suppliers in **Ex. C-0030**, KML transaction summary of all purchases between 2012 and 2018, pp. 3-8, 10-13.

[440] **Ex. R-0362**, Corporation Registration of Empresa [redacted] SUNARP, retrieved on 10 May 2023, p. 7. [redacted] was also involved with another company under investigation, *see* **Ex. R-0363**, Corporation Registration of [redacted]., SUNARP, retrieved on 10 May 2023, p. 7.

[441] **Ex. R-0340**, Prosecutorial Order No. 19, First Supra-Provincial Corporate Prosecutor's Office Specializing in Money Laundering and Loss of Domain Crimes, 9 January 2017 [*Re-submitted version of C-0101, with Respondent's translation*], pp. 146–152.

[442] **Ex. C-0030,** KML transaction summary of all purchases between 2012 and 2018, p. 6.

which had been instantly *withdrawn in cash*.[443] Cash withdrawals and cash payments are another red flag for money laundering, specifically related to illegal mining.[444] Mr. [redacted] managing director of [redacted] and cousin of [redacted] testified during the [redacted] Investigation that he had bought gold from "unknown individuals on one of the street corners of Miraflores, without any documentation and, likewise, [he] did not know how much was being exported."[445] Mr. [redacted] also indicated "that he [had] carried out the handling and collection of money with Alfredo Néstor Egocheaga Rosas, who [was] an employee of [redacted] [i.e. [redacted][446]

177. In addition, in 2013 Kaloti was the sole trader of gold for [redacted] which as explained in **Section II.A.2** above had been founded and was managed by [redacted], another cousin of [redacted] In December 2013, [redacted] had exported to Kaloti 46.64 kg of gold, for a declared value of USD 1.8 million.[447] In addition, in January 2014,

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[443] **Ex. R-0340**, Prosecutorial Order No. 19, First Supra-Provincial Corporate Prosecutor's Office Specializing in Money Laundering and Loss of Domain Crimes, 9 January 2017 [*Re-submitted version of C-0101, with Respondent's translation*], pp. 147–148.

[444] **Ex. R-0318**, Typologies and Red Flags Associated to Money Laundering from Illegal Mining in Latin America and the Caribbean, OAS, January 2022, pp. 36, 52.

[445] **Ex. R-0340**, Prosecutorial Order No. 19, First Supra-Provincial Corporate Prosecutor's Office Specializing in Money Laundering and Loss of Domain Crimes, 9 January 2017 [*Re-submitted version of C-0101, with Respondent's translation*], p. 152. (Original Spanish: "*personas desconocidas en una de las esquinas de Miraflores, sin documento alguno y asimismo, desconocía de las cantidades de exportación y también por que señaló que los tramites y cobros de dinero lo hizo con Alfredo Néstor Egocheaga Rosas quien es empleado de* [redacted] [i.e. [redacted]

[446] **Ex. R-0340**, Prosecutorial Order No. 19, First Supra-Provincial Corporate Prosecutor's Office Specializing in Money Laundering and Loss of Domain Crimes, 9 January 2017 [*Re-submitted version of C-0101, with Respondent's translation*], p. 152. (Original Spanish: "*personas desconocidas en una de las esquinas de Miraflores, sin documento alguno y asimismo, desconocía de las cantidades de exportación y también por que señaló que los tramites y cobros de dinero lo hizo con Alfredo Néstor Egocheaga Rosas quien es empleado de* [redacted] [i.e. [redacted]

[447] **Ex. R-0340**, Prosecutorial Order No. 19, First Supra-Provincial Corporate Prosecutor's Office Specializing in Money Laundering and Loss of Domain Crimes, 9 January 2017 [*Re-submitted version of C-0101, with Respondent's translation*], p. 163.

Kaloti sourced Shipments 4 and 5 from [redacted][448] Together, these two shipments contained 225 kg of gold, which Claimant values at approximately USD 8.5 million.[449]

178. The facts thus show that there were multiple objective reasons to include Kaloti in the [redacted] Investigation.

179. The foregoing shows that Kaloti was not "irrationally" and "arbitrarily" included in the [redacted] Investigations. Rather, the information gathered in those investigations revealed suspicious practices by Kaloti, as well as close links between Kaloti and many companies within the [redacted] and [redacted] conglomerates and their criminal activity, all of which justified Kaloti's inclusion in the [redacted] Investigations.

180. Furthermore, while Claimant alleges that the [redacted] Investigations were entirely unrelated to the Gold, such investigations specifically referenced purchase statements concerning Shipment 2,[450] and revealed that the miners from which [redacted] claimed to have bought the Gold in that shipment (i) in fact did not know [redacted] representative or employees, and (ii) in any event, did not have the necessary licenses to mine that Gold.[451] Likewise, the [redacted] Investigation concerned, inter alia, facts related to Shipment 5.[452]

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[448] *See, e.g.,* Memorial, ¶¶ 39, 49; Reply, ¶¶ 15, 51.

[449] *See* Second Smajlovic Report, ¶ 5.86.

[450] The relevant purchase statements which form Shipment 2 are 02-000176, 002-000177, 002-000178, 002-000179, 002-000180 as shown in **Ex**. **C-0007**, [redacted] Gold Corporations S.A.C. document package, pp. 33–37. These same purchase statements are explicitly referenced in Investigation No. 42-2014; *see* **Ex. R-0339**, Prosecutorial Resolution No. 1, First Supra-Provincial Corporate Prosecutor's Office Specializing in Money Laundering and Loss of Domain Crimes, 20 September 2015 [*Re-submitted version of C-0052, with Respondent's translation*], p. 121.

[451] **Ex. R-0339**, Prosecutorial Resolution No. 1, First Supra-Provincial Corporate Prosecutor's Office Specializing in Money Laundering and Loss of Domain Crimes, 20 September 2015 [*Re-submitted version of C-0052, with Respondent's translation*], p 121–122.

[452] **Ex. R-0340**, Prosecutorial Order No. 19, First Supra-Provincial Corporate Prosecutor's Office Specializing in Money Laundering and Loss of Domain Crimes, 9 January 2017 [*Re-submitted version of C-0101, with Respondent's translation*], pp. 162–163, 172–174, 231.

2. Claimant's other complaints about the [redacted] Investigations (including that Kaloti did not have access to such investigations) are baseless

181. In the Reply, Claimant also argued that "Peru never notified KML . . . nor explained the progress of the [[redacted] [I]nvestigation[s]."[453] Claimant's arguments are baseless. Pursuant to the Peruvian Criminal Procedure Code, investigated parties have access to the information on the record of the investigation.[454] Given that Kaloti was a party to the [redacted] Investigations, Kaloti could have accessed the files concerning these investigations and learnt about their foundation and progress.

182. Claimant itself has submitted into the record of the present arbitration several documents from the [redacted] Investigations,[455] thus confirming that Kaloti had access to those files. The evidence also confirms that Kaloti itself was aware that it was being investigated and that it knew details about the content and progress of the [redacted] Investigations.[456] Furthermore, the resolutions contained in Claimant's Exhibits C-0052 and C-0101, explicitly mandated that the content of those resolutions

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[453] Reply, ¶ 339.

[454] **Ex. R-0153**, Legislative Decree No. 957, New Criminal Procedure Code, 22 July 2004, [*Re-submitted version of CL-0005, with Respondent's translation*], Art. 138(1) ("**The parties to the proceedings are entitled to request, at any time, a simple or certified copy of the steps taken** included in the prosecutor's and judicial files, as well as of the initial proceedings and the steps taken by the police. The request is handled by the authority in charge of the proceedings at the time such request is filed." (Emphasis added)) (Original Spanish: "*Los sujetos procesales están facultados para solicitar, en cualquier momento, copia, simple o certificada, de las actuaciones insertas en los expedientes fiscal y judicial, así como de las primeras diligencias y de las actuaciones realizadas por la Policía. De la solicitud conoce la autoridad que tiene a su cargo la causa al momento en que se interpone*").

[455] *See, e.g.*, **Ex. C-0052**, Prosecutorial Resolution No. 1, 20 September 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; **Ex. C-0101**, Prosecutorial Order No. 19, 9 January 2017, issued by the 1st supra-provincial corporate prosecutor's office specializing in money laundering and loss of domain crimes.

[456] **Ex. R-0221**, "*Una incautación, una demanda y el oro ilegal de Perú*," INSIGHT CRIME, 28 March 2017 [*Re-submitted version of C-0051, with Respondent's translation*], p. 5 ("And is it correct to say that Kaloti cannot state with any certainty that he was not about to import illegal gold prior to his seizure in Callao? '**That is part of the ongoing investigation; that has not been established**,' [redacted] replied. 'The authorities are acting based on their presumptions and there is a due process that is required for this investigation and that is what we have to respect'" (emphasis added)).

be notified to all investigated parties.[457] Kaloti, as an investigated party, would have received those notifications, which explains why it had Exhibits C-0052 and C-0101 and was able to introduce those documents into the record of the present arbitration.

183. In addition to the above, in the Reply Kaloti complained that "Peru has not attempted to explain which avenues were offered to KML to clear its name in these purported investigations."[458] *First*, Peru does not bear the burden of having to prove what procedural mechanism were available to Kaloti in relation to the investigations. *Second*, Kaloti cannot profess ignorance of the law; it knew or should have known what were those procedural "avenues." *Third*, the procedural mechanisms available to Kaloti include the following: the Criminal Procedure Code expressly states that investigated parties are entitled to participate in the investigation and, for example, may request the Prosecutor's Office to perform specific investigative steps to establish the relevant facts.[459] The Criminal Procedure Code also provides that, if an investigated party considers that it is being prejudiced by the excessive duration of an investigation ("*diligencias preliminares*")—as Claimant asserted in this arbitration[460]—such party is entitled to request that the Prosecutor's Office finalize the investigation

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[457] *See, e.g.,* **Ex. R-0339**, Prosecutorial Resolution No. 1, First Supra-Provincial Corporate Prosecutor's Office Specializing in Money Laundering and Loss of Domain Crimes, 20 September 2015 [*Re-submitted version of C-0052, with Respondent's translation*], p. 45 ("THIRD: NOTIFY the content of this resolution to the investigated parties."); **Ex. R-0340**, Prosecutorial Order No. 19, First Supra-Provincial Corporate Prosecutor's Office Specializing in Money Laundering and Loss of Domain Crimes, 9 January 2017 [*Re-submitted version of C-0101, with Respondent's translation*], p. 248 ("FOURTH: NOTIFY this Resolution in accordance to the Law, to all parties involved in the proceedings.").

[458] Reply, ¶ 339.

[459] **Ex. R-0153**, Legislative Decree No. 957, New Criminal Procedure Code, 22 July 2004, [*Re-submitted version of CL-0005, with Respondent's translation*], Art. 337(4) ("During the investigation, **both the accused and the other parties involved may request that the Prosecutor take the steps that they consider relevant and useful for the clarification of the facts**. The Prosecutor shall order such measures that it deems conducive to the investigation." (Emphasis added)) (Original Spanish: "*Durante la investigación, tanto el imputado como los demás intervinientes podrán solicitar al Fiscal todas aquellas diligencias que consideraren pertinentes y útiles para el esclarecimiento de los hechos. El Fiscal ordenará que se lleven a efecto aquellas que estimare conducentes*").

[460] Reply, ¶ 339.

and issue the relevant decision.[461] Should the Prosecutor's Office reject such request, the investigated party may request a decision from the competent criminal court.[462]

184. In other words, Peruvian law provided Kaloti with multiple legal means to obtain information about the content and progress of the [redacted] Investigations. Equally, Peruvian law granted the procedural right to Kaloti to seek relief if it considered that it was being prejudiced by its inclusion in these investigations. However, Kaloti did not exercise any of these rights.

185. In the Reply, Claimant also repeatedly argued that the fact that the [redacted] Investigations did not lead to the initiation of criminal proceedings against Kaloti necessarily means that Kaloti is innocent of any wrongdoing, including in relation to the Five Shipments of Gold.[463] Claimant has made this its leitmotif in the present arbitration, as if the fact that Kaloti was not prosecuted and convicted of a crime somehow supports its Treaty claims. However, the fact that Kaloti has not been indicted in Peru does not in any way show that Kaloti complied with its due diligence obligations in relation to the Suppliers and the origin of the Gold.

186. The fact that Kaloti was not prosecuted does not absolve it of any wrongdoing either. In Peru, like in any other jurisdiction, not all investigations regarding money laundering and illegal mining lead to the initiation of criminal proceedings, in great part due to the limited resources of the law enforcement and prosecutorial agencies

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[461] **Ex. R-0153**, Legislative Decree No. 957, New Criminal Procedure Code, 22 July 2004, [*Re-submitted version of CL-0005, with Respondent's translation*], Art 334(2) ("**Whoever considers themselves affected by an excessive duration of the preliminary proceedings, shall request the Prosecutor to terminate the proceedings and issue the corresponding order.**" (Emphasis added)) (Original Spanish: "*Quien se considere afectado por una excesiva duración de las diligencias preliminares, solicitará al fiscal le dé término y dicte la disposición que corresponda*").

[462] **Ex. R-0153**, Legislative Decree No. 957, New Criminal Procedure Code, 22 July 2004, [*Re-submitted version of CL-0005, with Respondent's translation*], Art 334(2), ("If the Prosecutor does not accept the request of the affected party or sets an unreasonable time limit, the latter may request within five days that the judge in charge of the preparatory investigation issues such order. The judge shall rule after a hearing in which both the Prosecutor and the applicant shall participate.") (Original Spanish: "*Si el fiscal no acepta la solicitud del afectado o fija un plazo irrazonable, este último podrá acudir al juez de la investigación preparatoria en el plazo de cinco días instando su pronunciamiento. El juez resolverá previa audiencia, con la participación del fiscal y del solicitante.*").

[463] *See, e.g.*, Reply, ¶¶ 28, 193.

and the incidence of illegal mining and money laundering, which are so widespread.[464] By way of example, by 2010 the value of exports of illegally mined gold in Peru had surpassed even that of all illicit narcotics exports *combined*.[465] It was and still is materially impossible for the State to prosecute all of the individuals and companies involved in every single offence concerning money laundering connected with illegal mining. This is true not only in relation to illegal mining and money laundering, but also in relation to other endemic criminal offences. To state the obvious, as an example, no State in the world can prosecute every single individual that is suspected of trafficking illicit narcotics.

187. Like in most (if not all) jurisdiction, Peru's prosecutorial authorities decide whether or not to initiate criminal proceedings against an investigated party on the basis of a wide range of factors, including the resources available to the State, whether initiating criminal proceedings against that party is the most effective way to protect the State interests at stake (e.g., preventing the export of illegally mined gold), and the difficulties that the prosecutorial authorities might face to prosecute or obtain evidence regarding defendants that, like Kaloti, are located in foreign countries.

188. In the present case, Peru decided to prosecute the local Suppliers of the Gold contained in the Five Shipments, ensuring that such Gold does not leave the country unless and until there is confirmation that it is of lawful origin. SUNAT, the Prosecutor's Office, and the Criminal Courts have all confirmed that, in all likelihood, the Suppliers and/or their representatives engaged in money laundering and that the Gold is of unlawful origin.[466] And at least one Criminal Court has confirmed that Kaloti did not take "the necessary precautions to avoid being used as a laundering

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[464] Counter-Memorial, § II.A.4.

[465] **Ex. R-0015**, Special Report: Economic Projections 2012–2013, MACROCONSULT, 17 May 2012, p. 7. The illegal gold exports figure would have been even higher if it had included illegal mining in the Madre de Dios region.

[466] *See supra* Sections II.A–C; *see also* Counter-Memorial, §§ II.B.2-3; II.B.6; II.C.1; II.C.3.

agent" when it allegedly purchased the Gold from the Suppliers.[467] In this context, the fact that no criminal proceedings have been initiated against Kaloti neither proves that Kaloti is innocent of any wrongdoing, nor that Peru breached the Treaty by seizing the Gold.

189. Finally, in the Reply Claimant alleged that Peru had breached its duty of confidentiality by leaking to the press information regarding the [redacted] Investigations. As explained in **Section II.F** below, Claimant's accusations are unsupported and inaccurate. Claimant's argument that "Peru breached its duty of confidentiality of criminal investigations" by discussing the [redacted] Investigations in the Counter-Memorial and subsequently publishing that submission[468] is disingenuous and equally unavailing.

190. It was Claimant that filed documentation from the [redacted] Investigations in the present arbitration.[469] Peru has referenced those exhibits submitted by Claimant, but has not submitted any other documents or information to the record regarding the [redacted] Investigations. In fact, Claimant itself alleged in the Reply that "Peru never . . . submitted [in the present arbitration] any document whatsoever concerning such investigation [i.e., the [redacted] Investigations]."[470]

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[467] **Ex. R-0136**, Precautionary Seizure against Shipment 4, 1 May 2014, p. 3 ("[Kaloti] has not submitted any documents proving and/or demonstrating that it has acquired the mineral in question in good faith and has taken the necessary precautions to avoid being used as a laundering agent, especially given, as is public knowledge, there are areas in Peru where mineral is extracted illegally and causes considerable damage to the environment.").

[468] Reply, ¶ 82. *See also* Reply, ¶ 11, where Claimant falsely alleges that "Peru has continued and expanded its defamation campaign against KML (in a Counter-Memorial made available to the public)."

[469] *See, e.g.,* **Ex. C-0052**, Prosecutorial Resolution No. 1, 20 September 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; **Ex. C-0101**, Prosecutorial Order No. 19, 9 January 2017, issued by the 1st supra-provincial corporate prosecutor's office specializing in money laundering and loss of domain crimes.

[470] Reply, ¶ 339.

191. Further, as Claimant itself acknowledged in its communication to the Tribunal, dated 16 August 2022, Claimant and Peru jointly agreed which specific sections of the Counter-Memorial would be redacted before its publication:

> at the request of Claimant, the Parties have conferred and have jointly agreed on a revised redacted version of Peru's Counter-Memorial dated August 05, 2022, which is attached to this email. Claimant appreciates the cooperation shown by Peru on this particular issue.[471]

192. In the same communication, Claimant expressly confirmed that the revised redacted version of the Counter-Memorial would "be uploaded by Claimant to the BOX subfolder titled Transparency-Publication", on the "understand[ing] that this document may be subsequently published by ICSID, after Peru has made it available to the public,"[472] pursuant to Section 23 of Procedural Order No. 1, and Article 10.21(4)(c) of the Treaty. It is therefore hypocritical for Claimant to criticize Peru about which information was included in the public version of the Counter-Memorial.

193. In sum, Claimant's arguments regarding the [redacted] Investigations are baseless and utterly without merit.

C. The Criminal Proceedings have been conducted in full accordance with Peru's money laundering and illegal mining legal framework and the applicable due process rights

194. Based on the irregularities identified by SUNAT and the Prosecutor's Office, between 27 January and 21 March 2014 the latter opened preliminary criminal investigations on each of the Suppliers and/or their legal representatives ("**Preliminary Investigations**").[473]

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[471] Email from Claimant's counsel to Secretary of the Tribunal, 18 August 2022.

[472] Email from Claimant's counsel to Secretary of the Tribunal, 18 August 2022.

[473] *See* Counter-Memorial, § II.C.1.

195. To avoid dissipation of the Gold during the Preliminary Investigations, the Prosecutor's Office requested and obtained from the Criminal Courts[474] orders for the precautionary seizure of Shipments 1 to 4 (i.e., the Precautionary Seizures).[475] Subsequently, based on their independent analyses of the evidence, the Criminal Courts ordered the initiation of criminal proceedings against the Suppliers and/or their representatives for alleged money laundering in connection with the Gold (i.e., the Criminal Proceedings).[476]

196. At the inception of the Criminal Proceedings, the Criminal Courts determined that the Precautionary Seizures continued to be necessary, among other reasons, because (i) there were strong indicia that the Gold might be the proceeds of money laundering, or an instrument through which the Suppliers had engaged in money laundering, and (ii) if these indicia were to be confirmed, the Gold would be permanently confiscated at the end of the Criminal Proceedings.[477] On these and other bases, the Criminal Courts decided to maintain the Precautionary Seizures, to prevent any dissipation of the Gold before the conclusion of the Criminal Proceedings.[478] Given that the Criminal

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[474] During the course of the preliminary investigations and Criminal Proceedings, different courts at different times have conducted or intervened in the various proceedings at issue. Consequently, in this Rejoinder Peru will simply refer herein to the "Criminal Courts," which should be understood to comprehend the various competent courts at the relevant times.

[475] *See* Counter-Memorial, § II.C.2.

[476] **Ex. R-0139**, Resolution No. 1: Order Initiating Criminal Proceedings, [redacted] Case, 16 March 2015; **Ex. R-0145**, Resolution No. 1: Order Initiating Criminal Proceedings, [redacted] Case, 14 May 2015; **Ex. R-0224**, Resolution No. 1: Order Initiating Criminal Proceedings, [redacted] Case, 9 September 2014 [*Re-submitted version of C-0087, with Respondent's translation*]; **Ex. R-0150**, Resolution No. 1: Order Initiating Criminal Proceedings, [redacted] Case, 10 March 2015.

[477] *See, e.g.*, **Ex. R-0145**, Resolution No. 1: Order Initiating Criminal Proceedings, [redacted] Case, 14 May 2015, p. 25 ("[T]here is a risk of having the criminal conduct materialized, potentially affecting in an irreparable way the confiscation of the assets that may take place in the criminal proceedings, by them being disposed or hidden, disappeared or taken away from the administration of justice."); **Ex. R-0224**, Resolution No. 1: Order Initiating Criminal Proceedings, [redacted] Case, 9 September 2014 [*Re-submitted version of C-0087, with Respondent's translation*], p. 11 ("'Noting that the accused [redacted] **legal representative of the company** [redacted] has not yet proven the legal origin of the seized gold, and in accordance to article 9 of LD No. 1106, it is ORDERED that the PRECAUTIONARY SEIZURE issued with the objective of ensuring a future forfeiture of the seized gold to be continued." (Emphasis in the original)).

[478] *See* Counter-Memorial, § II.C.3; *see also* Second Expert Report of Joaquín Missiego, 7 May 2023 ("**Second Missiego Report**"), ¶¶ 28–29.

Proceedings are still ongoing, the Precautionary Seizures remain in place as of the date of the present submission.

197. Peru demonstrated in the Counter-Memorial that the Criminal Courts' decisions to (i) initiate the Criminal Proceedings and (ii) order and maintain the Precautionary Seizures were based on overwhelming indicia that the Gold was of unlawful origin, and that the Suppliers had committed the crime of money laundering. Similarly, Peru demonstrated that the relevant prosecutorial authorities and Criminal Courts at all times had acted in accordance with their respective statutory mandates, in order to uphold Peru's legal framework in respect of money laundering and illegal mining, while at the same time respecting the due process rights of all interested parties.[479]

198. The Reply has failed to address most of Peru's arguments regarding the measures adopted by the State's prosecutorial authorities and Criminal Courts. Crucially, Claimant has not challenged (i) the decision of the Prosecutor's Office to open the Preliminary Investigations, (ii) the Criminal Courts' decisions to initiate the Criminal Proceedings, or (iii) *any* of the numerous and significant indicia concerning both the unlawful origin of the Gold and the Suppliers' money laundering offenses, on the basis of which the Criminal Courts had ordered and maintained the Precautionary Seizures. On the contrary, in his second expert report Claimant's own legal expert, [redacted] readily admits that the indicia gathered by the Prosecutor's Office and the Criminal Courts justify "the initiation of an investigation or the . . . commencement of a trial against the gold sellers [i.e., the Suppliers]."[480] Further, in the Reply, Claimant itself concedes (i) that "Peru could . . . take temporary, physical control of KML [Kaloti]'s [alleged] [G]old to investigate its origin, for a reasonable—and limited—period of time, based on realistic suspicions,"[481] and (ii) that each of the

[479] *See* Counter-Memorial, §§ II.B, II.C.

[480] Second [redacted] Report, p. 7.

[481] Reply, ¶ 148.

subsequent Precautionary Seizures, individually, "did not rise to the level of a breach of the TPA."[482]

199. Despite these key admissions, in the Reply Claimant inexplicably continued to argue that the Criminal Courts' actions violated the Treaty. Such claim is based on the following three arguments. *First*, that Peruvian law allegedly did not allow the Criminal Courts (i) to issue Precautionary Seizures over assets (i.e., the Gold) that according to Claimant were not owned by the investigated parties, but rather by Kaloti, or (ii) to maintain these seizures throughout the pendency of the Criminal Proceedings.[483] *Second*, Claimant alleges that the Criminal Courts improperly rejected Kaloti's requests to intervene in the Criminal Proceedings to establish its alleged rights as bona fide purchaser of the Gold.[484] *Third*, Claimant argues that the Criminal Courts have prolonged the Criminal Proceedings for an unreasonably lengthy period of time.[485] None of these arguments have merit.

200. As a threshold matter, all of Claimant's arguments regarding the Criminal Courts are based on the erroneous premise that Kaloti in fact qualifies as bona fide purchaser of the Gold. However, as demonstrated in **Section II.A** above, Claimant has not established that it ever acquired ownership and legal title over the Gold, or that it complied with the due diligence obligations applicable to gold purchasers under Peruvian law. Therefore, there is no basis on the record of this arbitration to accept Claimant's assertion that it qualifies as a bona fide purchaser of the Gold. The above suffices, without more, to reject Claimant's arguments regarding the Criminal Courts.

201. Without prejudice to the foregoing fatal flaw in Claimant's arguments regarding the Criminal Proceedings, the following subsections show that Claimant's arguments are meritless for other reasons as well, and thus should be rejected.

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[482] Reply, ¶ 125.

[483] *See, e.g.*, Reply, ¶¶ 290–299.

[484] *See, e.g.*, Reply, ¶¶ 61–65.

[485] *See, e.g.*, Reply, ¶¶ 68, 83–84.

1. The Criminal Courts acted in accordance with Peruvian law when ordering and maintaining the Precautionary Seizures of the Gold

202. In the Reply, Claimant mistakenly argues that the Precautionary Seizures were based "solely" on Article 2(3) of Law No. 27379 on the Procedure for the Adoption of Exceptional Measures for the Limitation of Rights in Preliminary Investigations ("**Preliminary Investigations Law**"), and that "**[n]o other article or norm whatsoever was ever applied or invoked by Peru** specifically in connection with [SUNAT's] initial immobilizations, or the prolongation of subsequent seizures [by the Criminal Courts of Kaloti's alleged Gold]" (emphasis added).[486] Claimant also wrongly argues that Article 2(3) of the Preliminary Investigations Law prohibits (i) "the seizure of assets owned by third parties," and (ii) the extension of any precautionary seizure beyond a maximum period of 30 days.[487] On the basis of these false premises, Claimant alleges that the Precautionary Seizures are contrary to Peruvian law. As explained in the following paragraphs, however, Claimant's arguments are wrong for at least three reasons.

203. *First*, neither the SUNAT Immobilizations nor the Criminal Courts' Precautionary Seizures were based *solely* on Article 2(3) of the Preliminary Investigations Law, as Claimant erroneously contends. Rather, SUNAT and the Criminal Courts invoked multiple other provisions of the Preliminary Investigations Law,[488] the Code of Criminal Procedure,[489] the Money Laundering Decree,[490] and the General Customs

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[486] Reply, ¶ 291.

[487] Reply, ¶ 290.

[488] **Ex. R-0106**, Law No. 27379, 20 December 2000 [*Re-submitted version of CL-0004, with Respondent's translation*].

[489] **Ex. R-0223**, Law No. 9024, Criminal Procedure Code, 23 November 1939 [*Re-submitted version of CL-0006, with Respondent's translation*].

[490] **Ex. R-0218**, Legislative Decree No. 1106, 18 April 2012 ("**Money Laundering Decree**") [*Re-submitted version of CL-0008, with Respondent's translation*].

Law[491] as the legal basis for the SUNAT Immobilizations[492] and the Precautionary Seizures.[493] In doing so, SUNAT and the Criminal Courts were acting in accordance with Peruvian law. As Claimant's own expert has admitted, the Preliminary Investigations Law seeks to "complement"—and thus must be applied together with—other "criminal procedure regulation[s],"[494] including the Code of Criminal Procedure. These additional criminal procedure regulations include Article 94 of the Code of Criminal Procedure, which allows the Criminal Courts to maintain the Precautionary Seizures until the conclusion of the Criminal Proceedings—even if Kaloti were to establish in the interim that it was the owner the Gold.[495]

204. Claimant wrongly argues in the Reply that "[u]ntil 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" (emphasis added),[496] and that therefore Peru cannot justify the Precautionary Seizures on the basis of that article.[497] Claimant

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[491] **Ex. R-0052**, Legislative Decree No. 1053, 208, 26 June 2008 ("**General Customs Law**").

[492] **Ex. R-0091**, SUNAT Immobilization Order No. 316-0300-2013-001497, 29 November 2013 (included in [redacted] Criminal Proceedings) [*Re-submitted version of C-0040, with Respondent's translation*], p.1; **Ex. R-0092**, SUNAT Immobilization Order No. 316-0300-2013-001479, 29 November 2013 (included in [redacted] Criminal Proceedings) [*Re-submitted version of C-0040, with Respondent's translation*], p.1; **Ex. R-0093**, SUNAT Immobilization Order No. 316-0300-2014-000110, 10 January 2014 (included in [redacted] Criminal Proceedings) [*Re-submitted legible version of C-0040*], p.1; **Ex. R-0094**, SUNAT Immobilization Order No. 316-0300-2014-000111, 10 January 2014 (included in [redacted] Criminal Proceedings) [*Re-submitted legible version of C-0040*], pp. 1-2; **Ex. C-0040**, [SUNAT Immobilization orders], pp. 2–12 (including Immobilization Order no. 316-0300-2014-000002 concerning [redacted] Shipment); **Ex. R-0097**, SUNAT Immobilization Order No. 316-0300-2014-000021, 9 January 2014 (included in [redacted] Criminal Proceedings) [*Re-submitted legible version of C-0040*], p.1; **Ex. R-0098**, SUNAT Immobilization No. 316-0300-2014-000022, 9 January 2014 (included in [redacted] Criminal Proceedings) [*Re-submitted legible version of C-0040*], p.1.

[493] Second Missiego Report, ¶¶ 48–49; *see also* **Ex. R-0145**, Resolution No. 1: Order Initiating Criminal Proceedings, [redacted] Case, 14 May 2015, pp. 25–26; **Ex. R-0150**, Resolution No. 1: Order Initiating Criminal Proceedings, [redacted] Case, 10 March 2015, p. 11; **Ex. R-0139**, Resolution No. 1: Order Initiating Criminal Proceedings, [redacted] Case, 16 March 2015, pp. 18–19, 22; **Ex. R-0224**, Resolution No. 1: Order Initiating Criminal Proceedings, [redacted] Case, 9 September 2014 [*Re-submitted version of C-0087, with Respondent's translation*], pp. 10–11.

[494] First Expert Report of [redacted] 10 February 2022 ("**First** [redacted] **Report**"), ¶ 1.4.

[495] Counter-Memorial, ¶ 195. *See also* First Missiego Report, ¶¶ 99–102.

[496] Reply, ¶ 21.

[497] Reply, ¶ 293.

is wrong as matter of both fact and law. Contrary to Claimant's argument, the Criminal Courts *did* expressly invoke Article 94 of the Code of Criminal Procedure.[498] For example, the Criminal Court in the [redacted] Criminal Proceeding invoked that provision as the basis for maintaining the Precautionary Seizure over Shipment 2, as follows:

> The seizure of the gold requested by the Prosecutor's Office is intended to make such measure remain in force in the context of the judicial and pre-trial investigations, thus article 94 b) of the Code of Criminal Procedure must be applied. . . [499] (Emphasis added)

205. In any event, Claimant is also wrong on the law. As Prof. Missiego explains in his Second Expert Report, the actions of Peruvian criminal courts during any criminal proceedings are necessarily based on the applicable criminal procedural laws (e.g., the Code of Criminal Procedure),[500] such that the Criminal Courts did not have the obligation to expressly list each and every procedural rule underlying their decisions.[501] That is, even if the Criminal Courts had *not* expressly invoked Article 94 of the Code of Criminal Procedure (quod non), such article would still have applied to, and justified, the maintenance of the Precautionary Seizures.

206. *Second,* contrary to Claimant's argument, Article 2(3) of the Preliminary Investigations Law does not restrict the scope of the precautionary seizures solely to assets owned by investigated parties (here, the Suppliers). Rather, that provision provides for the issuance of precautionary seizures with respect to assets that are suspected to be the (i) object, (ii) instrument, or (iii) proceeds of crime—regardless of whether these assets

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[498] **Ex. R-0145**, Resolution No. 1: Order Initiating Criminal Proceedings, [redacted] Case, 14 May 2015, p. 25; *see also* **Ex. R-0139**, Resolution No. 1: Order Initiating Criminal Proceedings, [redacted] Case, 16 March 2015, p. 22; **Ex. R-0224**, Resolution No. 1: Order Initiating Criminal Proceedings, [redacted] Case, 9 September 2014 [*Re-submitted version of C-0087, with Respondent's translation*], pp. 10–11; **Ex. R-0150**, Resolution No. 1: Order Initiating Criminal Proceedings, [redacted] Case, 10 March 2015, pp. 15–16.

[499] **Ex. R-0145**, Resolution No. 1: Order Initiating Criminal Proceedings, [redacted] Case, 14 May 2015, p. 25.

[500] Second Missiego Report, ¶ 50.

[501] Second Missiego Report, ¶50.

are owned by the parties that are themselves subject to the relevant preliminary investigations or by third parties.[502]

207. Further, Article 4 of the Preliminary Investigations Law establishes that "bona fide third parties" may take appropriate action in relation to the measures within the scope of that law, including in relation to the precautionary seizures set out in Article 2 thereof.[503] As Claimant's own legal expert admits, if the Preliminary Investigations Law "enables third parties in good faith to exercise their rights, it is because it recognizes that those may be affected by the imposition of measures limiting rights."[504] In fact, Claimant's legal expert Mr. [redacted] has expressly and unequivocally recognized that Peruvian law allowed the immobilization and seizure of the Gold, even in a scenario in which the Gold belonged *to Kaloti* rather than to the Suppliers:

> *Could immobilizations or seizures of gold be ordered if they were not the property of those investigated by the Public Prosecutor's Office?*
>
> **Short answer**: Yes, but always subject to certain legal limitations; and also respecting the rights and legitimate interests of third parties.[505]

208. Similarly, Article 94 of the Code of Criminal Procedure establishes that Peru's criminal courts may grant precautionary seizures over assets that are suspected to be the object, instrument or proceeds of crime, irrespective of whether or not the alleged legal owner of these assets is a defendant in the relevant criminal proceedings:[506]

> The seizure of the proceeds, objects, instruments or any product derived from the crime will be carried out **even if they are in possession of natural or legal third parties**, and without

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[502] *See* **Ex. R-0106**, Law No. 27379, 20 December 2000 [*Re-submitted version of CL-0004, with Respondent's translation*], Art. 2.

[503] *See* **Ex. R-0106**, Law No. 27379, 20 December 2000 [*Re-submitted version of CL-0004, with Respondent's translation*], Art. 4.

[504] First [redacted] Report, p. 28, ¶ 6.1.

[505] First [redacted] Report, p. 28, ¶ 6.

[506] *See* Counter-Memorial, ¶¶ 195, 524; Second Missiego Report, ¶¶ 99–100.

> prejudice of the right of such third parties to assert their rights, in accordance with the law.[507] (Emphasis added)

209. Claimant argues that, by referring to assets that are "**in possession** of natural or legal third parties" (emphasis added), Article 94 of the Code of Criminal Procedure implicitly prohibits the precautionary seizure of assets that *belong* to third parties.[508] But that is simply false. Like Claimant's own expert (see above), the Peruvian Supreme Court has expressly recognized precisely the contrary of what Claimant contends, insofar as such court has held that "the judge may in all cases . . . order a measure for the seizure of the assets originating from the commission of the crime, **even if they belong to third parties**" (emphasis added).[509]

210. The foregoing confirms that, even if at the relevant time(s) Kaloti had been the owner of the Gold (quod non), under Peruvian law the Criminal Courts would *still* have been entitled to order the Precautionary Seizures.

211. *Third,* contrary to Claimant's argument, the Precautionary Seizures can remain in force throughout the pendency of the Criminal Proceedings.[510] In the Memorial, Claimant had relied on the Preliminary Investigations Law to incorrectly argue that the Precautionary Seizures were subject to a time limit of 90 days, extendable for another 90 days.[511] In the Counter-Memorial, Peru had demonstrated that the 180-day limitation period mentioned by Claimant was applicable only during the preliminary investigation phase (i.e., the phase that precedes the initiation of criminal proceedings).[512] Once the preliminary investigations phase has ended and judicial criminal proceedings have commenced, precautionary measures (including seizures)

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[507] **Ex. R-0223**, Law No. 9024, Criminal Procedure Code, 23 November 1939 [*Re-submitted version of CL-0006, with Respondent's translation*], Art. 94.

[508] Reply, ¶¶ 297, 299.

[509] **Ex. JM-0027**, *Sentencia de Casación, Casación No. 1247-2017, Primera Sala Penal Transitoria de la Corte Suprema, 31 de julio de 2018*, p. 34.

[510] First Expert Report of Joaquín Missiego, 4 August 2022 ("**First Missiego Report**"), ¶¶ 99–100; Second Missiego Report, ¶¶ 17, 42–47, 53.

[511] Memorial, ¶ 119.

[512] First Missiego Report, ¶ 94.

can remain in place until the end of the criminal proceedings, as necessary.[513] Thus, the Criminal Court's decision to maintain the Precautionary Seizures following the initiation of the Criminal Proceedings was fully in accordance with Peruvian law.

212. In the Reply, Claimant no longer refers to the 180-day limitation period that it had invoked in the Memorial. Instead, it now claims that, pursuant to Article 2(3) of the Preliminary Investigations Law, the Precautionary Seizures could not be extended beyond a maximum period of only 15 days, extendable for another 15 days.[514] However, Claimant is entirely mistaken for the simple reason that the version of Article 2(3) of the Preliminary Investigations Law that Claimant has quoted in the Reply (and on which it relies to make its new argument regarding the 30-day time limit) was actually *derogated on 12 April 2007*, and accordingly did not apply to the Precautionary Seizures at all. Indeed, the Precautionary Seizures were adopted in 2014—some seven years *after* the derogation of the provision now invoked by Claimant.[515] The version of Article 2(3) that has been in force since 2007 (i.e., the version that *did* apply at the time that the Precautionary Seizures were adopted) *does not* set out any time limit at all for precautionary seizures.[516]

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[513] Counter-Memorial, ¶ 540; First Missiego Report, ¶ 94.

[514] Reply, ¶ 290.

[515] **Ex. R-0300**, Legislative Decree No. 988, 21 July 2007.

[516] In 2007, Legislative Decree No. 988 expressly modified Article 2.3 of the Preliminary Investigations Law in the following terms: "The Provincial Prosecutor, in cases of strict necessity and urgency, may request from the Criminal Judge the following measures limiting rights . . . 3. Sequestration and/or seizure of the objects of the criminal offense or the instruments with which it was executed as well as the proceeds, whether they be goods, money, profits or any proceeds derived from said offense, even if they are in the possession of natural or legal persons.

In the case of objects and proceeds of the criminal offense or the instruments or means with which the offense has been committed, the provisions of other special rules will also be followed.

When there is peril in delay, the measures provided for in this sections may be ordered by the Prosecutor as long as there are sufficient elements of conviction, in which case, immediately after being executed, they must be brought to the attention of the judge, stating the grounds that motivated them, who may confirm them or annul them.

The minutes of each intervention of the Prosecutor, shall be immediately brought to the attention of the Criminal Judge." **Ex. R-0106**, Law No. 27379, 20 December 2000 [*Re-submitted version of CL-0004, with Respondent's translation*], Art. 2.3.

213. Further, and in any event, as Peru already explained in the Counter-Memorial, the time limits and provisions of the Preliminary Investigations Law only apply during the pendency of *preliminary investigations* (i.e., before the initiation of judicial criminal proceedings). That is clear from Article 1 of the Preliminary Investigations Law, which expressly states that the scope of such law "is limited to measures that limit rights in **the course of preliminary investigations**" (emphasis added).[517] Claimant's own expert has admitted that the Preliminary Investigations Law "was a legislative response aimed at filling the legislative gap that existed at that time **in relation to precautionary protection before the start of criminal proceedings**" (emphasis added).[518]

214. Article 6 of the Preliminary Investigations Law expressly states that, if after the conclusion of the preliminary investigations phase, the criminal court decides to launch a judicial criminal proceeding, in its decision to do so (viz. *Auto de Apertura de Instrucción*), it must determine whether or not to maintain any previously granted precautionary measures.[519] Thus, once the Preliminary Investigations concluded and the Criminal Proceedings were initiated, the Criminal Courts were entitled to maintain the Precautionary Seizures throughout the pendency of the Criminal Proceedings.

215. Claimant's legal expert alleged that "in the event that its subsistence (maintenance of the measure) is ordered, the Judge should specify the term of duration of the precautionary measure."[520] However, neither Claimant nor its legal expert cited any legal provision that establishes that the court must indicate any particular duration for precautionary seizures granted or maintained in the context of criminal proceedings. Claimant's thesis would frustrate the objectives of asset seizures of this

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[517] **Ex. R-0106**, Law No. 27379, 20 December 2000 [*Re-submitted version of CL-0004, with Respondent's translation*], Art. 1.

[518] First [redacted] Report, ¶ 1.4.

[519] **Ex. R-0106**, Law No. 27379, 20 December 2000 [*Re-submitted version of CL-0004, with Respondent's translation*], Art. 6.

[520] Second [redacted] Report, ¶ 6.4.

nature, which seek inter alia: (i) to avoid the dissipation of assets that, *at the end of the relevant criminal proceedings,* are found to have been the object, instrument or proceeds of a crime; and (ii) to ensure that any confiscation order issued *at the conclusion of the criminal proceedings* can be enforced.[521]

216. The fact that the Precautionary Seizures may remain in force during the pendency of the Criminal Proceedings is also consistent with other Peruvian laws. For example, among other provisions, the Criminal Courts have expressly referred to Article 9 of the Money Laundering Decree as the basis for maintaining the Precautionary Seizures.[522] That article provides that, "[i]n all cases, the Judge shall resolve the seizure or the confiscation of the money, property, effects or profits involved, in accordance with the provisions of Article 102 of the Criminal Code."[523] For its part, Article 102 of the Criminal Code expressly provides that "[t]he judge . . . shall order the confiscation of the instruments with which the crime was committed, even if they belong to third parties."[524] Similarly, Article 13 of Law No. 28008 (concerning custom offenses) expressly provides that seizures over assets that are the object or instrument of a custom offense shall remain in force until the corresponding criminal proceeding is discontinued or a final decision is issued.[525]

217. Claimant also argues in the Reply that "Peru never told KML (before this arbitration) that the gold seized by Peru was never going to be returned to KML."[526] This is a strawman argument. Peru has never stated to anyone—whether before or during the

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[521] First Missiego Report, ¶¶ 80, 90, 154.

[522] *See, e.g.,* **Ex. R-0224**, Resolution No. 1: Order Initiating Criminal Proceedings, [redacted] Case, 9 September 2014 [*Re-submitted version of C-0087, with Respondent's translation*], p. 11.

[523] **Ex. R-0218**, Money Laundering Decree [*Re-submitted version of CL-0008, with Respondent's translation*], Art. 9.

[524] **Ex. R-0199**, Legislative Decree No. 635, Criminal Code, 3 April 1991 [*Re-submitted version of C-0009, with Respondent's translation*], Art. 102.

[525] **Ex. R-0311**, Law No. 28008, Custom Offenses Law, 18 June 2003, Art. 13 ("The Prosecutor will order the seizure and confiscation of the goods, means of transportation, assets and effects constituting the object of the crime, as well as the tools used in its execution, which shall be under the custody of the Customs Administration while a decision ordering their confiscation or return to their owners **is issued in a dismissal order, or final conviction or acquittal judgment**." (Emphasis added)).

[526] Reply, ¶ 109.

present arbitration—that the Gold will never be returned. To the contrary, the Precautionary Seizures were, and continue to be, temporary.[527] As Peru explained in the Counter-Memorial, if at the end of the Criminal Proceedings the Criminal Courts end up deciding that the defendants are not guilty and that the seized Gold was not the object, instrument or proceeds of criminal activity, the Precautionary Seizures would be lifted, and the Gold would be returned to its legitimate owners.[528] Conversely, if the Criminal Courts were to find against the Suppliers and determine that the Gold was indeed obtained through unlawful means or used for criminal purposes, the Criminal Courts would order that those assets be permanently confiscated[529]—even if the Gold is owned by a third party— pursuant to above cited provisions.

218. In conclusion, Claimant's argument that the Precautionary Seizures are contrary to Peruvian law lacks any legal basis. The Precautionary Seizures were initially granted, and were subsequently maintained, in full accordance with Peruvian law.

2. Kaloti failed to resort to any of the remedies that were available to it under Peruvian law to challenge the Precautionary Seizures

219. In the Memorial, Claimant misleadingly alleged that, when it "attempted to intervene and assert its [alleged] property rights [over the Gold] in the . . . [C]riminal [P]roceedings, a Peruvian court denied Claimant's application on the ground that it was not a party to the proceedings."[530] On that spurious basis, Claimant accused Peru of having kept Kaloti "locked in a legal black box"[531] and of unlawfully preventing it from "secur[ing] the release of its [alleged] [G]old."[532] Claimant based its allegation that it attempted to intervene in the Criminal Proceedings on a handful of written

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[527] *See* Second Missiego Report, ¶¶ 16, 66.

[528] *See* Counter-Memorial, ¶¶ 240–242; *see also* First Missiego Report, ¶ 92.

[529] **Ex. R-0199**, Legislative Decree No. 635, Criminal Code, 3 April 1991 [*Re-submitted version of C-0009, with Respondent's translation*], Art. 102.

[530] Memorial, ¶ 4.

[531] Memorial, ¶ 4.

[532] Memorial, ¶ 114.

submissions that did not amount to a formal intervention in the referenced proceedings. Such submissions were the following: (i) four requests filed by Kaloti before the Prosecutor's Office in connection with Shipments 2 and 3,[533] and (ii) three requests filed by Kaloti before the Criminal Court in the [redacted] Criminal Proceeding in connection with Shipment 3 (jointly, "**Requests**").[534]

220. In the Counter-Memorial, Peru demonstrated that none of the Requests complied with the legal requirements applicable under Peruvian law, as a result of which the Prosecutor's Office and the Criminal Courts were entirely justified in not granting the Requests.[535] Among other things, Peru demonstrated that (i) Kaloti had failed to make use of the remedies at its disposal under Peruvian law to intervene in the Criminal Proceedings and to challenge the Precautionary Seizures, and (ii) Kaloti had instead submitted the Requests, which were not only fundamentally flawed as a procedural matter, but also unmeritorious as a substantive matter.

221. Peru explained that Peruvian law provides at least three different remedies to third parties that have been affected by the issuance of precautionary seizures. *First*, as the Peruvian Supreme Court expressly held in 2010, "[a] third party who claims to be the owner of a seized asset and who has not participated in the offense [i.e., criminal conduct] . . . may request the reexamination of the precautionary seizure, so that it may be lifted and the asset released . . . ."[536] This *re-evaluation request* allows third parties to provide new information and evidence to the court regarding facts that may serve to prove that the circumstances under which the precautionary seizure was

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[533] **Ex. C-0086**, [redacted] KML appeal as the legitimate owner of the gold in the money laundering investigation against [redacted] 16 April 2014; **Ex. C-0089**, [redacted] Petition submitted by KML before the Ninth Provincial Prosecutor's Office of Callao, 29 April 2014; **Ex. C-0092**, [redacted] Petition submitted by KML before the Eleventh Provincial Prosecutor's Office of Callao, 05 August 2014; **Ex. C-0093**, [redacted] Petition submitted by KML before the Ninth Provincial Prosecutor's Office of Callao, 05 August 2014.

[534] **Ex. C-0013**, Petition before the *Sexto Juzgado Penal del Callao*; **Ex. R-0228**, Kaloti's Request to Lift Precautionary Seizure, 3 May 2016 [*Re-submitted version of C-0014, with Respondent's translation*]; **Ex. R-0229**, Kaloti's Request to Lift Precautionary Seizure, 25 May 2016 [*Re-submitted version of C-0015, with Respondent's translation*].

[535] Counter-Memorial, § II.C.4.

[536] **Ex. R-0152**, Plenary Agreement No. 5-2010/CJ-116, 16 November 2010, p. 6.

originally granted have changed.[537] To pursue this remedy, the third party impacted by the precautionary seizure (i.e., the petitioner) must file a written submission before the court that ordered the precautionary seizure, providing evidence that attests to its property rights over the seized assets and identifying any new circumstances that would justify lifting the relevant precautionary seizure. If the court determines that such petition is meritorious, and that the petitioner has not had any involvement in the alleged criminal conduct, it holds a hearing and subsequently issues a decision, which can then in turn be appealed.[538]

222. *Second*, a third party who claims to be affected by the issuance of a precautionary seizure may file a judicial *appeal*.[539] Unlike the re-evaluation request discussed above—which is predicated on the occurrence of new *facts*—, the appeal is a legal remedy that (i) can be invoked to challenge the *legal* basis on which the precautionary seizure was granted, and (ii) asks the Court of Appeals to either annul or revoke the seizure.[540]

223. *Third*, a third party that alleges a violation of its property rights can have recourse to the constitutional courts, by filing before such courts "an amparo request, which is intended to protect constitutional rights (including property rights)."[541] In such an *amparo* request, the petitioner asks for a judicial decision ordering the State organ that

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[537] **Ex. R-0152**, Plenary Agreement No. 5-2010/CJ-116, 16 November 2010, p. 6 ("The concept of reexamination is associated with the incorporation of an investigatory inquiry or some other element or evidence after the act itself, which modifies the original circumstances that initially generated the seizure.").

[538] *See* First Missiego Report, ¶ 130; *see also* **Ex. R-0153**, Legislative Decree No. 957, New Criminal Procedure Code, 22 July 2004 [*Re-submitted version of CL-0005, with Respondent's translation*], Art. 319.

[539] **Ex. R-0152**, Plenary Agreement No. 5-2010/CJ-116, 16 November 2010, p. 6.

[540] **Ex. R-0152**, Plenary Agreement No. 5-2010/CJ-116, 16 November 2010, p. 6 ("Of course, if the seizure lacks from the outset the material requirements that determine it, it will be appropriate to file an appeal").

[541] First Missiego Report, ¶ 127 ("[T]hrough an amparo request, which aims to protect constitutional rights, including the right to property").

issued the challenged measure to cease or refrain from taking any action that violates or may violate the petitioner's constitutional rights.[542]

224. In the Reply, Claimant readily admitted (i) that the above remedies were and always have been available to Kaloti, but (ii) that Kaloti failed to make use of any of these remedies in respect of the Precautionary Seizures.[543] Specifically, Claimant argued that, while the above-described remedies "were ways or channels that KML could have—in its own discretion—utilized, . . . they did not constitute affirmative burdens or obligations upon KML."[544] In other words, Claimant argues that it was entitled, but not obligated, to avail itself of domestic remedies. Claimant's argument misses the point entirely. Peru has never argued that Kaloti was under a legal obligation to resort to any of the above remedies, if Kaloti did not wish to challenge the Precautionary Seizures. Conversely, though, if Kaloti *did* intend to challenge those measures, it was obligated to do so in accordance with Peruvian law and procedure, including the above-described procedural avenues.[545]

225. Given that—as Claimant has admitted—Kaloti in fact did *not* make use of any of the procedural avenues available under Peruvian law to intervene in the Criminal Proceedings or to otherwise challenge the Precautionary Seizures, it is nothing short of perverse for Claimant now to argue that Peru or its Criminal Courts unlawfully prevented Kaloti from intervening in the Criminal Proceedings or challenging the Precautionary Seizures. Nor can Claimant credibly argue that it was kept "locked in a legal black box," because Kaloti had multiple remedies available under local law to assert whatever property rights it believed it possessed, but "in its own discretion" it decided not to pursue any of them. Under international law and general arbitration practice, (i) a claimant that complains about an alleged error in a judicial decision of a national court must have given an opportunity to the judicial system of the relevant State to correct that error, and (ii) a claimant also is required to mitigate its damages,

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[542] **Ex. JM-0029**, *Ley No. 31307, Código Procesal Constitucional, 21 de julio de 2021*, Arts. 1, 52.

[543] Reply, ¶ 64.

[544] Reply, ¶ 64.

[545] *See* Second Missiego Report, ¶¶ 69, 73.

and both obligations encompass a requirement to seek redress in the local courts, pursuant to the applicable local procedures, before resorting to international arbitration.

226. Claimant has also failed to address any of the numerous flaws identified by Peru in the Counter-Memorial in relation to each of the Requests.[546] Claimant's legal expert, Mr. [redacted] argued that "an alleged failure by KML [Kaloti] to comply with procedural formalities does not make it impossible for the court to respond to the petitions of the interested parties."[547] Claimant's legal expert added that the Requests gave "the Peruvian State . . . real and effective, timely, notice, that KML was the rightful owner of the [G]old."[548] As explained in the following paragraphs, these arguments also miss the point, and they fail as a matter of both fact and law.

227. Contrary to Mr. Caro Coria's argument, the relevant point is not whether a failure by Kaloti to comply with the applicable requirements would have rendered "it impossible" for the Criminal Courts to respond to the Requests. Rather, the point is that Claimant cannot credibly argue that the Criminal Courts violated Kaloti's due process rights by failing to grant the Requests, given that the Requests manifestly failed to meet the applicable procedural and substantive requirements.

228. As independent legal expert Prof. Missiego explains in his Second Expert Report, under Peruvian law—as in most (if not all) legal systems—the right to intervene as a third party in criminal proceedings is not an absolute one.[549] Rather, any third party that wishes to submit a claim or defense, or otherwise to intervene formally, in judicial criminal proceedings must comply with the relevant legal requirements to do so. Such requirements include following the appropriate procedures and fulfilling relevant

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[546] Reply, § II.E.

[547] Second [redacted] Report, ¶ 5.12.

[548] Second [redacted] Report, ¶ 5.12.

[549] Second Missiego Report, ¶ 73 ("The right to be heard and the right to submit requests and claims before Tribunals is not absolute, instead, it has to be exercised complying with the substantive and procedural requirements established under Peruvian law").

substantive requirements.[550] This basic principle is reflected in the Peruvian legal system in Article 94 of the Code of Criminal Procedure, which expressly establishes that third parties that claim to have been affected by the precautionary seizure of their assets must assert their alleged rights "in accordance with the law."[551] Similarly, Article 139(20) of the Peruvian Constitution establishes that the right to "criticize judicial decisions and judgments" must be exercised "within the limits of law."[552] Yet, as explained by Prof. Missiego, Kaloti filed the Requests "as if it were part of the [Criminal] [P]roceedings, making references to rules that were not applicable and submitting [R]equests that could not be granted, since that would have implied a violation of the local procedural law."[553]

229. In addition, it is disingenuous for Claimant and its legal expert Mr. [redacted] to suggest that the Requests (i) had merely failed to comply with "procedural formalities," and (ii) had otherwise proved that Kaloti "was the rightful owner of the [G]old" comprising the Five Shipments.[554] As a threshold matter, the Requests related exclusively to the Gold comprising Shipments 2 and 3—not Shipments 1, 4 and 5.[555] In fact, Claimant has not demonstrated that it attempted to intervene in the investigations and Criminal Proceedings concerning the Gold contained in Shipments 1, 4 and 5. Therefore, Claimant cannot reasonably argue, even under its own logic, that the Criminal Courts prevented Kaloti from asserting its alleged rights as a bona fide purchaser of the Gold contained in those three shipments.

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[550] Second Missiego Report, ¶¶ 72–74.

[551] **Ex. R-0223**, Law No. 9024, Criminal Procedure Code, 23 November 1939 [*Re-submitted version of CL-0006, with Respondent's translations*], Art. 94 ("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**." (Emphasis added)).

[552] **CL-0002**, Official English translation of the Political Constitution of Peru, Art. 139 (20).

[553] First Missiego Report, ¶ 145 ("[S]imply submitted briefs as if it were part of the proceeding, making references to rules that were not applicable and submitting requests that could not be granted, since that would have implied a violation of the local procedural law by the corresponding court.").

[554] Second [redacted] Report, ¶ 5.12

[555] First Missiego Report, ¶¶ 133–145.

230. Moreover, as explained below, the Requests in fact (i) did *not* prove that Kaloti "was the rightful owner of the [G]old" that was the subject of the Requests, i.e., the Gold comprising Shipments 2 and 3; and (ii) contained fundamental flaws that go far beyond minor procedural irregularities. Each of the seven Requests is discussed briefly below. To recall, six of those Requests (nos. 1, 2, 4, 5, 6 and 7) related exclusively to Shipment No. 3; one of those Requests (no. 3) related exclusively to Shipment No. 2.

231. On 16 April 2014, Kaloti filed the *first* Request, which related exclusively to Shipment 3. In such Request, it asked that the Prosecutor's Office (i) give Kaloti "access to the record" of the [redacted] Investigation [which involved the Gold in Shipment 3] so that Kaloti could "read it and submit briefs and motions"; and (ii) allow Kaloti to "be served in all matters related to the property right . . . on the gold."[556] However, Kaloti did not submit *any evidence whatsoever* with this Request. Notably, it did not submit any evidence proving that it had ever acquired ownership over the Gold contained in Shipment 3, or that Kaloti had complied with its due diligence obligations in allegedly purchasing that Gold.

232. Even assuming *arguendo* that Kaloti had established ownership of the Gold in Shipment 3 (quod non), the Prosecutor's Office could not have granted Kaloti full access to the criminal investigation files regarding [redacted] In Peru, as in most (if not all) jurisdictions, files in criminal investigations regarding third parties are confidential.[557]

233. On 29 April 2014, Kaloti submitted a *second* request in the [redacted] Investigation, again pertaining exclusively to the Gold in Shipment 3.[558] This time, Kaloti asked the Prosecutor's Office not to grant a precautionary seizure that SUNAT had allegedly requested in relation to Shipment 3. Leaving aside the fact that SUNAT in fact had *not*

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[556] **Ex. C-0086,** [redacted] KML appeal as the legitimate owner of the gold in the money laundering investigation against [redacted] 16 April 2014.

[557] First Missiego Report, ¶ 135.

[558] **Ex. C-0089,** [redacted] Petition submitted by KML before the Ninth Provincial Prosecutor's Office of Callao, 29 April 2014.

requested any such precautionary seizure with respect to Shipment 3, Kaloti based this Request on the alleged fact that it was the owner of that shipment.[559] However, Kaloti once again failed to prove that allegation, failing to submit any purchase agreement between [redacted] and Kaloti, or any evidence whatsoever that it had complied with the due diligence obligations applicable to gold purchasers in Peru.

234. In any event, as explained above and in the Counter-Memorial,[560] the Prosecutor's Office lacks the legal authority to lift precautionary seizures; only the judicial courts are empowered to do that. In addition, as explained in **Section II.C.1** above, even assuming that Kaloti had been the legitimate owner of the Gold in Shipment 3 (quod non), the Criminal Courts had the power and discretion to order and maintain the Precautionary Seizure over the Gold until the conclusion of the [redacted] Criminal Proceeding.

235. On 5 August 2014, Kaloti submitted to the Prosecutor's Office the *third* and *fourth* requests, which were practically identical to each other: one in the [redacted] Investigation[561] (pertaining to Shipment 2) and yet another in the [redacted] Investigation (pertaining to Shipment 3).[562] Each of those two Requests indicate that Kaloti attached a letter allegedly prepared by the law firm [redacted][563] However, Claimant has not even submitted the letter into the record of the present arbitration. Claimant claims that such letter provided "an analysis about the property title transfer [of Shipments 2 and 3], under the Laws of Florida."[564] Kaloti asked the

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[559] **Ex. C-0089**, [redacted] Petition submitted by KML before the Ninth Provincial Prosecutor's Office of Callao, 29 April 2014, pp. 2, 8.

[560] Counter-Memorial, ¶¶ 218, 220, 551.

[561] **Ex. C-0092**, [redacted] Petition submitted by KML before the Eleventh Provincial Prosecutor's Office of Callao, 05 August 2014.

[562] **Ex. C-0093**, [redacted] Petition submitted by KML before the Ninth Provincial Prosecutor's Office of Callao, 05 August 2014.

[563] **Ex. C-0093**, [redacted] Petition submitted by KML before the Ninth Provincial Prosecutor's Office of Callao, 05 August 2014. **Ex. C-0092**, [redacted] Petition submitted by KML before the Eleventh Provincial Prosecutor's Office of Callao, 05 August 2014.

[564] **Ex. C-0092**, [redacted] Petition submitted by KML before the Eleventh Provincial Prosecutor's Office of Callao, 05 August 2014, p. 2; **Ex. C-0093**, [redacted] Petition submitted by KML before the Ninth Provincial Prosecutor's Office of Callao, 05 August 2014, p. 2.

Prosecutor's Office "to grant the appropriate weight" to that letter.[565] But the Prosecutor's Office was not required to give any weight at all to a letter (i) that was filed by a company that was not even a party to the investigations; (ii) that addressed issues of Florida law (which would have been irrelevant for purposes of establishing ownership under Peruvian law of assets located in Peru); (iii) that did not change in any way the circumstances that had justified ordering the Precautionary Seizures over Shipments 2 and 3 to begin with; and (iv) that did not attest in any way that the Gold that was the subject of those two shipments had been lawfully procured.

236. On 29 April 2015, Kaloti submitted the *fifth* Request before the Criminal Court in the [redacted] Criminal Proceeding. Such Request once again related solely to Shipment No. 3, and requested that such shipment be returned to Kaloti.[566] The asserted basis for such petition was that Kaloti did not "have any criminal liability" in [redacted] alleged money laundering scheme.[567] But whether or not Kaloti was criminally liable was irrelevant. The Precautionary Seizure over Shipment 3 had been issued on the basis of the fact that (i) the seized Gold was likely of unlawful origin; and (ii) if such unlawful origin were ultimately confirmed, the Gold would be permanently confiscated pursuant to Article 9 of the Money Laundering Decree.[568] In addition, Kaloti's allegations were based on the threshold premise that it was the owner of Shipment 3, but as amply demonstrated in **Section II.A** above, that was not true, and Kaloti did not provide any evidence to the Criminal Court in the [redacted] Criminal Proceeding purporting to substantiate its ownership claim.

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[565] **Ex. C-0092**, [redacted] Petition submitted by KML before the Eleventh Provincial Prosecutor's Office of Callao, 05 August 2014, p. 2; **Ex. C-0093**, [redacted] Petition submitted by KML before the Ninth Provincial Prosecutor's Office of Callao, 05 August 2014, p. 2.

[566] **Ex. C-0013**, Petition before the *Sexto Juzgado Penal del Callao*, p. 4.

[567] **Ex. C-0013**, Petition before the *Sexto Juzgado Penal del Callao*, p. 4.

[568] **Ex. R-0224**, Resolution No. 1: Order Initiating Criminal Proceedings, [redacted] Case, 9 September 2014 [*Re-submitted version of C-0087, with Respondent's translation*], p. 11.

237. The *sixth* Request was yet again filed in the [redacted] Criminal Proceeding, again exclusively in relation to Shipment 3.[569] Therein Kaloti asked the Criminal Court to revoke the Precautionary Seizure over the Gold in Shipment 3, arguing that: (i) it had acquired ownership over the Gold "through a purchase agreement,"[570] (ii) Kaloti had paid [redacted] for the Gold "through [a] bank transfer,"[571] and (iii) Kaloti had acquired the Gold "after diligently verifying that all supporting documentation was in good standing."[572] However, Kaloti failed to submit any evidence at all to substantiate any of those assertions, and the evidence on the record of the present arbitration shows that all three assertions were false. Indeed, as explained in **Section II.A** above, Kaloti (i) never entered into any purchase agreement with [redacted][573] (ii) failed to verify that the documentation regarding [redacted] and the origin of the Gold in Shipment 3 was lawful (which, in fact, it was not), and (iii) has admitted in this proceeding that, contrary to what it represented to the Criminal Court, Kaloti never paid for that Gold; in Claimant's own words, "KML could not pay [redacted] (Purchase No. 3)."[574]

238. Moreover, as Peru already explained in the Counter-Memorial, Kaloti inexplicably purported to base its *sixth* Request not on the applicable Peruvian laws but rather on the Treaty and international law.[575] Further yet, although it filed the *sixth* Request in

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[569] **Ex. R-0228**, Kaloti's Request to Lift Precautionary Seizure, 3 May 2016 [*Re-submitted version of C-0014, with Respondent's translation*].

[570] **Ex. R-0228**, Kaloti's Request to Lift Precautionary Seizure, 3 May 2016 [*Re-submitted version of C-0014, with Respondent's translation*], p. 2; **Ex. R-0229**, Kaloti's Request to Lift Precautionary Seizure, 25 May 2016 [*Re-submitted version of C-0015, with Respondent's translation*], p. 2.

[571] **Ex. R-0228**, Kaloti's Request to Lift Precautionary Seizure, 3 May 2016 [*Re-submitted version of C-0014, with Respondent's translation*], p. 2; **Ex. R-0229**, Kaloti's Request to Lift Precautionary Seizure, 25 May 2016 [*Re-submitted version of C-0015, with Respondent's translation*], p. 2.

[572] **Ex. R-0228**, Kaloti's Request to Lift Precautionary Seizure, 3 May 2016 [*Re-submitted version of C-0014, with Respondent's translation*], p. 2; **Ex. R-0229**, Kaloti's Request to Lift Precautionary Seizure, 25 May 2016 [*Re-submitted version of C-0015, with Respondent's translation*], p. 2.

[573] *See supra* Section II.A.2.

[574] Reply, ¶ 35.

[575] **Ex. R-0228**, Kaloti's Request to Lift Precautionary Seizure, 3 May 2016 [*Re-submitted version of C-0014, with Respondent's translation*], pp. 2, 9–10; **Ex. R-0229**, Kaloti's Request to Lift Precautionary

the [redacted] Criminal Proceeding, Kaloti indicated in such Request that the document was being submitted "in the criminal procedure against [redacted][576] (who was not part of the [redacted] Criminal Proceeding; rather Mr. [redacted] was part of the (separate) [redacted] Criminal Proceeding, pertaining to Shipment 1).[577]

239. Kaloti filed the *seventh* Request, also in the [redacted] Criminal Proceeding, on 7 June 2016.[578] That Request was identical to the *sixth* Request, except that it did not refer to Mr. [redacted] and instead named the individuals that were in fact being investigated in the [redacted] Criminal Proceeding.[579] Otherwise, however, the *seventh* Request suffered from the same deficiencies identified above in relation to the sixth Request. That means that, in its *seventh* Request, Kaloti (i) misrepresented to the Criminal Court that it had fully paid [redacted] for Shipment 3,[580] (ii) failed to substantiate any of the premises underlying its Request (including in relation to its alleged ownership rights and due diligence concerning the Gold in Shipment 3), (iii) completely disregarded the applicable law, which was Peruvian law, and instead invoked the Treaty and international law,[581] and (iv) failed to pursue any of the appropriate domestic judicial remedies (i.e., re-evaluation request, appeal, or *amparo* request).

Seizure, 25 May 2016 [*Re-submitted version of C-0015, with Respondent's translation*], pp. 1, 9–10. ("the protections of foreign investment established in the Peru-US FTA.").

576 **Ex. R-0228**, Kaloti's Request to Lift Precautionary Seizure, 3 May 2016 [*Re-submitted version of C-0014, with Respondent's translation*], p.2.

577 **Ex. R-0139**, Resolution No. 1: Order Initiating Criminal Proceedings, [redacted] Case, 16 March 2015.

578 **Ex. R-0229**, Kaloti's Request to Lift Precautionary Seizure, 25 May 2016 [*Re-submitted version of C-0015, with Respondent's translation*].

579 **Ex. R-0229**, Kaloti's Request to Lift Precautionary Seizure, 25 May 2016 [*Re-submitted version of C-0015, with Respondent's translation*], p. 1.

580 **Ex. R-0229**, Kaloti's Request to Lift Precautionary Seizure, 25 May 2016 [*Re-submitted version of C-0015, with Respondent's translation*], ¶ 4 (b) ("KALOTI acquired it in good faith and supported by valuable consideration by payment through bank transfer.").

581 **Ex. R-0229**, Kaloti's Request to Lift Precautionary Seizure, 25 May 2016 [*Re-submitted version of C-0015, with Respondent's translation*], ¶¶ 2, 4 (d), 7–17.

240. In the Reply, Claimant also alleged that "Peru said nothing at all to KML before this arbitration about those petitions [i.e., its Requests]."[582] That is false. On multiple occasions the Criminal Courts made clear to Kaloti that the Requests had failed to comply with the applicable requirements. For example, as explained above, Kaloti filed three of the seven Requests to the Criminal Court in the [redacted] Criminal Proceeding, in response to which that Court repeatedly pointed out that Kaloti was "not a procedural party in th[e] criminal proceeding and [had] failed to prove . . . being the owner of the seized gold bars."[583]

241. Kaloti submitted the other four of its seven Requests to the Prosecutor's Office, but—as explained repeatedly—the Prosecutor's Office was simply not competent to grant that type of request. And of course Kaloti could not reasonably have expected the Criminal Courts to respond to Requests that had not even been submitted to them.

242. In any event, if Kaloti considered that the failure of the Prosecutor's Office and of the Criminal Courts to grant the Requests had breached its rights, it had multiple procedural avenues under Peruvian law to seek remedy for that alleged breach.[584] Kaloti, however, did not use any of those remedies.

243. Peru also noted in the Counter-Memorial that any bona fide purchaser in Kaloti's position would have taken legal action against the Suppliers, but Kaloti did not appear to have done so.[585] In the Reply, Claimant confirmed that it has not taken any legal action against the Suppliers.[586] By way of explanation, Claimant claimed that "the sellers [i.e., Suppliers] would likely [have] be[en] able to defend themselves against KML [Kaloti] based on the force majeure" defense.[587] But contrary to Claimant's argument, no *force majeure* defense would have been available to the Suppliers. Article

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[582] Reply, ¶ 61.

[583] **Ex. C-0100**, Resolution issued by the 6th Criminal Court of Callao, responding to KML's petitions, 23 July 2015, p. 3. *See also* **Ex. C-0016**, Decision from the *Cuarta Sala Penal Reos Libre*, 3 February 2016.

[584] *See* Second Missiego Report, ¶¶ 91–92.

[585] Counter-Memorial, ¶ 229.

[586] Reply, ¶ 46.

[587] Reply, ¶ 46.

1315 of the Peruvian Civil Code defines "*force majeure*" as "an event that is not attributable [to whoever invokes it], consisting of an extraordinary, unforeseeable and irresistible event, that prevents the performance of an obligation or determines the partial, late or defective execution of the obligation."[588] SUNAT, the Prosecutor's Office, and the Criminal Courts have all found that there are strong indicia that the Suppliers engaged in money laundering and/or illegal mining in relation to the Gold.[589] The Criminal Courts decided to issue the Precautionary Seizures based on these and other findings regarding the Suppliers' failure to prove the lawful origin of the Gold. Any commercial court would accord significant weight to these facts, and thus would in all likelihood conclude that the Suppliers cannot validly invoke the *force majeure* defense (including, inter alia, because the Precautionary Seizures would not qualify as extraordinary, unforeseeable, or irresistible events).

244. In conclusion, Claimant has failed to meet its burden of proving (i) that Kaloti adequately exercised its rights under Peruvian law to attempt to persuade the Criminal Courts that it was as a bona fide purchaser of the Gold (which it was not, as demonstrated by Peru in the present arbitration); and (ii) that the response of the Criminal Courts "has been so evidently arbitrary, unjust or idiosyncratic"[590] as to constitute an internationally wrongful act. In fact, Claimant has suggested in the present arbitration that Kaloti's decision not to avail itself of any of the judicial remedies available to it under Peruvian law was a conscious and deliberate one.[591]

245. The Requests suffered from various other flaws, including that (i) Claimant has failed to prove that it even attempted to intervene in the Criminal Proceedings concerning

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[588] **Ex. R-0222**, Legislative Decree No. 295, Civil Code, 24 July 1984, Arts. 900–01, 947 [*Re-submitted version of CL-0044, with Respondent's translation*], Art. 1315.

[589] *See* Counter-Memorial, §§ II.B.3, II.C.1–II.C.3; *see also* **Ex. R-0139**, Resolution No. 1: Order Initiating Criminal Proceedings, [redacted] Case, 16 March 2015; **Ex. R-0145**, Resolution No. 1: Order Initiating Criminal Proceedings, [redacted] Case, 14 May 2015; **Ex. R-0224**, Resolution No. 1: Order Initiating Criminal Proceedings, [redacted] Case, 9 September 2014 [*Re-submitted version of C-0087, with Respondent's translation*]; **Ex. R-0150**, Resolution No. 1: Order Initiating Criminal Proceedings, [redacted] Case, 10 March 2015.

[590] **CL-0049**, *Krederi Ltd. v. Ukraine*, ICSID Case No. ARB/14/17, Award, 2 July 2018, ¶ 442.

[591] Reply, ¶ 64.

Shipments 1, 4 and 5; (ii) the Requests that Kaloti filed in relation to Shipments 2 and 3 were fundamentally flawed; (iii) most of these Requests were not even submitted to the competent criminal court; instead, Kaloti inexplicably submitted them to the Prosecutor's Office; (iv) none of the Requests complied with the procedural and substantive requirements applicable under Peruvian law, nor did they demonstrate that Kaloti was a bona fide purchaser of the Gold; and (v) the Requests contained unrealistic petitions and were riddled with superficial, inaccurate, or outright false assertions. Given all of the foregoing defects in the Requests, Claimant cannot credibly argue that the Prosecutor's Office or the Criminal Courts acted arbitrarily, unjustly, or idiosyncratically by not granting them.

3. Claimant's allegations regarding the duration of the Criminal Proceedings are unfounded

246. In the Memorial, Claimant unfairly accused Peru of taking "an unreasonable length of time" to "conclude the [C]riminal [P]roceedings."[592] In the Counter-Memorial, Peru demonstrated that there were multiple legitimate reasons for the duration of the Criminal Proceedings and, therefore, that such duration was not "unreasonable."[593] In the Reply, Claimant ignored Peru's arguments, failing to address any of the justifications identified by Peru. Instead, in an improper attempt to reverse the burden of proof in this case, Claimant contented itself with the naked (and false) assertion that Peru had "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 [Criminal Proceedings]."[594] Claimant further alleged that, as a result of the delay in resolution of the Criminal Proceedings, Peru had placed Kaloti "in legal limbo by . . . making it indirectly subject to a pseudo-trial for close to eight years," while at the same time maintaining the Precautionary Seizures over its alleged assets.[595]

[592] Memorial, ¶ 118.

[593] Counter-Memorial, ¶¶ 231–243.

[594] Reply, ¶¶ 77, 83–84.

[595] Reply, ¶ 8.

Claimant's arguments fail for at least the following *seven* reasons.

247. *First*, given that Kaloti is *not* a party to the Criminal Proceedings, the only interest that Kaloti could have had with respect to these proceedings would be the Precautionary Seizures over the Gold.[596] However, Kaloti's interest in the Precautionary Seizures is entirely contingent on Claimant proving that it qualifies as a bona fide purchaser of the Gold. As explained in **Section II.C.2** above, Kaloti had at least three procedural avenues at its disposal to attempt to assert its alleged property rights in the Criminal Proceedings. Yet, Claimant has admitted that it voluntarily failed to make use of any of these remedies. And at least one Criminal Court has already confirmed that Kaloti has failed to establish its alleged property rights. Claimant failed to meet its burden of proving that it qualifies as bona fide purchaser of the Gold not only before the Peruvian courts, but also, as explained in **Section II.A** above, in the present arbitration. In fact, the evidence on the record (i) suggests that Kaloti never acquired ownership over the Gold, and (ii) confirms that in any event Kaloti did not conduct appropriate due diligence on either the Suppliers or the origin of the Gold, such that it does *not* qualify as a bona fide purchaser.

248. Therefore, Claimant has failed to prove that it holds any legitimate interest or right regarding any aspect of the Criminal Proceedings, including in relation to the duration of such proceedings, the Gold, and the Precautionary Seizures. Put differently, even if the Criminal Proceedings had in fact been prolonged for an unreasonable period of time (quod non), none of Claimant's rights under Peruvian law would have been violated. In this context, Claimant's argument that Kaloti has been "in legal limbo" and "subject to a pseudo-trial" is utterly unfounded.

249. *Second*, as Prof. Missiego explains in his Second Expert Report,[597] none of the Suppliers or of their representatives (i.e., the parties who do have an interest in the Criminal Proceedings and who would be most affected by any unreasonable delay in these

[596] **Ex. C-0100**, Resolution issued by the 6th Criminal Court of Callao, responding to KML's petitions, 23 July 2015, p. 3.

[597] *See* Second Missiego Report, ¶ 80.

proceedings) has complained in any way about the duration thereof, nor has any of them availed themselves of the multiple procedural avenues to which they could have resorted to expedite those proceedings. On the contrary, some of the Suppliers even requested that the pre-trial phase be extended to allow additional time to prepare their defence.[598]

250. *Third*, Claimant is improperly seeking to reverse the burden of proof. It falls on Claimant, as the party that is claiming that Peru is unreasonably delaying the Criminal Proceedings, to prove that there have been serious irregularities or deviations from Peruvian procedural law in those proceedings. Thus, Claimant's allegation that *Peru* has failed to submit evidence proving that the duration of the Criminal Proceedings is "normal" is entirely misplaced.

251. *Fourth*, Claimant, for its part, has failed to meet its burden of proving the existence of any irregularity in the Criminal Proceedings, let alone one that is serious enough to trigger State's liability under international law. Claimant's own legal expert Mr. [redacted] has publicly maintained that, to establish that a delay in a judicial proceeding is unjustified or undue, the affected party must prove that there has been an extremely abnormal administration of justice, which (i) has led to an unreasonable irregularity that (ii) is attributable to inaction or negligence by the courts:

> Therefore, **not every delay in the proceeding can be identified as a violation of the right under commentary** [i.e the right to a process without undue delays], but rather undue delays have been understood as **extreme abnormal scenarios of the administration of justice**, with **unreasonable irregularities** in the duration, exceeding what is foreseeable or tolerable, and also attributable to the **negligence or inactivity of the institutions in charge of the administration of justice**.[599] (Emphasis added)

252. Thus, and also according to Claimant's own expert, the analysis of whether there have been undue delays in a criminal proceeding "cannot be limited to merely verifying

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[598] **Ex. R-0205**, Request for an extension of the investigation period for additional proceedings, 17 July 2015, p. 2.

[599] **Ex. R-0333**, [redacted] "*Las garantías constitucionales del proceso penal*," ANUARIO DE DERECHO CONSTITUCIONAL LATINO AMERICAN (2006), p. 8.

the noncompliance with the [procedural] deadlines."[600] Rather, the evaluation must be "carried out case by case, by assessing the nature of the subject matter of the proceeding, the activity of the court and the own behavior of the claimant."[601] In addition, "the complexity of the case, the ordinary duration margins of other cases of the same kind, the allegedly injured party's interest at stake, his procedural behavior, and finally, the behavior of the authorities and consideration of the available means, must be also analized."[602] But Claimant has not analyzed any of the factors that its own expert argues should be factored in when invoking judicial delays. Nor has Mr. [redacted] himself followed his own recommendations. Had he analyzed even some of the factors that he identified in the above quotes, he would have concluded that there are multiple circumstances that justify the duration of the Criminal Proceedings, as Peru explained in the Counter-Memorial.

253. In the Reply, Claimant referred to the statute of limitations for money laundering in countries such as the United States, Germany, France, and Japan,[603] to argue that "the normal statute of limitations for money-laundering crimes is approximately five years."[604] On that basis, Claimant criticized the fact that the Criminal Proceedings have lasted more than seven years.[605] However, Claimant's invocation of such statutes of limitations is misplaced and irrelevant. There is no correlation whatsoever between the statute of limitations applicable to a particular crime (such as money laundering), on the one hand, and the expected duration of criminal proceedings concerning that

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[600] **Ex. R-0333**, [redacted] "*Las garantías constitucionales del proceso penal*," ANUARIO DE DERECHO CONSTITUCIONAL LATINO AMERICAN (2006), pp. 8–9.

[601] **Ex. R-0333**, [redacted] "*Las garantías constitucionales del proceso penal*," ANUARIO DE DERECHO CONSTITUCIONAL LATINO AMERICAN (2006), p. 9.

[602] **Ex. R-0333**, [redacted] "*Las garantías constitucionales del proceso penal*," ANUARIO DE DERECHO CONSTITUCIONAL LATINO AMERICAN (2006), p. 9.

[603] Reply, ¶ 84, fn. 50.

[604] Reply, ¶ 84, fn. 50.

[605] Reply, ¶ 84, fn. 50.

crime, on the other hand. Those are two different and unconnected concepts.[606] Further, while the statute of limitations concerning a category of crimes is the same for all offences that fall within that category, the duration of a criminal proceeding varies from case to case. As the legal experts of both Peru and Claimant have explained, such duration depends on multiple, case-specific factors, such as the complexity of the relevant criminal conduct, the number of investigated parties and the procedural conduct of such parties.[607]

254. Even if statutes of limitations were somehow relevant (quod non), Claimant has invoked only the statutes of limitations of various *foreign* countries with different legal systems, which could not possibly be relevant (even under Claimant's misguided theory) to the duration of criminal proceedings in Peru.[608] Moreover, Claimant fails to mention that the statute of limitations applicable under Peruvian law for the crime of money laundering is *15 years*—and *20 years* in the case of aggravated money laundering offenses.[609] There is therefore no irregularity or disproportion in the length

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[606] Second Missiego Report, ¶ 68. ("[I]n Peru there is no direct relation between the statute of limitations for prosecuting a crime and the duration of the criminal proceeding itself. In other words, one thing is the time limitation that the Prosecutor's Office has for prosecuting a crime, and, another very different thing is the duration of the criminal proceeding itself.").

[607] **Ex. R-0333**, [redacted] "*Las garantías constitucionales del proceso penal*," ANUARIO DE DERECHO CONSTITUCIONAL LATINO AMERICAN (2006), p. 9; Second Missiego Report, ¶ 68 ("The duration of the criminal proceeding. . . depends on several factors, such as the complexity of the case under investigation and subsequent trial, the work overload of the entities in charge of conducting the proceeding, among others.").

[608] Even assuming that the statute of limitations applicable in other jurisdictions were somehow relevant to determine the maximum duration of criminal proceedings in Peru (quod non), the jurisdictions cited by Claimant (i.e., the United States, Germany, France, and Japan) would not be adequate comparators. As Prof. Missiego explains in his Second Expert Report, other Latin American countries with legal systems similar to Peru's would better comparators. In this regard, Prof. Missiego notes that the Peruvian statute of limitations for the crime of money laundering is similar to those of other Latin American jurisdictions, such as Chile (15 years) and Argentina (12 years).Therefore, it is not true that "the normal statute of limitations for money-laundering crimes is approximately five years," as Claimant wrongly argued. *See* Second Missiego Report, ¶¶ 72–75.

[609] **Ex. R-0218**, Money Laundering Decree [*Re-submitted version of CL-0008, with Respondent's translation*], Art. 1; **Ex. R-0199**, Legislative Decree No. 635, Criminal Code, 3 April 1991 [*Re-submitted version of C-0009, with Respondent's translation*], Art. 80; Second Missiego Report, ¶¶ 71–72. Claimant has not disputed that the Criminal Proceedings were launched only a few weeks after the Suppliers' alleged crimes and thus well within the applicable statute of limitations.

of the Criminal Proceedings in relation to the applicable statute of limitations (if that is what Claimant was trying to suggest).

255. Claimant also falsely suggested in the Reply[610] that the duration of the Criminal Proceedings is inconsistent with the duration of other money laundering criminal proceedings before the same Criminal Courts in Peru. However, as Prof. Missiego explains in his Second Expert Report, many of the criminal proceedings before the Criminal Courts that are currently starting the trial phase—and that are thus still ongoing—were initiated in 2014 (i.e., the same year that the Criminal Proceedings commenced), or even earlier.[611] This data confirms that it is not extraordinary or even unusual for the Criminal Proceedings to have lasted more than seven years.[612]

256. *Fifth*, contrary Claimant's argument, Peru has proven that the duration of the Criminal Proceedings in fact is *not* unreasonable. Peru has explained that the investigation and prosecution of crimes concerning money laundering and illegal mining cannot be carried out on an accelerated or expedited basis, due to the inherent complexity of such crimes.[613] Claimant's own legal expert has publicly recognized such complexity.[614] Moreover, the Criminal Court that granted the Precautionary Seizures anticipated that the Criminal Proceedings would be both complex and lengthy, noting that "the nature and complexity" of the charges against the Suppliers necessarily would entail "delays" and lengthy investigations, including because numerous

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[610] Reply, ¶¶ 83–84.

[611] Second Missiego Report, ¶¶ 76–77 ("[F]rom a total of 154 scheduled hearings. . . 129 hearings are related to criminal proceedings that began in 2014 or before (which represents 84%)."); **Ex. JM-0042**, *Resultado de la revisión de programación de audiencias entre el 10 de enero de 2023 y el 12 de abril de 2023 en la Tercera Sala Penal de Apelaciones del Callao*.

[612] Second Missiego Report, ¶¶ 76–78.

[613] Counter-Memorial, ¶ 232.

[614] **Ex. R-0350**, Transcript of "*El Derecho Penal Económico ante la Criminalidad Organizada* | [redacted] YOUTUBE, 26 May 2020, 39:50-41:10; **Ex. R-0351**, Transcript of "*Presentación del libro "El delito de lavado de activos"* | [redacted] YOUTUBE, 30 September 2021.

"verification actions must be carried out . . . ."[615]

257. Indeed, Peru demonstrated in the Counter-Memorial that each of the Criminal Proceedings involved the performance of numerous investigative inquiries (*actos de investigación*) during the pre-trial phase, including (i) on-site inspections of the multiple mining concessions from which the Suppliers claimed to have sourced the Gold, and of the alleged addresses of the Suppliers;[616] (ii) the taking of statements from the defendants, the alleged concession holders, and other relevant witnesses;[617] (iii) preparation of expert reports;[618] (iv) multiple information requests to the Financial Intelligence Unit, SUNAT, the Public Registry Office, the Regional Governments, and other State agencies;[619] and (v) a detailed analysis of the financial resources and assets of the Suppliers.[620] All of that takes time, and accounts in significant part for the duration of the Criminal Proceedings. In addition, such proceedings involve

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[615] **Ex. R-0134**, Precautionary Seizure against Shipment 1, 21 February 2014, p. 4; **Ex. R-0135**, Precautionary Seizure against Shipment 2, 25 March 2014, p. 4; **Ex. C-0090**, [redacted] Ruling of the Superior Court of Justice of Callao – Permanent Criminal Court, 30 April 2014, p. 4; **Ex. R-0136**, Precautionary Seizure against Shipment 4, 1 May 2014, p. 5.

[616] *See, e.g.*, **Ex. R-0145**, Resolution No. 1: Order Initiating Criminal Proceedings, [redacted] Case, 14 May 2015, p. 24.

[617] *See, e.g.*, **Ex. R-0139**, Resolution No. 1: Order Initiating Criminal Proceedings, [redacted] Case, 16 March 2015, p. 20; **Ex. R-0145**, Resolution No. 1: Order Initiating Criminal Proceedings, [redacted] Case, 14 May 2015, p. 21; **Ex. R-0224**, Resolution No. 1: Order Initiating Criminal Proceedings, [redacted] Case, 9 September 2014 [*Re-submitted version of C-0087, with Respondent's translation*], p. 9; **Ex. R-0150**, Resolution No. 1: Order Initiating Criminal Proceedings, [redacted] Case, 10 March 2015, p. 13.

[618] *See, e.g.*, **Ex. R-0224**, Resolution No. 1: Order Initiating Criminal Proceedings, [redacted] Case, 9 September 2014 [*Re-submitted version of C-0087, with Respondent's translation*], p. 10. (For example, in this case an expert report on the economic situation of [redacted] was requested ("Pericia Contable")).

[619] *See, e.g.*, **Ex. R-0139**, Resolution No. 1: Order Initiating Criminal Proceedings, [redacted] Case, 16 March 2015, pp. 21–22; **Ex. R-0145**, Resolution No. 1: Order Initiating Criminal Proceedings, [redacted] Case, 14 May 2015, pp. 22–24; **Ex. R-0224**, Resolution No. 1: Order Initiating Criminal Proceedings, [redacted] Case, 9 September 2014 [*Re-submitted version of C-0087, with Respondent's translation*], p. 10; **Ex. R-0150**, Resolution No. 1: Order Initiating Criminal Proceedings, [redacted] Case, 10 March 2015, pp. 13-15.

[620] *See, e.g.*, **Ex. R-0224**, Resolution No. 1: Order Initiating Criminal Proceedings, [redacted] Case, 9 September 2014 [*Re-submitted version of C-0087, with Respondent's translation*], pp. 5–6; **Ex. R-0150**, Resolution No. 1: Order Initiating Criminal Proceedings, [redacted] Case, 10 March 2015, pp. 3–4.

numerous defendants, including not only the Suppliers but also their representatives, which has augmented the complexity and duration of the Criminal Proceedings.[621]

258. Yet another contributing factor to the length of the Criminal Proceedings was the recent Covid-19 pandemic. The pandemic forced the Executive Council of the Peruvian Judiciary to suspend the work of the Peruvian courts from March 2020 to March 2021.[622] Such suspension caused a severe backlog in the caseload of the Peruvian courts—as in those most other countries.[623] As a result of the referenced suspension, every procedural deadline in the Criminal Proceedings had to be postponed for quite some time.[624] Peru can hardly be blamed for that.

259. In sum, there are multiple circumstances that objectively justify the duration of the Criminal Proceedings so far.

260. *Sixth*, Peru explained in the Counter Memorial that despite all of the complexities of the Criminal Proceedings and the difficulties imposed by the global pandemic, the Criminal Proceedings had in fact advanced at a reasonable pace.[625] The progress in such proceedings since the Counter-Memorial was submitted in August 2022 is illustrated by the following:

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[621] *See* Counter-Memorial, § II.C.3, ¶ 199 (chart).

[622] *See* Counter-Memorial, ¶ 234; **Ex. R-0166**, Administrative Resolution No. 115-2020-CE-PJ, 16 March 2020; **Ex. R-0236**, Administrative Resolution No. 000025-2021-CE-PJ, 29 January 2021.

[623] **Ex. R-0352**, "*Court backlogs have increased by an average of one-third during the pandemic, new report finds*," ABA JOURNAL, 31 April 2021 ("The average case backlog for state and local courts across the United States increased by about one-third amid the COVID-19 pandemic"). *See also* **Ex. R-0353**, "'*Efecto Covid' en la justicia: tribunales civiles de Santiago advierten que tardarán tres años en ponerse al día*," LA TERCERA, 1 December 2020.

[624] *See, e.g.*, **Ex. R-0165**, Supreme Decree No. 008-2020-SA, 11 March 2020 (which was later renewed by Supreme Decree Nos. 020-2020-SA, 027-2020-SA, 031-2020-SA, 009-2021-SA, 025-2021-SA, 003-2022-SA, and **Ex. R-0225**, Supreme Decree No. 076-2022, 29 June 2020); **Ex. R-0166**, Administrative Resolution No. 115-2020-CE-PJ, 16 March 2020; **Ex. R-0167**, Administrative Resolution No. 000118-2020-CE-PJ, 11 April 2020; **Ex. R-0168**, Administrative Resolution No. 000061-2020-P-CE-PJ, 26 April 2020; **Ex. R-0169**, Administrative Resolution No. 000062-2020-P-CE-PJ, 10 May 2020; **Ex. R-0154**, Administrative Resolution No. 000157-2020-CE-PJ, 25 May 2020; **Ex. R-0173**, Administrative Resolution No. 000179-2020-CE-PJ, 30 June 2020; **Ex. R-0174**, Administrative Resolution No. 000120-2020-P-CE-PJ, 16 October 2020.

[625] Counter-Memorial, ¶¶ 235–239.

a. On 11 November 2022, the [redacted] Criminal Proceeding advanced from the indictment stage to the trial phase,[626] and the Criminal Court is holding several hearings to assess the evidence submitted by the Prosecutor's Office and the defendants;[627]

b. In the [redacted] Criminal Proceeding, the defendants [redacted] and [redacted] have submitted observations to their indictment,[628] and the Criminal Court of Appeals has ordered the remission of the prosecutorial file to the Prosecutor's Office to review the observations made;[629]

c. In the [redacted] Criminal Proceeding, the pre-trial phase finalized on 3 October 2022 and, shortly after that, the prosecutorial file was sent to the Prosecutor's Office for the preparation of the indictment;[630] and

d. Following the submission of the indictment in the [redacted] Criminal Proceeding,[631] the parties have submitted their observations to the indictment.[632]

261. *Seventh*, as explained in the Second Expert Report of Prof. Missiego, to the extent that Kaloti considered that the duration of the Criminal Proceedings had breached any of its due process rights, it could have pursued multiple remedies under Peruvian law,

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[626] **Ex. R-0334**, Case No. 1027-2015, Resolution No. 2, Third Criminal Court of Appeals of Callao, 11 November 2022; **Ex. R-0335**, Case No. 1027-2015, Resolution No. 3, Third Criminal Court of Appeals of Callao, 9 January 2023, p. 1.

[627] *See, e.g.,* **Ex. R-0335**, Case No. 1027-2015, Resolution No. 3, Third Criminal Court of Appeals of Callao, 9 January 2023, p. 1.

[628] **Ex. R-0336**, Decision No. 601-2015, Third Criminal Court of Appeals of Callao, 17 October 2022.

[629] **Ex. R-0336**, Decision No. 601-2015, Third Criminal Court of Appeals of Callao, 17 October 2022.

[630] **Ex. R-0354**, Case No. 00365-2015-0-0701-JR-PE-06, Criminal Court of Callao, 13 October 2022, pp. 3–4.

[631] **Ex. R-0337**, Criminal Indictment, [redacted] Case, 4 July 2022, p. 72.

[632] **Ex. R-0338**, Case No. 3306-2014, Resolution No. 2, Third Criminal Court of Appeals of Callao, 19 October 2022.

before a range of Peruvian administrative and judicial bodies.[633] However, Kaloti has failed to take advantage of *any* of the domestic avenues to address the issues that it now raises before this Tribunal.

262. The foregoing confirms (i) that the Criminal Proceedings have been conducted in accordance with Peruvian law, and (ii) that despite the inherent complexity of any money laundering proceeding and the multiplicity of parties involved in the Criminal Proceedings, the latter have continued to make progress, advancing through their different stages in accordance with Peruvian law. Thus, even if Kaloti were to hold any legitimate interest in the Criminal Proceedings (quod non), Claimant's assertions that such interest has been affected because the proceedings have been pending for an unreasonable amount of time[634] are unfounded.

D. Claimant continued to misrepresent the facts regarding Shipment 5

263. Throughout this arbitration, Claimant has falsely alleged that Peru has taken a number of measures in relation to Shipment 5 that are contrary to its obligations under the Treaty. In a hopeless attempt to support its allegations, Claimant has repeatedly and deliberately misrepresented the facts concerning Shipment 5. Such misrepresentations include the assertions (i) that SUNAT immobilized Shipment 5,[635] (ii) that such immobilization prevented Kaloti from paying [redacted] for that shipment,[636]

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[633] Second Missiego Report, ¶¶ 91–92 (As Prof. Missiego explains, "Kaloti had at its disposal administrative remedies, known as "*queja*" [claim], to complain about any alleged violation of due process rights by the Prosecutor's Office or the Judiciary. Kaloti could have submitted a *queja* against the Prosecutor in charge of the investigation before the Decentralized Office of Internal Control [*Oficina Desconcentrada de Control Interno*]. Likewise, Kaloti could have also submitted a *queja* against the Criminal Judge before the Office of Control of the Judiciary [*Organismo de Control de la Magistratura*]." Additionally, Prof. Missiego notes that Kaloti could have also filed an amparo request before the constitutional courts "not only for violations of its property rights, but also if it considered that its right to due process and effective judicial protection was being violated.").

[634] Reply, ¶ 8.

[635] *See, e.g.*, Memorial, ¶¶ 4, 136.

[636] *See* Reply, ¶ 59.

(iii) that Peruvian courts concluded that the Gold in Shipment 5 belonged to Kaloti,[637] and (iv) that the Gold nevertheless remains in Peru's possession.[638]

264. Peru demonstrated in the Counter-Memorial,[639] and further expounds below, that Claimant's arguments in respect of Shipment 5 are false, including for the following reasons: (i) SUNAT never immobilized Shipment 5; (ii) Claimant itself is solely responsible for its failure to pay [redacted] for the Gold in that shipment; (iii) Peru's courts have determined that Kaloti does *not* have any property rights over the Gold in Shipment 5, and (iv) the Gold in Shipment 5 has at all times remained in the facilities that Kaloti rented from [redacted] in Lima and, consequently, it has *never* been in Peru's possession. Given these facts, supported by unrebutted evidence on the record of this arbitration, Claimant's Treaty claims concerning Shipment 5 are manifestly unfounded.

265. The key facts and evidence concerning Shipment 5 are the following:

a. Claimant alleged that it bought the 126.775 kg of Gold contained in Shipment 4 (which, as explained below, is relevant to Shipment 5) on 7 January 2014, and the 99.84 kg in Shipment 5 on 8 January 2014;[640]

b. According to Claimant's evidence, (i) Shipment 4 reached the facilities that Kaloti rented from [redacted] in Lima, on 7 January 2014,[641] and (ii) that same day, Shipment 4 was transported from [redacted] facilities to the airport facilities operated by [redacted][642] with the intention to then export that shipment to Miami;

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[637] *See* Memorial, ¶ 49.

[638] *See* Reply, ¶ 56.

[639] *See* Counter-Memorial, § II.C.6.

[640] *See* Memorial, ¶ 39.

[641] **Ex. C-0008,** [redacted] document package, pp. 38, 46–47, 54.

[642] **Ex. C-0008,** [redacted] document package, p. 39.

c. On 9 January 2014, SUNAT immobilized Shipment 4 (which by then was physically at the airport facilities operated by [redacted] because there were strong indicia that the Gold in that shipment was of unlawful origin;[643]

d. According to Claimant, (i) Shipment 5 reached [redacted] facilities on 8 January 2014,[644] and (ii) in light of the immobilization of Shipment 4 on 9 January 2014, Kaloti and [redacted] decided that they would not attempt to export Shipment 5 to Miami. Claimant itself admitted in the First Notice of Intent that

> [d]ue to the fact that the previous day SUNAT had immobilized and prevented the export of the gold corresponding to Shipment No. 4 purchased from the same supplier, Kaloti decided to wait for the outcome of the immobilization of Shipment No. 4 before proceeding to export the mineral in Shipment No. 5.[645]

e. Given that Kaloti and [redacted] decided not to export the Gold in Shipment 5 to Miami, such shipment was never transported to the airport facilities operated by [redacted] (i.e., the facilities where the SUNAT Immobilizations of Shipments 1 to 4 took place). Instead, the Gold in Shipment 5 remained in [redacted] facilities in Lima. As Peru has noted repeatedly, and Claimant cannot rebut, Shipment 5 was never immobilized by SUNAT;

f. Claimant has admitted that (i) it never paid [redacted] for the Gold contained in Shipment 5,[646] and (ii) as a result, on 12 May 2014 [redacted] filed a lawsuit against Kaloti ("[redacted] **Civil Proceeding**") before the before the Lima Civil Court

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[643] **Ex. R-0096**, SUNAT Immobilization Order No. 316-0300-2014-000020, 9 January 2014 (included in [redacted] Criminal Proceedings) [*Re-submitted legible version of C-0040*]; **Ex. R-0097**, SUNAT Immobilization Order No. 316-0300-2014-000021, 9 January 2014 (included in [redacted] Criminal Proceedings) [*Re-submitted legible version of C-0040*]; **Ex. R-0098**, SUNAT Immobilization No. 316-0300-2014-000022, 9 January 2014 (included in [redacted] Criminal Proceedings) [*Re-submitted legible version of C-0040*]. *See* Counter-Memorial, ¶¶ 139, 144.

[644] Memorial, ¶ 39.

[645] First Notice of Intent, 6 May 2016, ¶ 50. ("*D]ebido a que el día anterior SUNAT había inmovilizado la exportación del oro correspondiente a la Compra Nro. 4 adquirido al mismo proveedor, Kaloti decidió esperar el desenlace de la inmovilización de la Compra Nro. 4 antes proceder a exportar el mineral de la Compra Nro. 5.*").

[646] *See, e.g.*, Reply, ¶ 59.

("**Civil Court**"), requesting that such court declare the termination of the contract that [redacted] and Kaloti had allegedly concluded in relation to Shipment 5;[647]

g. In the [redacted] Civil Proceeding, [redacted] requested the precautionary attachment of Shipment 5. On 18 June 2014, the Civil Court granted that request, (i) ordering the precautionary attachment of Shipment 5 (i.e., the Civil Attachment),[648] and (ii) expressly noting that this shipment remained in [redacted] facilities.[649] Pursuant to the Civil Attachment, Shipment 5 was placed under the custodianship of [redacted] which to the date of this Rejoinder continues to act as custodian of the shipment;[650]

h. Concurrent with the Civil Attachment, on 20 March 2015 the Criminal Court in the [redacted] Criminal Proceeding ordered the precautionary seizure of the Gold contained in Shipment 5 ("**Shipment 5 Precautionary Seizure**"),[651] including because there were strong indicia that the Gold was of unlawful origin and had been used by [redacted] for criminal purposes.[652] Following an appeal by [redacted] on 1 June 2015 the Criminal Court of Appeals lifted the Shipment 5 Precautionary Seizure (on jurisdictional grounds).[653] Consequently, the Shipment 5 Precautionary Seizure remained in place for less than three months;

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[647] *See* Reply, ¶ 56. *See also* **Ex. R-0215**, [redacted] Civil Lawsuit against Kaloti, 12 May 2014.

[648] **Ex. C-0141**, Civil attachment measure against Shipment 5, issued by the *Trigésimo Tercer Juzgado Civil de Lima*, 18 June 2014.

[649] **Ex. C-0141**, Civil attachment measure against Shipment 5, issued by the *Trigésimo Tercer Juzgado Civil de Lima*, 18 June 2014, pp. 2–3.

[650] *See also* **Ex. R-0347**, Resolution No. 66, Civil Court, 6 March 2023.

[651] **Ex. R-0210**, Resolution No. 1, Precautionary Seizure against Shipment 5, 20 March 2015.

[652] **Ex. R-0210**, Resolution No. 1, Precautionary Seizure against Shipment 5, 20 March 2015, p. 2.

[653] **Ex. R-0211**, Resolution No. 417-2015, Revokes Precautionary Seizure over Shipment 5, 1 June 2015, pp. 6, 9.

i. From 1 June 2015 to the date of this Rejoinder, the Civil Attachment has been the only precautionary measure that has remained in place in relation to Shipment 5;

j. In the meantime, the [redacted] Civil Proceeding continued its course, and the competent Peruvian court concluded that Kaloti did not hold any ownership right over the Gold in Shipment 5 because it had failed to pay [redacted] for that Gold;[654]

k. At present, Shipment 5 remains in the [redacted] facilities—amongst other reasons, because [redacted] alleges that it has not been paid for the costs that it has incurred as custodian of the shipment.[655]

266. The above chronology shows that the arguments that Claimant has advanced in the present arbitration regarding Shipment 5 are based on false factual assertions, and therefore lack merit. *First*, in both the Memorial and the Reply Claimant argued that "SUNAT made an 'intervention' [during SUNAT's inspection] on January 09, 2014, [concerning Shipment 5] that actually prevented the export from Peru of such Shipment No. 5."[656] Claimant does not explain what it means by "an intervention." In any event, as noted above, SUNAT never immobilized or took any action in relation to Shipment 5, because neither Claimant nor [redacted] ever tried to export that shipment outside of Peru. Not surprisingly, Claimant has failed to adduce any evidence whatsoever proving that SUNAT immobilized Shipment 5. By contrast, Claimant *did* submit evidence for the SUNAT Immobilizations of Shipments 1 to 4, including SUNAT's immobilizations orders and multiple communications regarding those immobilizations.[657]

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[654] **Ex. R-0238**, Resolution No. 46, Judgment, 23 September 2019, p. 8; **Ex. R-0212**, Resolution No. 08, Lima Court of Appeal, Third Civil Chamber, 14 June 2022, pp. 14–15.

[655] **Ex. R-0347**, Resolution No. 66, Civil Court, 6 March 2023.

[656] Reply, ¶ 55; *see also* Memorial, ¶¶ 4, 136.

[657] *See* **Ex. C-0040**, [Sunat Immobilization Orders]; **Ex. C-0057**, [redacted] Petition submitted to lift immobilization declared by immobilization order N° 316-0300-2013-001479, 2 December 2013; **Ex. R-**

267. Claimant's allegation that SUNAT immobilized Shipment 5 relies exclusively on a statement made by a former employee of [redacted] in relation to a SUNAT immobilization that occurred on 9 January 2014.[658] However, as the Criminal Court of Appeals explained when it lifted the Shipment 5 Precautionary Seizure, that former employee was "obviously referring to the immobilization of the 126.61 kg of gold [contained in Shipment 4],"[659] which was the immobilization that had taken place on 9 January 2014.[660] In other words, the statement of [redacted] representative, on which the entirety of Claimant's arguments are based, *did not* concern the 99.84 kg of Gold in Shipment 5.

268. *Second*, in the Reply Claimant recognized (i) that "[redacted] . . . and KML [Kaloti] . . . had a legal dispute in a Peruvian court [i.e., the [redacted] Civil Proceeding] regarding Shipment No. 5, where [redacted] demanded full payment" for that shipment,[661] (ii) that "a civil seizure" (i.e., the Civil Attachment) was ordered in respect of Shipment 5,[662] and (iii) that "Shipment No. 5 remains attached by [such] civil court order."[663] However, Claimant also alleged that "Peru is currently in physical possession of

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0295, Notifications, Immobilization Act, Results of the Requirement for C.G [redacted] S.A., SUNAT, 2013 [*Re-submitted version of C-0006, with Respondent's translation*], pp. 11–17; **Ex. C-0061**, [redacted] Communication sent by [redacted] to SUNAT in reference to notice No. 424- 2013-SUNAT/3X3200, 9 December 2013; **Ex. C-0007**, [redacted] document package, 13 January 2014, pp. 15–16, 17–19; **Ex. C-0009**, [redacted] document package, 21 January 2014, pp. 3–5, 7–8.

[658] Reply, ¶ 55.

[659] **Ex. R-0211**, Resolution No. 417-2015, Revokes Precautionary Seizure over Shipment 5, 1 June 2015, p. 6.

[660] *See* Counter-Memorial, 139; *see also* **Ex. R-0096**, SUNAT Immobilization Order No. 316-0300-2014-000020, 9 January 2014 (included in [redacted] Criminal Proceedings) [*Re-submitted legible version of C-0040*]; **Ex. R-0097**, SUNAT Immobilization Order No. 316-0300-2014-000021, 9 January 2014 (included in [redacted] Criminal Proceedings) [*Re-submitted legible version of C-0040*]; **Ex. R-0098**, SUNAT Immobilization No. 316-0300-2014-000022, 9 January 2014 (included in [redacted] Criminal Proceedings) [*Re-submitted legible version of C-0040*]; *see also* Memorial, ¶ 49.

[661] Reply, ¶ 56.

[662] Reply, ¶ 56.

[663] Reply, ¶ 40; *see also* **Ex. C-0141**, Civil attachment measure against Shipment 5, issued by the *Trigésimo Tercer Juzgado Civil de Lima*, 18 June 2014.

Shipment No. 5."[664] That last assertion is false: Peru is not in possession of Shipment 5. As noted above, Shipment 5 has been in [redacted] possession since 2014, as custodian appointed by the Civil Court in the [redacted] Civil Proceeding, pursuant to the Civil Attachment.[665] Claimant knows this. In fact, in its own First Notice of Intent, dated 3 May 2016, Claimant had included a table listing the measures that remained in force for each of the Five Shipments.[666] In that table, in relation to Shipment 5, Claimant listed only the Civil Attachment.[667] As recently as 24 January 2023, [redacted] filed a submission in the [redacted] Civil Proceedings (to which Kaloti is a party) requesting payment for the services that [redacted] was still providing as custodian of Shipment 5.[668]

269. *Third*, Claimant alleged in the Memorial (i) that, in October 2018, a Peruvian court had acknowledged that the Gold contained in Shipment 5 was Kaloti's property, and (ii) that Peru had nonetheless failed to return that Gold to Kaloti.[669] These are yet further deliberately misleading assertions by Claimant before this Tribunal. As Peru demonstrated in the Counter-Memorial, on 23 September 2019 (i.e., long before Claimant submitted the Memorial in this arbitration) the Civil Court in the [redacted] Civil Proceeding had ruled in favor of [redacted] In such ruling, the court had (i) declared the termination of the agreement between Kaloti and [redacted] concerning Shipment 5, and (ii) confirmed that Kaloti was *not* the owner of that shipment (because it had not paid for it).[670] Kaloti appealed that decision, but on 14 June 2022 the Civil Court of Appeals

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[664] Reply, ¶ 56.

[665] **Ex. R-0210**, Resolution No. 1, Precautionary Seizure against Shipment 5, 20 March 2015, p. 2; **Ex. R-0347**, Resolution No. 66, Civil Court, 6 March 2023.

[666] First Notice of Intent, 6 May 2016, p. 14.

[667] First Notice of Intent, 6 May 2016, p. 14.

[668] **Ex. R-0347**, Resolution No. 66, Civil Court, 6 March 2023.

[669] Memorial, ¶ 49.

[670] **Ex. R-0238**, Resolution No. 46, Judgment, 23 September 2019.

rejected the appeal, thereby confirming the Civil Court's ruling of 23 September 2019.[671]

270. In the Reply, Claimant did not dispute any of the facts described in the preceding paragraph. However, Claimant argued that "before such decision [i.e., the judgment of 14 June 2022]," and in particular before "the [alleged] expropriation date of November 30, 2018," Kaloti "was the owner of the property."[672] This is simply false. Pursuant to Article 1372 of the Peruvian Civil Code, a court judgment declaring the termination of an agreement has retroactive effects.[673] Here, those effects start from the date on which Kaloti failed to pay [redacted] for Shipment 5, which is what led to the termination of the agreement between [redacted] and Kaloti.[674] That date is 8 January 2014, which is when, according to Claimant and its own witnesses, (i) Shipment 5 reached [redacted] facilities, and (ii) Kaloti had agreed to pay for it.[675]

271. In the Reply, Claimant also argued that "the reason why KML could not pay . . . [redacted] (Purchase No. 5) the purchase price . . . is none other than . . . Peru's immobilizations and seizures of that precise gold."[676] Peru rebutted that argument in the Counter-Memorial[677] and in **Section II.A.2.b** above. While Peru rebutted Claimant's attempt to blame Peru for its failure to pay for *any* of the unpaid shipments of Gold, Claimant's attempt in relation to Shipment 5 is particularly frivolous. Given that SUNAT never immobilized Shipment 5, it simply cannot be true that Kaloti was unable to pay for Shipment 5 because of "Peru's immobilizations and seizures of that

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[671] **Ex. R-0212**, Resolution No. 08, Lima Court of Appeal, Third Civil Chamber, 14 June 2022, pp. 14–15.

[672] Reply, ¶ 33.

[673] **R-0222**, Legislative Decree No. 295, Civil Code, 24 July 1984 [*Re-submitted version of CL-0044, with Respondent's translation*], Art. 1372.

[674] *See* **Ex. R-0238**, Resolution No. 46, Judgment, 23 September 2019, pp. 1, 7; **Ex. R-0212**, Resolution No. 08, Lima Court of Appeal, Third Civil Chamber, 14 June 2022, p. 5.

[675] *See infra* Section II.A.2. *See also* Memorial, ¶¶ 25, 39; First [redacted] Witness Statement, ¶ 34; [redacted] Witness Statement, ¶ 31.

[676] Reply, ¶ 35.

[677] Counter-Memorial, § II.C.6.

precise gold."[678] Claimant cites the Shipment 5 Precautionary Seizure as alleged reason for its failure to pay for such shipment.[679] However, that seizure was ordered on 20 March 2015, which was (i) more than *fourteen months after* Kaloti was supposed to pay for Shipment 5 (i.e., on 8 January 2014), (ii) *nine months after* [redacted] had sued Kaloti for its failure to make that payment,[680] and (iii) *eight months after* the Civil Court had ordered the Civil Attachment (on the basis that Kaloti had failed to comply with its payment obligations towards [redacted][681] Additionally, the Shipment 5 Precautionary Seizure remained in place for less than three months and was lifted on 1 June 2015,[682] such that it could not have possibly prevented Kaloti from paying for Shipment 5 after that date.

272. *Fourth*, and finally, Claimant wrongly posits that, by arguing that Shipment 5 is not currently subject to any precautionary seizure ordered in the context of the [redacted] Criminal Proceeding, Peru "[is] admitting that there were no legal or regulatory problems with Shipment No. 5."[683] Peru has admitted no such thing. On the contrary, in the Counter-Memorial,[684] and in **Section II.A.3.b** above, Peru demonstrated that (i) Kaloti failed to comply with its due diligence obligations regarding Shipment 5, and (ii) the evidence strongly suggests that the Gold contained in that shipment is of unlawful origin—a fact that Kaloti could and should have known. It is precisely on the basis of these strong indicia that the Criminal Court in the [redacted] Criminal Proceeding had ordered the Shipment 5 Precautionary Seizure in the first place.[685] Contrary to Claimant's argument, the fact that the Criminal Court of Appeals later lifted that seizure (*on jurisdictional grounds*) does not mean that "there were no legal or

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[678] Reply, ¶ 35.

[679] *See* Reply, ¶ 59, fn. 31.

[680] **Ex. R-0215**, [redacted] Civil Lawsuit against Kaloti, 12 May 2014.

[681] **Ex. C-0141**, Civil attachment measure against Shipment 5, issued by the *Trigésimo Tercer Juzgado Civil de Lima*, 18 June 2014.

[682] **Ex. R-0211**, Resolution No. 417-2015, Revokes Precautionary Seizure over Shipment 5, 1 June 2015.

[683] Reply, ¶ 58.

[684] Counter-Memorial, § II.B.6.

[685] **Ex. R-0210**, Resolution No. 1, Precautionary Seizure against Shipment 5, 20 March 2015, p. 2.

regulatory problems with Shipment No. 5."[686] On the contrary, while the Criminal Court of Appeals concluded that the Shipment 5 Precautionary Seizure had not been ordered by the competent criminal court, it repeatedly acknowledged the numerous indicia of the unlawful origin of the Gold.[687] The Criminal Court of Appeals also expressly noted that the Prosecutor's Office was entitled to request a new precautionary seizure over Shipment 5 from the competent criminal court.[688]

273. In sum, Claimant's allegations regarding Shipment 5 are false. SUNAT never immobilized that shipment, and Claimant is solely responsible for its failure to pay for it. Shipment 5 has never been in Peru's possession. As a result of Kaloti's failure to comply with its payment obligations towards [redacted] since 2014 Shipment 5 has remained in [redacted] facilities, subject to a Civil Attachment, and Peru's courts have determined that Kaloti does *not* have any property rights over the Gold in that shipment. Therefore, Claimant's Treaty claims concerning Shipment 5 should be dismissed.

E. Claimant's arguments regarding Peru's alleged failure to initiate asset forfeiture proceedings are legally and factually flawed

274. In the Reply, Claimant repeatedly complained—for the first time in the present arbitration—that Peru allegedly had "never initiated an eminent domain process (*pérdida de dominio*) in connection with KML's five shipments of gold."[689] Similarly, in his second expert report, Claimant's legal expert, Mr. [redacted] argued that Peru allegedly had "not initiated any proceedings for the extinction or loss of ownership of the gold [i.e., asset forfeiture proceedings]."[690] On that basis, Claimant and Mr. Caro

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[686] Reply, ¶ 58.

[687] **Ex. R-0211**, Resolution No. 417-2015, Revokes Precautionary Seizure over Shipment 5, 1 June 2015, pp. 4–6.

[688] **Ex. R-0211**, Resolution No. 417-2015, Revokes Precautionary Seizure over Shipment 5, 1 June 2015, p. 8.

[689] Reply, ¶¶ 336, 378.

[690] Second [redacted] Report, ¶ 3.3; *see also* Second [redacted] Report, p. 7 ("Peru has not initiated an extinguishment of title proceeding over the gold").

Coria suggested that the Precautionary Seizures ordered in the Criminal Proceedings were contrary to Claimant's rights as an allegedly bona fide purchaser of the Gold.[691]

275. These arguments are based on the unfounded premise that Kaloti qualifies as a bona fide purchaser of the Gold. However, as explained in **Section II.A** above, Claimant has utterly failed to meet its burden of proving that it qualifies as a bona fide purchaser. This is true in the context of (i) the present arbitration, (ii) the Criminal Proceedings, and (iii) the [redacted] Civil Proceeding. That, in and of itself, suffices to dismiss Claimant's arguments regarding Peru's alleged failure to initiate asset forfeiture proceedings in relation to the Gold.

276. The following paragraphs show that Claimant's arguments also must be rejected because (i) they misrepresent the nature of asset forfeiture proceedings, and (ii) Peru in fact did initiate asset forfeiture proceedings in relation to at least one of the Five Shipments, such that Claimant's arguments are also wrong as a matter of fact.

277. The asset forfeiture proceeding was established by Legislative Decree No. 1373 ("**Asset Forfeiture Decree**") and the Asset Forfeiture Regulations, to facilitate the transfer to the State of assets that are found to be the object, instrument, or proceeds of unlawful activities. These unlawful activities include criminal offences, such as money laundering and illegal mining.[692]

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[691] Reply, ¶¶ 98–99, 108, 335–336.

[692] **Ex. R-0241**, Legislative Decree No. 1373, 3 February 2018 ("**Asset Forfeiture Decree**"), Preliminary Title, Art. I, Art. 3.10. *See also* Art. 7.1 of the Asset Forfeiture Decree, which contains a list of scenarios in which the asset forfeiture proceeding can take place, including "the presence of goods that are [an] object, [an] instrument, results or gains of illicit activities; the existence of licit goods that have been used to hide the origins of illicit goods; the presence of goods related with an unjustified patrimonial increase, among others."

278. The asset forfeiture proceeding is structured in two phases: (i) an investigation phase[693] and (ii) a judicial phase.[694] The *investigation phase*, which is conducted by a specialized prosecutor, seeks inter alia to (i) gather evidence to ascertain whether the assets in question are the object, instrument, or proceeds of unlawful activities, and (ii) secure precautionary measures that are necessary to safeguard the asset forfeiture proceeding's objectives, which include forfeiture of the assets in the event that they are found to be the object, instrument or proceeds of unlawful activities.[695]

279. If the specialized prosecutor determines that there is enough evidence to warrant forfeiture of the assets pursuant to Peruvian law, the investigation phase concludes and the *judicial phase* begins. This second phase includes written submissions and hearings through which the parties are given the opportunity to present their arguments and evidence to the court. The judicial phase concludes with a final decision from the court,[696] either ordering the forfeiture of the asset in question or dismissing the case. Should the court order the forfeiture of the asset, all previous legal transactions regarding such asset (including any purchase agreement) become void *ab initio*. In that regard, Article 5.1 of the Asset Forfeiture Regulations expressly establishes that "legal acts concerning assets of illicit origin or assets that are used for illicit activities **are contrary to the [Peruvian] legal and constitutional order and,**

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[693] **Ex. R-0241**, Asset Forfeiture Decree, Arts. 12–16; Second Missiego Report, ¶ 126 ("[T]he first stage of the patrimonial investigation is intended to (i) identify and determine the location of the assets that would be affected by the asset forfeiture proceeding; (ii) identify the alleged owners of these assets and third-parties that could potentially assert any right over them; (iii) collect evidence demonstrating the facts on which the forfeiture proceeding is based; and, (iv) request precautionary measures and other measures that could facilitate the accomplishment of the goals of the asset forfeiture proceeding. This stage ends when its objective has been accomplished or, in any event, within a maximum period of twelve months, which may be renewed only once.").

[694] **Ex. R-0241**, Asset Forfeiture Decree, Arts. 12, 17–25; Second Missiego Report, ¶ 127 ("The judicial stage, on the other hand, begins with the admission of the lawsuit. The respondent can respond to the lawsuit, submitting evidence and putting forward the technical arguments of defense that it considers appropriate.").

[695] **Ex. R-0241**, Asset Forfeiture Decree, Art. 14.

[696] *See* **Ex. R-0241**, Asset Forfeiture Decree, Arts. 22–23.

therefore, they are void ab initio, and under no circumstances they give raise to valid legal title [over such assets]" (emphasis added).[697]

280. In the Reply, Claimant alleged that the initiation of asset forfeiture proceedings by Peru would somehow have allowed Kaloti to secure the lifting of the Precautionary Seizures ordered in the Criminal Proceedings. Specifically, Claimant alleged that "[u]nder Peruvian law, such measures [i.e., the Precautionary Seizures] 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 [Kaloti]."[698] However, under Peruvian law, the outcome of an asset forfeiture proceeding cannot lead to the lifting of precautionary seizures ordered in separate criminal (or civil) proceedings. The Asset Forfeiture Decree expressly establishes that "[t]he asset forfeiture proceeding is independent and autonomous from any criminal, civil or other proceeding of judicial or arbitral nature."[699]

281. Thus, even if in the context of an asset forfeiture proceeding a court were to reject the transfer of the Gold to the State, such court decision would have no effect whatsoever on the Precautionary Seizures over Shipments 1 to 4, because such seizures were ordered by the Criminal Courts in the Criminal Proceedings on grounds that are distinct and independent from those underlying asset forfeiture proceedings. This means that, contrary to Claimant's argument, no asset forfeiture proceeding can lead to "the return of the [G]old to KML [Kaloti]"[700] as long as the Precautionary Seizures remain in place.

282. For the same reasons, it is simply false that the initiation of an asset forfeiture proceeding in relation to the Gold would provide Claimant "additional recourses or

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[697] **Ex. R-0250**, Asset Forfeiture Regulations, Art. 5.1; *see also* **Ex. R-0241**, Asset Forfeiture Decree, Art. 2.1.

[698] Reply, ¶ 108.

[699] **Ex. R-0241**, Asset Forfeiture Decree, Art. 2.3.

[700] Reply, ¶ 108.

appeals"[701] to challenge the existing Precautionary Seizures. As explained in **Section II.C.2** above, if Kaloti intended to challenge any of the Precautionary Seizures, it was obligated to do so through (i) the submission of a re-evaluation request before the Criminal Court that ordered the relevant Precautionary Seizure, (ii) an appeal against that Precautionary Seizure before the Criminal Court of Appeals, or (iii) an *amparo* request before the competent constitutional court, requesting that the precautionary measure be revoked or annulled on constitutional grounds.

283. Given this legal framework, Kaloti cannot request in the context of an asset forfeiture proceeding that any of the Precautionary Seizures ordered in the Criminal Proceedings be revoked, annulled, or lifted. In an asset forfeiture proceeding, the alleged owner of the assets can only oppose the specific and independent asset forfeiture or precautionary seizure requested by the specialized prosecutor *in that specific and independent proceeding*.

284. In addition, the initiation of an asset forfeiture proceeding was neither mandatory nor necessary for the Criminal Courts to (i) order the Precautionary Seizures, (ii) determine that the Suppliers and/or their representatives committed money laundering offences in connection with the Gold, or (iii) order the permanent confiscation of the Gold at the conclusion of the Criminal Proceedings.[702] The asset forfeiture proceeding simply constitutes *an additional and independent* procedural avenue that the Peruvian authorities may pursue in connection with the Gold. Unlike the Criminal Proceedings, which focus on the criminal liability of the Suppliers, asset forfeiture proceedings would focus on the origin of the Gold. In fact, confirming that it could not possibly have constituted a prerequisite for the Precautionary Seizures, the asset forfeiture proceeding became available under Peruvian law only on 2 February 2019, when the Asset Forfeiture Regulations were approved through

[701] Reply, ¶ 108.

[702] **Ex. R-0199**, Legislative Decree No. 635, Criminal Code, 3 April 1991 [*Re-submitted version of C-0009, with Respondent's translation*], Art. 102; Second Missiego Report, ¶¶ 121–124, 143.

Supreme Decree No. 007-2019. This occurred several years *after* the Precautionary Seizures were ordered.[703]

285. In any event, the factual premise of Claimant and its legal expert's arguments[704] is also wrong, because Peru did in fact launch at least one asset forfeiture proceeding in connection with the Gold. Specifically, on 18 August 2022 (i.e., *before* Claimant filed the Reply in the present arbitration) Peru initiated an asset forfeiture proceeding concerning the Gold in Shipment 1 ("**Shipment 1 Asset Forfeiture Proceeding**").[705]

286. In the context of that proceeding, which is in the investigation phase, the competent court ordered a precautionary seizure over the Gold in Shipment 1,[706] including on the basis of strong evidence suggesting that the Gold was of unlawful origin and had been used for laundering money. Indeed, judge that ordered such precautionary seizure found that "the assets affected by the precautionary seizure would have an illicit origin, as they would constitute the object of activities related with money laundering and illegal mining."[707] Pursuant to the Asset Forfeiture Decree, this precautionary seizure will remain in place until the Shipment 1 Asset Forfeiture

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[703] **Ex. R-0250**, Asset Forfeiture Regulations; Second Missiego Report, ¶ 119. Until 2018, an alternative legal recourse, known as "*pérdida de dominio*," existed under Peruvian law. However, unlike the asset forfeiture proceeding, the "*pérdida de dominio*" recourse could only be exercised once the criminal proceedings related to the relevant assets had concluded. That is, Peru could not have initiated the *pérdida de dominio* proceeding in parallel with the Criminal Proceedings. In any event, as in the case of the asset forfeiture proceeding, the initiation of a *pérdida de dominio* proceeding was neither mandatory nor necessary for the Criminal Courts to order the Precautionary Seizures. *See* Second Missiego Report, ¶¶ 119–122. *See also* **Ex. JM-0051**, *Exposición de Motivos del Decreto Legislativo No. 1373, 3 de agosto de 2018*, pp. 2–3. **Ex. R-0355**, Transcript of "*Fundamentos de la extinción de dominio* | [redacted] YOUTUBE, 5 May 2020.

[704] *See* Second [redacted] Report, ¶ 3.3; *see also* Second [redacted] Report, p. 7 ("Peru has not initiated an extinguishment of title proceeding over the gold"); Reply, ¶¶ 336, 378.

[705] **Ex. JM-0036**, *Sala de Apelaciones Transitoria Especializada en Extinción de Dominio de la Corte Superior de Justicia de Lima, Resolución No. 3, 24 de marzo de 2023*.

[706] **Ex. JM-0036**, *Sala de Apelaciones Transitoria Especializada en Extinción de Dominio de la Corte Superior de Justicia de Lima, Resolución No. 3, 24 de marzo de 2023*, p. 1.

[707] **Ex. JM-0036**, *Sala de Apelaciones Transitoria Especializada en Extinción de Dominio de la Corte Superior de Justicia de Lima, Resolución No. 3, 24 de marzo de 2023*, p. 4.

Proceeding concludes,[708] thus coexisting with the Precautionary Seizure ordered in relation to that shipment in the [redacted] Criminal Proceeding.

287. As of the date of this Rejoinder, no precautionary seizure has yet been executed in relation to the other Shipments in the context of an asset forfeiture proceeding. But contrary to the unfounded statements made by Claimant and its legal expert, this does not necessarily mean that no asset forfeiture proceeding has been initiated in relation to those other Shipments. This is so because any such proceeding becomes public only when an asset forfeiture lawsuit has been admitted or a precautionary measure has been executed.[709]

288. In conclusion, under Peruvian law the initiation of an asset forfeiture proceeding was neither mandatory nor necessary for the Criminal Courts to: (i) order the Precautionary Seizures, (ii) determine that the Suppliers and/or their representatives committed money laundering offences in connection with the Gold, or (iii) order the permanent confiscation of the Gold. Therefore, Claimant's arguments that the Precautionary Seizures ordered in the Criminal Proceedings were contrary to Claimant's rights as an allegedly bona fide purchaser of the Gold[710] because Peru allegedly failed to initiate asset forfeiture proceedings, are legally baseless and misguided. In any event, contrary to Claimant's and its legal expert's statements, Peru did initiate an asset forfeiture proceeding in relation to the Gold.

F. Peru did not cause Claimant's alleged demise

289. In the Memorial, Claimant asserted that its reputation around the world had been tarnished by Peru's alleged leak to the press of confidential information regarding some of the Challenged Measures. Claimant based such accusation on ten news articles and a book (collectively, "**Publications**"), which mentioned Kaloti in the context of gold seizures that had taken place in Peru between late 2013 and early

[708] **Ex. R-0241**, Asset Forfeiture Decree, Art. 15.10.

[709] **Ex. R-0241**, Asset Forfeiture Decree, Art. 2.7.

[710] Reply, ¶¶ 98–99, 108, 335–336.

2014.[711] Claimant argued that the Publications had caused numerous Latin-American gold suppliers, and eight financial institutions in the United States, to stop conducting business with Kaloti, allegedly leading to the demise of Kaloti's global operations in November 2018.[712] Thus, on Claimant's account, the Publications (which reported on events that took place in 2013 and early 2014) had somehow caused Kaloti's demise approximately *five years later*, in late 2018. This argument defies credibility. In 2018, Kaloti's business was transferred to [redacted] a company founded by [redacted] himself.[713] The creation of this company (in 2018) is much more likely to have caused Kaloti's alleged demise (in 2018) than the SUNAT Immobilizations (in late 2013 and early 2014) or the Publications reporting on them.

290. In the Counter-Memorial, Peru had demonstrated that Claimant's narrative of its demise was false and squarely belied by the evidence on the record.[714] In the Reply, Claimant did not rebut any of Peru's arguments, or submit any evidence substantiating its claims. Instead, it contented itself merely with parroting the same baseless allegations that it had already advanced in the Memorial.

291. Although Claimant said nothing new in its Reply in support of its debunked claim, in the following sections Peru again demonstrates that Kaloti's poor reputation was not due to the Publications, the Challenged Measures, or any conduct attributable to Peru. Rather, it was due to Kaloti's own substandard business practices, its close family and corporate links with other companies of the [redacted] and Kaloti's and the [redacted] involvement in suspect (and likely unlawful) transactions in numerous countries (**subsection F.1**). Peru also recalls that Claimant has failed to establish any of the premises underlying its claim, including that Peru leaked confidential information to the press (**subsection II.F.2**) and that Peru is responsible for the alleged refusal by gold suppliers to conduct business with Kaloti (**subsection II.F.3**) and for

[711] *See* **Ex. C-0051**, [News articles and books cited by Kaloti].

[712] Memorial, ¶¶ 59–61, 65–66, 136, 158.

[713] Reply, ¶¶ 503–04.

[714] *See* Counter-Memorial, § II.D.

the alleged severance of Kaloti's relationships with financial institutions (**subsection II.F.4**).

1. Kaloti is solely responsible for its sordid reputation

292. As Peru demonstrated in the Counter-Memorial, both before and after the adoption of the Challenged Measures, countless articles and investigations by reputable global media outlets and NGOs—such as Bloomberg,[715] the BBC,[716] the Financial Times,[717] Global Witness,[718] The Guardian,[719] and the Organized Crime and Corruption Reporting Project[720]—have detailed sordid practices by Kaloti and the [redacted] These widely reported practices have included forged audit reports,[721] smuggling gold out of Morocco,[722] purchasing conflict minerals,[723] funding global criminal

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[715] *See, e.g.*, **Ex. R-0124**, "*Dubai's Kaloti Removed From Gold List as New Factory Near*," BLOOMBERG, 13 April 2015.

[716] *See, e.g.,* **Ex. R-0112**, "*FinCEN: Why gold in your phone could be funding drug gangs*," BBC NEWS, 22 September 2020; **Ex. R-0113**, "*EY: Gold, drug money and a major auditor's 'cover-up,'*" BBC NEWS, 28 October 2019; **Ex. R-0114**, "*Ex-EY whistleblower wins $10.8m in damages*," BBC NEWS, 17 April 2020.

[717] **Ex. R-0115**, "*EY ordered to pay $10m to Dubai whistleblower*," FINANCIAL TIMES, 17 April 2020.

[718] **Ex. R-0118**, City of Gold: Why Dubai's First Conflict Gold Audit Never Saw the Light of Day, GLOBAL WITNESS, February 2014.

[719] **Ex. R-0108**, "*Billion dollar gold market in Dubai where not all was as it seemed*," THE GUARDIAN, 25 February 2014; **Ex. R-0116**, "*EY ordered to pay whistleblower $11m in Dubai gold audit case*," THE GUARDIAN, 17 April 2020.

[720] **Ex. R-0117**, "*US Drug Agents Say Diplomacy Trumped Money Laundering Concerns*," OCCRP, 23 September 2020.

[721] *See, e.g.,* **Ex. R-0115**, "*EY ordered to pay $10m to Dubai whistleblower*," FINANCIAL TIMES, 17 April 2020; **Ex. R-0118**, City of Gold: Why Dubai's First Conflict Gold Audit Never Saw the Light of Day, GLOBAL WITNESS, February 2014.

[722] *See, e.g.,* **Ex. R-0119**, *Amjad Rihan v.* [redacted] *Global Ltd., et al.*, Case No. 2020 EWHC 901 (QB), Judgment, 17 April 2020 ("***Rihan* (Judgment)**"), ¶¶ 3, 122. *See also* **Ex. R-0119**, *Rihan* (Judgment), ¶¶ 118–21; **Ex. R-0120**, "*EY whistleblower awarded $11 million after suppression of gold audit*," REUTERS, 17 April 2020; **Ex. R-0116**, "*EY ordered to pay whistleblower $11m in Dubai gold audit case*," THE GUARDIAN, 17 April 2020.

[723] **Ex. R-0118**, City of Gold: Why Dubai's First Conflict Gold Audit Never Saw the Light of Day, GLOBAL WITNESS, February 2014, pp. 9–15; *see also* **Ex. R-0067**, Beneath the Shine: A Tale of Two Gold Refiners, GLOBAL WITNESS, July 2020; **Ex. R-0119**, *Rihan* (Judgment), ¶¶ 4, 605.

organizations,[724] and money laundering on a massive scale.[725] Therefore, even assuming that Kaloti's alleged demise was caused or precipitated by its poor reputation,[726] Peru cannot be held responsible for that; rather, Kaloti alone is responsible.

293. In the Reply, Claimant unsuccessfully attempted to brush aside its reputation as an unscrupulous gold trader. It alleged that the international articles and investigations identified by Peru in its Counter-Memorial are irrelevant because they (i) predate 2013, (ii) did not lead to any criminal indictment or conviction of Kaloti or other companies of the [redacted] (iii) relate to countries other than Peru, and (iv) concern "entities different from KML" (i.e., other companies of the [redacted] but not Kaloti itself).[727] On these bases, Claimant alleged that financial institutions and "suppliers . . . were not, and needed not, be concerned"[728] about the various investigations by law enforcement agencies and negative press coverage identified by Peru. Claimant's attempt to deflect and blame Peru for Kaloti's own shoddy reputation falls flat, for at least four reasons.

294. *First*, it is false that all of the investigations and negative media coverage regarding Kaloti or the [redacted] identified by Peru predate 2013. As explained below, many arose in 2014 and thereafter. In any event, the fact that multiple investigations and publications did predate 2013 confirms that Kaloti and the [redacted] already had a poor reputation even *before* any of the Challenged Measures were adopted.

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[724] **Ex. R-0119**, *Rihan* (Judgment), ¶¶ 4, 103; **Ex. R-0160**, "*EY accountancy firm accused of facilitating money laundering by drug traffickers,*" EU-OCS, 30 October 2019.

[725] **Ex. R-0118**, City of Gold: Why Dubai's First Conflict Gold Audit Never Saw the Light of Day, GLOBAL WITNESS, February 2014; *see also* **Ex. R-0067**, Beneath the Shine: A Tale of Two Gold Refiners, GLOBAL WITNESS, July 2020, pp. 16–18.

[726] To be clear, contrary to Claimant's argument, Peru has never "admitted that reputational harm to KML [Kaloti] led to KML's [Kaloti's] ruin and cease of operations." *See* Reply, ¶ 135.

[727] Reply, ¶¶ 432–433, 437.

[728] Reply, ¶ 437.

295. *Second*, the fact that the international investigations identified by Peru "did not end in any [criminal] indictment or conviction"[729] of Kaloti or the [redacted] does not mean they did not affect Kaloti's reputation. In fact, Claimant itself alleges that the investigations conducted in Peru in relation to Kaloti and its Suppliers—which have not yet led to any conviction—had a devastating effect on Kaloti.[730] In any event, at least one court has found enough evidence to conclude that [redacted] and one of Kaloti's shareholders had been involved in money laundering; to recall, in a judgment issued in 2020, the English High Court emphatically stated that "there were reasonable grounds to suppose that Kaloti [Jewellery] could be involved in money laundering."[731] Such ruling was issued in a lawsuit brought by one of Kaloti Jewellery's auditors against such auditor's former employer, [redacted][732]

296. As Peru explained in the Counter-Memorial, the judgment of the English High Court highlights many money laundering red flags that were uncovered during a 2013 audit of [redacted][733] Such audit, which was widely reported by the press as early as February 2014,[734] had identified USD 5.2 *billion* in cash transactions and multiple serious due diligence failings by [redacted] (which was Claimant's main customer, and an affiliate of the [redacted] On the basis of that audit and other evidence, the English High Court underscored the [redacted] casual disregard for compliance with the law.[735] One of the auditor's many damning findings had been that [redacted] had been involved in the export of gold from Morocco coated in

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[729] *See* Reply, ¶ 432.

[730] *See* Reply, ¶¶ 122, 388, 399, 462; *see also* [redacted] Witness Statement, ¶ 28.

[731] **Ex. R-0119**, *Rihan* (Judgment), ¶ 142.

[732] Counter-Memorial, ¶¶ 269–271; *see also* **Ex. R-0108**, "*Billion dollar gold market in Dubai where not all was as it seemed*," THE GUARDIAN, 25 February 2014.

[733] Counter-Memorial, ¶ 271.

[734] **Ex. R-0118**, City of Gold: Why Dubai's First Conflict Gold Audit Never Saw the Light of Day, GLOBAL WITNESS, February 2014, pp. 3, 6; **Ex. R-0122**, "*Gold market breaches 'covered up,'*" BBC NEWS, 25 February 2014, p. 1 ("Dubai's biggest gold refiner committed serious breaches of the rules designed to stop gold mined in conflict zones from entering the global supply chain, a whistleblower has revealed."); **Ex. R-0108**, "*Billion dollar gold market in Dubai where not all was as it seemed*," THE GUARDIAN, 25 February 2014.

[735] **Ex. R-0119**, *Rihan* (Judgment), ¶ 333.

silver to evade export restrictions. [redacted] (who was and remains Claimant's shareholder, and director of Kaloti Jewellery[736]) had himself freely admitted that "it's normal to receive silver coated gold bars especially from Morocco due to the gold export limits imposed by the Moroccan customs."[737] With respect to that particular finding, the English High Court disapprovingly observed that Kaloti Jewellery's management (which includes various of Claimant's shareholders) "did know about the practice and did collude with it, were relaxed about it and regarded it as not unusual or concerning."[738] This is just one of several examples of information that (i) is completely unrelated to Peru and the Challenged Measures, (ii) is in the public domain, and (iii) would have led any law-abiding and prudent company to abstain from doing business or otherwise be associated with Kaloti.

297. *Third*, Claimant contended that the articles and investigations identified in the Counter-Memorial are irrelevant simply because they relate to countries other than Peru, but such argument is illogical. The fact that money laundering often has a cross-border dimension means that articles and investigations about a given gold trader in any jurisdiction could be relevant both to financial institutions and to reputable gold suppliers in other jurisdictions. Claimant's argument is also plainly contradicted by its own claim that US banks and suppliers from multiple countries (including Ecuador, Bolivia, and Chile)[739] severed their ties with Kaloti as a result of developments in Peru.[740] If articles concerning developments in Peru have the ability to affect US-based banks and Kaloti's global operations, articles and investigations concerning criminal activities in other jurisdictions would have similar effects.

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[736] **Ex. R-0315**, Letter from Claimant to Tribunal, 9 February 2023, ¶ 6; **Ex. R-0063**, [redacted] Company Profile, DUN & BRADSTREET, last accessed on 8 June 2022, p. 1.

[737] **Ex. R-0108**, *"Billion dollar gold market in Dubai where not all was as it seemed,"* THE GUARDIAN, 25 February 2014, p. 1.

[738] **Ex. R-0119**, *Rihan* (Judgment), ¶ 333.

[739] [redacted] Witness Statement, ¶¶ 19–20, 28; Second [redacted] Witness Statement, ¶ 26.

[740] Reply, ¶ 401; *see also* [redacted] Witness Statement, ¶ 28.

298. *Fourth*, Claimant's argument that the articles and investigations identified in the Counter-Memorial relate to "entities different from KML [Kaloti]"[741] is false and misleading. It is false because Kaloti was specifically referenced in several of those articles and investigations. For example, in 2013 (i.e., prior to the Challenged Measures), [redacted] submitted a Suspicious Activity Report ("**SAR**") that specifically referred to Kaloti's irregular wire transfers. This is discussed in further detail in **Section II.F.4** below.

299. Claimant's argument is also misleading because the "entities different from KML [Kaloti]" were in fact all part of the [redacted] Kaloti was so intrinsically linked to such entities that articles and investigations affecting the reputation of the [redacted] necessarily would also have affected Kaloti's reputation on an individual level. To recall, the links between Kaloti and the other entities and individuals involved in the [redacted] are manifold: (i) [redacted] was founded by [redacted] who is the cousin of [redacted] Claimant's founder;[742] (ii) [redacted] is the father of [redacted] and the father-in-law of [redacted] (the latter two of whom together own a 75% shareholding in Kaloti[743] and both signed the undertaking filed by Claimant in the present arbitration[744]); (iii) [redacted] is Managing Director and Chief Executive Officer of [redacted][745] (iv) [redacted] is Director of [redacted][746] (v) in addition to being Kaloti's majority shareholders and the managers of [redacted] [redacted] and [redacted] are either

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[741] Reply, ¶ 437.

[742] First [redacted] Witness Statement, ¶¶ 9, 12.

[743] **Ex. C-0102**, KML Operating Agreement, 15 January 2011, p. 16.

[744] **Ex. C-0155**, KML undertaking regarding security for costs, pursuant to Procedural Order No. 3, 27 October 2022.

[745] **Ex. R-0063**, [redacted] Company Profile, DUN & BRADSTREET, last accessed on 8 June 2022, p. 1.

[746] **Ex. R-0063**, [redacted] Company Profile, DUN & BRADSTREET, last accessed on 8 June 2022, p. 1.

shareholders or directors of numerous other companies in the [redacted][747] (vi) Kaloti Jewellery's website noted in 2014 that Kaloti was its Florida-based "branch;"[748] and (vii) to this date, the LinkedIn page of the [redacted] Group lists Claimant's address in Miami as one its locations around the world.[749]

300. Confirming that Kaloti is effectively a branch of [redacted] Kaloti's own "Departments & Responsibilities" document—which details Kaloti's daily operations procedures[750]—required that Kaloti send daily reports on its operations to the owners and managers of [redacted] (including the above-mentioned [redacted] and [redacted] For example, the responsibilities of Kaloti's departments included the following requirements: (i) e-mailing all "Airway Bill[s], Packing List[s], and Invoice[s] to the following people: [redacted][(i.e., [redacted] [(i.e., [redacted], [and] [redacted],"[751] (ii) sending by e-mail to these same individuals of [redacted] "Stock Card and Stock Balance for all the metal in the inventory" of Kaloti "[a]t the end of every day,"[752] and (iii) "[r]econcil[ing] with Dubai [Kaloti's trading activities] on a daily and monthly basis."[753] Claimant's own witnesses have testified in this case that as part of their

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[747] **Ex. R-0064,** [redacted] (L.L.C) Company Profile, DUN & BRADSTREET, last accessed on 8 June 2022, p. 1; **Ex. R-0065,** [redacted] Company Profile, DUN & BRADSTREET, last accessed on 8 June 2022, p. 1; **Ex. R-0066,** [redacted] Company Profile, DUN & BRADSTREET, last accessed on 8 June 2022, p. 1; *see also* **Ex. R-0067**, Beneath the Shine: A Tale of Two Gold Refiners, GLOBAL WITNESS, July 2020, pp. 6, 23.

[748] **Ex. R-0109**, Kaloti Precious Metals Web Archive, 14 March 2014, p. 1.

[749] **Ex. R-0265,** [redacted] International Group, About Page, LINKEDIN, last accessed 30 April 2023, p. 2.

[750] **Ex. R-0266,** Departments Overview and Job Distribution, Kaloti Metals & Logistics, undated. The document is by Claimant's own definition a document which details Kaloti's procedures. Claimant produced this document in response to Peru's Request No. 10, which asked for "Documents . . . contain[ing] Kaloti's policies, procedures and training for its staff regarding due diligence on suppliers and the gold purchased from such suppliers" (Procedural Order No. 2, Annex 2, Request No. 10).

[751] **Ex. R-0266,** Departments Overview and Job Distribution, Kaloti Metals & Logistics, undated, pp. 7–8.

[752] **Ex. R-0266,** Departments Overview and Job Distribution, Kaloti Metals & Logistics, undated, p. 8.

[753] **Ex. R-0266,** Departments Overview and Job Distribution, Kaloti Metals & Logistics, undated, p. 3.

onboarding in Kaloti, they received several weeks of training in the UAE (which, not coincidentally, is where [redacted] is based).[754]

301. Further still, in Peru Kaloti openly and publicly held itself out as part of the [redacted] For example, at the International Gold & Silver Symposium in 2014 held in Peru, Kaloti participated under the banner of the "[redacted] Group" and distributed brochures with the latter's branding.[755] Moreover, Mr. [redacted] himself has testified in the present arbitration that Kaloti's suppliers were induced to conduct business with Kaloti by promising that [redacted] would "channel the necessary resources" to purchase the requisite amounts of gold, including "by pledging the required resources technically and financially."[756] In that same vein, Mr. [redacted] has explained that a letter of intent by [redacted] was sent to Kaloti "**for KML [Kaloti] to be able to demonstrate financial strength to third parties**" (emphasis added).[757]

302. Unsurprisingly, even the Suppliers often conflated Kaloti and [redacted] For example, when interviewed in the context of the [redacted] Criminal Proceedings, [redacted] representative [redacted] stated that "[h]is role in the company [redacted] was to make contact with the Kaloti Metal & Logistics refinery, located in Miami and **Dubai**" (emphasis added).[758]

303. The foregoing demonstrates (i) that any information related to suspect and potentially unlawful activity by [redacted] and other companies of the [redacted] would have been deemed relevant by Kaloti's lenders, bankers, and suppliers, among others; and (ii) that to the extent that Kaloti suffered reputational harm as a result of that

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[754] [redacted] Witness Statement, ¶ 11.

[755] **Ex. C-0026**, Records of assistance of KML to the International Gold & Silver Symposium, pp. 2–6.

[756] Second [redacted] Witness Statement, ¶ 17; **Ex. C-0047**, [redacted] letter to KML, 10 September 2013.

[757] Second [redacted] Witness Statement, ¶ 17.

[758] **Ex. R-0145**, Resolution No. 1: Order Initiating Criminal Proceedings, [redacted] Case, 14 May 2015, p. 9 (Original Spanish, "*His role in the company [redacted] was to make contact with the Kaloti Metal & Logistic refinery, located in Miami and Dubai.*").

information, such harm was the result of the [redacted] own practices and history rather than of any acts or omissions by Peru.

2. Peru did not leak any confidential information to the press

304. Repeating verbatim what it had alleged in the Memorial, Claimant argued in the Reply that the Publications contained details of the Peruvian investigations addressed in **Sections II.B and II.C** above (i.e., the [redacted] Investigations and the Preliminary Investigations) that could only have been known by Peruvian authorities.[759] Claimant concluded that the foregoing means necessarily that Peru leaked information regarding the investigations to the press, thereby breaching Peru's "legal duty of confidentiality."[760]

305. As Peru already demonstrated in the Counter-Memorial, the content of the Publications suggests that, contrary to what Claimant contends, the authors thereof did *not* have access to confidential governmental information.[761] The few statements therein that were attributed to State officials were merely general comments concerning illegal mining and money laundering, which were not confidential but rather issues of public interest.[762]

306. Moreover, Claimant's allegations must be dismissed because Claimant has failed to identify (i) what allegedly confidential information was supposedly leaked to the press by Peru, and then reported in the Publications, (ii) the legal provisions that allegedly rendered that information confidential, (iii) which specific Publications contained the allegedly confidential information, and (iv) which, when or how State officials might have leaked the allegedly confidential information. Rather, Claimant contented itself simply with asserting that since "[i]t was certainly not [Kaloti] who

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[759] Reply, ¶ 137.

[760] Reply, ¶ 443. *See also* Reply, ¶¶ 138–39.

[761] Counter-Memorial, ¶ 284.

[762] **Ex. R-0221**, "*Una incautación, una demanda y el oro ilegal de Perú,*" INSIGHT CRIME, 28 March 2017 [*Re-submitted version of C-0051, with Respondent's translation*]; **Ex. R-0227**, "*Aduanas incautó media tonelada de oro ilegal por US$18 millones,*" EL COMERCIO, 8 January 2014 [*Re-submitted version of C-0051, with Respondent's translation*]; Counter-Memorial, ¶ 288.

informed the press that [Kaloti] was being investigated in Peru," any leaks about the [redacted] Investigations were a fortiori attributable to Peru.[763] However, that is not necessarily so: as discussed below, there were numerous third parties that could have been the source of the information.

307. Moreover, and in any event, the evidence on the record in this arbitration belies the main premise of Claimant's allegation, which is that Kaloti itself had not informed the press that it was being investigated in Peru. As Peru already explained in the Counter-Memorial—and Claimant failed to rebut—,[764] a Publication by the media outlet *InSight Crime* transcribed an interview of a representative of Kaloti that sought to establish: (i) *whether* the Peruvian companies that had their gold seized in Peru intended to export that gold to Kaloti;[765] and (ii) *whether* Kaloti had been included in certain investigations that were being conducted at the time by Peruvian authorities.[766] Ironically, it was Kaloti's own representative that confirmed that there were indeed ongoing investigations involving Kaloti.[767]

308. Even if Kaloti itself had not disclosed the information concerning the [redacted] Investigations, over 27 companies and 22 individuals were named in, and notified of, the [redacted] Investigation,[768] and over 28 companies and 28 individuals were named

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[763] Reply, ¶ 139.

[764] Counter-Memorial, ¶ 284.

[765] **Ex. R-0221**, "*Una incautación, una demanda y el oro ilegal de Perú,*" INSIGHT CRIME, 28 March 2017 [*Re-submitted version of C-0051, with Respondent's translation*], p. 5.

[766] **Ex. R-0221**, "*Una incautación, una demanda y el oro ilegal de Perú,*" INSIGHT CRIME, 28 March 2017 [*Re-submitted version of C-0051, with Respondent's translation*], p. 5.

[767] **Ex. R-0221**, "*Una incautación, una demanda y el oro ilegal de Perú,*" INSIGHT CRIME, 28 March 2017 [*Re-submitted version of C-0051, with Respondent's translation*], p. 5 ("And is it correct to say that Kaloti cannot state with any certainty that he was not about to import illegal gold prior to his seizure in Callao? '**That is part of the ongoing investigation; that has not been established**,' [redacted] replied. 'The authorities are acting based on their presumptions and there is a due process that is required for this investigation and that is what we have to respect'" (emphasis added)).

[768] *See, e.g.*, **Ex. R-0339**, Prosecutorial Resolution No. 1, First Supra-Provincial Corporate Prosecutor's Office Specializing in Money Laundering and Loss of Domain Crimes, 20 September 2015 [*Re-submitted version of C-0052, with Respondent's translation*], pp. 1–3, 38, 45 ("THIRD: NOTIFY the content of this resolution to the persons under investigation.").

in, and notified of the [redacted] Investigation.[769] Therefore, to the extent that information was leaked to the press, such leak could have originated from any of those companies or individuals. This fact is fatal to Claimant's argument that only Peru could have leaked the information in question.

309. In the Reply, Claimant responded by arguing that under Peruvian law, the State is responsible for any leak of confidential information regarding the [redacted] Investigations—including any leaks originating from third parties that are unrelated to the State.[770] But that is simply false, and Claimant has failed to point any Peruvian law, statute or regulation supporting such proposition.

310. In light of Claimant's failure to meet its burden of proof, and in the interest of procedural economy, Peru will not reiterate the other arguments included in the Counter-Memorial and unrebutted by Claimant, concerning Claimant's allegation that Peru leaked confidential information to the press. Instead, Peru respectfully refers the Tribunal to the relevant discussion in the Counter-Memorial.[771]

3. Peru was not responsible for any suppliers' alleged refusal to conduct business with Kaloti

311. Even assuming *arguendo* that the Publications had been based on confidential information leaked by Peru (quod non), Claimant's claim would need to be dismissed because Claimant has not proven (i) that its alleged "loss of suppliers" was so severe that it "resulted in a complete loss of KML's [Kaloti's] business on November 30, 2018,"[772] (*see* **Section IV.C.5** below); and (ii) that such alleged "loss of suppliers" was caused either by the Publications (again, assuming purely for the sake of argument that the Publications were attributable to Peru) or by the Challenged Measures, rather than by one or more other causes unattributable to Peru.

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[769] **Ex. R-0340**, Prosecutorial Order No. 19, First Supra-Provincial Corporate Prosecutor's Office Specializing in Money Laundering and Loss of Domain Crimes, 9 January 2017 [*Re-submitted version of C-0101, with Respondent's translation*], pp. 2–3, 248.

[770] Reply, ¶ 139.

[771] Counter-Memorial, ¶¶ 286–91.

[772] Reply, ¶ 441.

312. To establish the requisite causation, Claimant bears the burden of submitting contemporaneous evidence, such as communications from suppliers refusing to sell gold to Kaloti as a result of the Publications, or internal communications from Kaloti employees discussing their failed efforts to buy gold as a result of the Publications. But Claimant has produced no such evidence.

313. During the document production phase of the present arbitration, Peru had requested that Claimant produce all "[d]ocuments regarding the alleged decision of Kaloti's suppliers . . . to terminate any commercial relationship with Kaloti from 2014 to 2018."[773] Peru explained that the document request encompassed but was not limited to "(i) Correspondence between Kaloti and the listed suppliers discussing their decision to cease supplying gold to Kaloti and the reasons thereof; and (ii) any Documents prepared by or received by Kaloti analyzing the . . . suppliers' decision to cease supplying gold to Kaloti."[774] Tellingly, Claimant responded that it had "not found any responsive documents."[775]

314. Forced to confront the complete absence of evidence to support its claim, Claimant illogically argues (i) that it never "allege[d] that these documents exist[ed]," and (ii) that "many documents were left and lost in KML's [Kaloti's] office in Lima."[776] The first assertion amounts to an admission by Claimant that it has no evidence to support its claim, and the second assertion directly contradicts the first (since, if the documents have never existed, they cannot have been lost). In any event, for the reasons that Peru set out during document production, Kaloti's excuse that the documents requested by Peru "were left and lost in KML's [Kaloti's] office in Lima" is simply not credible and, even if true, would not relieve Claimant of its burden of proof in this case.[777]

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[773] Procedural Order No. 2, Annex 2, Request No. 11, pp. 40–44.
[774] Procedural Order No. 2, Annex 2, Request No. 11, pp. 40–41.
[775] Procedural Order No. 2, Annex 2, Request No. 11, p. 40.
[776] Procedural Order No. 2, Annex, Request No. 11, pp. 40–41.
[777] Procedural Order No. 2, Annex 2, p. 5.

315. In any event, it is undisputed that Claimant's allegation that many suppliers "refused" to sell gold to Kaloti as a result of the Publications[778] rests entirely on (i) the testimony of Claimant's own witnesses, which is unsupported by documentary evidence, and (ii) a document that purports to list all of Kaloti's transactions between 2011 and 2018 (i.e., the Transaction History). Both the referenced testimony and the Transaction History have extremely limited (if any) evidentiary value because they were prepared specifically for the purposes of this arbitration. Further, the relevant aspects of such testimony, of the Transaction History, and of Claimant's arguments are directly contradicted by the contemporary documentary evidence in the record. For example, according to the Transaction History, the company [redacted] continuously supplied gold to Kaloti from 2013 to 2016.[779] However, in the context of preliminary investigations conducted by the Prosecutor's office, the representative of [redacted] declared that the company had *begun* supplying gold to Kaloti only "from the month of June 2015."[780]

316. In addition, as explained below, even assuming that it accurately reflected Kaloti's transactions, the Transaction History would contradict Claimant's argument that Kaloti was unable to secure significant volumes of gold following the SUNAT Immobilizations or any of the Challenged Measures.

a. <u>Claimant has failed to prove that gold supply difficulties caused Kaloti's alleged demise</u>

317. Claimant alleges that "Peru's series of gold seizures in [late] 2013 and [early January] of 2014 were leaked by Peru and reported in both the domestic and international press,"[781] and that such reports then "'put a chill' on [Kaloti]'s ability to purchase large

[778] Reply, ¶ 401.

[779] **Ex. C-0030**, KML transaction summary of all purchases between 2012 and 2018, pp. 9, 11, 14, 17.

[780] **Ex. R-0339**, Prosecutorial Resolution No. 1, First Supra-Provincial Corporate Prosecutor's Office Specializing in Money Laundering and Loss of Domain Crimes, 20 September 2015 [*Re-submitted version of C-0052, with Respondent's translation*], p. 107.

[781] Reply, ¶ 399.

quantities of gold, severely dampening supply."[782] However, the Transaction History in fact shows that, in the four years immediately following the SUNAT Immobilizations, Kaloti traded very large quantities of gold (specifically, 23,488 kg in 2014,[783] 16,906 kg in 2015,[784] 19,889 kg in 2016,[785] and 16,498 kg in 2017).[786] That amounts to an average of approximately 19,195 kg of gold per year. Such figure constituted a decline of only 17.35% compared to the annual average of 23,227 kg per year achieved in Kaloti's transactions during the three years that *preceded* the SUNAT Immobilizations i.e., between 2011 and 2013.[787] More importantly, the post-SUNAT Immobilizations average of 19,195 kg of gold traded per year was still a gargantuan amount. To put these volumes into perspective, 19,195 kg of gold per year is almost the total yearly gold production *in the entire country of Ecuador*.[788] Such being the case, the figure cannot reasonably be described as "a sharp decline in gold suppliers' willingness to sell to [Kaloti]."[789] Nor does it constitute the type of supply difficulties that could have caused a "complete loss of [Kaloti]'s business on November 30, 2018."[790]

318. Even [redacted] himself admitted in his first witness statement that Kaloti had "invested in, processed and sold, **very significant quantities of Peruvian gold between 2012 and 2018**" (emphasis added).[791] Then, in his second witness statement, [redacted] confirmed that "**from 2014 and until 2018, KML [Kaloti] managed (on average) to procure in excess of 14,300 kilograms of gold per annum from new suppliers** (Exhibit C-0030-ENG), including sellers outside of Peru" (emphasis

[782] Reply, ¶ 401.

[783] **Ex. C-0030**, KML transaction summary of all purchases between 2012 and 2018, p. 11.

[784] **Ex. C-0030**, KML transaction summary of all purchases between 2012 and 2018, p. 14.

[785] **Ex. C-0030**, KML transaction summary of all purchases between 2012 and 2018, p. 17.

[786] **Ex. C-0030**, KML transaction summary of all purchases between 2012 and 2018, p. 20.

[787] **Ex. C-0030**, KML transaction summary of all purchases between 2012 and 2018, pp. 3, 6, 9, 11, 14, 17, 20.

[788] **Ex. R-0267**, Global Mine Production, GOLDHUB, 9 June 2022, p. 3.

[789] Reply, ¶ 394.

[790] Reply, ¶ 441.

[791] First [redacted] Witness Statement, ¶ 35.

added).[792] Since even 14,300 kg annually was still a substantial amount, the foregoing admissions by [redacted] in his witness statements contradict Claimant's argument that the SUNAT Immobilizations in late 2013 and early 2014 had "'put a chill' on [Kaloti]'s ability to purchase large quantities of gold, severely dampening supply."[793]

319. As Peru explained in the Counter-Memorial,[794] the supply of gold to Kaloti from some companies actually *increased* after the SUNAT Immobilizations. For example, Claimant's own evidence shows that Vega Granada S.A.S. did not stop supplying gold in 2014, contrary to what Claimant alleges.[795] Rather, the evidence shows that Vega Granada provided approximately 932 kg of gold to Kaloti in 2017, thereby becoming Kaloti's third-largest supplier that year.[796] Vega Granada's supply of gold to Kaloti in 2017 represents *an increase of 233 times* the amount of gold that Vega Granada had provided to Kaloti in 2013.[797] Likewise, contrary to Claimant's argument,[798] [redacted] did not stop supplying gold in 2014; instead, pursuant to the Transaction History, its supply *increased* from 27.7 kg in 2013 to 735 kg in 2016 (i.e., *a 26-fold increase*).[799] And, as noted above, the representative of [redacted] represented to Peru's authorities that it had begun supplying gold to Kaloti only in June 2015 (i.e., *after* the SUNAT Immobilizations).

320. Many other suppliers listed in the Transaction History did not begin selling gold to Kaloti until *after* the SUNAT Immobilizations had already occurred and *after* the original Publications had appeared in the press.[800] Claimant itself admits that post-

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[792] Second [redacted] Witness Statement, ¶ 27.

[793] Reply, ¶ 401.

[794] Counter-Memorial, ¶ 296.

[795] Memorial, ¶ 59.

[796] **Ex. C-0030**, KML transaction summary of all purchases between 2012 and 2018, pp. 18–20.

[797] **Ex. C-0030**, KML transaction summary of all purchases between 2012 and 2018, p. 9.

[798] Memorial, ¶ 59.

[799] **Ex. C-0030**, KML transaction summary of all purchases between 2012 and 2018, pp. 9, 17.

[800] For example, [redacted] [redacted] and [redacted] began supplying gold in 2016 and [redacted] in 2017. *See* **Ex. C-0030**, KML transaction summary of all purchases between 2012 and 2018, pp. 15–16, 19; *see also* **Ex. AS-0053**, Agreement for the Sale and Purchase of Precious Metals Between KML and [redacted] 12 May 2017, p. 3.

2014 it secured "new suppliers of gold."[801] In fact, Kaloti also began transacting higher quantities of gold with its suppliers. One of these suppliers was the Guyana-based company [redacted] which between 2016 and 2018 (i.e., years *after* the SUNAT Immobilizations) supplied to Kaloti more than 12% of the *total* gold production of Guyana.[802] The foregoing demonstrates unequivocally the falsity of Claimant's assertions that it was unable to buy significant volumes of gold after the Challenged Measures.

321. The Transaction History also shows a shift in 2015 in the supplier base of Kaloti; thereafter, Kaloti traded increasingly copious amounts of gold from Ecuador.[803] That is not surprising and in fact is consistent with the tactics of traders of illegally mined gold. Starting in 2012, Peru strengthened its legal framework to tackle the pernicious crime of illegal mining.[804] As a direct consequence of that clampdown, Ecuador and Bolivia emerged as transit points for illegally mined Peruvian gold.[805] In the Counter-Memorial, Peru discussed and illustrated the transit of illegal gold to Bolivia.[806] The same occurred in Ecuador. As shown in **Figure 2** below, in 2014 gold *exports* from Ecuador were almost *four* times the declared gold *production*—an unequivocal sign that illegal gold was being smuggled into Ecuador (almost certainly from Peru, as demonstrated below) for onward exportation:[807]

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[801] Reply, ¶ 445.

[802] *See* **Ex. C-0030**, KML transaction summary of all purchases between 2012 and 2018, pp. 16, 19, 22, *in conjunction with* **Ex. R-0130**, Invest in Guyana: Mining Extract Safely and Responsibly, GUYANA OFFICE FOR INVESTMENT, 2022, p. 2. Dividing the figures provided by Claimant in **Ex. C-0030** for [redacted] a Guyanese company, by the yearly production of gold in Guyana provided in **Ex. R-0130**, shows that Claimant's purchases from [redacted] *alone* meant that Claimant had at least a 12% market share in Guyana.

[803] **Ex. C-0030**, KML transaction summary of all purchases between 2012 and 2018, pp. 10, 12–14, showing that Clear Process began supplying from 2014; the following began supplying gold to Kaloti from 2015, [redacted]

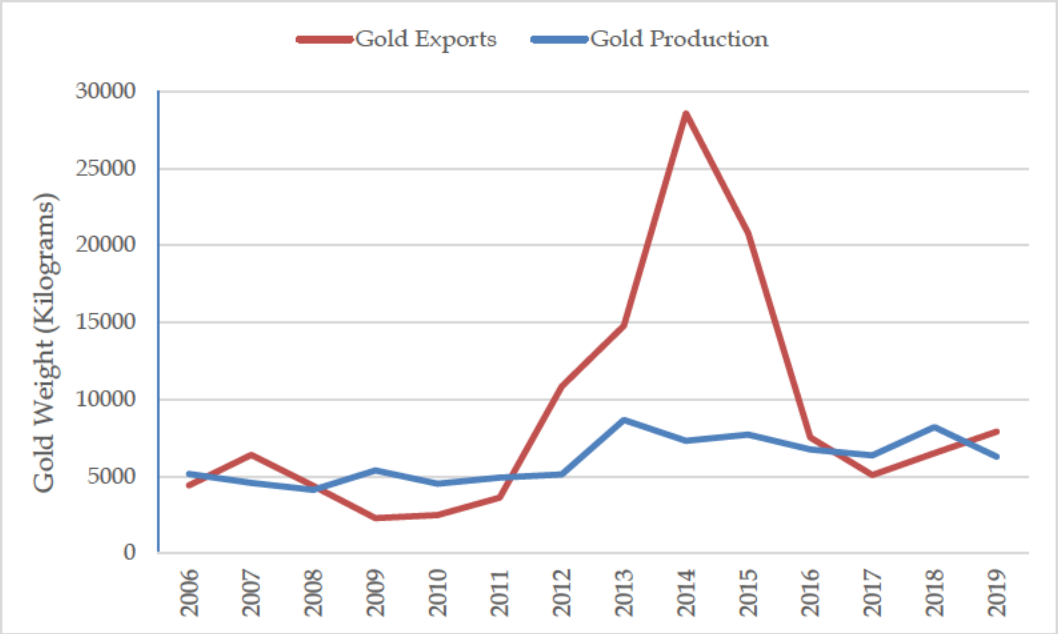
[804] Counter-Memorial, § II.A.

[805] **Ex. R-0275**, "*Ecuador Emerges as Trafficking Hub for Peru's Illegal Gold*," INSIGHT CRIME, 8 July 2016.

[806] Counter-Memorial, Figure 5.

[807] **Ex. R-0269**, *Tras el dinero del oro ilícito – El caso de Ecuador*, OAS, December 2021, p. 18; **Ex. R-0270**, "*El 'oro sucio' de Ecuador sale en avión desde Guayaquil*," PLAN V, 16 August 2015.

Figure 2: Gold Exports vs. Gold Production in Ecuador 2006-2019[808]



322. In 2015, Kaloti's trade of gold from Ecuador accounted for nearly a *quarter (23%) of Ecuador's total declared gold production*.[809]

323. The Transaction History does show a decline in the volume of Kaloti's gold transactions for 2018, down to 6,567 kg. However, that decline could not have been caused by the SUNAT Immobilizations, because these immobilizations had taken place approximately *five years earlier*, in late 2013 and January 2014. Rather, such decline was likely due simply to the fact that Kaloti's business was transferred to another company founded by [redacted] himself. Specifically, in 2018 [redacted]

[808] **Ex. R-0269**, *Tras el dinero del oro ilícito – El caso de Ecuador*, OAS, December 2021, p. 18.

[809] **Ex. AS-0068**, Appendix 3 – Discounted Cash Flow Model (Updated) – Appendix "3.9.2 KMLs Gold Purchases" which shows that Kaloti transacted 1547.8 kg of gold with companies in Ecuador. However this number fails to account for the quantities of gold transacted with [redacted] companies whose names specifically reference regions in Ecuador. From these companies Kaloti purchased 184.72 kg; *see* **Ex. C-0030**, KML transaction summary of all purchases between 2012 and 2018, pp. 12–14. In total Kaloti therefore transacted 1732.53 kg of gold with Ecuadorian companies. **Ex. R-0269**, *Tras el dinero del oro ilícito – El caso de Ecuador*, OAS, December 2021, p. 18 shows that the total Ecuadorian gold production for 2015 was 7723 kg. 1732.53 kg is 22.433% of 7723 kg.

founded [redacted][810] to take over and continue Kaloti's business. [redacted] himself admits that [redacted] is "a company with operations similar to . . . those of KML [Kaloti] in the precious metal business."[811] Despite [redacted] arguing that "[redacted] did not inherit or take suppliers (sellers) of gold from Kaloti,"[812] Claimant's own evidence shows that a quarter of [redacted] suppliers had been Kaloti's suppliers in 2018.[813] Relatedly, Kaloti's head trader,[814] Ms. [redacted] who would "negotiat[e] a price with gold sellers in Peru"[815] and through whom "95% of KML's [Kaloti's] closing operations were channeled,"[816] now works at [redacted] In May 2021 she replaced [redacted] as the General Manager of [redacted][817] and remains in this role as of 2023.[818]

324. During document production, Peru requested that Claimant produce (i) "[c]omplete financial statements for [redacted] from 2018 to date, including all annexes, appendices, schedules and notes thereto,"[819] and (ii) a "[l]ist of suppliers of gold worldwide to . . . [redacted] in 2018-2019."[820] Peru and its quantum experts explained that "[t]he simultaneous operation of both existing and new businesses [i.e., Kaloti and [redacted] serving the same geographic markets (aside from Peru)

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[810] First [redacted] Witness Statement, ¶ 10.

[811] First [redacted] Witness Statement, ¶ 10.

[812] Second [redacted] Witness Statement, ¶ 5.

[813] *Compare* **Ex. C-0134**, [redacted] list of suppliers from 2019 to 2020 *with* **Ex. C-0030**, KML transaction summary of all purchases between 2012 and 2018, where the following companies appear: [redacted].

[814] [redacted] Witness Statement, ¶ 11.

[815] [redacted] Witness Statement, ¶ 20.

[816] [redacted] Witness Statement, ¶ 9.

[817] **Ex. R-0344**, Articles of Amendment to Articles of Organization of [redacted] Florida Department of State Division of Corporations, 31 May 2021.

[818] **Ex. R-0345**, Confirmation Cover Sheet for [redacted] 2023 Company Annual Report, 18 January 2023.

[819] Procedural Order No. 2, Annex 2, Request No. 21, pp. 78-82

[820] Procedural Order No. 2, Annex 2, Request No. 22, p. 82.

would normally be expected to cannibalize the sales and profitability of the existing business [i.e., Kaloti]," and that the "requested Documents w[ould] help to elucidate the extent to which such 'cannibaliz[ation]' took place."[821] The requested documents were thus "relevant and material to the issue of whether [redacted] establishment of [redacted] was a supervening cause of Kaloti's [alleged] loss" of business.[822] The Tribunal granted both of Peru's requests but Claimant refused to comply with the Tribunal's orders. Specifically, Claimant failed to produce [redacted] list of suppliers for 2018 and any of its financial statements. On that basis, the Tribunal should draw the inference that the requested documents are adverse to Claimant's interest and that they would have confirmed that Kaloti's decline in gold transactions in 2018 is explained not by the Challenged Measures but rather by the creation and operations of [redacted] which took over Kaloti's business.

325. In the Reply, Claimant was utterly unable to address the evidence adduced by Peru showing that Kaloti's business had not dried up as a result of the Challenged Measures. Instead, through its new witness [redacted] (who is [redacted] son-in-law[823]), Claimant has proffered a purported new list of suppliers that allegedly stopped suppling gold to Kaloti during the relevant time period.[824] However, neither [redacted] nor Claimant have provided *any* documentary evidence whatsoever to support their argument. The only document attached to [redacted] witness statement is his passport. In addition, his testimony contains multiple statements that are contrary to the facts, as demonstrated by evidence in the record.

326. [redacted] claims that "[a]fter a prominent news report [about the SUNAT Immobilizations] came out . . . in January 2014 . . . suppliers from inside and outside of Peru began to call [him] with concerns, and some halted their deliveries and

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[821] Procedural Order No. 2, Annex 2, Request No. 22, pp. 82–83.

[822] Procedural Order No. 2, Annex 2, Request No. 22, p. 83.

[823] [redacted] Witness Statement, ¶ 31.

[824] [redacted] Witness Statement, ¶ 19.

commitments of gold to KML [Kaloti]."[825] As an example of the foregoing, [redacted] refers to the Ecuadorian company [redacted] which he says "ceased their sales to KML [Kaloti] in or around 2015."[826] However, [redacted] actually *began* selling gold to Kaloti in 2014, *after* the Gold contained in the Five Shipments had already been seized and the original Publications had already appeared in the media.[827] The following year, in 2015, [redacted] supplied approximately 1,369 kg of gold to Kaloti, *tripling* the gold quantity that it had supplied to Kaloti in 2014.[828] Had [redacted] truly been concerned about the adverse media attention that Kaloti had received in 2014 (as [redacted] alleges), it would not have begun supplying gold to Kaloti later that year (2014) and would not have supplied even more gold to Kaloti in 2015 (let alone the massive quantity that it did provide, which amounted to 20% of Ecuador's gold production that year). As explained below, [redacted] stopped trading gold with Kaloti not because of any alleged concerns regarding Kaloti's reputation, but rather simply because its members had been arrested for money laundering and illegal mining.

327. The evidence thus exposes Claimant's arguments concerning its trading activity following the Challenged Measures for what they are: sheer falsehoods.

b. Claimant has failed to prove any causal link between the Challenged Measures and its alleged gold supply difficulties

328. Claimant also has failed to prove that the suppliers that allegedly stopped providing gold to Kaloti did so *as a result of* the Publications (again, assuming that the Publications were attributable to Peru, which they were not), or of the Investigations, the seizures of the Gold, or any of the Challenged Measures. As explained above, Claimant has failed to submit *any* documentary evidence reflecting any alleged concerns of Kaloti's suppliers about any of the above—not even in response to Peru's

[825] [redacted] Witness Statement, ¶ 15.

[826] [redacted] Witness Statement, ¶ 19(c).

[827] **Ex. C-0030**, KML transaction summary of all purchases between 2012 and 2018, p. 10.

[828] **Ex. C-0030**, KML transaction summary of all purchases between 2012 and 2018, pp. 10, 12.

document production requests. The evidence that is on the record in fact shows the contrary: that several of the suppliers that stopped selling gold to Kaloti did so for reasons that were unrelated to the Challenged Measures and not attributable to Peru.

329. As previously explained, it is a frequent practice of dishonest gold suppliers to export significant volumes of gold over short periods of time (typically a few months) and then vanish, often before paying the corresponding taxes. Of the 130 suppliers that exported gold in Peru in 2013, more than half (69) were first-time gold exporters.[829] Between 2007 and 2013, only 20.4% of exporters in Peru had operated for five or more years, and 68.3% only exported gold during one or at most two years.[830] This deliberate and deceitful practice, rather than the Challenged Measures, explains why some of Kaloti's suppliers only supplied gold for short periods of time in 2013 and 2014 and then stopped exporting gold to any company, including Kaloti. Perhaps Claimant hoped that Peru would not notice, or bring to the attention of the Tribunal, that of Kaloti's 286 suppliers worldwide between 2011 and 2018, 229 of them (*i.e.,* a whopping 80%) supplied gold for no more than 2 years.[831]

330. [redacted] one of the companies controlled by the [redacted] family (*see* **Section II.B** above) and a major supplier of Kaloti, "was the fourth largest gold exporter [of Peru] during 2013," but that was also "the only year in which it conducted exports and it did so only for four months."[832] [redacted] another of Kaloti's major suppliers, only exported gold for four to six months, between 2012 and 2013.[833]

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[829] **Ex. R-0251,** Victor Torres, "*La economía ilegal del oro en el Perú: Impacto socioeconómico*," PENSAMIENTO CRÍTICO (2015), p. 16.

[830] **Ex. R-0251,** Victor Torres, "*La economía ilegal del oro en el Perú: Impacto socioeconómico*," PENSAMIENTO CRÍTICO (2015), p. 16.

[831] *See* **Ex. BR-0002**, Brattle Workpapers B, Tab B6 showing the years in which Kaloti purchased gold from each supplier it can be observed that the vast majority only supplied once or twice to Kaloti.

[832] **Ex. R-0251,** Victor Torres, "*La economía ilegal del oro en el Perú: Impacto socioeconómico*," PENSAMIENTO CRÍTICO (2015), p. 17.

[833] **Ex. R-0251,** Victor Torres, "*La economía ilegal del oro en el Perú: Impacto socioeconómico*," PENSAMIENTO CRÍTICO (2015), p. 17.

331. Despite such evidence, [redacted] asserts that many suppliers stopped selling gold to Kaloti as a result of "skewed" accusations published in the media against Kaloti. For example, [redacted] claims that "[t]wo companies of the group known as [redacted] . . . ceased their dealings and sales of gold to KML [Kaloti] after 2014."[834] According to [redacted], "[the representative of these companies,] Mr. [redacted] explained . . . that he no longer wanted to sell to KML [Kaloti] due to concerns after hearing about KML's [Kaloti's] gold immobilizations."[835] This statement by [redacted] son-in-law is misleading. As explained at length in **Section II.B** above, in addition to owning [redacted] Mr. [redacted] was a shareholder of [redacted] which had supplied the Gold in Shipment 2. Therefore, Mr. [redacted] did not "hear about" the immobilizations of part of the Gold—as [redacted] disingenuously characterizes it—but rather was himself responsible for, and notified by SUNAT of, the immobilization of such Gold.

332. Moreover, on 8 May 2014, roughly a year after its incorporation, [redacted] was dissolved.[836] As explained above, the same occurred with other companies of the group, such as [redacted][837] Therefore these companies could not have continued to supply gold to Kaloti post-2014 even in the absence of the Challenged Measures.[838]

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[834] [redacted] Witness Statement, ¶ 19(b).

[835] [redacted] Witness Statement, ¶ 19(b).

[836] **Ex. R-0356**, Corporation Registration of [redacted] SUNARP, retrieved on 10 May 2023, p. 8; *see also* **Ex. R-0339**, Prosecutorial Resolution No. 1, First Supra-Provincial Corporate Prosecutor's Office Specializing in Money Laundering and Loss of Domain Crimes, 20 September 2015 [*Re-submitted version of C-0052, with Respondent's translation*], p. 57.

[837] **Ex. R-0346**, Corporation Registration of [redacted] SUNARP, retrieved on 3 May 2023, p. 7.

[838] **Ex. R-0251,** Victor Torres, "*La economía ilegal del oro en el Perú: Impacto socioeconómico*," PENSAMIENTO CRÍTICO (2015), p. 17; **Ex. R-0272**, [redacted] Cumulative Export Report by Exporter, Period, Agent, Customs and Country, SUNAT, 1 April 2023; **Ex. R-0339**, Prosecutorial Resolution No. 1, First Supra-Provincial Corporate Prosecutor's Office Specializing in Money Laundering and Loss of Domain Crimes, 20 September 2015 [*Re-submitted version of C-0052, with Respondent's translation*], pp. 57-58; **Ex. R-0346**, Corporation Registration of [redacted] SUNARP, retrieved on 3 May 2023, p. 7; **Ex. R-0356**, Corporation Registration of [redacted] SUNARP, retrieved on 10 May 2023, p. 8; **Ex. R-0361**, [redacted] Gold Corporation S.A.C., Cumulative Export Report by Exporter, Period, Agent, Customs and Country, SUNAT, 10 May 2023.

And even if they could have done so, Kaloti *should* have severed ties with the [redacted] family, for the reasons set out in **Section II.B** above.

333. [redacted] also claims that the Ecuadorian company [redacted] "ceased [its] sales to KML [Kaloti] in or around 2015."[839] According to [redacted], "[[redacted] representative] Mr. Javier . . . mentioned . . . that he [had] bec[o]me aware of newspaper headlines regarding the events involving KML [Kaloti] in Peru and did not want to sully CP [i.e., [redacted]s image."[840] Even assuming that what [redacted] alleges is true (which appears unlikely since he has not submitted any supporting evidence), [redacted] could not have continued suppling gold to Kaloti because in June 2016 its owners and directors—including Kaloti's contact "Mr. Javier"—were arrested in Ecuador and placed in preventative detention.[841] That and the *modus operandi* of criminal organizations in the mining industry such as [redacted] rather than the Publications—is the reason why the latter did not continue exporting gold to Kaloti after 2015.

334. While investigating [redacted] for money laundering in Ecuador,[842] the Ecuadorian Prosecutor's Office found that [redacted] and a company called Spartan (also mentioned in [redacted] witness statement) "employed emissaries to strike deals with Peruvian gold smugglers on the border between the two countries,"[843] and that "the precious metal's illegal and foreign origins were concealed using falsified documents and identities stolen from legally registered Ecuadorians."[844] As widely reported by the Ecuadorian press, Ecuador's Vice Minister of Security also concluded that "since 2013, the companies Spartan del Ecuador S.A. and [redacted] Cía. Ltda.,

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[839] [redacted] Witness Statement, ¶ 19(c).

[840] [redacted] Witness Statement, ¶ 19(c).

[841] **Ex. R-0273**, *"Siete detenidos por supuesto lavado de activos en exportaciones de oro,"* LA REPÚBLICA, 17 June 2016; **Ex. R-0277**, *"The route of the gold commercialized by Spartan and* [redacted] *registers alleged anomalies,"* ECUADORIAN PROSECUTOR'S OFFICE, 13 August 2016, p. 2.

[842] **Ex. R-0274**, *"Fiscalía indagó un año el envío de oro a EE.UU,"* EL COMERCIO, 18 June 2016; **Ex. R-0273**, *"Siete detenidos por supuesto lavado de activos en exportaciones de oro,"* LA REPÚBLICA, 17 June 2016; **Ex. R-0276**, *"Emisarios de dos firmas obtenían el oro de contrabandistas peruanos,"* EL COMERCIO, 7 July 2016.

[843] **Ex. R-0275**, *"Ecuador Emerges as Trafficking Hub for Peru's Illegal Gold,"* INSIGHT CRIME, 8 July 2016.

[844] **Ex. R-0275**, *"Ecuador Emerges as Trafficking Hub for Peru's Illegal Gold,"* INSIGHT CRIME, 8 July 2016.

became in a short period of time the largest gold exporters of the country, to American companies such as . . .Kaloti" and that "the gold allegedly came from illegal mining in Peru."[845]

335. Other irregularities identified by Ecuadorian authorities included: (i) that [redacted] and Spartan, both of which had begun exporting in 2013, had—implausibly—amassed a 50% share of the gold market in Ecuador by the following year; (ii) that alleged suppliers had claimed to have no commercial relationship with [redacted] (iii) that receipts had been forged by [redacted] and (iv) that large quantities of gold had been exported by [redacted] from Ecuador without having declared the production of that gold to the relevant mining authorities.[846] It therefore seems evident that, far from being concerned about sullying its image, [redacted] was contending with more serious problems. Given all of the foregoing, Kaloti was either aware of Clearprocess's unlawful practices, or willfully blind to them.

336. [redacted] also states that [redacted] ("[redacted] "discontinued sales to KML [Kaloti] in mid-2014," allegedly because such company "could not risk tarnishing their reputation in the gold industry after . . . events in Peru involving [Kaloti]."[847] However, [redacted] provides no documentary evidence in support of his claim. In any event, the claim is rendered highly improbable by the context, as [redacted] was being investigated in Bolivia for a number of potential crimes, including *inter alia* tax evasion, failing to comply with export and registration rules, and registering at fake addresses—all hallmarks of unscrupulous gold traders.[848] [redacted]

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[845] **Ex. R-0273**, "*Siete detenidos por supuesto lavado de activos en exportaciones de oro*," LA REPÚBLICA, 17 June 2016 (Original Spanish "Since 2013, the companies Spartan del Ecuador S.A. and [redacted] Cía. Ltda., became in a short period of time the biggest gold exporters of the country, to American companies such as . . .Kaloti . . .the gold allegedly came from illegal mining in Peru.").

[846] **Ex. R-0277**, "*The route of the gold commercialized by Spartan and* [redacted] *registers alleged anomalies*," ECUADORIAN PROSECUTOR'S OFFICE, 13 August 2016; **Ex. R-0276**, "*Emisarios de dos firmas obtenían el oro de contrabandistas peruanos,*" EL COMERCIO, 7 July 2016.

[847] [redacted] Witness Statement, ¶ 19(a).

[848] **Ex. R-0191**, Jaime Navarro, *La verdad sobre la evasión de impuestos en las exportaciones de oro*, March 2014. *See also* **Ex. R-0192**, "*El Deber FinCEN Files: Domicilios 'fantasmas', evasión de impuestos y altos flujos de dinero en el comercio del oro boliviano*," CEDLA, last accessed 22 July 2022, pp. 2–7.

therefore seems to be yet another example of a supplier that stopped dealing with Kaloti not because of the Challenged Measures, but rather because of its own time was up, having run the cycle of criminal organizations in the gold industry. Like [redacted] many other suppliers of Kaloti faced investigations and/or have been convicted for criminal activities related to the export of gold.[849]

337. In conclusion, Claimant has failed to prove its claim that the Publications, the Challenged Measures, or any conduct attributable to Peru led to a refusal by gold suppliers to do business with Kaloti. Specifically, Claimant has not demonstrated (i) that the Publications were based on confidential information leaked by Peru, (ii) that Kaloti's alleged "loss of suppliers" was so severe that it "resulted in a complete loss of [Kaloti]'s business,"[850] and (iii) that the alleged "loss of suppliers" was caused by the Publications, the Challenged Measures, or any conduct attributable to Peru.[851]

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[849] For example, the managers of [redacted] which supplied gold to Kaloti from 2015, were recently sentenced in the United States for financial and gun crimes, which included employing various money laundering and fraud techniques, such as "falsifying invoices for sales of gold, when in reality it was the receipt of a large cash deposit." **Ex. R-0193**, "*Gold Dealers Sentenced for Financial Crimes and Gun Crimes*," U.S. DEPARTMENT OF JUSTICE, 3 December 2021, p. 2; **Ex. C-0030**, KML transaction summary of all purchases between 2012 and 2018, pp. 13, 15, 17, 20 (listing [redacted] LLC, also referred to as GGEX). Similarly, Nueva Arica S.A.C., which supplied gold to Kaloti in 2013, engaged in money laundering and the purchase of undocumented gold. **Ex. C-0030**, KML transaction summary of all purchases between 2012 and 2018, p. 6; **Ex. R-0340**, Prosecutorial Order No. 19, First Supra-Provincial Corporate Prosecutor's Office Specializing in Money Laundering and Loss of Domain Crimes, 9 January 2017 [*Re-submitted version of C-0101, with Respondent's translation*], pp. 151–152. In addition, Ángel de Mamoré, which supplied gold to Kaloti in 2012 and 2013 and which, according to Kaloti, stopped supplying in 2014, was investigated for tax fraud, breaching export rules, and registering to phantom addresses. **Ex. C-0030**, KML transaction summary of all purchases between 2012 and 2018, pp. 4, 7; **Ex. R-0192**, "*El Deber FinCEN Files: Domicilios 'fantasmas', evasión de impuestos y altos flujos de dinero en el comercio del oro boliviano*," CEDLA, last accessed 22 July 2022, p. 4; **Ex. R-0316**, "*Perú investigan lavandería de oro de la minería ilegal*," OJO, 1 August 2018; **Ex. R-0317**, "*Incautan 48 kg de oro provenientes de la minería ilegal en almacén del Callao*," EL COMERCIO, 21 August 2018.

[850] Reply, ¶ 441.

[851] Reply, ¶ 441.

4. Peru was not responsible for any severed relationship between Kaloti and financial institutions

338. Claimant also argues that the Publications "caused financial institutions to stop dealing with KML [Kaloti], beginning in April 2014."[852] For this proposition, Claimant relies exclusively on a series of letters sent to Kaloti by several US-based banks from 1 April 2014 to 10 August 2018 ("**Bank Letters**") informing Kaloti that its accounts were being closed ("**Bank Account Closures**").[853] In the Memorial, Claimant argued that the Bank Account Closures (i) deprived Kaloti of the financing it needed to continue its "strategy . . . of paying sellers of Peruvian gold very promptly and at prices better that [sic] those paid by KML's [Kaloti's] competitors,"[854] and (ii) eventually led to Kaloti's demise in November 2018.[855]

339. In the Counter-Memorial, Peru demonstrated that Claimant's arguments were internally contradictory, unsubstantiated, and belied by the evidence on the record. To recall:

a. Claimant had repeatedly stated that [redacted] guaranteed that it would have access to unlimited financing in order "to buy as much gold . . . as it could source."[856] In addition, Claimant had not demonstrated that it ever relied on loans from any financial institutions or that it depended on such financing to continue its "strategy . . . of paying sellers of Peruvian gold very promptly and at prices better that [sic] those paid by KML's [Kaloti's] competitors;"[857]

b. Claimant had not submitted with its Memorial any evidence to show that it had depended on, or even used, outside financing by the specific US-based banks that sent the Bank Letters;[858]

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[852] Memorial, ¶ 65.

[853] **Ex. C-0027**, Notice of closure of bank accounts of KML's.

[854] Memorial, ¶ 67. *See also* First [redacted] Witness Statement, ¶ 55.

[855] Memorial, ¶ 151, 158. *See also* First [redacted] Witness Statement, ¶¶ 55, 57.

[856] Memorial, ¶ 145. *See also* Memorial, ¶¶ 22, 29, 46; [redacted] Witness Statement, ¶ 21.

[857] Memorial, ¶ 67.

[858] Counter-Memorial, ¶ 304.

c. the Transaction History, and [redacted] own admission,[859] showed that Kaloti in fact had been able to trade very substantial volumes of gold up until 2018 (i.e., *after* all the Bank Letters had been sent), which further disproved that the Bank Account Closures had affected Kaloti's ability to obtain financing for the purchase of gold;[860] and

d. Claimant's argument that "[t]he only reason for KML [Kaloti], or Mr. [redacted] to have been flagged in compliance reviews . . . was directly and exclusively attributable to Peru"[861] is contrary to the evidence on the record of this arbitration. Even by the time that the first Bank Letter was sent (i.e., 1 April 2014), there were already ample developments (including the commencement of multiple investigations and the circulation of numerous publications on the [redacted] sordid practices) that would have prompted financial institutions to flag Kaloti and any other company or individual of the [redacted] as part of their compliance reviews.[862]

340. In the Reply, Claimant merely recycles the same arguments set out in the Memorial, without rebutting the evidence adduced by Peru and without resolving the glaring contradictions identified by Peru in Claimant's arguments.

341. In addition, Claimant's responses to Peru's document production requests in the present arbitration confirm that Claimant is bereft of evidence to support its claims concerning the reasons behind the Bank Account Closures. Peru requested that Claimant produce "Documents regarding the decision of several financial institutions (listed at ¶ 65 of the Memorial) to stop dealing with Kaloti beginning in April 2014," including (i) "Correspondence between Kaloti and the listed financial institutions discussing their decision to stop dealing with Kaloti;" and (ii) "any Documents

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[859] *See* First [redacted] Witness Statement, ¶ 35 ("KML [Kaloti] actually invested in, processed and sold, very significant quantities of Peruvian gold between 2012 and 2018"); Second [redacted] Witness Statement, ¶ 27.

[860] Counter-Memorial, ¶ 302.

[861] Memorial, ¶ 66.

[862] Counter-Memorial, ¶ 305.

prepared by or received by Kaloti analyzing the impact of the financial institutions' decision to cease dealing with Kaloti."[863] In response to such request, Claimant stated that it had not found "any responsive documents" except for the Bank Letters that it had submitted with the Memorial. In an attempt to justify this absence of supporting evidence, Claimant invoked the same, self-serving excuse it advanced in relation to other document production requests, namely, that "many documents were left and lost in KML's [Kaloti's] office in Lima."[864] As Peru already explained, Claimant's response is manifestly unsatisfactory for at least three reasons. *First*, none of the Bank Letters support Claimant's allegation that financial institutions had stopped dealing with Kaloti *as a result of* the Challenged Measures, as none of those letters identified any specific reasons for the Bank Account Closures.

342. *Second*, the Bank Letters are not responsive to the second part of Peru's document production request, as they do not reflect Kaloti's *own* "analy[sis] [of] the impact of the financial institutions' decision to cease dealing with Kaloti."[865]

343. *Third*, Claimant's assertion that responsive documents were lost following the closure of its Lima office is simply not credible and, in any event, does not relieve it of its burden of proof. That excuse is particularly implausible in relation to this specific request, because there is no reason why correspondence exchanged between Kaloti (whose registered office and managers are located in the United States) and financial institutions (likewise based in the United States) would have been sent to and archived in Lima, without at the very least retaining the original or a copy in Kaloti's central office in Miami, Florida. In fact, each of the Bank Letters was sent to Kaloti's address in Miami.[866] The documents requested by Peru would therefore have been received and kept at Kaloti's registered address in Miami. Also, any serious global business would have retained an electronic copy of such documents in its servers.

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[863] Procedural Order No. 2, Annex 2, Request No. 12, pp. 44–45.

[864] Procedural Order No. 2, Annex 2, Request No. 12, pp. 44–45.

[865] Procedural Order No. 2, Annex 2, Request No. 12, p. 45.

[866] **Ex. C-0027**, Notice of closure of bank accounts of KML's, pp. 2–9, showing that all of the letters are addressed to Kaloti's registered address in Miami.

Indeed, Kaloti would have retained the documents requested by Peru, for example, to explain to is main customer and financier (i.e., [redacted] the alleged difficulties Kaloti was facing in order to buy gold as a result of the Bank Account Closures. Equally, Kaloti would have kept the requested documents for litigation purposes. Specifically, Kaloti would have kept those documents to prove the alleged effects of Peru's measures, particularly given that Claimant sent to Peru its first notice of intent in relation to the present dispute in 2016 (i.e., at the same time the relevant financial institutions were closing Kaloti's bank accounts allegedly as a result of the Peru's actions).[867]

344. Based on the foregoing, it is obvious that Claimant has failed to meet its burden of proof in relation to its claim that the Challenged Measures "caused financial institutions to stop dealing with [Kaloti]."[868] Without prejudice to the above arguments and to Claimant's burden of proof in this arbitration, the following subsections identify additional evidence that further confirms the meritless nature of Claimant's claim.

a. Claimant has failed to prove that any financial institution severed its ties with Kaloti as a result of the Challenged Measures

345. In the absence of evidence to support its claim concerning the alleged severed ties with financial institutions, Claimant once again resorted to speculation. For example, in the Reply Claimant argued that, because "***all*** of KML's [Kaloti's] bank account closures occurred ***after*** Peru seized gold from KML [Kaloti]" (emphasis in original),[869]

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[867] **Ex. R-0242**, Kaloti's First Notice of Intent, filed with the General Office of International Economic Affairs, 3 May 2016 [*Re-submitted version of C-0158, with Respondent's translation*]. Whilst Claimant labels this document a mere "communication" it is clear on the first page that it was a "NOTICE OF INTENT TO SUBMIT A CLAIM TO ARBITRATION UNDER THE PERU – UNITED STATES TRADE PROMOTION AGREEMENT" (Original Spanish, "*NOTIFICACIÓN DE INTENCIÓN DE SOMETER UNA RECLAMACIÓN A ARBITRAJE BAJO EL ACUERDO DE PROMOCIÓN COMERCIAL PERÚ – ESTADOS UNIDOS*").

[868] Memorial, ¶ 65.

[869] Reply, ¶ 431.

"there is a clear proximity and connection in time"[870] between the seizure of the Gold and the Bank Account Closures. On that basis, Claimant speculated that Peru must be responsible for the Bank Account Closures.[871] Claimant's argument is fallacious and fails for at least three reasons.

346. *First*, it is simply not the case that "[t]here is a clear proximity and connection in time" between the SUNAT Immobilizations and all of the Bank Account Closures. All the SUNAT Immobilizations occurred between late 2013 and January 2014. However, as the Reply itself noted, only two of the eight Bank Account Closures occurred in 2014 (in April and October); the other six did not take place until *several years later* (on 23 March 2016, 5 July 2016, 30 December 2016, 30 March 2017, 30 December 2016, and 10 August 2018).[872]

347. *Second*, Kaloti's financial statements suggest that four of the eight relevant bank accounts had been opened by Kaloti *after* the SUNAT Immobilizations.[873] Had the banks been as concerned about the immobilisations as Claimant alleges, they would not have opened the bank accounts for Kaloti in the first place.

348. *Third,* Claimant's argument that the Bank Account Closures must have been caused by the seizures of the Gold merely because such closures postdate those seizures is an example of the logical fallacy known as *post hoc, ergo propter hoc*, which, as the *Glencore v. Colombia* tribunal noted, "equates temporal correlation with causality."[874] As the *Glencore* tribunal also noted, "[a] conclusion cannot be based exclusively on the order

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[870] Reply, ¶ 431.

[871] Reply, ¶ 431.

[872] Reply, ¶ 431.

[873] Namely, City National Bank (opened in 2014), PNC Bank (opened in 2016), Metropolitan Commercial Bank (opened in 2017), and Fifth Third Bank (opened in 2017). *See* **Ex. AS-0062**, KML 2014 Balance Sheet, p. 5 (this is the first year City National Bank appears on Kaloti's accounting books); **Ex. AS-0064**, KML 2016 Balance Sheet, p. 4 (this is the first year that PNC Bank appears on Kaloti's accounting books); **Ex. AS-0065**, KML 2017 Balance Sheet, p. 3 (this is the first year that Metropolitan Commercial Bank and Fifth Third Bank appear on Kaloti's accounting books).

[874] **RL-0163**, *Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, 27 August 2019 (Fernández-Armesto, Garibaldi, Thomas), ¶ 729.

of events, but must consider other factors potentially responsible for the result."[875] In the Counter-Memorial, Peru demonstrated that there were indeed numerous other factors that were much more likely to have caused the Bank Account Closures.

349. To recall, the evidence suggests that the most probable cause of such closures was Kaloti Jewellery's suspicious wire transfers to Kaloti, of which the banks were already on notice prior to the SUNAT Immobilizations. For example, in 2011, the DEA had commenced an investigation known as "Operation Honey Badger" into suspicious wire transfers made to the [redacted][876] The existing evidence available to the DEA indicated that the [redacted] was providing financial services for criminal organizations and facilitating money laundering. Such was the strength of the evidence against the [redacted] that the DEA recommended that the US Treasury designate the [redacted] as a "primary money-laundering concern"[877]—a designation under US law that is reserved for persons or entities that present a major money-laundering risk.

350. Further, in 2013, [redacted] (with which Kaloti held an account)[878] submitted a SAR that explicitly mentioned Kaloti as the "primary beneficiary" of large and suspicious transfers from [redacted][879] [redacted] also noted that one of Kaloti's accounts "was acting as a pass-through account by adding an additional and seemingly unnecessary layer in the movement of funds,"[880] which constitutes a money-laundering red flag:[881]

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[875] **RL-0163**, *Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, 27 August 2019 (Fernández-Armesto, Garibaldi, Thomas), ¶ 729.

[876] **Ex. R-0125,** "*The Kaloti Gold Machine*," ARIJ, 20 September 2020, pp. 3–4.

[877] **Ex. R-0112**, ""*FinCEN: Why gold in your phone could be funding drug gangs*," BBC NEWS, 22 September 2020, p. 2; *see also* **Ex. R-0125**, "*The Kaloti Gold Machine*," ARIJ, 20 September 2020, p. 2.

[878] **Ex. AS-0061**, KML 2012 Balance Sheet, p. 11 (showing a balance at JMPC).

[879] **Ex. R-0260**, "*Los pagos bajo sospecha de acopiadora de oro de EE.UU. a empresas peruanas investigadas por lavado y minería ilegal*," CONVOCA, 21 September 2020.

[880] **Ex. R-0260**, "*Los pagos bajo sospecha de acopiadora de oro de EE.UU. a empresas peruanas investigadas por lavado y minería ilegal*," CONVOCA, 21 September 2020.

[881] **Ex. R-0026**, Money Laundering/Terrorist Financing Risks and Vulnerabilities Associated with Gold, FATF, July 2015, p. 24.

> A review of Kaloti Metals & Logistics's JPMC [redacted] Business Banking account indicated a roughly one-to-one, credit-to-debit wire ration of $369,131,079.73-to-$370,768,111.06. This gives the appearance that Kaloti Metals and Logistics's JPMC [redacted] account was **acting as a pass-through account by adding an additional and seemingly unnecessary layer in the movement of funds**.[882] (Emphasis added)

351. In the same SAR (issued in 2013, before any of the Challenged Measures), [redacted] also referred to Kaloti's suspicious transactions in Peru and other countries with companies that (i) were based in "bank secrecy haven[s]," (ii) operated in the "high-risk," "cash-for-gold" industry, (iii) appeared to "lack a public domain presence," and/or (iv) seemed to be mere "shell companies":

> The types of entities that benefitted from Kaloti Metals & Logistics's [sic] wire transfers included the following: 1. entities banking at Non-JPMC foreign correspondent bank United International Bank NV, located in Curacao, **a bank secrecy haven**; 2. Peruvian and Bolivian-based gold dealers; and 3. apparent **shell companies** that maintain addresses in South Florida. Most beneficiaries appear to **lack a public domain presence** and several of those entities may be **cash-for-gold companies and/or scrap gold companies, a high-risk industry**.[883] (Emphases added)

352. By the end of 2013, (i.e., the year in which [redacted] had submitted its SAR), Kaloti's account at [redacted] was no longer being used by Kaloti.[884] In 2013, [redacted] had

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[882] **Ex. R-0260**, "*Los pagos bajo sospecha de acopiadora de oro de EE.UU. a empresas peruanas investigadas por lavado y minería ilegal*," CONVOCA, 21 September 2020.
[883] *See* **Ex. R-0192**, "*El Deber FinCEN Files: Domicilios 'fantasmas', evasión de impuestos y altos flujos de dinero en el comercio del oro boliviano*," CEDLA, last accessed 22 July 2022, p. 3.
[884] **Ex. BR-0058**, Kaloti Metal and Logistics Statement of Financial Position for the Period Ended on 31 December 2013, p. 3 (showing the balance of the JPMC account at zero).

also cut ties with [redacted] Kaloti's main client.[885] Kaloti's accounting books show a similar situation around the same time with respect to Citibank.[886]

353. It is likely that the financial institutions that sent the Bank Letters had also noticed Kaloti's suspicious "pass-through" transactional behavior and its links with dubious companies, and had factored that into their decision to relinquish Kaloti as a client. However, that would not necessarily have been the only reason for doing so; as explained in the following paragraphs, numerous other red flags unrelated to the Challenged Measures could have caused the Bank Account Closures.

354. For example, in February 2014—i.e., a few months before the first two Bank Account Closures[887]—an [redacted] auditor had publicly disclosed that the [redacted] had pressured [redacted] to not report certain audit findings that indicated that the [redacted] was involved in money laundering on a massive scale.[888] This disclosure was publicized by major international media outlets, such as the BBC and The Guardian.[889] The latter even published a video interview of the [redacted] auditor, in which he described the [redacted] practices as "appalling, immoral, and extremely unethical."[890] The Guardian also reported that [redacted] (a major shareholder of Kaloti) had admitted in a meeting with [redacted] that it was

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[885] **Ex. R-0278**, [redacted] SAR [redacted] FINCEN, 23 February 2013; *see also* **Ex. R-0126**, "*US Treasury Department abandoned major money laundering case against Dubai gold company*," ICIJ, 21 September 2020, p. 10.

[886] **Ex. AS-0061**, KML 2012 Balance Sheet, p. 11 (showing a balance at Citibank); **Ex. BR-0058**, Kaloti Metal and Logistics Statement of Financial Position for the Period Ended on 31 December 2013, p. 3 (showing the balance of the CitiBank account at zero).

[887] **Ex. C-0027**, Notice of closure of bank accounts of KML's, pp. 8–9, SunTrust letter is dated 1 April 2014, Regions Bank letter is dated 28 October 2014.

[888] **Ex. R-0118**, City of Gold: Why Dubai's First Conflict Gold Audit Never Saw the Light of Day, GLOBAL WITNESS, February 2014; *see also* **Ex. R-0067**, Beneath the Shine: A Tale of Two Gold Refiners, GLOBAL WITNESS, July 2020, pp. 16–18.

[889] **Ex. R-0122**, "*Gold market breaches 'covered up,'*" BBC NEWS, 25 February 2014, p. 1 ("Dubai's biggest gold refiner committed serious breaches of the rules designed to stop gold mined in conflict zones from entering the global supply chain, a whistleblower has revealed."); **Ex. R-0108**, "*Billion dollar gold market in Dubai where not all was as it seemed*," THE GUARDIAN, 25 February 2014.

[890] **Ex. R-0123**, Video Transcript: "*Billion dollar gold market in Dubai where not all was as it seemed*," THE GUARDIAN, 25 February 2014, 00:05–00:21; *see also* **Ex. R-0108**, "*Billion dollar gold market in Dubai where not all was as it seemed*," THE GUARDIAN, 25 February 2014.

normal for the [redacted] to purchase gold from suppliers that circumvented customs regulations.[891] Also in February 2014, the international NGO Global Witness published a report referencing dubious transactions of the [redacted][892]

355. In April 2015, Bloomberg reported that, following a separate audit of various companies of the [redacted] the Dubai Multi Commodities Centre had removed [redacted] refinery from the list of companies that adhere to the Dubai Good Delivery standard of quality and responsible sourcing.[893]

356. In 2016—the year in which three of the Bank Account Closures occurred—Kaloti was named in an Ecuadorian investigation as being one of the biggest purchasers of a suspected money laundering company and supplier of illegally mined gold (viz., [redacted][894]

357. In January 2018—i.e., four months *before* the last Bank Account Closure—The Guardian reported that the above-referenced auditor had sued [redacted] before the English courts.[895] As The Guardian explained, the auditor alleged that (i) "Kaloti [Jewellery] had imported 5 tons of gold bars from Morocco painted silver to avoid Moroccan restrictions on gold exports," (ii) "more than $5bn worth of cash transactions processed by the firm [[redacted] were not reported to the Dubai authorities," and (iii) "[a]bout 57 tons of Sudanese gold [had] been received [by [redacted] without conducting proper due diligence as to whether it had come from a

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[891] **Ex. R-0123**, Video Transcript: "*Billion dollar gold market in Dubai where not all was as it seemed*," THE GUARDIAN, 25 February 2014, 01:39–02:52.

[892] **Ex. R-0118**, City of Gold: Why Dubai's First Conflict Gold Audit Never Saw the Light of Day, GLOBAL WITNESS, February 2014; **Ex. R-0122**, "*Gold market breaches 'covered up,'*" BBC NEWS, 25 February 2014.

[893] *See, e.g.*, **Ex. R-0124**, "*Dubai's Kaloti Removed From Gold List as New Factory Near*," BLOOMBERG, 13 April 2015.

[894] **Ex. R-0273**, "*Siete detenidos por supuesto lavado de activos en exportaciones de oro*," LA REPÚBLICA, 17 June 2016; **Ex. R-0301**, "*Descubierta red transnacional dedicada al lavado de activos y contrabando de oro*," GOBIERNO DEL ECUADOR, 17 June 2016.

[895] **Ex. R-0279**, "*Whistleblower suing* [redacted] *over gold dealings with Dubai firm*," THE GUARDIAN, 20 January 2018, pp. 2–3.

conflict zone."[896] The Guardian further noted that "Kaloti [Jewellery] [was] also alleged to have dealt with several organisations listed by the US authorities as fronts for terrorism and organised crime," including "one linked to armed rebels in the Democratic Republic of Congo and another in Iran that at the time was subject to US and EU trade sanctions."[897]

358. The foregoing examples represent only a fraction of the hundreds of red flags that any person—and therefore any Bank—can find on the internet simply by conducting a search on "Kaloti." Indeed, from as early as 2013, and regularly since then, countless independent sources have reported on the suspect and possibly criminal activity of the [redacted] and Kaloti's majority owners. By February 2014, the [redacted] *own auditors* had already publicly linked Kaloti's owners to a multi-billion, money-laundering scheme, to illegal mining, and to other illegal activities that were unrelated to Peru or to any of the Challenged Measures. Given such context, and in light of the evidence on the record in this arbitration, Claimant's argument that the Bank Account Closures were caused by the seizures of Gold by Peruvian authorities is unsubstantiated and speculative, and must therefore be rejected.

b. Claimant has failed to prove that the Bank Account Closures caused Kaloti's demise

359. Even assuming *arguendo* that the Challenged Measures were the proximate cause of the Bank Account Closures (quod non), Claimant has failed to prove that such closures caused Kaloti's demise. In the Memorial, Claimant alleged that the Bank Account Closures deprived Kaloti of the financing it needed to continue to purchase gold.[898] But as recalled above, Peru demonstrated in the Counter-Memorial that Claimant's argument lacked any basis, including because Claimant had repeatedly stated that

[896] **Ex. R-0279,** *"Whistleblower suing* [redacted] *over gold dealings with Dubai firm,"* THE GUARDIAN, 20 January 2018, p. 3.

[897] **Ex. R-0279,** *"Whistleblower suing* [redacted] *over gold dealings with Dubai firm,"* THE GUARDIAN, 20 January 2018, p. 3.

[898] Memorial, ¶ 67.

[redacted] guaranteed that it would have access to unlimited financing in order "to buy as much gold . . . as it could source."[899]

360. In the Reply, Claimant did not even address Peru's rebuttal arguments, resorting instead to a new argument. Based on the testimony of Claimant's new witness [redacted], Claimant now alleges that the Bank Account Closures prevented Kaloti from making "money transfers"[900] to its suppliers. Similarly, in the Reply Claimant cites [redacted] first witness statement to allege that "[w]ithout U.S. bank accounts . . . many suppliers (sellers of gold) all over the world did not want to deal with KML [Kaloti]."[901] Neither [redacted] nor [redacted] nor Claimant have provided any documentary evidence whatsoever proving Kaloti's alleged inability to make money transfers, or how such inability supposedly resulted in "many suppliers (sellers of gold) all over the world" refusing to deal with Kaloti. Claimant has not submitted a single communication with those suppliers or the relevant banks. Nor has Claimant managed to put forth a single internal communications between Kaloti's management or employees on the subject, despite claiming in the present proceeding that the issue was of such importance that it led to Kaloti's demise. Equally, Claimant has failed to submit any internal notes of the phone calls that [redacted] claims to have held with financial institutions.

361. Contrary to Claimant's allegations, the evidence on the record shows that Kaloti held multiple bank accounts, from the time of its incorporation and until it decided to terminate operations.[902] Kaloti's financial statements also show that between 2012 and 2018, Kaloti held accounts with Capital Bank/Global, Sierra Global and Continental,

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[899] Memorial, ¶ 145. *See also* Memorial, ¶¶ 22, 29, 46; [redacted] Witness Statement, ¶ 21.

[900] [redacted] Witness Statement, ¶29.

[901] Reply, fn. 362.

[902] **Ex. AS-0061**, KML 2012 Balance Sheet, p. 11; **Ex. BR-0058**, Kaloti Metal and Logistics Statement of Financial Position for the Period Ended on 31 December 2013, p. 3; **Ex. AS-0062**, KML 2014 Balance Sheet, p. 5; **Ex. AS-0063**, KML 2015 Balance Sheet, p. 4; **Ex. AS-0064**, KML 2016 Balance Sheet, p. 4; **Ex. AS-0065**, KML 2017 Balance Sheet, p. 3; **Ex. AS-0066**, KML 2018 Balance Sheet, p. 3, all showing the bank accounts it held in each year.

amongst other banks.[903] Several of those bank accounts were kept open until Kaloti decided to shutter its operations. Moreover, Kaloti was actually able to open seven new accounts even *after* the SUNAT Immobilizations. Specifically, Kaloti opened two new accounts in 2014[904], another in 2016,[905] two in 2017,[906] and two more in 2018.[907] Confirming the foregoing, the table below shows that Kaloti held active bank accounts, from the time of its incorporation and until it decided to terminate operations:

[903] **Ex. AS-0061**, KML 2012 Balance Sheet, p. 11; **Ex. BR-0058**, Kaloti Metal and Logistics Statement of Financial Position for the Period Ended on 31 December 2013, p. 3; **Ex. AS-0062**, KML 2014 Balance Sheet, p. 5; **Ex. AS-0063**, KML 2015 Balance Sheet, p. 4; **Ex. AS-0064**, KML 2016 Balance Sheet, p. 4; **Ex. AS-0065**, KML 2017 Balance Sheet, p. 3; **Ex. AS-0066**, KML 2018 Balance Sheet, p. 3, all showing the bank accounts it held in each year.

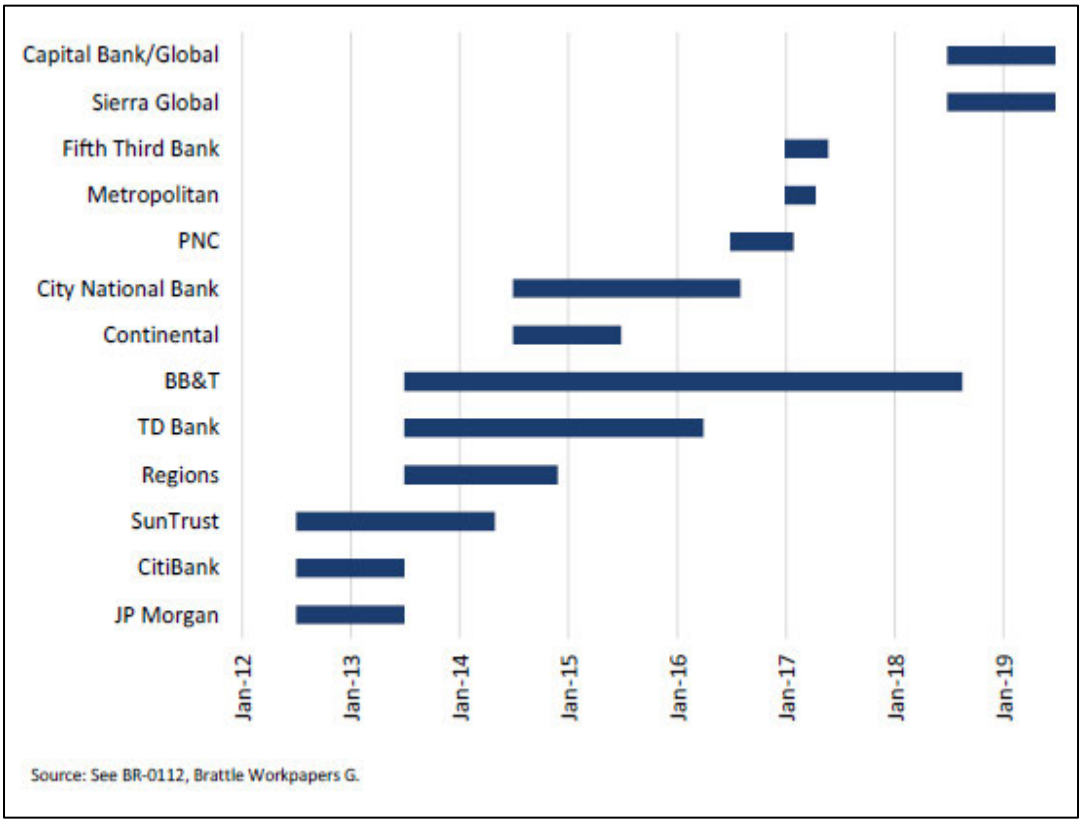
[904] **Ex. AS-0062**, KML 2014 Balance Sheet, p. 5 (this is the first year City National Bank, Continental National Bank, and Regions appear on Kaloti's accounting books).

[905] **Ex. AS-0064**, KML 2016 Balance Sheet, p. 4 (this is the first year that PNC Bank appears on Kaloti's accounting books).

[906] **Ex. AS-0065**, KML 2017 Balance Sheet, p. 3 (this is the first year that Metropolitan Commercial Bank and Fifth Third Bank appear on Kaloti's accounting books).

[907] **Ex. AS-0066**, KML 2018 Balance Sheet, p. 3 (this is the first year that Sierra Global and Capital Bank/Global appear on Kaloti's accounting books).

Figure 3: Active Account Periods for Kaloti's Accounts with US Banks[908]



362. It is also untrue that Kaloti's inability to resell the relatively small volume of Gold comprising the Five Shipments (i.e., 475 kg, worth approximately USD 17 million) prevented Kaloti from continuing to operate, as Claimant alleges.[909] The Transaction History shows that from 2014 to 2018—i.e., the period during which Kaloti allegedly had difficulties to make money transfers to buy gold—Kaloti actually traded an astonishing amount of gold. Specifically, the Transaction History shows that Kaloti traded more than 83,383 kg between 2014 and 2018,[910] which means that, during that period, and despite the alleged constraints that it now invokes, Kaloti managed to transfer to suppliers in Peru and other countries *multiple USD billions.*

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[908] Brattle Second Report, p. 29, Figure 2.

[909] Reply, ¶ 446.

[910] **Ex. C-0030**, KML transaction summary of all purchases between 2012 and 2018, pp. 11, 14, 17, 20, 22.

363. In conclusion, Claimant has utterly failed to demonstrate (i) that any suppliers or financial institutions severed their relationships with Kaloti *because of* any act or omission attributable to Peru, and (ii) that the alleged severance of such relationships actually caused Kaloti's demise. Consequently, Claimant's allegation that Peru caused Kaloti's alleged demise should be rejected.

G. Claimant's request for adverse inferences should be rejected

364. In the Reply, Claimant argued that Peru violated Procedural Order No. 2 ("**PO2**") because it had allegedly failed (i) to produce documents responsive to Claimant's document production requests Nos. 6, 7, and 13 (jointly, "**Claimant's Document Production Requests**"), and (ii) to provide any valid justification for not producing those documents.[911] On that basis, Claimant requested that the Tribunal draw a wide range of inferences adverse to Peru. Such request is ill-founded, as it ignores that (i) several of the documents requested by Claimant simply do not exist, and (ii) as Peru explained during document production, the responsive documents that do exist are already on the record of this arbitration.

365. Pursuant to Article 9(6) of the IBA Rules on the Taking of Evidence ("**IBA Rules**"), a Tribunal has the *discretion*[912] to draw adverse inferences if a party *fails to provide a satisfactory explanation* for not producing a document that (i) was responsive to a request that was not objected to in due time, or (ii) was ordered to be produced by the Tribunal:

> If a Party fails **without satisfactory explanation** to produce any Document requested in a Request to Produce to which it has not objected in due time or fails to produce any Document ordered to be produced by

[911] Procedural Order No. 2, Annex 1, Requests Nos. 6, 7, 13, pp. 38, 44, 72.

[912] *See, e.g.*, **RL-0248**, *Lone Pine Resources Inc. v. Government of Canada*, ICSID Case No. UNCT/15/2, Final Award, 21 November 2022 (van den Berg, Haigh, Stern), ¶ 259 ("Pursuant to Article 9(5) of the IBA Rules . . . the Tribunal has **the discretion** to draw adverse inferences vis-à-vis Respondent's case, on account of any non-production of documents by Respondent in contravention of the Tribunal's directions to produce the documents" (emphasis added)).

the Arbitral Tribunal, the Arbitral Tribunal **may** infer that such document would be adverse to the interests of that Party.[913] (Emphasis added)

366. As explained below, Peru did not produce additional documents in response to Claimant's Document Production Requests because the only documents that are responsive to those requests are already on the record of the present arbitration. Consequently, Claimant's request for adverse inferences does not meet the requirements set out in Article 9 of the IBA Rules for the Tribunal to draw *any type of adverse inferences*.

367. Further, and in any event, Claimant's request fails to meet the requirements identified in the jurisprudence of international courts and tribunals for drawing the specific adverse inferences that Claimant asks of this Tribunal. Specifically, the inferences that Claimant seeks are neither reasonable, nor consistent with the evidence on the record, nor logically related to the documents requested in Claimant's Document Production Requests.

1. No adverse inferences may be drawn because the documents requested in Claimant's Document Production Requests do not exist or are already on the record of this arbitration

368. Claimant's Document Production Requests were riddled with inaccuracies and fundamental errors.[914] Through **Document Production Request No. 6**, Claimant requested that Peru produce a "[s]eizure order of [Kaloti]'s gold (of Shipment 5 from [redacted] **issued by** the *Segunda Fiscalía Supraprovincial a cargo de los Delitos de Lavado de Activos y Pérdida de Dominio* [(i.e., the Prosecutor's Office)], [on] March 25, 2014" (emphasis added).[915] Peru already explained during document production that (i) precautionary measures under Peruvian law are generally ordered by a court,[916] and

[913] IBA Rules, Art. 9(6).

[914] *See* Procedural Order No. 2, Annex 1, General Response of the Republic of Peru to Claimant's Document Production Requests, ¶ 6.

[915] Procedural Order No. 2, Annex 1, Request No. 6, p. 38.

[916] Procedural Order No. 2, Annex 1, Peru's answer to Request No. 6, p. 38.

(ii) therefore, Claimant's request concerning a seizure order *issued* by the Prosecutor's Office was unlikely to exist.

369. Despite this flaw in Request No. 6, Peru agreed, in the spirit of cooperation, 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 [in response to the request of the Prosecutor's Office]" (emphasis added), rather than conducting a search for the (likely non-existent) document(s) requested by Claimant.[917]

370. Peru also explained that Shipment 5 was subject to a precautionary seizure (i.e., the Shipment 5 Precautionary Seizure) that had been ordered in the [redacted] Criminal Proceeding *not* on "25 March 2014" (as Claimant wrongly indicated in Document Production Request No. 6[918]), but rather on 20 March 2015. Together with the Memorial, Peru had already submitted as **Exhibit R-0210** the resolution dated 20 March 2015, whereby the competent Criminal Court had granted the Shipment 5 Precautionary Seizure.[919] Peru thus explained that "there [was] a strong likelihood that no order issued on **25 March 2014** exist[ed]" (emphasis added).[920] Having conducted a reasonable search, Peru confirms that there is no extant order dated 25 March 2014 concerning Shipment 5. Given the above, no adverse inference should be drawn against Peru, particularly given that Claimant has provided no evidence whatsoever that the seizure order requested in its **Document Production Request No. 6** in fact exists.

371. Through **Document Production Request No. 7**, Claimant requested "[s]eizure orders of [Kaloti]'s gold (of [redacted] [redacted] and [redacted] purchases) issued by various

[917] Procedural Order No. 2, Annex 1, Peru's answer to Request No. 6, pp. 38–39.

[918] Procedural Order No. 2, Annex 1, Request No. 6, pp. 42–43; Counter-Memorial, ¶ 247.

[919] **Ex. R-0210**, Resolution No. 1, Precautionary Seizure against Shipment 5, 20 March 2015.

[920] Procedural Order No. 2, Annex 1, Peru's answer to Request No. 6, pp. 42–43.

Peruvian courts on March 11, 2014, March 27, 2014, and May 6, 2014, respectively."[921] During document production, Peru had explained that Claimant's failure to provide appropriate search parameters would significantly reduce the likelihood of finding such documents, including because Claimant had not indicated which court would have granted the requested precautionary seizures—Claimant had simply referred to "various Peruvian courts"—or in which specific criminal proceedings such orders would have been issued.[922]

372. Importantly, Peru also explained that the requested seizure orders likely did not exist because Claimant had probably cited erroneous dates for such orders.[923] As Peru had explained in the Counter-Memorial,[924] (i) Shipment 2 (from [redacted] had been subject to a Precautionary Seizure on 25 March 2014 (*not* on "March 27, 2014"), (ii) Shipment 3 (from [redacted] had been subject to a Precautionary Seizure on 30 April 2014 (*not* on "May 6, 2014"), and (iii) Shipment 4 (from [redacted] had been subject to a Precautionary Seizure on 1 May 2014 (*not* on "March 11, 2014").[925] Peru also noted during document production that these three Precautionary Seizures were already on the record of the present arbitration,[926] as **Exhibits R-0135** (Shipment 2), **C-0090** (Shipment 3), and **R-0136** (Shipment 4).[927]

373. Nevertheless, Peru agreed to conduct a reasonable search for the documents requested by Claimant in its Document Production Request No. 7. Having conducted such search, Peru confirms that—as it had already anticipated might be the case,

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[921] Procedural Order No. 2, Annex 1, Request No. 7, p. 44.

[922] Procedural Order No. 2, Annex 1, Peru's answer to Request No. 7, pp. 44–45.

[923] Procedural Order No. 2, Annex 1, Peru's answer to Request No. 7, p. 46. *See* **Ex. R-0135**, Precautionary Seizure against Shipment 2, 25 March 2014; **Ex. C-0090**, [redacted] Ruling of the Superior Court of Justice of Callao – Permanent Criminal Court, 30 April 2014; **Ex. R-0136**, Precautionary Seizure against Shipment 4, 1 May 2014.

[924] Counter-Memorial, ¶¶ 122, 156.

[925] Procedural Order No. 2, Annex 1, Peru's answer to Request No. 7, p. 45.

[926] Procedural Order No. 2, Annex 1, Peru's answer to Request No. 7, p. 46.

[927] *See* **Ex. R-0135**, Precautionary Seizure against Shipment 2, 25 March 2014; **Ex. C-0090**, [redacted] Ruling of the Superior Court of Justice of Callao – Permanent Criminal Court, 30 April 2014; **Ex. R-0136**, Precautionary Seizure against Shipment 4, 1 May 2014.

during document production—the documents requested by Claimant simply do not exist. Claimant has not produced a single piece of evidence that suggests that the seizure orders listed in Document Production Request No. 7 do in fact exist. Therefore, no adverse inference can properly be drawn from the fact that Peru has not produced such orders. Peru cannot produce that which does not exist.

374. Through **Document Production Request No. 13**, Claimant requested the "Exhibits of the File (*Carpeta Fiscal*) No. 42-2014-1°FISLAAPD-MP-FN-3D, issued by the *1° Fiscalía Supraprovincional a cargo de los Delitos de Lavado de Activos y Pérdida de Dominio* dated October 12, 2015."[928] In response to this request, Peru explained that the term "*carpeta fiscal*" refers to a file or record of all of the documents pertaining to a given preliminary investigation of the Prosecutor's Office, and as such does not have a specific date attached to it.[929] Nevertheless, in compliance with PO2, Peru conducted a reasonable search and confirmed that there was no "File (*Carpeta Fiscal*) No. 42-2014-1°FISLAAPD-MP-FN-3D . . . dated October 12, 2015."[930] Claimant had again failed to properly formulate its document production request.

375. Through its reasonable search, Peru also ascertained that the number identified by Claimant in its Document Production Request No. 13 was not the number of a "File (*Carpeta Fiscal*)" but rather that of a single official letter (*oficio*) from the Prosecutor's Office; moreover, such letter was not dated "October 12, 2015" as indicated by Claimant but rather 16 October 2015. Claimant itself had previously submitted that same letter into the record of this arbitration as "Exhibit C-0108[,] Communication No. 42-2014-1°FISLAAPD-MP-EN-3D forwarding the prosecutor's resolution No. 1 dated September 20, 2015."[931] In addition, the only attachment to that letter of 16 October

[928] Reply, ¶ 18; Procedural Order No. 2, Annex 1, Request No. 13, p. 72.

[929] Procedural Order No. 2, Annex 1, Peru's answer to Request No. 13, p. 73.

[930] Procedural Order No. 2, Annex 1, Request No. 13, p. 72.

[931] **Ex. C-0108**, Communication No. 42-2014-1°FISLAAPD-MP-EN-3D forwarding the prosecutor's resolution No. 1 dated 20 September 2015, 16 October 2015.

2015 was a prosecutorial filing (*resolución fiscal*) dated 20 September 2015.[932] Peru did not need to produce this prosecutorial filing either, as that, too, was already part of the record of this arbitration, as **Exhibit C-0052**.[933]

376. In the Reply, Claimant asserted that Peru had not provided a reasonable explanation for not producing the specific documents that Document Production Request No. 13 had intended to cover.[934] This is false, because Peru repeatedly explained in its direct communications with Claimant that Peru would not be producing any documents that had already been filed in the arbitration, given that they were already in Claimant's possession.[935] Claimant did not protest at the time, and in fact Claimant itself noted in its Redfern Schedule that it was "not requesting Peru to produce documents already submitted as Exhibits in the arbitration."[936]

377. The above demonstrates that Peru fully complied with PO2 and produced those documents found to be responsive to Claimant's Document Production Requests. There is therefore simply no basis under Article 9 of the IBA Rules, or under any other legal provision, to draw any adverse inferences against Peru in relation to Claimant's Document Production Requests.

2. In any event, the adverse inferences requested by Claimant are unreasonable and manifestly unfounded

378. Even assuming *arguendo* that Peru had failed to comply with PO2 in respect of Claimant's Document Production Requests (quod non), Claimant has manifestly failed to substantiate the specific adverse inferences that it asked the Tribunal to draw.

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[932] *See* **Ex. C-0108**, Communication No. 42-2014-1°FISLAAPD-MP-EN-3D forwarding the prosecutor's resolution No. 1 dated 20 September 2015, 16 October 2015 ("I have the pleasure of writing to you to FORWARD the prosecutorial filing dated 20 September 2015").

[933] **Ex. R-0339**, Prosecutorial Resolution No. 1, First Supra-Provincial Corporate Prosecutor's Office Specializing in Money Laundering and Loss of Domain Crimes, 20 September 2015 [*Re-submitted version of C-0052, with Respondent's translation*].

[934] Claimant's Reply, ¶ 19.

[935] **Ex. R-0243**, Email from Arnold & Porter to WDA Legal, 12 October 2022; **Ex. R-0244**, Email from Arnold & Porter to WDA Legal, 5 January 2023.

[936] *See* Procedural Order No. 2, Annex 1, p. 10.

The jurisprudence of international courts and tribunals has established that (i) the party seeking an adverse inference must "produce all available evidence corroborating the inference sought,"[937] (ii) such evidence must at least prove prima facie the requested inference,[938] and (iii) the inference sought must be "reasonable, consistent with facts in the record and logically related to the likely nature of the evidence withheld."[939] However, the evidence on the record in fact confirms that none of the inferences sought by Claimant meets the requirements identified above.

379. *First*, Claimant requested that the Tribunal infer that "[Kaloti] was never investigated in Peru in connection with the [F]ive [S]hipments."[940] But there is no support for that inference. Claimant merely alleged that "[t]he documents that Peru failed to produce do not mention, and are hence exculpatory, of [Kaloti]."[941] This is not a "reasonable" inference; Claimant did not even bother to explain how "the inference sought [is] logically related to the likely nature of the evidence [allegedly] withheld,"[942] or why the fact that certain documents do not mention Kaloti would *a fortiori* mean that

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[937] **RL-0250**, J. K. Sharpe, "*Drawing Adverse Inferences from Non-Production of Evidence*," ARBITRATION INTERNATIONAL (2006), pp. 551, 554–557. *See also* **RL-0251**, *Kathryn Faye Hilt v. Islamic Republic of Iran*, IUSCT Case No. 10427, Award No. 354-10427-2, 16 March 1988 (Briner, Aldrich, Bahrami-Ahmadi), ¶ 21; **RL-0252**, *William J. Levitt v. Government of the Islamic Republic of Iran, et al.*, IUSCT Case No. 210, Award No. 520-210-3, 29 August 1991 (Arangio-Ruiz, Allison, Moin), ¶ 64.

[938] **RL-0250**, J. K. Sharpe, "*Drawing Adverse Inferences from Non-Production of Evidence*," ARBITRATION INTERNATIONAL (2006), pp. 551, 564–570. *See also* **RL-0249**, *Rockwell International Systems, Inc. v. Government of the Islamic Republic of Iran*, IUSCT Case No. 430, Award No. 438-430-1, 5 September 1989 (Böckstiegel, Noori, Holtzmann), ¶ 141 ("Prima facie evidence must be recognized as a satisfactory basis to grant a claim where proof of the facts underlying the claim presents extreme difficulty and an inference from the evidence can reasonably be drawn."); **RL-0253**, *Lockheed Corp. v. Government of Iran et. al.*, IUSCT Case No. 829, Award No. 367-829-2, 9 June 1988 (Briner, Aldrich, Khalilian), ¶ 50.

[939] **RL-0250**, J. K. Sharpe, "*Drawing Adverse Inferences from Non-Production of Evidence*," ARBITRATION INTERNATIONAL (2006), pp. 551, 562–564. *See also* **RL-0254**, *Frederica Lincoln Riahi v. Government of the Islamic Republic of Iran*, IUSCT Case No. 485, Final Award No. 600-485-1, 27 February 2003 (Broms, Brower, Noori), ¶¶ 103–104.

[940] Reply, ¶ 21.

[941] Reply, ¶ 21.

[942] **RL-0250**, J. K. Sharpe, "*Drawing Adverse Inferences from Non-Production of Evidence*," ARBITRATION INTERNATIONAL (2006), p. 551. *See also* Reply, ¶ 24.

Claimant "was never investigated in connection with the [F]ive [S]hipments."[943] Such proposition is fundamentally flawed as a matter of pure logic.

380. Moreover, the inference sought by Claimant is refuted by the evidence on the record. As discussed in **Section II.B** above, Kaloti was included in two criminal investigations launched by the Prosecutor's Office: the [redacted] Investigation and the [redacted] Investigation,[944] amongst other reasons because Kaloti had made suspicious transfers of money to multiple companies (including [redacted] and [redacted] that themselves were under investigation for money laundering.[945] Notably, (i) the [redacted] Investigation concerned, inter alia, facts related to Shipment 5,[946] and (ii) the [redacted] Investigation specifically referenced purchase statements concerning Shipment 2,[947] and uncovered that the miners from which [redacted] claimed to have bought the Gold in that shipment in fact did not know [redacted] representative or employees and, in any event, did not have the necessary licenses to mine that Gold.[948] Therefore, contrary

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[943] Reply, ¶ 21.

[944] **Ex. R-0339**, Prosecutorial Resolution No. 1, First Supra-Provincial Corporate Prosecutor's Office Specializing in Money Laundering and Loss of Domain Crimes, 20 September 2015 [*Re-submitted version of C-0052, with Respondent's translation*], pp. 2, 4; **Ex. R-0340**, Prosecutorial Order No. 19, First Supra-Provincial Corporate Prosecutor's Office Specializing in Money Laundering and Loss of Domain Crimes, 9 January 2017 [*Re-submitted version of C-0101, with Respondent's translation*], pp. 1, 3.

[945] *See* **Ex. R-0339**, Prosecutorial Resolution No. 1, First Supra-Provincial Corporate Prosecutor's Office Specializing in Money Laundering and Loss of Domain Crimes, 20 September 2015 [*Re-submitted version of C-0052, with Respondent's translation*], p. 26; **Ex. R-0340**, Prosecutorial Order No. 19, First Supra-Provincial Corporate Prosecutor's Office Specializing in Money Laundering and Loss of Domain Crimes, 9 January 2017 [*Re-submitted version of C-0101, with Respondent's translation*], p. 34.

[946] **Ex. R-0340**, Prosecutorial Order No. 19, First Supra-Provincial Corporate Prosecutor's Office Specializing in Money Laundering and Loss of Domain Crimes, 9 January 2017 [*Re-submitted version of C-0101, with Respondent's translation*], pp. 162–163, 172–174, 230.

[947] The relevant purchase statements which form Shipment 2 are 02-000176, 002-000177, 002-000178, 002-000179, 002-000180 as shown in **Ex. C-0007**, [redacted] Gold Corporations S.A.C. document package, pp. 33–37. These same purchase statements are explicitly referenced in Investigation No. 42-2014, *see* **Ex. R-0339**, Prosecutorial Resolution No. 1, First Supra-Provincial Corporate Prosecutor's Office Specializing in Money Laundering and Loss of Domain Crimes, 20 September 2015 [*Re-submitted version of C-0052, with Respondent's translation*], p. 120.

[948] **Ex. R-0339**, Prosecutorial Resolution No. 1, First Supra-Provincial Corporate Prosecutor's Office Specializing in Money Laundering and Loss of Domain Crimes, 20 September 2015 [*Re-submitted version of C-0052, with Respondent's translation*], p 102.

to the inference sought by Claimant, Kaloti has been investigated in relation to at least some of the Five Shipments.

381. Claimant also alleged that a report prepared by the Peruvian National Police's Directorate for Money Laundering Investigations ("**DIRILA**"),[949] and three reports prepared by the Financial Intelligence Unit of Peru ("**UIF**"),[950] confirmed that Kaloti "was never involved or accused of wrongdoing" and that "Peru started to look for excuses to begin investigations only after the [G]old had been seized from [Kaloti]."[951] This is false for several reasons, including the fact that the documents in fact repeatedly note that Kaloti had made payments for dozens of USD million to companies and persons that were being investigated for money laundering and illegal mining.[952] Those include [redacted] (who, as explained in **Section II.B** above, has been investigated in relation to multiple criminal activities) and companies controlled by Mr. [redacted] Thus, far from clearing Kaloti of any wrongdoing, the documents cited by Claimant itself confirm that Kaloti has close ties with several suspected criminals.

382. *Second*, Claimant requested that the Tribunal infer that "Peru knew that all the [G]old seized was legitimately owned by [Kaloti] at least until November 30, 2018."[953] According to Claimant, the Tribunal should draw this inference exclusively on the basis that some of "[t]he documents sought by [Kaloti] relate to the seizure of th[e] [F]ive [S]hipments of gold."[954] Under Claimant's theory, if Peru failed to produce *any*

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[949] **Ex. C-0161**, Composite exhibit – documents produced by Peru on 05 January 2023, pp. 8–15 (*in Claimant's translation, pp. 6–11*).

[950] **Ex. C-0161**, Composite exhibit – documents produced by Peru on 05 January 2023, pp. 16–34 (UIF Report No. 011-2014-DAO-UIF-SBS dated 28 February 2014) (*in Claimant's translation, pp. 12–30*), pp. 35–52(UIF Report No. 027-2014-DAO-UIF-SBS dated 29 April 2014) (*in Claimant's translation, pp. 31–45*), pp. 53–58 (UIF Report No. 075-2014-DAO-UIF-SBS dated 26 September 2014) (*in Claimant's translation, pp. 52-55*).

[951] Reply, ¶ 28.

[952] **Ex. C-0161**, Composite exhibit – documents produced by Peru on 05 January 2023, pp. 9, 11, 26, 29, 33, 39, 52 (*in Claimant's translation, pp. 7–8, 22, 25, 29, 35, 49*).

[953] Reply, ¶ 21.

[954] Reply, ¶ 21.

document related in *any* way to the seizure of the Five Shipments automatically means that "Peru knew that all the gold seized was legitimately owned by [Kaloti]."[955] Such conclusion is a complete *non sequitur*. In any event, the evidence on the record shows that the Gold in fact was *not* legitimately owned by Kaloti. This has been discussed in detail in **Section II.A** above, wherein Peru showed that Claimant has not presented even prima facie evidence that Kaloti legitimately owned the Gold. Among other evidentiary gaps, Claimant has failed to provide (i) agreement(s) for the purchase of the Gold, (ii) proof that Kaloti had in fact paid for that Gold, (iii) proof that the Gold was in fact delivered to Kaloti, and/or (iv) evidence proving that, when it allegedly purchased the Gold, Kaloti complied with its due diligence obligations under Peruvian law.[956]

383. *Third*, Claimant requested that the Tribunal infer that "Peru only pursued shipments of gold (tangible assets) specifically sold to [Kaloti]," which according to Claimant "demonstrates that [Kaloti] was in practice the real target of Peru's arbitrary and discriminatory actions and omissions."[957] Claimant attempted to base this inference on its own assertion that "[t]he documents sought by [Kaloti] relate to those four companies [(i.e., the Suppliers)]."[958] This is yet another baseless and unreasonable inference sought by Claimant, and one that is also contradicted by the evidence on the record.

384. The evidence shows that, in addition to the Gold, the Criminal Courts have seized assets of the Suppliers that were *unrelated* to Kaloti. For example, on 11 March 2015 the Prosecutor's Office requested the precautionary seizure of movable and immovable assets belonging to [redacted] and its representatives:

> I REQUEST THE PRECAUTIONARY SEIZURE of the movable and immovable property of defendants [redacted] and the company [redacted] up to the amount that is necessary in order

[955] Reply, ¶ 21.

[956] *See supra* Section II.A.

[957] Reply, ¶ 21.

[958] Reply, ¶ 21.

to guarantee the payment of civil reparation in favor of the aggrieved party.[959] (Emphasis added)

385. In its decision to initiate the [redacted] Criminal Proceeding, the Criminal Court not only maintained the Precautionary Seizure over the Gold contained in Shipment 2, but also granted the above-cited precautionary attachment over the property of [redacted] and its representatives.[960] The Criminal Courts ordered similar precautionary attachments over the assets of the parties investigated in the [redacted] Criminal Proceeding,[961] the [redacted] Criminal Proceeding,[962] and the [redacted] Criminal Proceeding.[963] Thus, contrary to Claimant's arguments, the Criminal Courts have in fact seized assets of the Suppliers that are unrelated to Kaloti.

386. Further, the evidence that Claimant itself has submitted in this arbitration shows that Peru has investigated numerous companies (and not only Kaloti) in relation to money laundering and illegal mining. For example, the document that Claimant requested through its **Document Production Request No. 13** (which, as explained above, it turned out Claimant itself had already previously submitted in this arbitration) shows that the [redacted] Investigation involved more than 20 individuals and more than 25 companies.[964] Therefore, the inference sought by Claimant—that Peru's only targets were Kaloti and property sold to Kaloti—is both unsubstantiated and directly contradicted by the evidence on the record.

387. *Fourth*, Claimant requested that the Tribunal infer that "[u]ntil the commencement of this arbitration, Peru never invoked Article 94 of Peru's Code of Criminal Procedure

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[959] **Ex. R-0164**, Criminal Complaint No. 382-2014, [redacted] Case, 11 March 2015, p. 41.

[960] **Ex. R-0145**, Resolution No. 1: Order Initiating Criminal Proceedings, [redacted] Case, 14 May 2015, p. 24.

[961] **Ex. R-0139**, Resolution No. 1: Order Initiating Criminal Proceedings, [redacted] Case, 16 March 2015, p. 22.

[962] **Ex. R-0224**, Resolution No. 1: Order Initiating Criminal Proceedings, [redacted] Case, 9 September 2014 [*Re-submitted version of C-0087, with Respondent's translation*], pp. 10–11.

[963] **Ex. R-0150**, Resolution No. 1: Order Initiating Criminal Proceedings, [redacted] Case, 10 March 2015, pp. 15–16.

[964] **Ex. R-0339**, Prosecutorial Resolution No. 1, First Supra-Provincial Corporate Prosecutor's Office Specializing in Money Laundering and Loss of Domain Crimes, 20 September 2015 [*Re-submitted version of C-0052, with Respondent's translation*], pp. 90–91. *See also* Counter-Memorial, ¶ 253.

in connection with the relevant seizures of gold."[965] This inference, for which Claimant offered no explanation or justification whatsoever, is similarly belied by the evidence on the record. For example, as explained in **Section II.C** above, the Criminal Court in charge of the [redacted] Criminal Proceeding had expressly invoked Article 94 of Peru's Code of Criminal Procedure as the basis for the seizure of the Gold contained in Shipment 2.[966]

388. *Fifth,* Claimant requested that the Tribunal infer that "Shipment No. 5, specifically and without limitation, is currently in Peru's possession."[967] This inference, for which Claimant also offered no explanation or justification whatsoever, is equally contradicted by the evidence on the record. As explained in **Section II.D** above, the Gold in Shipment 5 has at all times remained in the facilities that Kaloti rented from [redacted] in Lima and, consequently, it has *never* been in Peru's possession.

389. For the foregoing reasons, Claimant's requests for adverse inferences are frivolous and must be rejected.

III. JURISDICTION

390. In accordance with the principle *actori incumbit onus probandi*,[968] Claimant, as the party alleging that the Tribunal has jurisdiction to adjudicate its claims, bears the burden of proving the facts necessary to establish such jurisdiction.[969] This burden requires

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[965] Reply, ¶ 21.

[966] **Ex. R-0145**, Resolution No. 1: Order Initiating Criminal Proceedings, [redacted] Case, 14 May 2015, p. 25 ("The seizure of the gold requested by the Prosecutor's Office is intended to make said measure last during the investigation stages, **for which the provisions of Article 94 subsection b) of the Criminal Procedure Code** must be applied" (emphasis added)).

[967] Reply, ¶ 21.

[968] *See* **RL-0180**, *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Award, 7 July 2004 (Fortier, Schwebel, El Kholy), ¶ 58; **RL-0181**, *Limited Liability Company Amto v. Ukraine*, SCC Case No. 080/2005, Final Award, 26 March 2008 (Cremades, Runeland, Söderlund), ¶ 64.

[969] *See* **RL-0182**, *Vito G. Gallo v. Government of Canada*, UNCITRAL, PCA Case No. 55798, Award, 15 September 2011 (Fernández-Armesto, Castel, Lévy), ¶ 277; **RL-0138**, *Spence International Investments et al. v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (Corrected), 30 May 2017 (Bethlehem, Vinuesa, Kantor) ("***Spence v. Costa Rica* (Corrected Award)**"), ¶ 239; **RL-0183**, *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009 (Stern, Bucher, Fernández-Armesto) ("***Phoenix* (Award)**"), ¶ 61.

Claimant to prove inter alia (i) the existence of a covered investment in Peru (i.e., jurisdiction *ratione materiae*);[970] and (ii) that its claims comply with the three-year temporal limitations period established by Article 10.18 of the Treaty (i.e., the Temporal Limitations Provision) (i.e., jurisdiction *ratione temporis*).[971]

391. Peru demonstrated in the Counter-Memorial that Claimant had failed to satisfy these jurisdictional requirements, and that the Tribunal accordingly lacks jurisdiction over Claimant's claims.[972] In the Reply, Claimant again failed to (i) identify a covered investment in Peru, or (ii) demonstrate that its claims comply with the Temporal Limitations Provision. Peru therefore reiterates in the sections that follow that the Tribunal lacks jurisdiction *ratione materiae* (**Section III.A**) and jurisdiction *ratione temporis* (**Section III.B**) over Claimant's claims.

A. The Tribunal lacks jurisdiction *ratione materiae* over Claimant's claims because Claimant has failed to establish the existence of a covered investment

392. Peru demonstrated in the Counter-Memorial—and Claimant does not dispute—that the Tribunal's jurisdiction *ratione materiae* is limited to disputes arising out of a "covered investment"—i.e., an investment made by Claimant that is protected under the Treaty.[973] In order to establish the existence of a covered investment, Claimant must demonstrate that:

a. the alleged investment possesses the characteristics of an investment under Treaty Article 10.28 and Article 25 of the ICSID Convention;[974]

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[970] *See* **RL-0001**, Treaty [*Re-submitted version of CL-0001, with additional pages*], Art. 10.16 (providing consent for the submission of "an investment dispute"); ICSID Convention, Art. 25.

[971] **RL-0001**, Treaty [*Re-submitted version of CL-0001, with additional pages*], Art. 10.18.

[972] *See generally* Counter-Memorial, § III.

[973] *See* Counter-Memorial, ¶¶ 324–326; Memorial, ¶ 72.

[974] *See* Counter-Memorial, ¶¶ 330–333 (*citing* **RL-0190**, *Amec Foster Wheeler USA Corp., et al., v. Republic of Colombia*, ICSID Case No. ARB/19/34, Submission of the United States of America, 4 April 2022, ¶ 30 ("***Amec Foster* (USA Submission)**"); **RL-0192**, *Seo Jin Hae v. Republic of Korea*, HKIAC Case No. 18117, United States Submission, 19 June 2019 ("***Seo Jin Hae* (USA Submission)**"), ¶ 15; **RL-0191**, *Seo*

b. Claimant acquired ownership or control over the alleged investment, pursuant to Treaty Article 10.28;[975]

c. Claimant made the investment in the territory of Peru, pursuant to Treaty Article 1.3;[976] and

d. the alleged investment was made in compliance with Peruvian law and international public policy.[977]

393. In both the Memorial and Reply, Claimant calculatedly avoided identifying its alleged investments with clarity and specificity. Instead, it claimed at various times that it had protected investments in the form of "tangible movable objects such as gold,"[978] "the

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Jin Hae v. Republic of Korea, HKIAC Case No. 18117, Final Award, 27 September 2019 (Simma, Lo, McRae) ("***Seo Jin Hae* (Final Award)**"), ¶¶ 89, 96; **RL-0193**, *Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc. v. Republic of Panama*, ICSID Case No. ARB/16/34, Submission of the United States, 28 August 2017 ("***Bridgestone* (USA Submission)**"), ¶ 14).

[975] *See* Counter-Memorial, ¶¶ 325, 361.

[976] *See* Counter-Memorial, ¶¶ 380–383 (*citing* ICSID Convention, Art. 25; Report of the Executive Directors on the Convention, p. 40; **RL-0207**, *Hope Services LLC v. Republic of Cameroon*, ICSID Case No. ARB/20/2, Award, 23 December 2021 (Scherer, Ziadé, Garel), ¶ 215; **RL-0206**, *Abaclat and others v. Argentina*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (Dissenting Opinion of Professor Georges Abi-Saab), 4 August 2011), ¶ 74; **RL-0105**, *Archer Daniels Midland Company, et al., v. United Mexican States*, ICSID Case No. ARB(AF)/04/5, Award, 21 November 2007 (Cremades, Rovine, Siqueiros) ("***ADM* (Award)**"), ¶ 273–274; **RL-0205**, Christopher R. Zheng, "*The Territoriality Requirement in Investment Treaties: A Constraint on Jurisdictional Expansionism*," SINGAPORE LAW REVIEW (2016), p. 29).

[977] *See* Counter-Memorial, ¶¶ 372–373 (*citing* **RL-0215**, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Award, 16 August 2007 (Fortier, Cremades, Reisman), ¶ 339; **RL-0082**, *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2006 (Blanco, Landy, von Wobeser) ("***Inceysa* (Award)**"), ¶ 207; **RL-0178**, *Salini Costruttori S.p.A. and Italstrade S.pA. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 16 July 2001 (Briner, Cremades, Fadlallah), ¶ 46; **RL-0183**, *Phoenix* (Award), ¶ 101; **CL-0049**, *Krederi Ltd. v. Ukraine*, ICSID Case No. ARB/14/17, Award, 2 July 2018, ¶¶ 385–386; **RL-0004**, *World Duty Free Co. v. Republic of Kenya*, ICSID Case No. Arb/00/7, Award, 4 October 2006 (Guillaume, Rogers, Veeder), ¶ 157; **RL-0214**, *Álvarez and Marín Corp. S.A., et al., v. Republic of Panama*, ICSID Case No. ARB/15/14, Award, 12 October 2018 (Fernández-Armesto, Grigera Naón, Álvarez) ("***Álvarez and Marín Corp.* (Award)**"), ¶ 135; **RL-0213**, *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010 (Stern, Cremades, Landau), ¶¶ 123–124; **RL-0189**, *SAUR International S A. v. Argentine Republic*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability, 6 June 2012 (Fernández-Armesto, Hanotiau, Tomuschat), ¶ 308; **RL-0097**, *Plama Consortium Ltd. v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008 (Salans, van den Berg, Veeder) ("***Plama* (Award)**"), ¶¶ 138–139).

[978] Reply, ¶ 154; Memorial, ¶ 81.

going concern enterprise of [Kaloti] in Peru,"[979] "its infrastructure for testing, processing, and selling gold,"[980] "hired workers, rented living space for those workers and storage space for the gold purchased,"[981] "advertisement investments,"[982] and "plans for [Kaloti] to open a refinery and expand its business in Peru."[983] This deliberate and strategic vagueness in Claimant's pleading is telling. A legitimate claimant should, at the very least, be able to clearly identify the investment that is the subject of the arbitration. But Claimant is not even able to comply with that basic requirement.

394. A careful review of Claimant's pleadings reveal that its claims in this arbitration are premised upon the existence of two alleged investments: (i) the Five Shipments of Gold, and (ii) Kaloti as a "going concern." For instance, Claimant asserted that Peru committed "distinct—but related—indirect expropriations," comprised of "Peru's seizure of the five gold shipments" and "an indirect expropriation of [Kaloti]'s going concern business enterprise."[984] Claimant also described the latter as "an indirect creeping expropriation of the entirety of [Kaloti]'s global business operations."[985] Similarly, Claimant's damages claims seek compensation for (i) the Five Shipments of Gold, and (ii) the alleged lost profits of and loss of "[Kaloti]'s enterprise as a going concern business."[986]

395. In the subsections that follow, Peru will demonstrate that (i) the Five Shipments of Gold do not qualify as a covered investment (**subsection 1**); and (ii) the "going concern enterprise" of Kaloti does not qualify as a covered investment (**subsection 2**).

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[979] Reply, ¶ 158.
[980] Reply, ¶ 154. *See also* Memorial, ¶ 81.
[981] Reply, ¶ 172.
[982] Reply, ¶ 158.
[983] Reply, ¶ 170. *See also* Reply, ¶ 163.
[984] Reply, ¶ 380.
[985] Reply, ¶ 394.
[986] Reply, ¶ 411.

Peru will also briefly address Claimant's sporadic references to other alleged investments, none of which qualify as covered investments (**subsection 3**).

1. The Five Shipments do not qualify as a covered investment

396. In the Counter-Memorial, Peru demonstrated that the Five Shipments of Gold do not qualify as a covered investment because (i) they do not possess the characteristics of an investment, (ii) Claimant has failed to prove that it acquired ownership over the Gold in the Five Shipments, and (iii) such alleged investment was made in violation of Peruvian law and international public policy.[987]

397. In the Reply, Claimant dismissed Peru's arguments, feigning incredulity and remarking that it "is really hard to fathom how [the Gold] . . . would not qualify as an investment."[988] In fact, it is not at all hard to fathom in the light of the Treaty, ICSID Convention, and international law, all of which impose certain requirements that Claimant's alleged investment simply does not meet.

a. <u>The Five Shipments do not possess the characteristics of a covered investment</u>

398. Claimant must show that its alleged investment (i.e., the Five Shipments of Gold) possesses the characteristics of an investment, but has failed to do so.

(i) An "investment" under Article 25 of the ICSID Convention must meet certain objective characteristics

399. Peru explained in the Counter-Memorial that Article 25 of the ICSID Convention (as interpreted by investment tribunals) establishes certain objective characteristics of an "investment."[989] Specifically, investment tribunals have interpreted the term "investment" to require (i) a contribution having an economic value;[990] (ii) an

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[987] *See generally* Counter-Memorial, §§ III.A.1–3.

[988] Reply, ¶ 156.

[989] *See* Counter-Memorial, § III.A.1.

[990] *See* Counter-Memorial, ¶ 333 (*citing* **RL-0194**, *Poštová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic*, ICSID Case No. ARB/13/8, Award, 9 April 2015 (Zuleta, Townsend, Stern) ("***Poštová* (Award)**"), ¶ 361).

expectation of return;[991] (iii) the assumption of an investment risk;[992] and (iv) a certain minimum duration.[993]

400. Claimant agreed that investment case law has recognized the foregoing characteristics of an investment. Specifically, Claimant cited two cases—*Fedax v. Venezuela* (1997) and *Salini v. Morocco* (2001)—both of which recognized the four above-referenced characteristics.[994] Claimant espouses the definition of investment advanced in *Salini v. Marocco*. The tribunal in that case acknowledged that the characteristics of an investment should be "assessed globally" and that they "may be interdependent."[995] Claimant also noted that the *Salini v. Morocco* tribunal considered the "[s]ignificance

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[991] *See* Counter-Memorial, ¶ 333 (*citing* **RL-0078**, Christopher Schreuer, *et al.*, THE ICSID CONVENTION: A COMMENTARY (2009), p. 372; **RL-0197**, *Toto Costruzioni Generali S.p.A. v. Republic of Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction, 11 September 2009 (van Houtte, Feliciano, Moghaizel), ¶ 84).

[992] *See* Counter-Memorial, ¶ 333 (*citing* **RL-0198,** *Romak S A. (Switzerland) v. Republic of Uzbekistan*, UNCITRAL, PCA Case No. AA280, Award, 26 November 2009 (Mantilla-Serrano, Rubins, Molfessis) ("***Romak* (Award)**"), ¶¶ 229–230; **RL-0199,** [redacted] *(Hong Kong) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/15/41, Award, 11 October 2019 (Boo, Unterhalter, Hossain), ¶¶ 218–220).

[993] *See* Counter-Memorial, ¶ 333 (*citing* **RL-0200**, *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, 16 May 2018 (Beechey, Born, Stern), ¶ 199; **RL-0196**, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan,* ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005 (Kaufmann-Kohler, Böckstiegel, Berman), ¶ 132) ("***Bayindir* (Decision)**").

[994] *See* **CL-0109**, *Fedax N.V. v. The Republic of Venezuela*, ICSID Case No. ARB/96/3, decision of the tribunal on objections to jurisdiction, 11 July 1997, ¶ 43 ("The basic features of an investment have been described as involving a certain duration, a certain regularity of profit and return, assumption of risk, a substantial commitment and a significance for the host State's development."); **CL-0110**, *Salini Construttori S.P.A. and Italstrade S.P A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 16 July 2001, ¶ 52 ("The doctrine generally considers that investment infers: contributions, a certain duration of performance of the contract and a participation in the risks of the transaction (*cf. commentary by E. Gaillard, cited above, p. 292*). In reading the Convention's preamble, one may add the contribution to the economic development of the host State of the investment as an additional condition" (emphasis in original)).

[995] **CL-0110**, *Salini Construttori S.P.A. and Italstrade S.P.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 16 July 2001, ¶ 52.

[of the alleged investment] for the host State's development."[996] Claimant argued that the Five Shipments of Gold possessed all five of these requisite characteristics.[997]

(ii) The Treaty also requires an investment to meet certain objective characteristics

401. As Peru explained in the Counter-Memorial,[998] Article 10.28 provides the definition of an "investment" and establishes certain requisite characteristics, as follows:

> every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as **the commitment of capital or other resources**, **the expectation of gain or profit**, **or** t**he assumption of risk**.[999] (Emphasis added)

402. Claimant argues, however, that an alleged investment need not possess all of those characteristics.[1000] Specifically, Claimant argues that "by having met one characteristic [Kaloti] has already met its burden."[1001] Claimant's distorted interpretation of Article 10.28 is incorrect, for the following two reasons.

403. *First*, Claimant's argument is inconsistent with the text of Article 10.28.[1002] The article expressly establishes that an asset will only qualify as an investment if it "has the **characteristics** of an investment" (emphasis added).[1003] The word is used in its plural

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[996] Reply, ¶ 158 (*citing* **CL-0110**, *Salini Construttori S.P A. and Italstrade S.P A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 16 July 2001, ¶ 52).

[997] *See* Reply, ¶ 158.

[998] *See* Counter-Memorial, ¶¶ 325, 330.

[999] **RL-0001**, Treaty [*Re-submitted version of CL-0001, with additional pages*], Art. 10.28. *See also* **RL-0190**, *Amec Foster* (USA Submission), ¶ 30; **RL-0192**, *Seo Jin Hae* (USA Submission), ¶ 15; **RL-0193**, *Bridgestone* (USA Submission), ¶ 14; **RL-0191**, *Seo Jin Hae* (Final Award), ¶ 89 ("[T]he definition makes clear that not every such asset qualifies. Instead, it must have 'the characteristics of an investment'.").

[1000] Reply, ¶ 161.

[1001] Reply, ¶ 161.

[1002] *See* **RL-0265**, Vienna Convention on the Law of Treaties, United Nations, 23 May 1969 ("**VCLT**"), Art. 31.1.

[1003] **RL-0001**, Treaty [*Re-submitted version of CL-0001, with additional pages*], Art. 10.28. *See also* **RL-0190**, *Amec Foster* (USA Submission), ¶ 30. *See also* **RL-0192**, *Seo Jin Hae* (USA Submission), ¶ 15; **RL-0193**, *Bridgestone* (USA Submission), ¶ 14; **RL-0191**, *Seo Jin Hae* (Final Award), ¶ 89 ("[T]he definition makes clear that not every such asset qualifies. Instead, it must have 'the characteristics of an investment'.").

form—i.e., requiring *more than one* characteristic of an investment. Article 10.28 goes on to provide a non-exhaustive list of such investments. Arguing, as Claimant does, that only one characteristic is required would violate the ordinary meaning of the term "characteristics" in Article 10.28.

404. The non-disputing party submissions of the United States (the other Party to the Treaty) identified by Peru in the Counter-Memorial also support Peru's interpretation of Article 10.28.[1004] For example, in interpreting a similarly-worded definition of investment, the United States has confirmed that an asset must have "the characteristics of an investment."[1005] The United States has also stated that the "use of the word 'including' in relation to 'characteristics of an investment' indicates that the list of identified characteristics, i.e., 'the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk' **is not an exhaustive list; additional characteristics may be relevant**" (emphasis added).[1006]

405. In this respect, Claimant's interpretation of Article 10.28 would deprive the provision of its *effet utile*. Specifically, under Claimant's theory, a claimant could identify only one of the listed characteristics—e.g., the commitment of capital—and declare that it had an investment. However, as investment tribunals have repeatedly affirmed, the mere commitment of capital is not sufficient to establish the existence of an investment.[1007] This was the case in *Apotex v. United States*, wherein the claimant

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[1004] *See* Counter-Memorial, ¶¶ 331–332 (*citing* **RL-0190**, *Amec Foster* (USA Submission), ¶ 30). *See also* **RL-0192**, *Seo Jin Hae* (USA Submission), ¶ 15; **RL-0193**, *Bridgestone* (USA Submission), ¶ 14).

[1005] **RL-0193**, *Bridgestone* (USA Submission), ¶ 14.

[1006] **RL-0190**, *Amec Foster* (USA Submission), ¶ 30. *See also, e.g.*, **RL-0193**, *Bridgestone* (USA Submission), ¶ 14 ("[T]he analysis should be guided by whether [the asset] has the characteristics of an investment, **including such characteristics as** the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk" (emphasis added)); **RL-0192**, *Seo Jin Hae* (USA Submission), ¶ 15 ("[The asset] must still always possess the characteristics of an investment, **including such characteristics as** the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk" (emphasis added)).

[1007] *See, e.g.*, **RL-0198**, *Romak* (Award), ¶¶ 221–222; **RL-0194**, *Poštová* (Award), ¶ 361; **RL-0202**, *Apotex Inc. v. United States of America*, ICSID Case No. UNCT/10/2, Award on Jurisdiction and Admissibility, 14 June 2013 (Landau, Davidson, Smith) ("***Apotex* (Award on Jurisdiction)**"), ¶¶ 235, 239; **RL-0242**,

alleged—and the tribunal accepted—that it had committed "significant capital in the United States towards the purchase of raw materials and ingredients."[1008] However, the tribunal observed (i) that these expenditures were undertaken by the claimant for the purpose of manufacturing products outside of the host State,[1009] and (ii) that claimant's activity in the host State in general was limited to "support[ing] and facilitat[ing] its . . . manufacturing and export operations" outside of the host State.[1010] The tribunal concluded that such activities constituted "no more than ordinary conduct of a business for the export and sale of goods" which did not amount to an investment.[1011] Therefore, the fact that claimant had made a commitment of capital did not, by itself, give rise to an interest or asset possessing the "characteristics of an investment." To argue otherwise would be to deprive Article 10.28 of its meaning.

406. *Second*, Claimant's argument is inconsistent with other applicable case law. As Peru explained in the Counter-Memorial, the tribunal in *Seo Jin Hae v. Korea* interpreted an identically-worded treaty provision of the Korea-US free trade agreement.[1012] The tribunal undertook a "global assessment of which characteristics are present and how strongly they show in the asset in question," and determined that such assessment should "start with the three listed characteristics because they were deemed particularly important by the drafters of the [treaty]."[1013] Claimant summarily concluded that the *Seo Jin Hae* tribunal's reasoning is inapposite "because the drafters of the [Korea-US free trade agreement] found them to be concurrently applicable."[1014]

Bayview Irrigation District et al. v. United Mexican States, ICSID Case No. ARB(AF)/05/01, Award, 19 June 2007 (Lowe, Gómez-Palacio, Meese), ¶ 104; **RL-0177**, *Global Trading Resource Corp. and Globex International, Inc. v. Ukraine*, ICSID Case No. ARB/09/11, Award, 1 December 2010 (Berman, Gaillard, Thomas) ("***Global Trading* (Award)**"), ¶ 56.

[1008] **RL-0202**, *Apotex* (Award on Jurisdiction), ¶ 239.

[1009] **RL-0202**, *Apotex* (Award on Jurisdiction), ¶ 239.

[1010] **RL-0202**, *Apotex* (Award on Jurisdiction), ¶ 235.

[1011] **RL-0202**, *Apotex* (Award on Jurisdiction), ¶¶ 235, 239.

[1012] *See* Counter-Memorial, ¶ 332 (*citing* **RL-0191**, *Seo Jin Hae v. Republic of Korea*, HKIAC Case No. 18117, Final Award, 27 September 2019 (Simma, Lo, McRae)).

[1013] **RL-0191**, *Seo Jin Hae* (Final Award), ¶ 96.

[1014] Reply, ¶ 161.

However, the Korea-US free trade agreement and the Treaty include identical definitions of an investment, such that the *Seo Jin Hae* tribunal's interpretation of that treaty term is directly relevant.

407. Thus, Claimant is incorrect that it need only show that the Five Shipments of Gold satisfy only one characteristic of an investment. Instead, Claimant is required to demonstrate that the Gold in the Five Shipments satisfied the relevant characteristics identified above and recognized even by Claimant. However, for the reasons explained in detail in Section III.A.1 of the Counter-Memorial and briefly recalled below, Claimant is unable to do so.

(iii) Kaloti did not make a commitment of capital or other resources

408. The tribunal in *Fedax v. Venezuela*—one of the few cases relied upon by Claimant—recognized that the contribution of capital or other resources is one of "the basic features of an investment."[1015] However, as Peru demonstrated in the Counter-Memorial, Claimant has not satisfied this "basic" characteristic.[1016] This is so for at least the following two reasons.

409. *First*, investment case law confirms that a payment for the mere purchase of a good or service—like the payments allegedly made by Kaloti with respect to the Five Shipments—does not constitute a "contribution" or "commitment."[1017] Instead, as confirmed by the tribunal in *Global Trading v. Ukraine*, neither "individual contracts, of limited duration, for the purchase and sale of goods, on a commercial basis . . . nor the moneys expended by the supplier in financing its part in their performance, can

[1015] **CL-0109**, *Fedax N.V. v. The Republic of Venezuela*, ICSID case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction, 11 July 1997, ¶ 43.

[1016] Counter-Memorial, ¶¶ 336–346.

[1017] *See, e.g.*, **RL-0198**, *Romak* (Award), ¶¶ 221–222; **RL-0194**, *Poštová* (Award), ¶ 361; **RL-0202**, *Apotex* (Award on Jurisdiction), ¶¶ 235, 239; **RL-0242**, *Bayview Irrigation District et al. v. United Mexican States*, ICSID Case No. ARB(AF)/05/01, Award, 19 June 2007 (Lowe, Gómez-Palacio, Meese), ¶ 104; **RL-0177**, *Global Trading* (Award), ¶ 56.

by any reasonable process of interpretation be construed to be 'investments' for the purposes of the ICSID Convention."[1018]

410. Therefore, the alleged purchase and export of the Five Shipments does not possess this "basic" characteristic of an investment.[1019]

411. *Second*, and even if a payment for the purchase of a good could constitute a contribution giving rise to an investment, Claimant has not demonstrated that it made such payments for each of the Five Shipments of Gold. Instead, as demonstrated in **Section II.A** above, the evidence on the record shows that Kaloti did not pay for four (viz., Shipments 1, 2, 3, and 5) of the Five Shipments.

412. In the Reply, Claimant responded by arguing that it "bought 344,421 kg of gold worldwide between 2012 and 2018, from which 161,168 kg of that gold was in Peru (alone)."[1020] But that argument fails to address the issue; namely, whether Claimant has established that the specific alleged investment on which the claims are based—i.e., the *Five Shipments of Gold*—entailed a contribution of capital and other resources. And Claimant has failed to prove that it contributed capital in relation to the Gold in *each* of the Five Shipments.

413. In conclusion, Claimant has not demonstrated that the alleged purchase of each of the Five Shipments of Gold involved the contribution of capital or other resources, and therefore did not qualify as a covered investment.

(iv) Kaloti did not assume any investment risk

414. Another requisite characteristic of an investment is the assumption of risk. In this respect, investment tribunals have affirmed that:

[1018] **RL-0177**, *Global Trading* (Award), ¶ 56. *See also* **RL-0202**, *Apotex* (Award on Jurisdiction), ¶¶ 235, 239 (noting that, even where a claimant "has committed significant capital in the [host State] towards the purchase of raw materials," trade operations amount to "no more than the ordinary conduct of a business for the export and sale of goods").

[1019] **RL-0202**, *Apotex* (Award on Jurisdiction), ¶ 239. *See also* **RL-0242**, *Bayview Irrigation District et al. v. United Mexican States*, ICSID Case No. ARB(AF)/05/01, Award, 19 June 2007 (Lowe, Gómez-Palacio, Meese), ¶ 104; **RL-0177**, *Global Trading* (Award), ¶ 56.

[1020] Reply, ¶ 158.

a. "what is required for an investment is a risk that is distinguishable from the type of risk that arises in an ordinary commercial transaction;"[1021]

b. examples of risks that arise in ordinary commercial transactions include "the risk of an asset declining in value,"[1022] and

c. a risk in the context of an investment entails "a situation in which the investor cannot be sure of a return on his investment, and may not know the amount he will end up spending, even if all relevant counterparties discharge their contractual obligations."[1023]

415. Arbitral jurisprudence has explained that "an investment risk [is] an operational risk and not a commercial risk or a sovereign risk."[1024] But as Peru noted in the Counter-Memorial, the purchase of the Five Shipments of Gold would only have exposed Kaloti to ordinary commercial risk, rather than to any investment risk in connection with its alleged investments.[1025] In the Reply, Claimant responded by arguing that Kaloti assumed risk because it "established on-the-ground operations, without knowing with certainty what would happen with such operations."[1026] But that argument would apply to any business venture—including for commercial transactions for the sale of goods and services—and does not address the risk that is specific to an investment. Claimant is required to show that it assumed risk *in respect*

[1021] **RL-0203**, *Nova Scotia Power Inc. (Canada) v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/1, Award, 30 April 2014 (van Houtte, Williams, Vinuesa), ¶ 105. *See also* **RL-0201**, *Christian Doutremepuich and Antoine Doutremepuich v. Republic of Mauritius*, PCA Case No. 2018-37, Award on Jurisdiction, 23 August 2019 (Scherer, Caprasse, Paulsson) ("***Doutremepuich* (Award)**"), ¶ 145 ("The required element of risk is to be distinguished from 'the ordinary commercial or business risk assumed by all those who enter into a contractual relationship.'"); **RL-0179**, *Joy Mining Machinery Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction, 6 August 2004 (Orrego Vicuña, Craig, Weeramantry), ¶ 57; **RL-0191**, *Seo Jin Hae* (Final Award), ¶ 130; **RL-0198**, *Romak* (Award), ¶ 229 ("[a]ll economic activity entails a certain degree of risk" but "this kind of risk is pure commercial risk, . . . the risk of doing business generally.").

[1022] **RL-0191**, *Seo Jin Hae* (Final Award), ¶¶ 130–133.

[1023] **RL-0198**, *Romak* (Award), ¶ 230. *See also* **RL-0201**, *Doutremepuich* (Award), ¶ 145.

[1024] **RL-0194**, *Poštová banka* (Award), ¶ 369.

[1025] Counter-Memorial, ¶¶ 347–350.

[1026] Reply, ¶ 158.

of the claimed investment (i.e., the Five Shipments of Gold).[1027] Claimant has not—and cannot—show that the ordinary commercial transactions involving the purported purchase of Gold entailed an assumption of risk, within the meaning given to the notion of risk in the context of investment law.

416. In any event, even Claimant's own evidence confirms that Kaloti faced only ordinary commercial risk—and low commercial risk at that. For instance, in the Memorial, Claimant asserted that the "**risk associated with its trading operation was non-existent** due to the high demand for its product, coupled with a single costumer demanding 45,000 kilograms of gold per year from Peru [i.e. [redacted] (emphasis added).[1028] Similarly, in his second witness statement, Mr. [redacted] stated that "[Kaloti] faced relatively **low commercial risks** (regarding volatility in profitability) **due to the type of gold operations [Kaloti] performed**" (emphasis added).[1029]

417. Desperate to identify an investment risk, Claimant also argued in the Reply that it assumed risks that "culminated in losing [Kaloti]'s entire going concern business enterprise."[1030] It asserted that "[i]f [Kaloti] had only assumed the risks of 'ordinary commercial transactions,' [Kaloti] would not have had to terminate operations because of Peru's actions."[1031] Claimant thus seems to argue that it faced risk, and thus made an investment, because it unilaterally decided to cease operations in Peru and

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[1027] **RL-0203**, *Nova Scotia Power Inc. (Canada) v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/1, Award, 30 April 2014 (van Houtte, Williams, Vinuesa), ¶ 105 ("**[T]he relevant risk is that which is specific to the investment** which did take place, not for the lost opportunity to make a different investment or commercial decision" (emphasis added)); **RL-0201**, *Doutremepuich* (Award), ¶ 145 ("The third criterion under the test set out above is that the contribution entails participating in the risks of the operation. **The risks must be inherent in the contribution**" (emphasis added)).

[1028] Memorial, ¶ 31. *See also* Memorial, ¶ 22 ("[Kaloti] had a captive demand for gold and, consequently, access to reliable financing for its investments and expansion (growth) in Peru. **This came primarily from [redacted] (Dubai)**, a very large and financially sound worldwide conglomerate" (emphasis added)); ¶ 25 ("After receiving the metals, [Kaloti]'s local Peruvian employees tested the weight and purity of the metals and **prepared them to be exported to the United States to be sold to refineries, including especially to [redacted] (Dubai)**" (emphasis added)).

[1029] Second [redacted] Witness Statement, ¶ 13.

[1030] Reply, ¶ 168.

[1031] Reply, ¶ 168.

blame Peru. That is a self-serving and conclusory argument by Claimant. Such circular reasoning cannot form the basis for this Tribunal's jurisdiction *ratione materiae*. In any event, investment tribunals have stated that the risk of being subject to the host State's laws, or the risk of having an asset expropriated, is *not* an investment risk. Pointedly, the tribunal in *Seo Jin Hae v. Korea* explained that "if one acquires an asset in another State, this always creates the risk of such asset being expropriated . . . . If one found that this type of risk qualifies for the purposes of [the treaty] the characteristic of an assumption of risk would be rendered meaningless."[1032]

418. In sum, the alleged purchase of the Five Shipments of Gold did not involve an investment risk, and therefore did not qualify as a covered investment.

(v) Kaloti's alleged investment lacked the requisite duration

419. Duration is another requisite characteristic of a covered investment.[1033] As the *Bayindir v. Pakistan* tribunal explained, "[t]he element of duration is the paramount factor which distinguishes investments within the scope of the ICSID Convention and ordinary commercial transactions."[1034] Duration will exist in the case of a "long-term contract" spanning several years,[1035] but not in respect of "an ordinary sales contract."[1036] As Peru established in the Counter-Memorial,[1037] and further elaborates below, Claimant's alleged investments fail to meet the duration requirement. As Peru

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[1032] **RL-0191**, *Seo Jin Hae* (Final Award), ¶¶ 131–132 ("The Tribunal accepts that by acquiring the Property, the Claimant assumed the risk of being subject to [the host State's] laws . . . . However, once again, this is a risk inherent in any asset acquired in the host State. Accordingly, the Tribunal finds it difficult to accept that the risk of being subject to the laws of the host State qualifies as a risk within the meaning of the [treaty].").

[1033] Counter-Memorial, ¶¶ 353–354.

[1034] **RL-0196**, *Bayindir* (Decision), ¶ 132.

[1035] **RL-0196**, *Bayindir* (Decision), ¶ 136.

[1036] **RL-0196**, *Bayindir* (Decision), ¶¶ 132–133. *See also* **RL-0179**, *Joy Mining Machinery Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction, 6 August 2004 (Orrego Vicuña, Craig, Weeramantry), ¶¶ 56–57; **RL-0204**, *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award, 8 November 2010 (Robinson, Alexandrov, Turbowicz), ¶ 318.

[1037] Counter-Memorial, ¶¶ 353–359.

observed in the Counter-Memorial, the alleged purchase of the Five Shipments of Gold do not have possess this characteristic.

420. In the Reply, in attempting to address the issue of duration, Claimant—yet again—did not address the Five Shipments of Gold specifically, but instead resorted to arguments about Kaloti's alleged business operations more broadly. Claimant thus argued that it operated in Peru from 2012 to 2018,[1038] and that its operations were "not based on one or a couple of contracts with fixed duration, but on multiple transactions (investments), and a track record that has been sufficiently established in this arbitration."[1039] Simply put, Claimant has no argument that the Five Shipments of Gold had the duration to be qualified as an investment and therefore ignores the issue.

421. But Claimant cannot ignore the facts and the evidence, including its own. For example, Claimant and its own witnesses repeatedly claimed that after acquiring gold in Peru, Kaloti would quickly sell that gold[1040] and intended to follow that same process with the Five Shipments.[1041] Indeed, according to Claimant, it "resold the gold so efficiently, that in 2013 end-of-the-year total inventory on-hand amounted to less than a day's worth of [Kaloti] sales."[1042] These arguments are dispositive: the alleged purchase of the Five Shipments of Gold did not involve the requisite duration, and therefore did not qualify as a covered investment.

[1038] Reply, ¶¶ 158, 184.

[1039] Reply, ¶ 184.

[1040] *See, e.g.*, Memorial, ¶ 25 ("**After receiving the metals**, [Kaloti]'s local Peruvian employees tested the weight and purity of the metals and **prepared them to be exported to the United States to be sold** to refineries, including especially to [redacted] (Dubai)" (emphasis added)); ¶ 28 ("When [Kaloti] bought gold in Peru, [Kaloti] already knew the price at which such gold was going to be resold"); ¶ 39. *See also* [redacted] Witness Statement, ¶ 20 ("[Kaloti] could always be certain **to resell the gold very quickly** to [redacted] (emphasis added)); Second [redacted] Witness Statement, ¶ 19.

[1041] *See* Reply, ¶¶ 35, 46, 418.

[1042] Memorial, ¶ 26.

(vi) Kaloti did not contribute to the State's development

422. Having recognized in the Reply that an investment within the meaning of Article 25 of the ICSID Convention must contribute to the host State's development,[1043] Claimant argued that "[b]y buying gold in Peru, [Kaloti] also helped such State accomplish its goal of developing the mining of mineral . . . as strategically planned in the law to fight money laundering . . . ."[1044] This argument is both shameless and untrue. Far from contributing positively to Peru's development, Kaloti acquired the Five Shipments without conducting the due diligence required by law for such transactions.[1045] Had Kaloti fulfilled its legal obligations, it would have discovered the substantial indicia of illegal activity by the Suppliers, which are now rightly subject to criminal investigations and proceedings for alleged money laundering in relation to illegal mining.[1046] Such conduct cannot and does not contribute to the development of Peru.

423. Furthermore, Kaloti did not pay any taxes in Peru, including in connection with its alleged investment in the Gold.[1047] As described in greater detail below, Peruvian law imposes income tax on a broad scope of activities, so long as the income is generated in Peru.[1048] The fact that Kaloti did not pay such taxes—whether because it did not operate or generate any income in Peru, or because it evaded tax liability in Peru—is a clear indicator that Kaloti at no point acted as a genuine participant in Peru's national economy,[1049] let alone contributed to Peru's development.

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[1043] *See* Reply, ¶ 158 (referring to "the factors initially outlined in *Fedax v. Venezuela* in 1997, and then *Salini v. Morocco* in 2001," and including in such factors "Significance for the host State's development.").

[1044] Reply, ¶ 158.

[1045] *See supra* Section II.A.3.

[1046] *See supra* Section II.A–C.

[1047] **Ex. R-0371**, Letter No. 000168-2023-SUNAT/7B0000 from SUNAT (G. Lopez) to Special Commission (J. Panihuara), 10 March 2023.

[1048] **Ex. R-0372**, Supreme Decree No. 179-2004-EF, Income Tax Law, 6 December 2004, Art. 9.

[1049] *See* Section III.A.2 below.

424. In conclusion, Claimant has utterly failed to demonstrate that the Five Shipments of Gold possessed the objective characteristics of an investment under the ICSID Convention and the Treaty. The Tribunal therefore lacks jurisdiction *ratione materiae* over all of Claimant's claims based upon the Five Shipments of Gold.

b. Claimant has failed to prove that it acquired ownership over the Five Shipments

425. In accordance with the definition of "investment" in Treaty Article 10.28, Claimant must establish that it "owns or controls" the assets underlying its claims.[1050] Such ownership or control constitutes a threshold requirement. Therefore, Claimant's burden of proof requires it to demonstrate that it actually owns or controls its investment *in accordance with Peruvian law*.[1051]

426. In the Reply, Claimant did not contest that it must establish ownership or control over the alleged investment to meet the jurisdictional requirement under the Treaty. But Claimant fell well short of its burden of proving the facts necessary to establish this Tribunal's jurisdiction in respect of its alleged ownership of the Five Shipments of Gold. Indeed, Claimant did not even address Peru's *ratione materiae* objection on its failure to establish that it owns or controls its alleged investments.[1052] Given that every claim advanced by Claimant in this arbitration is based on the proposition that it has acquired legal title and ownership of the Gold, Claimant's failure to establish lawful ownership of the Gold must necessarily lead to the dismissal of all of its claims.[1053]

[1050] **RL-0001**, Treaty [*Re-submitted version of CL-0001, with additional pages*], Art. 10.28. *See also* Counter-Memorial, ¶ 361.

[1051] *See* **RL-0187**, [redacted] *v. United Republic of Tanzania*, ICSID Case No. ARB/10/12, Award, 2 November 2012 (Park, Pryles, Legum), ¶¶ 264–265; **RL-0182**, *Vito G. Gallo v. Government of Canada*, UNCITRAL, PCA Case No. 55798, Award, 15 September 2011 (Fernández-Armesto, Castel, Lévy),¶ 328.

[1052] *See* Reply, § IV.B.

[1053] The foregoing is also predicable from those claims that, according to Claimant, arise from its alleged investment in Kaloti as a going concern business, as those claims are also based on the assumption that Claimant owns the Gold. As a result, the Tribunal lacks jurisdiction *ratione materiae* over the totality of Claimant's claims.

427. As demonstrated in **Section II.A.2** above, there simply is *no evidence* on the record that proves that Claimant ever acquired ownership of the Gold. Claimant has been incapable of submitting the most basic evidence concerning the acquisition of movable assets: the sale and purchase agreements and proof of payment (e.g., wire transfers) for the Gold contained in the Five Shipments.[1054]

428. In lieu of a sale and purchase agreement, Claimant produced the Trading Terms allegedly executed with the Suppliers.[1055] But the Trading Terms *are not* agreements for the purchase of the Gold and do not demonstrate that Kaloti acquired ownership rights over the Gold.[1056] The Trading Terms merely set out general rules that would govern *potential* future transactions with the Suppliers, but do not concern any *actual* transaction.

429. Moreover, as explained in **Section II.A.2** above, the Trading Terms and other evidence suggest that rather than purchasing and acquiring legal title over the Gold from the Suppliers, Kaloti was acting as a mere broker (i.e. financing the Suppliers' operations and trading gold on their behalf). This is evidenced inter alia by the fact that the Trading Terms refer to the Suppliers as Kaloti's "Client" or "Costumer," and indicate that Kaloti might – or might not – provide a type of brokering service known as "gold bullion margin trading" services.[1057] As [redacted] explained, "gold bullion margin

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[1054] *See* Counter-Memorial, ¶ 368.

[1055] *See* **Ex. R-0307**, Terms and conditions for Bullion Trading and Related Transactions between KML and [redacted] 13 May 2013 [*Re-submitted version of C-0165, with Respondent's translation*]; **Ex. R-0308**, Terms and conditions for Bullion Trading and Related Transactions between KML and [redacted] 2 October 2013 [*Re-submitted version of C-0166, with Respondent's translation*]; **Ex. R-0309**, Terms and conditions for Bullion Trading and Related Transactions between KML and [redacted] undated [*Re-submitted version of C-0167, with Respondent's translation*]; **Ex. R-0310**, Terms and conditions for Bullion Trading and Related Transactions between KML and [redacted] 29 October 2013 [*Re-submitted version of C-0168, with Respondent's translation*].

[1056] *See supra* Section II.A.2.

[1057] **Ex. R-0307**, Terms and conditions for Bullion Trading and Related Transactions between KML and [redacted] 13 May 2013 [*Re-submitted version of C-0165, with Respondent's translation*]; **Ex. R-0308**, Terms and conditions for Bullion Trading and Related Transactions between KML and [redacted] 2 October 2013 [*Re-submitted version of C-0166, with Respondent's translation*]; **Ex. R-0309**, Terms and conditions for Bullion Trading and Related Transactions between KML and [redacted]

trading" works "somewhat similar to when stocks are traded *on margin* in Wall Street."[1058] Mirroring "margin trading" practices[1059] in the context of stocks, the Trading Terms refer to future potential transactions through which the *Suppliers would borrow money from Kaloti* (i.e., their broker) to trade precious metals.[1060] In other words, the Trading Terms allowed the Suppliers to finance its purchases of gold in Peru, and then sell it through Kaloti to a third party. However, the Trading Terms did not indicate in any way that Kaloti would be buying gold *from* the Suppliers. The Trading Terms simply lack any of the essential characteristics of a purchase agreement.

430. Other evidence on the record shows that Kaloti never acquired ownership over the Gold.[1061] Indeed, Claimant admitted that it made no payment for Shipments 3 and 5. Similarly, Claimant has failed to demonstrate that it fully paid for Shipments 1 and 2.[1062] A Peruvian court has already confirmed that Kaloti's failure to pay for Shipment 5 means that it does not own that Gold.[1063]

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undated [*Re-submitted version of C-0167, with Respondent's translation*]; **Ex. R-0310**, Terms and conditions for Bullion Trading and Related Transactions between KML and [redacted] 29 October 2013 [*Re-submitted version of C-0168, with Respondent's translation*].

[1058] Second [redacted] Witness Statement, ¶ 30.

[1059] As explained in Section II.A.2 above, "margin trading" is the practice of "borrowing money from your broker to buy a stock and using your investment as collateral." *See* **Ex. R-0293**, "*Margin: Borrowing Money to Pay for Stocks*," U.S. SECURITIES AND EXCHANGE COMMISSION, 17 April 2009, p. 1.

[1060] **Ex. R-0307**, Terms and conditions for Bullion Trading and Related Transactions between KML and [redacted] 13 May 2013 [*Re-submitted version of C-0165, with Respondent's translation*], p. 6; **Ex. R-0308**, Terms and conditions for Bullion Trading and Related Transactions between KML and [redacted] 2 October 2013 [*Re-submitted version of C-0166, with Respondent's translation*], p. 7; **Ex. R-0309**, Terms and conditions for Bullion Trading and Related Transactions between KML and [redacted] undated [*Re-submitted version of C-0167, with Respondent's translation*], p. 6; **Ex. R-0310**, Terms and conditions for Bullion Trading and Related Transactions between KML and [redacted] 29 October 2013 [*Re-submitted version of C-0168, with Respondent's translation*], p. 4.

[1061] *See supra* Section II.A.2; Counter-Memorial, ¶¶ 369–371.

[1062] *See* Counter-Memorial, ¶ 369.

[1063] **Ex. R-0212**, Resolution No. 08, Lima Court of Appeal, Third Civil Chamber, 14 June 2022, pp. 5, 14–15.

431. Claimant's assertion that it could not pay for Shipments 3 and 5[1064] because of the SUNAT Immobilizations and the Precautionary Seizures of the Gold[1065] is not only false—Shipment 5 was not even subject to SUNAT Immobilizations or the Precautionary Seizures[1066]—but also openly contradicts its allegations that (i) it paid its suppliers "very rapidly as soon as the gold reached our facility in Lima, Peru;"[1067] and (ii) that payment of the gold did not depend on its resale by Kaloti, because it borrowed money to finance the gold that it purchased in Peru.[1068]

432. Claimant's argument that it could not pay for Shipments 3 and 5 due to the SUNAT Immobilizations and the Precautionary Seizures of the Gold is also contradicted by its assertion that it did pay (at least in part) for Shipments 1, 2 and 4, which *were* immobilized by SUNAT and subsequently subject to the Precautionary Seizures.

433. Peru respectfully refers the Tribunal to **Section II.A** above, which explains in more detail the foregoing and discusses additional evidence pointing to Claimant's failure to demonstrate that it acquired ownership over the Gold.

434. Additionally, even if Claimant had been able to establish that it acquired the Gold (quod non), such purchase would not be valid under Peruvian law. As explained in the Counter-Memorial, illegally mined products do not give rise to property rights under Peruvian law.[1069] Even though Claimant did not contest Peru's discussion of

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[1064] Reply, ¶ 35.

[1065] Contrary to Claimant's assertion, Shipment 5 was not immobilized by SUNAT. Peru has explained that Shipment 5 was subject to a Civil Attachment ordered by the Civil Court of Lima in the context of the civil proceedings brought by [redacted] against Kaloti for the failure to pay for Shipment 5. *See supra* Section II.D. *See also* Counter-Memorial, ¶¶ 35, 182, 245.

[1066] *See* Counter-Memorial, ¶¶ 35, 117, 125, 182.

[1067] First [redacted] Witness Statement, ¶ 34. *See also* Memorial, ¶ 29 ("[Kaloti] benefited from a low lead time from order to payment"); [redacted] Witness Statement, ¶¶ 22, 30 ("It was not until the third week, after the immobilizations occurred, that I began to question the delays, because it no longer seemed like a simple delay. The situation was beginning to worsen, mainly because the gold had already been paid for (Exhibit C-0041-ENG), all according to [Kaloti]'s business model"), ¶ 31 ("The advance payment of gold was one of [Kaloti]'s main letters of introduction and also one of the differentiating elements compared to other operators.").

[1068] *See* Memorial, ¶ 146; Reply, ¶ 397.

[1069] *See* Counter-Memorial, § II.A.4.

the applicable Peruvian laws, Peru briefly recalls herein the laws and regulations that would have precluded Kaloti from acquiring legal title and ownership over the Gold.

435. *First*, Peruvian law provides that the Peruvian State is the exclusive owner of all mineral resources located within its territory.[1070] Before a private party is allowed to extract mineral resources, it must obtain a concession from the State;[1071] in exchange, the concessionaire must pay fees, mining royalties, and income taxes to the State.[1072] If no concession has been granted, Peru remains the exclusive owner of the mineral resources—including those that may have been extracted without authorization. The General Mining Law confirms the foregoing and expressly provides that unlawfully mined minerals must be returned to the State.[1073]

436. *Second*, as discussed in the Counter-Memorial[1074] and in **Section II.A.3** above, Peruvian law requires the buyer to verify the lawful origin of the mineral being acquired and conduct due diligence on the supplier of such mineral.[1075] The purpose of such requirement is to avoid the exploitation and sale of illegally mined minerals. As demonstrated above, Kaloti failed to comply with its obligation to conduct appropriate due diligence on the Suppliers and the origin of the Gold.[1076]

[1070] **CL-0002**, Official English translation of the Political Constitution of Peru, 29 December 1993, Art. 66 ("Natural resources, renewable and non-renewable, are patrimony of the Nation. The State is sovereign in their utilization. An organic law fixes the conditions of their use and grants them to private individuals. Such a concession grants the title holders a real right subject to those legal regulations.").

[1071] **Ex. R-0013**, General Mining Law, Art. 7.

[1072] **Ex. R-0011**, Mining Annual Report 2020, MINEM, May 2020, pp. 116–123.

[1073] **Ex. R-0013**, General Mining Law, Art. 52 ("The person who extracts mineral resources without having a right to do so **shall return to the State the improperly extracted minerals**, or their value, without deducting any costs [from that value], and without prejudice to any judicial action that might be pursued [against that person]"(emphasis added)).

[1074] *See* Counter-Memorial, § II.A.

[1075] *See* **Ex. R-0013**, General Mining Law, Art. 4 ("The purchaser is obligated to verify the origin of the mineral resources."); **Ex. R-0179**, Supreme Decree No. 03-94-EM, 14 January 1994, Art. 6; **Ex. R-0049**, Illegal Mining Controls and Inspection Decree, Art. 11; **Ex. R-0005**, Supreme Decree No. 055-2010-EM, 21 August 2010, Art. 3.

[1076] *See supra* Section II.A.3.

437. *Third*, Peruvian law provides that the acquisition of illegally mined minerals does not give rise to any property rights. While Article 70 of the Constitution protects property rights, it expressly establishes that such rights must be exercised "in harmony with the common good, and **within the limits of the law**" (emphasis added).[1077] Accordingly, Peruvian law proscribes the commercialization of goods that have been procured through unlawful or illicit means—such as illegally mined gold—rendering any transfer of such good void *ab initio*.[1078] Peruvian courts have confirmed that a property right is void *ab initio* if the origin of the asset is unlawful.[1079] And the General Mining Law expressly states that improperly extracted minerals shall be returned to the State.[1080]

438. The rule that assets of unlawful origin do not vest ownership rights upon the purchaser is also enshrined in the Peruvian Civil Code. Article 948 of the Civil Code protects the rights of good faith purchasers that acquire goods that are in possession of the seller, but introduces an express *exception*—including for good faith purchasers—for goods acquired in violation of Peruvian criminal law.[1081] Specifically, Article 948 provides as follows:

> Whoever receives in good faith, and as owner, the possession of an object, will acquire the property over such object, even if the transferor does not have a valid right to transfer the property. Exempted from this rule are the assets that have been lost or which have been acquired in contravention of the Criminal Law.[1082]

[1077] **CL-0002**, Official English translation of the Political Constitution of Peru, 29 December 1993, Art. 70.

[1078] *See, e.g.*, **Ex. R-0250**, Asset Forfeiture Regulations, Art. 5.1; **Ex. R-0241**, Asset Forfeiture Decree, Art. 2.1; **Ex. R-0222**, Legislative Decree No. 295, Civil Code, 24 July 1984 [*Re-submitted version of CL-0044, with Respondent's translation*], Arts. 219.3–4.

[1079] **Ex. R-0232**, Resolution No. 16, Judgment, Appeals Chamber Specialized in Asset Forfeiture of Lima, 21 January 2021, ¶ 15.

[1080] **Ex. R-0013**, General Mining Law, Art. 52.

[1081] *See* **Ex. R-0222**, Legislative Decree No. 295, Civil Code, 24 July 1984 [*Re-submitted version of CL-0044, with Respondent's translation*], Art. 948.

[1082] **Ex. R-0222**, Legislative Decree No. 295, Civil Code, 24 July 1984 [*Re-submitted version of CL-0044, with Respondent's translation*], Art. 948.

439. Under the express exception included in Article 948, if the initial acquirer of the assets has obtained such assets in contravention of criminal law, any subsequent purchaser does not acquire legal ownership, even if it claims to have been acting in good faith.[1083]

440. In any event, Kaloti does not meet the requirement of Article 948 because, as demonstrated in **Section II.A.3** above, it was not a bona fide purchaser of the Gold. Kaloti conducted a grossly deficient due diligence and violated (i) Article 4 of the 1992 General Mining Law;[1084] (ii) Article 3 of the 2010 Supreme Decree No. 055-2010-EM;[1085] and (iii) Article 11 of the 2012 Illegal Mining Controls and Inspection Decree.[1086]

441. But even assuming for the sake of argument that Kaloti qualified as a good faith purchaser (quod non), the illicit origin of the Gold would prevent Kaloti from claiming any property rights over it. Based on the exception in the second sentence of Article 948, Kaloti could not acquire ownership over the Gold because, as the evidence shows, the Gold had been procured by the Suppliers in violation of Peruvian criminal law.

442. Claimant's legal expert wrongly asserted that the express exception in Article 948 "is not applicable to [Kaloti] in the present case because it has not been proven that [Kaloti] has committed a crime in or through its acquisition (purchase) of the gold."[1087] Claimant's legal expert based such conclusion on his incorrect interpretation of the exception in Article 948, according to which the exception requires the commission of

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[1083] **Ex. R-0263**, Commentary to Civil Code of Peru, 2020, pp. 287–291.

[1084] **Ex. R-0013**, General Mining Law, Art. 4 ("The purchaser is obligated to verify the origin of the mineral resources.").

[1085] **Ex. R-0005**, Supreme Decree No. 055-2010-EM, 21 August 2010, Art. 3 ("Per the provisions of Article 4 of Consolidated Amended Text of the General Mining Law, the beneficiary plants that acquire the product of the mining activity without processing or as concentrate, melted down, tailing or any other state until before its refining as well as individuals or legal entities exclusively engaged in the purchase and sale of gold and/or raw minerals, must verify their origin and maintain an updated registry in electronic or physical form that includes the following information regarding each purchase of the mineral product.").

[1086] **Ex. R-0049**, Illegal Mining Controls and Inspection Decree, Art. 11 ("[All purchasers] of mining products . . . regardless of their condition, whether the acquisition is made temporarily or permanently, must verify the origin of such products, request the corresponding documents and must verify the authenticity of the data recorded in the corresponding information systems.").

[1087] Second [redacted] Report, ¶ 2.7.

a criminal offence by the alleged bona fide third party that acquires the asset (in this case, a criminal offence by Kaloti when it purportedly acquired the Gold). However, for the exception in Article 948 to apply, the criminal offence is not limited to the last in the series of acquisitions. An acquisition in violation of Peruvian criminal law earlier in the ownership chain vitiates subsequent acquisitions—similar to the fruit of a poisonous tree doctrine in a different context. Otherwise, assets would be "laundered" by a third party who purports to be acting in good faith when acquiring assets of criminal provenance.

443. Consistent with the above, the person who acquires minerals bears the burden of establishing the lawful origin of such minerals. Specifically, in the context of asset forfeiture procedures (discussed in detail in **Section II.E** above), if a supplier of minerals fails to prove their lawful origin, such resources must be presumed unlawful (i.e. produced or acquired in violation of Peruvian criminal law).[1088] In this case, Claimant has failed to provide any evidence showing that the Gold was legally mined and therefore of lawful origin. Pursuant to Peruvian law concerning asset forfeiture, the Gold must therefore be presumed to be of illegal origin and not susceptible of generating or vesting property rights—even in respect of an allegedly good faith purchaser, which Kaloti was not. Indeed, Peru has adduced ample evidence showing that Kaloti cannot be deemed a good faith purchaser of the Gold, as it either knew or should have known that the Gold was illegally mined and/or transacted in contravention of Peruvian law.[1089]

444. In conclusion, Claimant has failed to prove that the Five Shipments qualify as an "investment" under Treaty Article 10.28. Consequently, the Tribunal lacks jurisdiction *ratione materiae* over all of Claimant's claims.

[1088] **Ex. R-0214**, Resolution No. 10, Hearing Judgment, Transitory Appeals Chamber Specialized in Asset Forfeiture of Lima, 14 October 2020, p. 13. *See also* **Ex. R-0233**, Resolution No. 83, Judgment, Specialized Court in Asset Forfeiture of Lima, 26 January 2022, p. 55.

[1089] *See supra* Section II.A.

c. Claimant's alleged investment in the Five Shipments was not made in accordance with Peruvian law and international public policy

445. In the previous subsection, Peru explained that the Tribunal lacks jurisdiction *ratione materiae* because Claimant has not established that it had ownership or control over its alleged investments—inter alia, because illegally mined products do not give rise to property rights under Peruvian law. Additionally, pursuant to international law, investments made in violation of the host State's law or of international public law do not deserve protection under investment treaties, including the Treaty. Therefore, even if Claimant could demonstrate that it owns or controls the Gold (quod non), such asset would not be a covered investment protected by the Treaty because it was made in violation of Peruvian law and international public policy.

446. In that regard, Peru demonstrated in the Counter-Memorial that the Tribunal lacks jurisdiction *ratione materiae* also because Claimant's alleged investment in the Five Shipments was not made in accordance with Peruvian law, as required under the Treaty and the ICSID Convention.[1090] Claimant's response in the Reply confirmed that it has failed to prove inter alia that it complied with its obligation under Peruvian law to ascertain the lawful origin of the Gold comprising the Five Shipments.[1091] In fact, the evidence on the record—unrebutted by Claimant—indicates that the origin of the Gold in the Five Shipments was indeed unlawful and the transactions were part of a money laundering scheme.[1092]

447. Unable to rebut the evidence, in the Reply Claimant instead (i) denied that the protections under the Treaty apply only to lawful investments,[1093] and (ii) alleged that Peru has not pointed to any specific provision or "concrete statutory norm" that has been breached by Claimant.[1094] Claimant is wrong on both counts.

[1090] Counter-Memorial, § III.A.3.

[1091] *See supra* Section II.A.3; Counter-Memorial, § II.B.6.

[1092] *See supra* Section II.A.3; Counter-Memorial, §§ II.B.6, II.C.1.

[1093] Reply, ¶ 197.

[1094] Reply, ¶ 188.

448. *First*, as Peru demonstrated in the Counter-Memorial, it is a well-established principle of international investment law that investments made in violation of the host State's law or of international public policy are not protected by investment treaties or the ICSID Convention.[1095] This principle applies regardless of whether the applicable treaty includes a provision expressly requiring that investments be made in accordance with the law of the host State. This has been confirmed in numerous cases, several of which were cited by Peru in the Counter-Memorial.[1096] For example, in *Phoenix Action* the tribunal noted that

> States cannot be deemed to offer access to the ICSID dispute settlement mechanism to investments made in violation of their laws. . . . And it is the Tribunal's view that this condition – the **conformity of the establishment of the investment with the national laws – is implicit even when not expressly stated in the relevant BIT**.[1097] (Emphasis added)

449. That tribunal recalled that

> [t]he purpose of the international mechanism of protection of investment through ICSID arbitration **cannot be to protect investments made in violation of the laws of the host State or investments not made in good faith**, obtained for example through misrepresentations, concealments or corruption.[1098] (Emphasis added)

450. Similarly, the tribunal in *Plama v. Bulgaria* noted that

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[1095] Counter-Memorial, ¶¶ 372–373.

[1096] *See* Counter-Memorial, § III.A.3. *See also, e.g.*, **RL-0183**, *Phoenix* (Award), ¶ 101; **CL-0049**, *Krederi v. Ukraine*, ICSID Case No. ARB/14/17, Award, 2 July 2018, ¶ 386; **RL-0214**, *Álvarez and Marín Corp.* (Award), ¶ 135; **RL-0215**, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Award, 16 August 2007 (Fortier, Cremades, Reisman), ¶ 339; **RL-0082**, *Inceysa* (Award), ¶ 207; **RL-0178**, *Salini Costruttori S.p.A. and Italstrade S.p A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 16 July 2001 (Briner, Cremades, Fadlallah), ¶ 46; **RL-0213**, *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010 (Stern, Cremades, Landau), ¶¶ 123–124; **RL-0189**, *SAUR International S.A. v. Argentine Republic*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability, 6 June 2012 (Fernandez-Armesto, Hanotiau, Tomuschat), ¶ 308; **RL-0097**, *Plama* (Award), ¶¶ 138–139.

[1097] **RL-0183**, *Phoenix* (Award), ¶ 101.

[1098] **RL-0183**, *Phoenix* (Award), ¶ 100.

> [u]nlike a number of Bilateral Investment Treaties, the ECT [Energy Charter Treaty] does not contain a provision requiring the conformity of the Investment with a particular law. This does not mean, however, that the protections provided for by the ECT cover all kinds of investments, including those contrary to domestic or international law.[1099]

451. That tribunal thus concluded that "the substantive protections of the ECT cannot apply to investments that are made contrary to law."[1100]

452. Along similar lines, the *Cortec v. Kenya* tribunal noted that the "accepted jurisprudence" holds that even absent an explicit legality requirement in the text of the relevant treaty, an investment can enjoy treaty protections only if it was made "in accordance with the laws of the host State and made in good faith."[1101] Likewise, the *SAUR v. Argentina* tribunal found that whether a BIT contains an express legality requirement is "not a relevant factor," since

> **[t]he requirement of not having incurred a serious violation of the legal system is a tacit condition, inherent in all BITs since**, in no case can it be understood that a State is offering the benefit of protection through investment arbitration, when the investor has committed an unlawful action in order to achieve that protection.[1102] (Emphasis added)

453. Other tribunals have likewise affirmed that the legality requirement is inherent to a State's consent to arbitration. For example, the *Álvarez y Marín v. Panama* tribunal affirmed that it is "reasonable to assume that States have only consented to this curtailment of their sovereignty, under the condition that this protection mechanism is limited to investments made in compliance with their own legal systems."[1103] The *Fraport II* tribunal, for its part, reached the same conclusion:

[1099] **RL-0097**, *Plama* (Award), ¶ 138.

[1100] **RL-0097**, *Plama* (Award), ¶ 139.

[1101] **RL-0257**, *Cortec Mining Kenya Ltd., et al. v. Republic of Kenya*, ICSID Case No ARB/15/29, Award, 22 October 2018 (Binnie, Dharmananda, Stern), ¶¶ 260, 319, 333.

[1102] **RL-0189**, *SAUR International S.A. v. Argentine Republic*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability, 6 June 2012 (Fernandez-Armesto, Hanotiau, Tomuschat), ¶ 308.

[1103] **RL-0214**, *Álvarez and Marín Corp.* (Award), ¶ 135.

> The illegality of the investment at the time it is made goes to the root of the host State's offer of arbitration under the treaty . . . Lack of jurisdiction is founded in this case on the absence of consent to arbitration by the State for failure to satisfy an essential condition of its offer of this method of dispute settlement.[1104]

454. Several tribunals have linked the legality requirement to the general principle of good faith. For instance, the tribunal in *Phoenix Action* found that when an investment is tainted by illegality, access to international arbitration "cannot be granted if such protection would run contrary to the general principles of international law, among which the principle of good faith is of utmost importance."[1105] Similarly, in *Plama v. Bulgaria* the tribunal dismissed the investor's claims after it found that the relevant investment had been made in breach of both Bulgarian law (which imposed a requirement of good faith) and the international legal principle of good faith.[1106] The tribunal in *Inceysa v. El Salvador* reached a similar conclusion:

> Good faith is a supreme principle, which governs legal relations in all their aspects and content. . . . El Salvador gave its consent to the jurisdiction of the Centre, presupposing good faith behavior on the part of future investors.[1107]

455. Tribunals have also tied the legality requirement to the general principle of *nemo auditur propriam turpitudinem allegans*. In *Khan Resources v. Mongolia*, the tribunal noted that an investor who has obtained its investment in violation of local laws attempts to bring the investment within the scope of the relevant treaty "only as a result of [its] wrongful acts. Such an investor should not be allowed to benefit as a result, in accordance with the maxim *nemo auditur propriam turpitudinem allegans*."[1108] Likewise, the tribunal in *Álvarez y Marín v. Panama* warned that "extending coverage to

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[1104] **RL-0188**, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines (II)*, ICSID Case No. ARB/11/12, Award, 10 December 2014 (Bernardini, Alexandrov, Berg) ("***Fraport AG (II)* (Award)**"), ¶ 467.

[1105] **RL-0183**, *Phoenix* (Award), ¶ 106.

[1106] **RL-0097**, *Plama* (Award), ¶¶ 140, 144.

[1107] **RL-0082**, *Inceysa* (Award), ¶¶ 230, 238.

[1108] **RL-0258**, *Khan Resources Inc., et al., v. Government of Mongolia*, PCA Case No 2011-09, UNCITRAL, Decision on Jurisdiction, 25 July 2012 (Williams, Hanotiau, Fortier), ¶ 383.

investments made in violation of national law, would go against one of the most basic principles of any legal systems: *nemo auditur propriam turpitudinem allegans*."[1109]

456. In recognizing the legality requirement, international tribunals have also referred to the principle of "clean hands." For example, the *Littop v. Ukraine* tribunal noted that the doctrine of clean hands, just like the concept of good faith, is now a principle of international law. In several cases tribunals have made clear that a party cannot come to investment arbitration with unclean hands.[1110] This has now been recognised in cases where there has been some illegality underlying the contract or the rights which a party is seeking to enforce.[1111]

457. The *Fraport II v. Philippines* tribunal, stressed in its award that

> [i]nvestment treaty cases confirm that such treaties do not afford protection to illegal investments . . . based on rules of international law, such as the 'clean hands' doctrine or doctrines to the same effect.[1112]

458. Claimant has failed to address this case law, most of which was cited by Peru in the Counter-Memorial. Instead, in the Reply Claimant merely asserted, incorrectly, that Treaty Article 10.14 somehow overrides the legality requirement.[1113] That provision does no such thing. Treaty Article 10.14 merely clarifies the scope of the National Treatment Provision (i.e., Treaty Article 10.3). Specifically, Treaty Article 10.14 states that the National Treatment Provision cannot be construed to prevent the host State from imposing—if it so chooses—an express requirement that investments be made in compliance with that State's laws and regulations. Treaty Article 10.14 provides as follows:

> Nothing in Article 10.3 [National Treatment] shall be construed to prevent a Party from adopting or maintaining a measure that

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[1109] **RL-0214**, *Álvarez and Marín Corp.* (Award), ¶¶ 13, 135. *See also* **RL-0097**, *Plama* (Award), ¶ 143.

[1110] **RL-0259**, *Littop Enterprises Ltd., et al., v. Ukraine*, SCC Case No. V 2015/092, Final Award, 4 February 2021 (Lew, Fortier, Oreamuno), ¶¶ 438–439.

[1111] **RL-0259**, *Littop Enterprises Ltd., et al., v. Ukraine*, SCC Case No. V 2015/092, Final Award, 4 February 2021 (Lew, Fortier, Oreamuno), ¶¶ 438–439.

[1112] **RL-0188**, *Fraport AG (II)* (Award), ¶ 328, fns. 386–387.

[1113] Reply, ¶ 197.

> prescribes special formalities in connection with covered investments, such as a requirement . . . that covered investments be legally constituted under the laws or regulations of the Party.[1114]

459. Treaty Article 10.14 does not derogate from the well-established principle that international investment agreements protect only lawful investments. Equally, nothing in Treaty Article 10.14 suggests that Peru has consented to arbitrate disputes related to investments that are contrary to Peruvian law or international public policy. The above is confirmed by the findings of tribunals that have analyzed provisions that are similar to Treaty Article 10.14.[1115] For example, the tribunal in *Canadian Cattlemen for Fair Trade v. USA* noted in relation to Article 1111 of the North American Free Trade Agreement ("**NAFTA**")—which is materially identical to Treaty Article 10.14.—that

> all Article 1111 says is that it would not be a violation of national treatment or most favoured treatment requirements for a Party to require a foreign investor or its investment to provide certain information or observe certain formalities in the making of that investment.[1116]

460. In an attempt to support its argument concerning the legality requirement, Claimant relies on a single authority: the award in *Bear Creek v. Peru*, which found that Article 816 of the Canada-Peru FTA operated to exclude any legality requirement. But that case is an outlier and is contrary to the long and settled line of jurisprudence cited above and in the Counter-Memorial. Indeed, several arbitral tribunals—including in cases concerning treaties that did not contain a provision expressly requiring compliance with the host State's law—have dismissed claims from claimants whose

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[1114] **RL-0001**, Treaty [*Re-submitted version of CL-0001, with additional pages*], Art. 10.14.1.

[1115] **RL-0246**, North American Free Trade Agreement, 1 January 1994, Art. 1111(1) ("Nothing in Article 1102 [National Treatment] shall be construed to prevent a Party from adopting or maintaining a measure that prescribes special formalities in connection with the establishment of investments by investors of another Party, such as a requirement that investors be residents of the Party or that 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 investments of investors of another Party pursuant to this Chapter.").

[1116] **RL-0247**, *The Canadian Cattlemen for Fair Trade v. United States of America*, UNCITRAL, Award on Jurisdiction, 28 January 2008 (Böckstiegel, Bacchus, Low), p. 96, fn. 9.

investments were made in violation of the host State's law or of international public policy.[1117] For example, in *Anderson v. Costa Rica* the tribunal determined that it had no jurisdiction over claimants' claims because claimants' investments were part of a pyramid scheme that violated domestic laws.[1118] Similarly, the *Álvarez and Marín v. Panama* tribunal also denied jurisdiction and concluded that "[claimants'] breach is of such magnitude that the loss of the international legal protection afforded to the investment is justified."[1119] Other investments tribunals have also dismissed cases brought by claimants that made their investments in violation of the host State's law or of international public policy because they considered those violations (i) rendered the investors' claims inadmissible;[1120] or (ii) had an impact on the merits of claimants' claims.[1121]

461. *Second*, Claimant's allegation that "Peru has not pointed to any specific legal article, or concrete statutory norm, allegedly breached by [Kaloti]" is also incorrect.[1122] Peru demonstrated in Section II.B.6 of the Counter-Memorial—and again in **Section II.A.3** above—that Claimant had failed to demonstrate that it complied with its obligations under Peruvian law to verify and document the lawful origin of the gold contained in the Five Shipments.[1123] In those sections, Peru explained *inter alia* that, to prevent illegal mining and related criminal offenses (such as money laundering), Peruvian law

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[1117] *See, e.g.,* **CL-0097**, *Alasdair Ross Anderson et al. v. Costa Rica*, ICSID Case No. ARB(AF)/07/3, Award, 19 May 2010, ¶¶ 55–60, 65(a)); *see also* **RL-0082**, *Inceysa* (Award), ¶¶ 335–336; **RL-0214**, *Álvarez and Marín Corp.* (Award), ¶¶ 397–399; **RL-0188**, *Fraport AG (II)* (Award), ¶¶ 328–332; **RL-0210**, *Churchill Mining PLC and Planet Mining Pty Ltd. v. Republic of Indonesi*a, ICSID Case No. ARB/12/14 and ARB/12/40, Award, 6 December 2016 (Kaufmann-Kohler, Hwang, van den Berg), ¶¶ 508–509, 528–532; **RL-0004**, *World Duty Free Co. v. Republic of Kenya*, ICSID Case No. Arb/00/7, Award, 4 October 2006 (Guillaume, Rogers, Veeder), ¶ 157.

[1118] **CL-0097**, *Alasdair Ross Anderson et al. v. Costa Rica*, ICSID Case No. ARB(AF)/07/3, Award, 19 May 2010, ¶¶ 55–60, 65(a)).

[1119] **RL-0214**, *Álvarez and Marín Corp.* (Award), ¶ 398.

[1120] *See, e.g.,* **RL-0210**, *Churchill Mining PLC and Planet Mining Pty Ltd. V. Republic of Indonesia*, ICSID Case No. ARB/12/14 and ARB/12/40, Award, 6 December 2016 (Kaufmann-Kohler, Hwang, van den Berg), ¶¶ 508–509, 528–532.

[1121] *See, e.g.,* **RL-0097**, *Plama* (Award), ¶¶ 143–146.

[1122] Reply, ¶ 188.

[1123] *See, e.g.,* Counter-Memorial, § II.B.6. *See also id.*, ¶ 375.

requires gold purchasers to (i) verify the lawful origin of the gold, (ii) conduct due diligence on their suppliers, and (iii) keep updated records demonstrating that they have complied with these obligations.[1124] The Illegal Mining Controls and Inspection Decree, for instance, expressly states that "[a]ll purchasers of mining products . . . regardless of their condition, . . . must verify the origin of such products, request the corresponding documents and must verify the authenticity of the data recorded in the corresponding information systems."[1125] That decree also establishes requirements for the minimum data to be verified by purchasers of mineral products.[1126]

462. Peru has demonstrated, on the basis of ample and unrebutted evidence, that Claimant did not comply with such obligations, in a glaring violation of Peruvian law.[1127] For instance, in **Section II.A.3** above Peru has exposed in detail the multiple ways in which Claimant failed to conduct even minimal due diligence on the Suppliers, and thus failed to ascertain that the Gold contained in the Five Shipments was of (un)lawful origin. Claimant's alleged investment in the Five Shipments was therefore not made in accordance with Peruvian law. Consequently, the Tribunal lacks jurisdiction.

463. In addition, Section II.C.1 of the Counter-Memorial discussed the evidence on the record that strongly suggest that the Five Shipments were part of a money laundering scheme.[1128] The evidence in all four Criminal Proceedings against the Suppliers not only met but far exceeded the standard of sufficient indicia required by Peruvian criminal law to initiate such criminal proceedings.[1129] The evidence includes, for example, multiple and strong indicia suggesting that the Suppliers misled the Peruvian authorities regarding the mining concession from which they allegedly

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[1124] *See* **Ex. R-0013**, General Mining Law, 3 June 1992, Art. 4; **Ex. R-0179**, Supreme Decree No. 03-94-EM, 14 January 1994, Art. 6; **Ex. R-0049**, Illegal Mining Controls and Inspection Decree, Art. 11; **Ex. R-0005**, Supreme Decree No. 055-2010-EM, 21 August 2010, Art. 3.

[1125] **Ex. R-0049**, Illegal Mining Controls and Inspection Decree, Art. 11.

[1126] **Ex. R-0049**, Illegal Mining Controls and Inspection Decree, Art. 11.

[1127] *See* Counter-Memorial, § II.B.6. *See also supra* Section II.A.3.

[1128] *See* Counter-Memorial, § II.C.1. *See also id.*, ¶ 375.

[1129] *See* Counter-Memorial, § II.C.1.

sourced the Gold.[1130] Moreover, Peru explained that the Criminal Proceedings have continued to make progress, advancing through different stages that require meeting higher standards of proof, thus corroborating Peru's arguments that there are strong indicia of illegality with respect to the Five Shipments.[1131]

464. In the Reply, Claimant argued that indicia are not sufficient to convict anyone in Peru.[1132] Claimant missed the point. Peru does not ask this Tribunal to find that the Suppliers are criminally liable under Peruvian law and must be convicted; that is clearly outside the scope and jurisdiction of the Tribunal. Consequently, Peru is not required to establish that there is sufficient evidence on the record to support a conviction under the Peruvian law criminal standard (i.e., beyond reasonable doubt).[1133] Rather, as Peru explained in the Counter-Memorial, the applicable standard of proof to establish illegality under international law is the *balance of probabilities*. Several investment tribunals have applied such standard to determine the illegality of an investment. For example, in *Rompetrol v. Romania*, the tribunal applied the balance of probabilities standard, and explained that the severity of the alleged illegality does not require a more demanding evidentiary standard than the balance of probabilities.[1134] Similarly, in *Libananco v. Turkey* the tribunal noted that "fraud is a serious allegation, but [the tribunal] does not consider that this (without more) requires it to apply a heightened standard of proof."[1135]

465. Applying the balance of probabilities standard in the present arbitration in respect of the legality requirement discussed herein, the Tribunal can reasonably conclude that

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[1130] *See, e.g.,* Counter-Memorial, ¶¶ 184, 199–208.

[1131] *See, e.g.,* Counter-Memorial, ¶¶ 235–239. *See also supra* Section II.C.3.

[1132] Reply, ¶¶ 189, 191.

[1133] First Missiego Report, ¶ 12.

[1134] **RL-0024**, *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, 6 May 2013 (Berman, Donovan, Lalonde), ¶ 182 (*citing* **RL-0211**, *Libananco Holdings Co. Ltd. v. Republic of Turkey*, ICSID Case No. ARB/06/8, Award, 2 September 2011 (Hwang, Alvarez, Berman), ¶ 125).

[1135] **RL-0211**, *Libananco Holdings Co. Ltd. v. Republic of Turkey*, ICSID Case No. ARB/06/8, Award, 2 September 2011 (Hwang, Alvarez, Berman), ¶ 125. *See also* **RL-0210**, *Churchill Mining PLC and Planet Mining Pty Ltd. v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and ARB/12/40, Award, 6 December 2016 (Kaufmann-Kohler, Hwang, van den Berg), ¶ 244.

the Gold contained in the Five Shipments was of unlawful origin and in all likelihood (based on the preponderance of evidence) part of a money laundering and tax avoidance scheme.[1136] As Peru has explained, money laundering is proscribed under both international and Peruvian law.[1137] At the very least, based on the evidence on the record (discussed in the Counter-Memorial and in **Section II.A.3** above), the Tribunal can and should conclude that Claimant breached its obligation under Peruvian law to verify that the Gold, its alleged investment, was lawfully sourced by the Suppliers.

466. For all of the above reasons, Claimant's alleged investment in the Gold comprising the Five Shipments does not qualify for protection under the Treaty, and Claimant's claims must be dismissed for lack of jurisdiction *ratione materiae*.

2. Kaloti's business does not qualify as a covered investment

467. Claimant appears to argue that "[Kaloti's] going concern business enterprise"[1138] was a covered investment under the Treaty. It is not. Article 1.3 of the Treaty defines a "covered investment" as

> with respect to a Party, an investment, as defined in Article 10.28 (Definitions), **in its territory** of an investor of another Party.[1139] (Emphasis added)

468. As Peru explained in the Counter-Memorial, Article 25 of the ICSID Convention likewise requires that a claimant's investment be located in the territory of the respondent State.[1140]

[1136] *See* Counter-Memorial, ¶¶ 184, 199–209. *See also* First Missiego Report, ¶¶ 12–14.

[1137] Counter-Memorial, ¶ 376. *See also* **Ex. R-0218**, Money Laundering Decree, Arts. 3–4; **RL-0208**, *Kyrgyz Republic v. Valeri Belokon*, Judgment of the Paris Court of Appeal, 21 February 2017 (Paulsson, Hobér, Schiersing), pp. 5–6; **RL-0209**, United Nations Office on Drugs and Crime, Convention Against Corruption, 2004, Art. 14.

[1138] Reply, ¶ 380.

[1139] **RL-0001**, Treaty [*Re-submitted version of CL-0001, with additional pages*], Art. 1.3. *See also* Counter-Memorial, ¶ 382.

[1140] *See* Counter-Memorial, ¶ 383 (*citing* **RL-0207**, *Hope Services LLC v. Republic of Cameroon*, ICSID Case No. ARB/20/2, Award, 23 December 2021 (Scherer, Ziadé, Garel), ¶ 215).

469. However, the "going concern business enterprise" of Kaloti was not an investment in the territory of Peru, for at least the following reasons.

470. *First*, Claimant's own admissions confirm that Kaloti's business was not an investment in the territory of Peru. Specifically, according to Claimant, Kaloti is "a limited liability company registered in the State of Florida," which (ii) is "not incorporated in Peru," (iii) has its "substantial business activities in the territory of [the United States]," and (iv) "maintained its principal place of business" in the United States.[1141]

471. *Second*, and relatedly, there is an irreconcilable tension between Claimant's arguments on the Tribunal's jurisdiction *ratione materiae* and its jurisdiction *ratione personae*. Specifically, Claimant argued that

a. on the one hand, Claimant has a covered investment because Kaloti is an *enterprise in the territory of Peru*;[1142] and

b. on the other hand, Claimant is a protected investor because Kaloti is an *enterprise of the United States*[1143]—i.e., it is "registered and domiciled in the United States."[1144]

472. Claimant cannot have it both ways: it cannot argue that Kaloti itself is both an investor of the United States and, at the same time, an investment in Peru.

473. *Third*, Kaloti's business was not an investment in the territory of Peru because Kaloti did not have a permanent establishment in Peru. Under Peruvian law, foreign companies that have a permanent establishment in Peru must register in the Peruvian

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[1141] Memorial, ¶¶ 11, 76, 219. *See also* Counter-Memorial, ¶ 382.

[1142] *See generally* Reply, § IV.B.

[1143] *See* Reply, § IV.A header ("*Ratione Personae*: [Kaloti] is a protected investor under the TPA").

[1144] Reply, ¶¶ 433, 437, 454. Claimant also asserts that Kaloti is (i) "a United States legal entity;" (ii) "established in, and is directly subject to the laws, regulations, and supervision of, the United States of America;" and (iii) "domiciled in, and continues to be legally in good standing with, the state of Florida, United States."

Single Taxpayers' Registry, the RUC (*Registro Único del Contribuyente*).[1145] A permanent establishment consists of (i) a fixed place of business in Peru, such as *inter alia* an office, administrative center, workshop, or (ii) a person acting as its agent in Peru.[1146] However, as it expressly recognized in the Criminal Proceedings,[1147] Kaloti is not registered in the Single Taxpayers' Registry and thus does not have a RUC.[1148] In fact, Peruvian law provides that the use of a fixed place of business for the sole purpose of buying goods for a company located outside of Peru—as Kaloti did—does not constitute a permanent establishment.[1149]

474. *Fourth*, the fact that Kaloti did not pay taxes in Peru further confirms that Kaloti's business was not an investment in the territory of Peru.[1150] Under Peruvian law, foreign companies that operate through a permanent establishment in Peru are subject to income tax on their Peruvian-source income.[1151] Peruvian-sourced income is broadly defined, and encompasses the proceeds resulting from economic activities undertaken in Peru,[1152] including income derived from property located in Peru, income from commercial and business activities carried out in Peru, and capital-generated income such as interests and commissions, when the capital is used in

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[1145] **Ex. R-0372**, Supreme Decree No. 179-2004-EF, Income Tax Law, 6 December 2004, Art. 14(h); **Ex. R-0373**, Legislative Decree No. 943, Law of the Single Taxpayers' Registry, 17 December 2003, Art. 2.

[1146] **Ex. R-0325**, Supreme Decree No. 122-94-EF, Regulation on the Income Tax Law, 19 September 1994, Art. 3(a).

[1147] **Ex. R-0378**, [redacted] Petition No. 187-2014-9-FPP-Callo submitted by Kaloti, Ninth Provincial Prosecutor's Office of Callao, 29 April 2014 [*Re-submitted version of C-0089, with Respondent's translation*], p. 4 ("as Kaloti Metals & Logistics is not domiciled [in Peru] (it does not have RUC)").

[1148] **Ex. R-0374**, Single Taxpayers' Registry, Search results for "Kaloti Metals & Logistics," SUNAT, last accessed 11 May 2023. Claimant's own contemporaneous documents show that Kaloti did not have a Single Taxpayers' Registry number. *See* **C-0129**, Due diligence files prepared by KML of [redacted] pp. 16, 24, 29.

[1149] **Ex. R-0325**, Supreme Decree No. 122-94-EF, Regulation on the Income Tax Law, 19 September 1994, Art. 3(b)(3).

[1150] *See* Section III.A.1.a above.

[1151] **Ex. R-0372**, Supreme Decree No. 179-2004-EF, Income Tax Law, 6 December 2004, Art. 6.

[1152] **Ex. R-0372**, Supreme Decree No. 179-2004-EF, Income Tax Law, 6 December 2004, Art. 9.

Peru.[1153] Consequently, if a foreign company—like Kaloti—conducted any of these types of economic activities in Peru, it would have been subject to income tax.

475. In the Reply, Claimant sought to portray Kaloti as operating in Peru, including by making vague allegations about "other legitimate sources of income [in Peru], including collecting interest from suppliers (sellers) of gold, commissions, shipping charges, processing fees, and others."[1154] Yet Kaloti did not pay an income tax in Peru.[1155] This means that one of the following must be true:

a. Kaloti did not have a permanent establishment in Peru and did not generate any Peruvian-sourced income, which is dispositive in showing that Kaloti's enterprise is not a covered investment under the Treaty; or

b. Kaloti was subject to, but evaded, Peruvian income tax, which would mean that the investment was made in violation of Peruvian law and is therefore not subject to the Treaty's protection.

476. In either case, Kaloti's business enterprise does not qualify as a covered investment.

477. *Fifth*, and finally, Claimant's attempt to rely on a Peruvian registration document fails to support its jurisdiction *ratione materiae* argument fails. In the Reply, Claimant's sole argument on the issue was its comment that "[Kaloti] itself was actually registered in Peru, as a company and ongoing business, with the Peruvian *Superintendencia Nacional de los Registros Públicos (SUNARP)*."[1156] This argument is misleading, as this registration does not prove that Kaloti is an investment in the territory of Peru. To the contrary, the regulation pursuant to which Kaloti registered, the Regulation No. 200-2001-SUNARP-SN ("**Company Registry Regulation**"), allows *foreign* companies to register powers of attorneys with the SUNARP.[1157] A foreign company is not required

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[1153] **Ex. R-0372**, Supreme Decree No. 179-2004-EF, Income Tax Law, 6 December 2004, Art. 9(b)–(c), (e).

[1154] Second [redacted] Witness Statement, ¶ 32.

[1155] *See* Section III.A.1.a above.

[1156] Reply, ¶ 155.

[1157] **Ex. R-0239**, Resolution No. 200-2001-SUNARP-SN, Regulations of the National Superintendent of Registries, 1 September 2001, Art. 165.

to be incorporated in or establish operations in Peru in order to complete such registration.[1158] Thus, Kaloti's registration merely memorializes that Kaloti, as a *foreign* company, granted a power of attorney on 4 April 2014.[1159] Not surprisingly, Claimant elided the above fact about its registration with SUNARP, and offered no support for the suggestion that such registration would entail an investment "in the territory" of Peru.

478. Claimant has thus failed to satisfy the threshold requirement of showing that the "going concern business enterprise" of Kaloti was an investment "in the territory" of Peru. The Tribunal therefore lacks jurisdiction *ratione materiae* over all of Claimant's claims based on this alleged investment.

3. None of the other alleged investments mentioned in passing by Claimant qualify as covered investments

479. In addition to the Five Shipments of Gold and Kaloti as a "going concern," Claimant mentioned sundry other alleged investments and attempted to demonstrate that these other alleged investments possess the characteristics of investments. But as a threshold matter, Peru notes that none of Claimant's claims in this arbitration appear to be based on such alleged investments. It appears therefore that the reference to those other alleged investments is designed to divert the attention of Peru and the Tribunal away from the fact that the Five Shipments of Gold and the alleged "going concern" are not covered investments. Nevertheless, and for the sake of completeness only, Peru will briefly demonstrate that these other alleged investments are likewise not covered under the Treaty.

[1158] **Ex. R-0239**, Resolution No. 200-2001-SUNARP-SN, Regulations of the National Superintendent of Registries, 1 September 2001, Art. 165.

[1159] **Ex. R-0240**, Certificate of Registry, SUNARP, 10 February 2014.

a. Kaloti's alleged consideration of establishing a refinery in Peru is not a covered investment

480. In attempting to establish the existence of a covered investment, Claimant mentioned in the Reply that it "considered establishing a refinery in Peru."[1160] Pursuant to Article 10.28 of the Treaty, an investment is an "asset that an investor owns or controls"[1161] — not an asset that it thought about potentially acquiring. In that vein, the tribunal in *Doutremepuich v. Mauritius* considered that

> [t]he role of the Tribunal is not to second-guess what possible future investments the Claimants might have made. Rather, the Tribunal is to determine whether or not at the time of the termination of the Project an investment had occurred that qualifies as such under the Treaty.[1162]

481. Thus, Claimant's alleged consideration of establishing a refinery in Peru neither constitutes a covered investment nor contributes in any way to Claimant's arguments.

482. In any event, as a factual matter, Peru notes that Kaloti had not made any plans to establish a refinery in Peru. The sole evidence provided by Claimant with respect to the refinery are minutes of a shareholders meeting that only "grant[ed] Mr. [redacted] the permission to **study[] the opportunity** of establishing/building gold refinery and trading house in Lima" (emphasis added).[1163] Claimant has provided no evidence to show that this study was in fact carried out, let alone that it resulted in a firm commitment to pursue an investment in a refinery.

[1160] Reply, ¶¶ 163, 184.

[1161] **RL-0001**, Treaty [*Re-submitted version of CL-0001, with additional pages*], Art. 10.28.

[1162] **RL-0201**, *Doutremepuich* (Award), ¶ 152. *See also* **RL-0243,** *Nordzucker AG v. Republic of Poland*, UNCITRAL, Partial Award, 10 December 2008 (van Houtte, Tomaszewski, Bucher), ¶ 185 ("[T]he intended investment must be not only intended by the future investor but must be actually 'in the making' or 'about to be made.' Indeed, for a host State to have an obligation to promote and admit an investment, there must be more than a mere intention to invest which exists only in the mind of the potential investor. The host State can have no obligation to promote anything it is not aware of or to admit something which is not ready to be admitted.").

[1163] *See* **Ex. C-0049**, Minutes of KML - Granting permission to study the opportunity to establish a gold refinery in Peru, 8 April 2013.

b. Claimant's alleged "advertisement investments" are unexplained

483. Claimant also argued in the Reply that it held "advertisement investments."[1164] Claimant did not even bother to explain what such investments are—let alone whether or why they would qualify as covered investments under the Treaty or the ICSID Convention.

c. Claimant's alleged "infrastructure" does not qualify as a covered investment

484. In the Reply, at the outset of its section on the Tribunal's jurisdiction *ratione materiae*, Claimant also referred to "its infrastructure for testing, processing, and selling gold."[1165] Claimant referred to its alleged "infrastructure" twice thereafter—but never provided any explanation of, or evidence to support, this vague assertion. These passing references to infrastructure are insufficient to discharge Claimant's burden of demonstrating the existence of a covered investment.

485. In any event, Peru demonstrated in the Counter-Memorial that Claimant did not have any presence in Peru that could qualify as a covered investment.[1166] For instance, while Claimant had alleged that it had an "office" in Lima,[1167] Peru showed that such alleged "office" was in fact a facility within the premises of [redacted] which provided space for storage and administration, as part of a broader transport and storage agreement.[1168] Furthermore, the apartment that Kaloti claimed that it rented in Lima "for expatriate and travelling personnel"[1169] was in fact the private residence of Mr. [redacted] (Kaloti's operational manager in Peru).[1170] And the lease agreement

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[1164] Reply, ¶ 158.

[1165] Reply, ¶ 154.

[1166] *See* Counter-Memorial, ¶¶ 341–345.

[1167] Memorial, ¶ 19.

[1168] *See* Counter-Memorial, ¶ 342 (*citing* **Ex. R-0208**, Lease agreement between [redacted] and Kaloti, 8 July 2013 [*Re-submitted version of C-0028, with Respondent's translation*], Clause 2 ("whose main objective is to provide services for the Transfer of Securities and Documents")).

[1169] Memorial, ¶ 20.

[1170] *See* **Ex. C-0035**, KML lease agreement, payment vouchers and picture of apartment in Lima, Peru, 10 July 2013. *See also* Peru's Counter-Memorial, ¶ 343.

for that apartment expressly prohibited any sublease or other use.[1171] Similarly, while Claimant had claimed to have "employees" in Peru,[1172] the only purported evidence thereof consisted of three service contracts—which Kaloti could terminate at any time—for the performance of specific tasks (i.e., the testing and assaying of minerals before exporting them to the United States).[1173] In the Reply, Claimant was forced to concede that these were "independent contractors."[1174]

486. Thus, while Claimant meekly referred in the Reply to Kaloti's alleged "infrastructure," the reality is that Kaloti had no such infrastructure to speak of, and it certainly would not have qualified as a covered investment under the Treaty or the ICSID Convention.

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487. In conclusion, Claimant has failed to establish the existence of a covered investment. The Tribunal therefore lacks jurisdiction *ratione materiae* over all of Claimant's claims.

B. The Tribunal lacks jurisdiction *ratione temporis* over most of Claimant's claims because Claimant did not comply with the Temporal Limitations Provision

488. In the Counter-Memorial, Peru demonstrated that the Tribunal lacks jurisdiction *ratione temporis* over most of Claimant's claims[1175] because Claimant did not comply with the Temporal Limitations Provision.[1176] That provision establishes that:

> No claim may be submitted to arbitration . . . if more than three years have elapsed from the date on which the claimant first

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[1171] **Ex. C-0035**, KML lease agreement, payment vouchers and picture of apartment in Lima, Peru, 10 July 2013, p. 3, Clause 3.

[1172] Memorial, ¶¶ 21, 24.

[1173] Peru explained in the Counter-Memorial that, under Peruvian law, a service contract is a civil contract where the service provider remains autonomous in the execution of the requested services. *See* **Ex. R-0222**, Legislative Decree No. 295, Civil Code, 24 July 1984, 25 July 1984 [*Re-submitted version of CL-0044, with Respondent's translation*], Art. 1764.

[1174] Reply, ¶ 165.

[1175] As noted above, the only claim that is not the subject of this objection is Claimant's meritless claim that Peru breached the MST Provision by failing to negotiate.

[1176] *See* Counter-Memorial, § III.B.

> acquired, or should have first acquired, knowledge of the breach alleged under Article 10.16.1 and knowledge that the claimant . . . has incurred loss or damage.[1177]

489. As Peru demonstrated, Claimant submitted most of its claims more than three years after it had (or should have) acquired knowledge of the alleged breaches and loss.[1178] Specifically, Claimant's claims that are time-barred are (i) its claims under the MST Provision concerning denial of justice, discrimination, legitimate expectations;[1179] (ii) its claim of breach of the National Treatment Provision; and (iii) its two indirect expropriation claims.

490. In the Reply, Claimant accepted that it was required to comply with the Temporal Limitations Provision, but sought to distort the terms of that provision in order to avoid dismissal of its claims.[1180] Claimant also insisted that it complied with the three-year limitations period by alleging that the disparate acts of which it complains can be amalgamated into composite acts—which, in Claimant's view, allows it to artificially delay the date of its knowledge of the alleged breaches and loss.[1181] Claimant also argued, apparently in the alternative, that (i) the Temporal Limitations Provision should not bar its claims because the litigation of those claims would not prejudice Peru,[1182] and (ii) it can erase the Temporal Limitations Provision using the MFN Clause.[1183]

491. In the subsections that follow, Peru will first recall that the Temporal Limitations Provision is a condition to consent under the Treaty (**subsection B.1**). Peru will then (i) identify the relevant cut-off date for the purposes of the three-year limitations

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[1177] **RL-0001**, Treaty [*Re-submitted version of CL-0001, with additional pages*], Art. 10.18.1.

[1178] *See* Counter-Memorial, § III.B.

[1179] In the Reply, Claimant asserted a new claim under the MST Provision, alleging that Peru interfered with Claimant's legitimate expectations. *See* Reply, ¶¶ 375–379. As Peru demonstrates below, this claim is also time-barred.

[1180] Reply, ¶¶ 205–218.

[1181] Reply, ¶ 219.

[1182] Reply, § IV.C.f.

[1183] Reply, § IV.C.g.

period (**subsection B.2**); (ii) demonstrate that contrary to Claimant's arguments, the challenged measures do not constitute a "composite act" (**subsection B.3** below); and (iii) demonstrate that Claimant had acquired knowledge of the alleged breaches and loss before the applicable cut-off date (**subsection B.4**). Finally, Peru explains that Claimant cannot circumvent the Temporal Limitations Provision, including by dint of the MFN Clause (**subsection B.5**).

1. The Temporal Limitations Provision is a condition of Peru's consent to arbitration that limits the Tribunal's jurisdiction ratione temporis

492. Peru explained in the Counter-Memorial that the text of the Treaty,[1184] applicable jurisprudence,[1185] and the joint interpretation of the two States Parties to the Treaty (i.e., Peru and the United States)[1186] all confirm that the Temporal Limitations Provision is a condition of consent to arbitration that limits the jurisdiction *ratione temporis* of this Tribunal. Peru will not repeat that discussion here, but instead respectfully refers the Tribunal to the Counter-Memorial.[1187]

493. In the Reply, Claimant appeared to accept that the Temporal Limitations Provision imposes a time-bar, but bizarrely and inexplicably argued that "Peru did not object to

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[1184] **RL-0001**, Treaty [*Re-submitted version of CL-0001, with additional pages*], Art. 10.18.1.

[1185] *See, e.g.*, **RL-0135**, *Corona Materials, LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award on the Respondent's expedited preliminary objections in accordance with Article 10.20.5 of the DR-CAFTA, 31 May 2016 (Dupuy, Thomas, Mantilla-Serrano) ("***Corona* (Award)**"), ¶ 191 ("Having regard to the ordinary meaning of the terms, read in their context and in light of the Agreement's object and purpose, the DR-CAFTA Parties have plainly conditioned their consents to arbitration. If a claimant does not comply with the conditions and limitations established in Article 10.18, its claim cannot be submitted to arbitration."); **RL-0136**, *Grand River Enterprises Six Nations Ltd., et al. v. United States of America*, NAFTA/UNCITRAL, Decision on Objections to Jurisdiction, 20 July 2006 (Nariman, Anaya, Crook) ("***Grand River* (Decision)**"), ¶ 29; **RL-0137**, *Resolute Forest Products Inc. v. Government of Canada,* PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility, 30 January 2018 (Crawford, Cass, Lévesque), ¶ 153; **RL-0103**, *Gramercy Funds Management LLC, et al., v. Republic of Peru*, ICSID Case No. UNCT/18/2, United States of America Written Submission pursuant to Article 10.20.2 of the TPA, 21 June 2019 ("***Gramercy* (USA Sumission)**"), ¶¶ 5–6.

[1186] *See* **RL-0103**, *Gramercy* (USA Sumission), ¶ 5 (stating that the Temporal Limitations Provision of this Treaty "imposes a *ratione temporis* jurisdictional limitation on the authority of a tribunal to act on the merits of the dispute."); **RL-0287**, *The Renco Group, Inc. v. Republic of Peru [II]*, PCA CASE NO. 2019-46, Submission of the United States of America, 6 March 2020, ¶ 3.

[1187] *See* Counter-Memorial, ¶¶ 389–392.

the application of the US-Peru TPA *ratione temporis*. This issue is hence settled for purposes of this arbitration."[1188] Claimant is incorrect, of course. Peru has objected that the Tribunal lacks jurisdiction *ratione temporis* due to Claimant's failure to comply with the Temporal Limitations Provision.

2. The Cut-off Date is 30 April 2018

494. Investment tribunals applying temporal limitations provisions similar to the provision at issue in this arbitration have established a three-step analysis, which: (i) requires identification of the cut-off date—i.e., the specific date three years before the claimant submitted its claims to arbitration; (ii) asks whether the claimant first acquired, or should have first acquired, knowledge of the alleged breach before the cut-off date; and (iii) asks whether the claimant acquired, or should have first acquired, knowledge that it has incurred loss or damage before the cut-off date.[1189]

495. Here, there is no dispute that the Cut-off Date is 30 April 2018.[1190] If Claimant acquired or should have acquired knowledge of the alleged breach and loss before that date, its claim is time-barred and outside the jurisdiction of the Tribunal.

3. Claimant amalgamates disparate measures into a composite act in an attempt to circumvent the Temporal Limitations Provision

496. In this arbitration, Claimant challenges a wide array of alleged acts and omissions undertaken by different entities over time (i.e., the Challenged Measures). Claimant does not and cannot deny that the Challenged Measures occurred *several years* before the Cut-off Date, i.e., before 30 April 2018. These include the key measures that underly all of its claims, namely: (i) "the physical possession and control of [the] gold by Peru" through the SUNAT Immobilizations (adopted between November 2013 and January 2014), and (ii) the Precautionary Seizures (ordered between February 2014

[1188] Reply, ¶ 199.

[1189] *See, e.g.*, **RL-0143**, *Infinito Gold Ltd. v. Costa Rica*, ICSID Case No. ARB/14/5, Decision on Jurisdiction, 4 December 2017 (Kaufmann-Kohler, Hanotiau, Stern), ¶ 330; **RL-0135**, *Corona* (Award), ¶ 196.

[1190] *See* Counter-Memorial, ¶ 395; Reply, ¶ 214.

and May 2014).[1191] As Claimant knows, a claim that the SUNAT Immobilizations or the Precautionary Seizures violated the Treaty would be time-barred pursuant to the Temporal Limitations Provision. Moreover, and by Claimant's own admission, none of the individual acts or omissions on its own could have constituted a breach of the Treaty.[1192]

497. Claimant's solution to these insurmountable obstacles is to resort to the notion of "composite act,"[1193] thereby artificially amalgamating various acts and on that basis offering a theory of composite breach that occurs after the Cut-off Date. In its haste, Claimant has not even clearly identified which actions and omissions by Peru comprise the alleged composite act; indeed, the set of alleged acts and omissions mentioned by Claimant appears to have changed over time.[1194] Claimant adds the lack of clarity by resorting to broad formulations lacking in specificity—for example, arguing that "the conduct of those Peruvian agencies and offices of the Peruvian government, together, constituted a composite wrongful act."[1195] Conveniently and self-servingly, Claimant posits that "all the breaches of the US-Peru TPA relevant in this arbitration occurred, and became actionable, on November 30, 2018"[1196]—i.e., *after* the Cut-off Date of 30 April 2018. However, Claimant is wrong, as demonstrated by Peru in this arbitration.

498. As a general observation, a "composite act" is not an expedient for an investor to sidestep and thus frustrate conditions of consent (or legal standards) contained in a treaty, including statute of limitations provisions. Put differently, an investor may not

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[1191] Reply, ¶ 219.

[1192] *See, e.g.*, Reply, ¶ 228.

[1193] Reply, ¶ 224.

[1194] For example, as Peru explains in further detail in Section IV.C.3 below, the alleged acts and omissions upon which Claimant bases its creeping expropriation claims have changed over time. *Compare* Reply, ¶ 385 *with* Memorial, ¶ 136. Claimant appears to have withdrawn its complaints in respect of certain alleged conduct (e.g., that the Peruvian authorities never "interviewed or questioned" Mr. [redacted] and to have added new complaints (e.g., that Peru "never responded . . . to the multiple requests for return of the gold effectively delivered to Peru by [Kaloti]").

[1195] Reply, ¶ 224.

[1196] Reply, ¶ 232.

simply identify any set of actions, select an alleged act or omission that—if taken individually—would comply with the applicable statute of limitations, slap a label of "composite act" to the set of actions, and on that basis argue that its claim complies with the statute of limitations.[1197] Put differently, mere assertions or references to the composite effect of certain measures are insufficient to substantiate a composite breach argument.[1198] Claimant has not satisfied its burden of proving the existence of a composite act in the case sub judice.

a. Claimant bears the burden of proving the existence of a composite act

499. Article 15 of the ILC Articles on State Responsibility provides that a breach of an international obligation may occur through a composite act, understood as "a series of actions or omissions."[1199] The commentary the ILC Articles states that a composite act only exists where the individual acts were "sufficiently numerous and inter-connected to amount not merely to isolated incidents or exceptions but to a pattern or system."[1200] In this respect, Professor Crawford has explained that "a composite act is **more than a simple series of repeated actions**, but, rather, **a legal entity the whole of which represents more than the sum of its parts**" (emphasis added).[1201] As explained by the ILC Articles and their commentary, "the time at which a composite act 'occurs' [is] 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."[1202]

[1197] Counter-Memorial, ¶ 478 (*citing* **CL-0053**, *Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Award, 03 June 2021, ¶¶ 229–230.).

[1198] *See* **CL-0053**, *Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Award, 03 June 2021, ¶¶ 229–230.

[1199] **CL-0040**, ILC Articles on Responsibility of States for Internationally Wrongful Acts, 12 December 2001 ("**ILC Articles**"), Art. 15(1).

[1200] **RL-0022**, ILC Commentary, Art. 15, Commentary 5 (*quoting Ireland v. United Kingdom* European Court of Human Rights, Application No. 5310/71, Award, 18 January 1978, ¶ 159).

[1201] **RL-0150**, James Crawford, STATE RESPONSIBILITY: THE GENERAL PART (2014), p. 266.

[1202] **RL-0022**, ILC Commentary, Art. 15, Commentary 5. *See also* **CL-0040**, ILC Articles, Art. 15(1) (providing that a "composite act" materializes when "**the action or omission occurs** which, taken with the other actions or omissions, is sufficient to constitute the wrongful act").

500. In order to establish that this Tribunal has jurisdiction *ratione temporis* over its claims that Peru breached its international obligations under the Treaty though a composite act, Claimant must therefore:

a. establish the existence of a composite act under international law proving that there was a pattern or system underlying the Challenged Measures; and

b. demonstrate that the composite act is within the Tribunal's jurisdiction *ratione materiae*, by showing that the "last act or omission" comprising part of the composite act occurred after the Cut-off Date.

501. Claimant does not appear to dispute that it must satisfy these requirements[1203] but it has manifestly failed to meet them.

b. Claimant has not and cannot prove the existence of a common pattern or system underlying the Challenged Measures that gives rise to a composite act

502. Peru explained in the Counter-Memorial that investment tribunals have required that claimants alleging a composite act must demonstrate the existence of a common pattern or system.[1204] For instance, the tribunal in *LSF-KEB Holdings SCA v. Korea* recently confirmed that a claimant cannot content itself with cobbling together any set of actions or omissions,[1205] but rather must "establish[] a scheme of systemic [conduct] separate and distinct from a series of acts or omissions which they claim individually

[1203] *See* Reply, ¶¶ 219–232.

[1204] *See, e.g.*, **RL-0266**, *LSF-KEB Holdings SCA, et al., v. Republic of Korea*, ICSID Case No. ARB/12/37, Award, 30 August 2022 (Binnie, Brower, Stern) ("***LSF-KEB Holdings* (Award)**"), ¶¶ 354–355 ("The basic issue is to determine what is the "composite act" which has "acquired a different legal character" from its composite parts. . . . The [c]laimants have not established a scheme of systemic [conduct] separate and distinct from a series of acts or omissions which they claim individually give rise to State liability. . . . . The [alleged State conduct] events as outlined by the [c]laimants amounted to a "series of repeated actions" and not, as discussed by Professor James Crawford, "a legal entity the whole of which represents more than the sum of its parts"); **RL-0216**, *EDF (Services) Ltd. v. Romania*, ICSID Case No. ARB/05/13, Award, 08 October 2009 (Bernardini, Rovine, Derains), ¶ 308; *See also* **RL-0057**, *RosInvestCo UK Ltd. v. Russian Federation*, SCC Case No. V079/2005, Final Award, 12 September 2010 (Böckstiegel, Steyn, Berman), ¶ 621; **RL-0024**, *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, 6 May 2013 (Berman, Donovan, Lalonde), ¶ 271.

[1205] **RL-0266**, *LSF-KEB Holdings* (Award), ¶¶ 354–355.

give rise to State liability."[1206] But as Peru explained in the Counter-Memorial, Claimant has made no effort even to identify—let alone adduce evidence to demonstrate—any coordination or pattern underlying the Challenged Measures.[1207] To the contrary, the complained-of conduct relates to alleged acts or omissions by different State entities, spanning a period of more than five years,[1208] which Claimant has not even attempted to connect. For example, Claimant's denial of justice claim challenges the alleged conduct of at least six separate State entities—namely, SUNAT,[1209] the *Fiscal de la Décimo Primera Fiscalía Provincial del Callao*,[1210] the *Fiscal de la Novena Fiscalía Provincial del Callao*,[1211] the *Sexto Juzgado Penal del Callao*,[1212] the *Octavo Juzgado Penal del Callao*,[1213] and the *Juzgado Penal Transitorio del Callao*.[1214] Moreover, most of the Challenged Measures were not even directed at Kaloti, but were taken in the context of administrative and judicial proceedings against the Suppliers.[1215]

503. In the Reply, Claimant responded by claiming that the Challenged Measures shared certain characteristics—i.e., that they were "incurred by the Republic of Peru,"[1216] and involved "the seizures of [Kaloti's] gold."[1217] Claimant then alleged that "Peru's own

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[1206] **RL-0266**, *LSF-KEB Holdings* (Award), ¶ 354.

[1207] *See* Counter-Memorial, ¶ 402.

[1208] *See, e.g.*, Reply, ¶¶ 356, 368, 461.

[1209] Memorial, ¶ 111; Reply, ¶¶ 322, 325, 327.

[1210] Memorial, ¶ 115; **Ex. C-0086**, [redacted] KML appeal as the legitimate owner of the gold in the money laundering investigation against [redacted] 16 April 2014; **Ex. C-0092**, [redacted] Petition submitted by KML before the Eleventh Provincial Prosecutor's Office of Callao, 5 August 2014.

[1211] Memorial, ¶ 115; **Ex. C-0089**, [redacted] Petition submitted by KML before the Ninth Provincial Prosecutor's Office of Callao, 29 April 2014; **Ex. C-0093**, [redacted] Petition submitted by KML before the Ninth Provincial Prosecutor's Office of Callao, 5 August 2014.

[1212] Memorial, ¶ 115; Reply, ¶ 331; **Ex. C-0013**, Petition before the *Sexto Juzgado Penal del Callao*, undated.

[1213] Memorial, ¶ 115; Reply, ¶ 331; **Ex. R-0228**, Kaloti's Request to Lift Precautionary Seizure, 3 May 2016 [*Re-submitted version of C-0014, with Respondent's translation*].

[1214] Memorial, ¶ 115; Reply, ¶ 331; **Ex. R-0229**, Kaloti's Request to Lift Precautionary Seizure, 25 May 2016 [*Re-submitted version of C-0015, with Respondent's translation*].

[1215] Counter-Memorial, ¶ 402.

[1216] Reply, ¶ 220.

[1217] Reply, ¶ 221.

legal expert, lawyer Joaquín Missiego, has admitted and clearly stated that, here, all those offices or agencies acted in a coordinated manner."[1218] That is a blatant misrepresentation of Mr. Missiego's testimony. Contrary to what Claimant asserts, Mr. Missiego noted that *Claimant had alleged* "'prior coordination'" between SUNAT and the prosecutorial authorities, and Mr. Missiego observed that such allegation "is based on mere speculation and has no legal basis whatsoever."[1219] Mr. Missiego further explained that Peruvian agencies have a duty to exchange relevant information to identify and prosecute illegal activities,[1220] which "is not illegal or improper, but on the contrary, it is necessary and suitable for fighting activities that arouse suspicions about their legality."[1221] Claimant has knowingly distorted that observation by Mr. Missiego to suggest that there was a pattern or system comprising a composite act. Claimant resorts to such desperate tactics because it has been utterly unable to demonstrate that there was a scheme or coordination between the various State organs in the adoption of their respective measures, so as to constitute "a legal entity the whole of which represents more than the sum of its parts."[1222]

504. In sum, (i) Claimant is unable to identify the Challenged Measures with specificity, (ii) such measures were adopted by various different agencies over a period of several years, and (iii) Claimant is unable to adduce any evidence of an underlying pattern or scheme. For these reasons, Claimant has failed to demonstrate the existence of a composite act—"a legal entity the whole of which represents more than the sum of its parts."[1223]

[1218] Reply, ¶ 223.

[1219] First Missiego Report, ¶ 56.

[1220] First Missiego Report, ¶¶ 56–57.

[1221] First Missiego Report, ¶ 56.

[1222] **RL-0150**, James Crawford, STATE RESPONSIBILITY: THE GENERAL PART (2014), p. 266.

[1223] **RL-0150**, James Crawford, STATE RESPONSIBILITY: THE GENERAL PART (2014), p. 266 ("[A] composite act is more than a simple series of repeated actions").

c. Claimant has not shown that any alleged composite act took place after the Cut-off Date

505. Even assuming that Claimant had been able to identify a composite act (quod non), Claimant must still demonstrate that such composite act took place after the Cut-off Date, but is unable to do so.[1224] Specifically, Claimant alleges that the composite act occurred on 30 November 2018; in its own words: "all the breaches of the [Treaty] relevant in this arbitration occurred, and became actionable, on November 30, 2018, when [Kaloti's] investments permanently lost all value."[1225] However, Claimant has not demonstrated that a composite act occurred on 30 November 2018.

506. To recall, the commentary to ILC Article 15 explains that "the time at which a composite act 'occurs' [i]s 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."[1226] In the words of the *Siemens v. Argentina* tribunal, this final act is the "last step . . . that tilts the balance [which] is similar to the straw that breaks the camel's back."[1227] That last step must also satisfy the requisite causal link between the alleged breach and loss.[1228] Therefore, in order to establish that the composite act took place on 30 November 2018, Claimant must identify a final State act that served as the proverbial "straw that br[oke] the camel's back"[1229] and caused its alleged losses.

[1224] *See* **RL-0001**, Treaty [*Re-submitted version of CL-0001, with additional pages*], Art. 10.18.1.

[1225] Reply, ¶ 232.

[1226] **RL-0022**, ILC Commentary, Art. 15, Commentary 5. *See also* **CL-0040**, ILC Articles, Art. 15(1) (providing that a "composite act" materializes when "**the action or omission occurs** which, taken with the other actions or omissions, is sufficient to constitute the wrongful act").

[1227] **CL-0018**, *Siemens A.G. v. Argentina*, ICSID Case No. ARB/02/8, Award, 6 February 2007, ¶¶ 263, 309.

[1228] *See* **CL-0040**, ILC Articles, Art. 2; **RL-0123**, *Case Concerning Elettronica Sicula S.p.A. (ELSI) (United States v. Italy)*, ICJ, Judgment, 20 July 1989, ¶ 101 ("There were several causes acting together that led to the disaster to ELSI. No doubt the effects of the requisition might have been one of the factors involved. But the underlying cause was ELSI's headlong course towards insolvency; which state of affairs it seems to have attained even prior to the requisition."); **CL-0063,** *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, ¶ 279.

[1229] **CL-0018**, *Siemens A.G. v. Argentina*, ICSID Case No. ARB/02/8, Award, 6 February 2007, ¶¶ 263, 309.

507. Yet Claimant has not identified a Challenged Measure attributable to Peru that took place on 30 November 2018. In fact, as Peru explained in the Counter-Memorial, Claimant has not identified *any* Challenged Measure that took place between the period of the Cut-off Date and 30 November 2018.[1230] Based on Claimant's evidence in this arbitration, the only measures attributable to Peru within that timeframe are two judicial decisions:

a. a ruling of the First Criminal Liquidator Court issued on 23 July 2018 that declared closed the pre-trial stage of the [redacted] Criminal Proceedings, and ordered that such proceedings advance to the next stage;[1231] and

b. a ruling of the Third Civil Chamber of the Superior Court of Justice of Lima issued on 11 October 2018, *in favor of Kaloti*, upholding the latter's appeal against the first instance ruling issued in the civil proceeding concerning Shipment 5.[1232]

508. Claimant has not shown that such decisions had an adverse impact on its alleged investments, let alone that either decision could have caused Kaloti's failure and served to coalesce all the preceding measures into a composite internationally wrongful act.[1233]

509. Not only did those two court rulings not have any adverse effect on Kaloti's alleged investments (quod non), but also merely represented events in ongoing judicial proceedings. Here, the *Corona Materials v. Dominican Republic* tribunal is apposite: "[W]here a 'series of similar and related actions by a respondent State' is at issue, an investor cannot evade the limitations period by basing its claim on 'the most recent

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[1230] *See* Counter-Memorial, ¶ 446, Figure 9.

[1231] **Ex. C-0097**, [redacted] Ruling of the 1st Criminal Liquidator Court, 23 July 2018.

[1232] **Ex. C-0110**, Resolution No. 4, 11 October 2018, issued by the Third Civil Chamber of the Supreme Court of Peru.

[1233] *See* Counter-Memorial, ¶ 446. Claimant incorrectly suggested that Peru had accepted that these events may have formed part of a composite act (*see* Reply, ¶ 273); Peru did not.

transgression in that series."[1234] In the context of that proceeding, the United States similarly affirmed that "[w]here a 'series of similar and related actions by a respondent state' is at issue, an investor cannot evade the limitations period by basing its claim on 'the most recent transgression in that series.'"[1235]

510. For these reasons, Claimant has not been able to show that any alleged composite act materialized after the Cut-off Date.

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511. In sum, Claimant has not established the existence of a composite act, let alone one whose last act in the series occurred after the Cut-off Date. Claimant's attempt to manufacture a composite act in order to overcome the Temporal Limitations Provisions and bring its claims within the Tribunal's jurisdiction *ratione temporis* must be rejected.

4. *Claimant acquired or should have acquired knowledge of the alleged breaches and loss before the Cut-off Date*

512. Because Claimant's claims are premised upon the existence of a composite act, and because there was no such composite act that took place prior to the Cut-off Date, no further analysis is required. Nevertheless, Peru will demonstrate in this subsection that Claimant knew or should have known of the alleged breaches and loss prior to the Cut-off Date.

513. Peru had explained in the Counter-Memorial, and Claimant conceded in the Reply, that "knowledge" encompasses both *actual* knowledge and *constructive* knowledge

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[1234] **RL-0135**, *Corona* (Award), ¶ 215. *See also* **RL-0135**, *Corona* (Award), ¶ 212 (analyzing whether the State act after the relevant date "was understood by the Claimant itself at that time as not producing any separate effects on its investment other than those that were already produced by the initial decision").

[1235] **RL-0141**, *Corona Materials v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Submission of the United States of America, 11 March 2016, ¶ 5 (*citing* **RL-0218**, *Grand River Enterprises Six Nations Ltd., et al. v. United States of America*, NAFTA/UNCITRAL, Award, 12 January 2011 (Nairman, Anaya, Crook), ¶ 81).

(i.e., what Claimant should have known).[1236] However, Claimant argued that it did not have the requisite knowledge because "[n]one of the amounts or concepts currently being claimed in this arbitration were known or mentioned by [Kaloti] before 2018."[1237] That argument fails.[1238] Arbitral jurisprudence[1239] and the States Parties to the Treaty[1240] have confirmed that the limitations period will begin to run at the point when the claimant knew or should have known that loss was suffered—even if the extent and quantum of the loss is still unclear,[1241] or if the damage is not immediate.[1242] For example, the *Spence v. Costa Rica* tribunal—which Claimant

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[1236] *See* Reply, §§ IV.C.d–IV.C.e; Counter-Memorial, ¶ 392. *See also* **RL-0135**, *Corona* (Award),¶ 193; **RL-0136**, *Grand River* (Decision), ¶ 59.

[1237] Reply, ¶ 270.

[1238] Counter-Memorial, ¶¶ 397–398.

[1239] **RL-0038**, *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016 (Fernández-Armesto, Orrego Vicuña, Simma), ¶ 217 ("[W]hat is required [for time bar purposes] is simple knowledge that loss or damage has been caused, even if the extent and quantification are still unclear"); **RL-0146**, *Mondev International Ltd. v. United States of America,* ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002 (Stephen, Crawford, Schwebel), ¶ 87 ("A claimant may know that it has suffered loss or damage even if the extent or quantification of the loss or damage is still unclear."); **RL-0136**, *Grand River* (Decision), ¶¶ 77–78 ("damage or injury may be incurred even though the amount or extent may not become known until some future time."); **RL-0135**, *Corona* (Award), ¶ 194 ("[I]n order for the limitation period to begin to run, it is not necessary that a claimant be in a position to fully particularize its legal claims (in that they can be subsequently elaborated with more specificity); nor must the amount of loss or damage suffered be precisely determined.").

[1240] *See, e.g.,* **RL-0287**, *The Renco Group, Inc. v. Republic of Peru [II]*, PCA CASE NO. 2019-46, Submission of the United States of America, 6 March 2020, ¶ 5 ("With regard to knowledge of "incurred loss or damage" under Article 10.18.1, a claimant may have knowledge of loss or damage even if the amount or extent of that loss or damage cannot be precisely quantified until some future date. Moreover, the term "incur" broadly means to "to become liable or subject to." Therefore, *an investor may "incur" loss or damage even if the financial impact* (whether in the form of a disbursement of funds, reduction in profits, or otherwise) of that loss or damage is not immediate."). *See also* **RL-0103**, *Gramercy* (USA Sumission), ¶ 8.

[1241] *See, e.g.*, **RL-0144**, *Ansung Housing Co., Ltd. v. People's Republic of China*, ICSID Case No. ARB/14/25, Award, 9 March 2017 (Reed, van den Berg, Pryles), ¶ 110 (where the tribunal analysed a temporal limitations provision very similar to the one *sub judice*, and held that "[t]he limitation period begins with an investor's *first knowledge of the fact that it has incurred loss or damage*, not with the date on which it gains knowledge of the *quantum* of that loss or damage" (emphasis added)).

[1242] *See, e.g.,* **RL-0147**, *Michael Ballantine and Lisa Ballantine v. Dominican Republic*, PCA Case No. 2016-17, Final Award, 3 September 2019 (Ramírez-Hernández, Cheek, Vinuesa), ¶ 265 (where the tribunal found, based on an identically-worded temporal limitations provision, that "an investor may have knowledge of it *even if the financial impact of that loss or damage is not immediate*" (emphasis added)).

cites[1243]—concluded that "the Tribunal agrees with the approach adopted in *Mondev*, *Grand River*, *Clayton* and *Corona Materials* that the limitation clause does not require *full or precise knowledge of the loss or damage*" (emphasis added).[1244] Thus, and contrary to Claimant's argument, Kaloti was not required to know or discuss the exact amount of damages claimed in this arbitration in order for the limitations period to have been triggered.

514. In the subsections that follow, Peru will demonstrate that for each of its main claims,[1245] Claimant had or should have acquired knowledge of the alleged breach and loss before the Cut-off Date.

a. Claimant acquired knowledge of the alleged breaches of the MST Provision before the Cut-off Date

515. The evidence on the record and Claimant's own submissions in this arbitration demonstrate that Claimant acquired knowledge of the most of alleged breaches of the MST Provision before 30 April 2018. In particular, all key administrative and judicial decisions or alleged omissions underlying Claimant's denial of justice and discrimination claims took place no later than in 2016.[1246] Claimant's knowledge is reflected inter alia in the First Notice of Intent of 3 May 2016.[1247]

516. In the Reply, Claimant characterized the First Notice of Intent as a "letter sent by [Kaloti] to Peru mentioning the US-Peru TPA"[1248] which "did not refer to the specific

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[1243] Reply, ¶ 234.

[1244] **RL-0138**, *Spence International Investments, et al., v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (Corrected), 30 May 2017 (Bethlehem, Vinuesa, Kantor), ¶ 213.

[1245] As noted above, the only claim that is not the subject of this objection is Claimant's meritless claim that Peru breached the MST Provision by failing to negotiate.

[1246] *See* Counter-Memorial, ¶¶ 410, 414–419.

[1247] *See* Counter-Memorial, ¶¶ 410, 414–419. *See also* **Ex. R-0242**, Kaloti's First Notice of Intent, filed with the General Office of International Economic Affairs, 3 May 2016 [*Re-submitted version of C-0158, with Respondent's translation*]; **Ex. R-0228**, Kaloti's Request to Lift Precautionary Seizure, 3 May 2016 [*Re-submitted version of C-0014, with Respondent's translation*],¶ 17(a); **Ex. R-0229**, Kaloti's Request to Lift Precautionary Seizure, 25 May 2016 [*Re-submitted version of C-0015, with Respondent's translation*], ¶ 17(a).

[1248] Reply, ¶ 245.

Treaty breaches, or concrete damages claimed by [Kaloti] in this arbitration."[1249] That argument is both disingenuous and contradicted by the plain text of that Notice. For example, the title of the Notice leaves no doubt that by 3 May 2016 (i.e., two years before the Cut-off Date) Claimant believed that Peru had breached its obligations; the title reads: "Notice of Intent to Submit a Claim to Arbitration under the Trade Promotion Agreement Peru-United States."[1250] Likewise, the Notice expresses in plain terms Claimant's intention "to submit a claim to arbitration against the Republic of Peru" on the basis of certain key events that, according to Claimant, gave rise to the alleged breaches, and for which Claimant would seek compensation for loss.[1251] Claimant later filed the Second Notice of Intent, which only confirmed the knowledge that Claimant had acquired and had reflected in the First Notice of Intent. As the United States stressed in its non-disputing party submission in *Corona Materials v. Dominican Republic*, "[a]cquiring more detailed information about the breach or the loss does not reset the limitations period."[1252]

517. In the Reply, Claimant asserted a new claim of breach of the MST Provision, alleging that Peru violated Claimant's legitimate expectations.[1253] In addition to being belated and therefore inadmissible—for the reasons explained in **Section IV.A** below—that claim is equally time-barred under the Temporal Limitations Provision, because it is predicated on acts and alleged omissions that (i) are the basis of Claimant's alleged breach of the MST Provision and (ii) predate the Cut-off Date. Specifically, Claimant's legitimate expectations claim is based on the following measures, all of which pre-date the Cut-off Date: the seizure of the Five Shipments of Gold, investigating Kaloti,

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[1249] Reply, ¶ 244.

[1250] **Ex. R-0242**, Kaloti's First Notice of Intent, filed with the General Office of International Economic Affairs, 3 May 2016 [*Re-submitted version of C-0158, with Respondent's translation*], p. 1.

[1251] *See generally* **Ex. R-0242**, Kaloti's First Notice of Intent, filed with the General Office of International Economic Affairs, 3 May 2016 [*Re-submitted version of C-0158, with Respondent's translation*], ¶ 1.

[1252] **RL-0141**, *Corona Materials v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Submission of the United States of America, 11 March 2016, ¶ 6.

[1253] *See* Reply, § V.B.f.

and failing to respond to Kaloti's requests with respect to the Gold.[1254] Claimant had actual knowledge of these events long before the Cut-off Date; it knew of the SUNAT Immobilizations in 2013-2014;[1255] knew of the Precautionary Seizures were issued in 2014,[1256] and maintained in 2015;[1257] was aware of ongoing investigations in 2015;[1258] and filed the relevant requests well before the Cut-off Date (i.e., between 16 April 2015 and 7 June 2016),[1259] and thus should have known before that time that its Requests were not successful.

[1254] *See* Reply, § V.B.f.

[1255] As discussed, the SUNAT Immobilizations took place between 2013 and 2014. *See* **Ex. R-0091**, SUNAT Immobilization Order No. 316-0300-2013-001497, 29 November 2013 (included in [redacted] Criminal Proceedings) [*Re-submitted version of C-0040, with Respondent's translation*]; **Ex. R-0092**, SUNAT Immobilization Order No. 316-0300-2013-001479, 29 November 2013 (included in [redacted] Criminal Proceedings) [*Re-submitted version of C-0040, with Respondent's translation*]; **Ex. R-0093**, SUNAT Immobilization Order No. 316-0300-2014-000110, 10 January 2014 (included in [redacted] Criminal Proceedings) [*Re-submitted legible version of C-0040*]; **Ex. R-0094**, SUNAT Immobilization Order No. 316-0300-2014-000111, 10 January 2014 (included in [redacted] Criminal Proceedings) [*Re-submitted legible version of C-0040*]; **Ex. C-0040**, [SUNAT Immobilization orders], p. 12 (including Immobilization No. 316-0300-2014-000002 concerning [redacted] Shipment); **Ex. R-0096**, SUNAT Immobilization Order No. 316-0300-2014-000020, 9 January 2014 (included in [redacted] Criminal Proceedings) [*Re-submitted legible version of C-0040*]; **Ex. R-0097**, SUNAT Immobilization Order No. 316-0300-2014-000021, 9 January 2014 (included in [redacted] Criminal Proceedings) [*Re-submitted legible version of C-0040*]; **Ex. R-0098**, SUNAT Immobilization No. 316-0300-2014-000022, 9 January 2014 (included in [redacted] Criminal Proceedings) [*Re-submitted legible version of C-0040*].

[1256] *See* **Ex. R-0134**, Precautionary Seizure against Shipment 1, 21 February 2014; **Ex. R-0135**, Precautionary Seizure against Shipment 2, 25 March 2014; **Ex. C-0090**, [redacted] Ruling of the Superior Court of Justice of Callao – Permanent Criminal Court, 30 April 2014; **Ex. R-0136**, Precautionary Seizure against Shipment 4, 1 May 2014.

[1257] *See* **Ex. R-0139**, Resolution No. 1: Order Initiating Criminal Proceedings, [redacted] Case, 16 March 2015; **Ex. R-0145**, Resolution No. 1: Order Initiating Criminal Proceedings, [redacted] Case, 14 May 2015; **Ex. R-0224**, Resolution No. 1: Order Initiating Criminal Proceedings, [redacted] Case, 9 September 2014 [*Re-submitted version of C-0087, with Respondent's translation*]; **Ex. R-0150**, Resolution No. 1: Order Initiating Criminal Proceedings, [redacted] Case, 10 March 2015.

[1258] Reply, ¶ 400.

[1259] *See* Reply, ¶ 378. *See also* **Ex. C-0086**, [redacted] KML appeal as the legitimate owner of the gold in the money laundering investigation against [redacted] 16 April 2014; **Ex. C-0089**, [redacted] Petition submitted by KML before the Ninth Provincial Prosecutor's Office of Callao, 29 April 2014; **Ex. C-0092**, [redacted] Petition submitted by KML before the Eleventh Provincial Prosecutor's Office of Callao, 5 August 2014; **Ex. C-0093**, [redacted] Petition submitted by KML before the Ninth Provincial Prosecutor's Office of Callao, 5 August 2014; **Ex. C-0013**, Petition before the *Sexto Juzgado Penal del Callao*; **Ex. R-0228**, Kaloti's Request to Lift Precautionary Seizure, 3 May 2016 [*Re-submitted version of C-0014, with Respondent's translation*]; **Ex. R-0229**, Kaloti's Request to Lift Precautionary Seizure, 25 May 2016 [*Re-submitted version of C-0015, with Respondent's translation*].

518. Claimant's own submissions also confirm that it knew of the alleged harm—i.e., the seizure of the Gold and the harm to Kaloti's "going concern"—before the Cut-off Date. Indeed, Claimant has asserted that it began mitigating such harm well before the Cut-off Date: "[Kaloti] was diligent, **mitigated damages**, and sought new suppliers of gold in Peru (after Peru's initial measures) . . . [Kaloti] was forced to substantially change suppliers **starting in 2015**, as compared to 2013-2014."[1260]

519. In sum, the evidence shows that well before the Cut-off Date, Claimant had acquired knowledge of (i) the alleged breaches of the MST Provision (resulting from denial of justice, discrimination, and frustration of legitimate expectations), and (ii) the alleged loss resulting from that alleged breach. Pursuant to the Temporal Limitations Provision, these claims should be dismissed for lack of jurisdiction *ratione temporis*.

b. Claimant acquired knowledge of the alleged breach of the National Treatment Provision before the Cut-off Date

520. Claimant alleged in the Memorial that Peru breached the National Treatment Provision because "SUNAT only pursued asset seizures against the foreign purchasers, while none of the domestic purchasers had any of their gold seized."[1261] Peru demonstrated in the Counter-Memorial that Claimant had acquired knowledge of the alleged breach and loss no later than in 2014.[1262] Specifically, Kaloti knew of the SUNAT Immobilizations *years before* the Cut-off Date,[1263] and Kaloti's submissions confirm that it knew, or should have known, of the associated alleged lost profits also well before the Cut-off Date.[1264]

[1260] Reply, ¶ 400.

[1261] Memorial, ¶ 124. *See also* Reply, ¶ 356 (*citing* First [redacted] Witness Statement, ¶ 48).

[1262] *See* Counter-Memorial, ¶¶ 456–461.

[1263] As explained, SUNAT's immobilizations took place between November 2013 and January 2014, and Kaloti extensively discussed those immobilizations in the First Notice of Intent (i.e. in 2016, almost two years before the Cut-off Date). *See* **Ex. R-0242**, Kaloti's First Notice of Intent, filed with the General Office of International Economic Affairs, 3 May 2016 [*Re-submitted version of C-0158, with Respondent's translation*], ¶¶ 17–48.

[1264] Reply, ¶ 422. Memorial, ¶¶ 187–188.

521. In the Reply, Claimant's only response to Peru's submission was to argue that the First Notice of Intent did not specify the existence of a national treatment claim.[1265] While true, this does not change the fact that Kaloti was already aware of the alleged breach and loss before the Cut-off Date, as demonstrated in the Counter-Memorial. Rather than repeat its submissions in that respect, and for the sake of brevity, Peru respectfully refers the Tribunal to paragraphs 456 to 461 of the Counter-Memorial.

c. Claimant acquired knowledge of the alleged breach of the Expropriation Provision before the Cut-off Date

522. Claimant has submitted two creeping expropriation claims under the Expropriation Provision (i.e., Treaty Article 10.7), asserting the indirect expropriation of (i) Five Shipments of Gold; and (ii) Kaloti's global business operations.[1266] As Peru demonstrated in the Counter-Memorial, Kaloti acquired knowledge of those alleged breaches well before the Cut-off Date.[1267]

523. With respect to the *first* creeping expropriation claim, there can be no question that Kaloti knew of the alleged breach long before the Cut-off Date. Specifically, the Gold was immobilized by SUNAT in 2013 and 2014.[1268] Moreover, on 11 March 2014, Kaloti filed an amparo request ("**Amparo Request**") before the Constitutional Court of Lima,

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[1265] Reply, ¶ 256.

[1266] Memorial, ¶ 130; Reply, ¶ 394.

[1267] Counter-Memorial, ¶¶ 421–455.

[1268] *See* **Ex. R-0091**, SUNAT Immobilization Order No. 316-0300-2013-001497, 29 November 2013 (included in [redacted] Criminal Proceedings) [*Re-submitted version of C-0040, with Respondent's translation*]; **Ex. R-0092**, SUNAT Immobilization Order No. 316-0300-2013-001479, 29 November 2013 (included in [redacted] Criminal Proceedings) [*Re-submitted version of C-0040, with Respondent's translation*]; **Ex. R-0093**, SUNAT Immobilization Order No. 316-0300-2014-000110, 10 January 2014 (included in [redacted] Criminal Proceedings) [*Re-submitted legible version of C-0040*]; **Ex. R-0094**, SUNAT Immobilization Order No. 316-0300-2014-000111, 10 January 2014 (included in [redacted] Criminal Proceedings) [*Re-submitted legible version of C-0040*]; **Ex. C-0040**, [SUNAT Immobilization orders], p. 12 (including Immobilization Order no. 316-0300-2014-000002 concerning [redacted] Shipment); **Ex. R-0096**, SUNAT Immobilization Order No. 316-0300-2014-000020, 9 January 2014 (included in [redacted] Criminal Proceedings) [*Re-submitted legible version of C-0040*]; **Ex. R-0097**, SUNAT Immobilization Order No. 316-0300-2014-000021, 9 January 2014 (included in [redacted] Criminal Proceedings) [*Re-submitted legible version of C-0040*]; **Ex. R-0098**, SUNAT Immobilization No. 316-0300-2014-000022, 9 January 2014 (included in [redacted] Criminal Proceedings) [*Re-submitted legible version of C-0040*].

alleging that SUNAT's immobilization of Shipments 2 and 3 constituted an indirect expropriation of the Gold under Treaty Article 10.7.[1269] This is definitive evidence that Kaloti knew of the alleged breach years before the Cut-off Date.

524. In the Reply, Claimant argued that the Amparo Request is irrelevant because it only concerned Shipments 2 and 3, and did not seek financial compensation.[1270] Claimant is splitting hairs. For the purpose of Claimant's knowledge of the alleged breach of the Expropriation Provision, there is no distinction whatsoever between Shipments 2 and 3, on the one hand, and Shipments 1, 4, and 5, on the other hand. The fundamental fact is that more than four years before the Cut-off Date, Claimant had articulated a breach of the Expropriation Provision of the Treaty based upon the seizure of the Gold by SUNAT.[1271] And while Kaloti did not expressly request compensation through the Amparo Request, Kaloti did state therein that it had suffered loss.[1272] In any event, in the First Notice of Intent dated 3 May 2016, Kaloti alleged that it had suffered loss and should be compensated for the total value of the Five Shipments.[1273] The evidence thus shows that Claimant's first expropriation claim is time-barred.

525. Claimant's *second* expropriation claim—alleging the expropriation of Kaloti's business as a going concern—is likewise time-barred.[1274] In the Counter-Memorial, Peru demonstrated that Kaloti became aware of the events that allegedly caused Kaloti's insolvency (e.g., the seizure of the Five Shipments Gold, and the subsequent decline in its supply of gold) between 2014 and 2015.[1275] Kaloti alleged that it did not trigger its insolvency until 30 November 2018—by writing off the value of the Five Shipments, and thus recorded a negative net equity—the evidence shows that such

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[1269] **Ex. R-0230**, Amparo Request, Constitutional Court of Lima, 11 March 2014.

[1270] Reply, ¶¶ 257–260.

[1271] **Ex. R-0230**, Amparo Request, Constitutional Court of Lima, 11 March 2014, pp. 2–3.

[1272] **Ex. R-0230**, Amparo Request, Constitutional Court of Lima, 11 March 2014, ¶ 5.16.

[1273] **Ex. R-0242**, Kaloti's First Notice of Intent, filed with the General Office of International Economic Affairs, 3 May 2016 [*Re-submitted version of C-0158, with Respondent's translation*], ¶ 68.

[1274] Counter-Memorial, ¶¶ 438–455.

[1275] *See* Counter-Memorial, ¶¶ 441–442.

alleged decision was arbitrary and could have been made much earlier.[1276] Peru's independent damages experts, Brattle, confirm this in their second report, when addressing the selection by Claimant's damages expert, Mr. Smajlovic, of 30 November 2018 as the valuation date. Brattle explains that

> **Mr. Smajlovic's valuation date is arbitrary**. Mr. Smajlovic assumes a valuation date of 30 November 2018 because this was the date when KML's management and auditors purportedly concluded that KML's inventories must be written off, making the company insolvent. Brattle 1 explained that this date was arbitrary, and that the **Claimant did not provide any evidence supporting the alleged decision to write off the inventories. Mr. Smajlovic states that he has no basis to conclude whether the write-off of the inventories should have been done sooner than 30 November 2018**, confirming that his valuation date arbitrary.[1277] (Emphasis added)

526. In the Reply, Claimant's argued that "Peru has not, and could not, argue that in reality the gold was actually written-off before November 30, 2018."[1278] However, the fact that Claimant did not write off the value of the Gold until 30 November 2018 does not change the fact that—as demonstrated by the evidence—Claimant knew of the alleged expropriation and the fact of the loss before the Cut-off Date.

527. In sum, neither of Claimant's two creeping expropriation claims comply with the Temporal Limitations Provision of the Treaty.

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528. For all of the foregoing reasons, the aforementioned claims must be dismissed for lack of jurisdiction *ratione temporis* because the Claimant has failed to comply with the Temporal Limitations Provision.

[1276] *See* Counter-Memorial, ¶¶ 444, 448–451. *See also* First Brattle Report, ¶¶ 237, 240.

[1277] Second Brattle Report, ¶ 91.

[1278] Reply, ¶ 266.

5. *Claimant's other attempts to circumvent the Temporal Limitations Provision fail*

529. Aware that several of its claims are time-barred under the Temporal Limitations Provision, for the reasons explained above, Claimant argued both that its noncompliance can be excused and that it does not need to comply with that provision. Specifically, Claimant argued that (i) Peru has not been prejudiced, such that its claims should be deemed timely event though they do not meet the Temporal Limitations Provision;[1279] and (ii) pursuant to Treaty Article 10.4 ("**MFN Clause**"), Claimant can exempt itself from the Temporal Limitations Provision and instead import a longer temporal limitations period from the Peru-Australia FTA, and/or the absence of temporal limitations provisions in the Peru-UK BIT and the Peru-Italy BIT.[1280] These efforts by Claimant to sidestep the Temporal Limitations Provisions lack legal basis and must be dismissed.

a. Claimant cannot circumvent the Temporal Limitations Provision by arguing that its late claim caused no damage or prejudice to Peru

530. In the Reply, Claimant argued that its claims should not be deemed time-barred because "Peru has been able to present defenses, with evidence," such that "Peru has not been prejudiced or adversely affected" by Claimant's late submission (i.e., after the Cut-off Date) of its claims.[1281] Claimant's argument is entirely without legal merit and must be rejected.

531. The Temporal Limitations Provision is an express condition of the States Parties' consent to arbitration.[1282] That condition is not subject to exceptions; it prescribes that for claims to be within the jurisdiction *ratione temporis* of a tribunal and thus

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[1279] Reply, § IV.C.f.

[1280] Reply, § IV.C.g.

[1281] Reply, ¶ 277.

[1282] *See, e.g.*, **RL-0135**, *Corona* (Award), ¶ 191; **RL-0136**, *Grand River* (Decision), ¶ 29; **RL-0137**, *Resolute Forest Products Inc. v. Government of Canada,* PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility, 30 January 2018 (Crawford, Cass, Lévesque), ¶ 153; **RL-0103**, *Gramercy* (USA Sumission), ¶¶ 5-6.

admissible, the claims *must* be submitted within the temporal limitations period, and that no claim may be submitted thereafter.[1283] To recall, the text of the provision states that "[n]o claim may be submitted to arbitration . . . 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 . . . and knowledge that the claimant . . . has incurred loss or damage."[1284] Neither the letter nor spirit of that provision requires either Treaty Party (including Peru) to show that it has or will incur prejudice.

532. Investment case law interpreting similar provisions confirms that this condition of consent "is 'clear and rigid' and not subject to any 'suspension,' 'prolongation,' or 'other qualification'."[1285] Furthermore, the very purpose of this provision is to prevent prejudice to the States by being compelled to litigate claims that are outside the temporal limitations period expressly provided for in the Treaty.[1286] Looking at it from another angle, a Treaty Party would be prejudiced by the mere fact that it is being forced to engage in costly litigation and face potential liability arising from claims that fall outside of the temporal limit expressly set forth by the Treaty.

533. Claimant's argument that "Peru has not been prejudiced or adversely affected" by Claimant's late submission of its claims because the State "has been able to present defenses, with evidence"[1287] renders the Temporal Provisions Limitation meaningless—which is contrary to the customary rules of treaty interpretation. If accepted, that argument would open the gate for any and all claimants to submit claims after "more than three years have elapsed" and simply argue that the

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[1283] **RL-0001**, Treaty [*Re-submitted version of CL-0001, with additional pages*], Art. 10.18.1 ("No claim may be submitted to arbitration . . . if more than three years have elapsed . . . .").

[1284] **RL-0001**, Treaty [*Re-submitted version of CL-0001, with additional pages*], Art. 10.18.1.

[1285] **RL-0135**, *Corona* (Award), ¶ 192. In the context of NAFTA, arbitral tribunals have described the nearly identical Chapter Eleven limitations period in these same terms. *See also* **RL-0136**, *Grand River* (Decision), ¶ 29; **RL-0137**, *Resolute Forest Products Inc. v. Government of Canada,* PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility, 30 January 2018 (Crawford, Cass, Lévesque), ¶ 153; **RL-0103**, *Gramercy* (USA Sumission), ¶ 6.

[1286] **RL-0138**, *Spence International Investments, et al., v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (Corrected), 30 May 2017 (Bethlehem, Vinuesa, Kantor), ¶ 208.

[1287] Reply, ¶ 277.

respondent State will have the opportunity to "present defenses, with evidence" in the course of the arbitration. Claimant's argument is nonsensical.

534. For these reasons, Claimant's "no prejudice" argument is contrary to the express terms of the Temporal Limitations Provision and the rules of treaty interpretation, and thus cannot be accepted.

b. Claimant cannot circumvent the Temporal Limitations Provision through the MFN Clause

535. Claimant also attempts to sidestep the Temporal Limitations Provision and thus avoid the dismissal of its claims on jurisdictional grounds by invoking the MFN Clause.[1288] Specifically, Claimant argued in the Reply that it can avoid the Treaty's three-year limitations period by (i) importing the longer temporal limitations period from the Peru-Australia Free Trade Agreement,[1289] and/or (ii) invoking the absence of any temporal limitations provision in the Peru-United Kingdom BIT and the Peru-Italy Bilateral Investment Treaty.[1290] However, Claimant's argument is inconsistent with the terms of the MFN Clause and therefore must be rejected.

536. The MFN Clause is limited in scope; it provides as follows:

> 1. 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.
>
> 2. 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,

[1288] Reply, ¶¶ 280–284.

[1289] *See* Reply, ¶ 83; **CL-0120**, Peru-Australia FTA, 12 February 2018, in force since February 11, 2020, Art. 8.22(1).

[1290] Reply, ¶ 283.

expansion, management, conduct, operation, and sale or other disposition of investments.[1291]

537. Claimant argued in the Reply that the MFN Clause "is broadly worded," and compares it to the MFN provision at issue in the *Maffezini v. Spain* arbitration.[1292] That argument is wrong and misleading. In *Maffezini*, the tribunal applied an MFN provision that by its terms applied to "all matters" under the relevant treaty.[1293] In stark contrast, the MFN Clause only applies to (i) "treatment" accorded to "investors" with respect to "the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in the territory;" or (ii) "treatment" accorded to "investments in [the] territory," with respect to "the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments."[1294]

538. As explained in more detail in **Section IV.A.1** below, and as affirmed by investment case law, the existence or scope of a limitations provision in another treaty (namely, a condition of consent to arbitration) is *not* "treatment" accorded by Peru to "investments" or "investors," in the territory of Peru, with respect to the establishment, etc. of an investment.[1295] Pursuant to these specific terms and scope of

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[1291] **RL-0001**, Treaty [*Re-submitted version of CL-0001, with additional pages*], Art. 10.4,

[1292] Reply, ¶ 284.

[1293] *See* **RL-0288**, *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, 25 January 2000 (Orrego Vicuña, Buergenthal, Wolf), ¶¶ 38–65. Claimant also relies on *Suez v. Argentina*, which is another case interpreting a broadly-worded MFN provision, and which is accordingly inapposite. *See* Reply, ¶ 281; **CL-0139**, *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, 3 August 2006, ¶¶ 57–65 (relying on the language "[i]n all matters governed by this Agreement").

[1294] **RL-0001**, Treaty [*Re-submitted version of CL-0001, with additional pages*], Art. 10.4.

[1295] *See* **RL-0263**, *Içkale Inşaat Ltd. Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/24, Award, 8 March 2016 (Heiskanen, Lamm, Sands) ("***Içkale Inşaat Ltd. Şirketi* (Award)**"), ¶ 329 ("[D]ifferences between applicable legal standards cannot be said to amount to 'treatment accorded in similar situations.'"); **RL-0171**, *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award, 22 August 2012 (Dupuy, Brower, Bello Janeiro), ¶¶ 226–28 ("Where an MFN clause applies only to treatment in the territory of the Host State, the logical corollary is that treatment outside the territory of the Host State does not fall within the scope of the clause. . . . It is noteworthy that the resolution of

the MFN Clause, Claimant cannot import or invoke a temporal limitations provision (or the absence thereof) from another treaty.

539. The Treaty Parties made sure that there would be no room for doubt by expressly clarifying the scope of the MFN Clause in a footnote ("**MFN Footnote**") to that provision, which states as follows:

> For greater certainty, treatment "with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments" referred to in paragraphs 1 and 2 of 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.[1296]

540. As explained in the Counter-Memorial and above, the Temporal Limitations Provision is a condition of consent to arbitration, contained in "Section B: Investor-State Dispute Settlement."[1297] The MFN Footnote states clearly and unequivocally that the MFN Clause does *not* encompass provisions from Section B (including the Temporal Limitations Provision).

541. In the Reply, Claimant acknowledged that the MFN Footnote clarifies the scope of the MFN Clause, but argues that the footnote "merely prevents a claimant from importing *mechanisms*," and "[Kaloti] is not trying to import or use a dispute resolution mechanism not provided in the Treaty."[1298] Claimant's argument is not supported by the treaty text. The reference to Section B is not limited to the sum of its parts, but also includes specific parts or elements of that Section. Also, Claimant's interpretation of

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an investor-State dispute within the domestic courts of a Host State would constitute an activity that takes place within its territory. . . . The same cannot be said, however, of international arbitration, which almost without exception takes place outside the territory of the Host State and which per definition proceeds independently of any State control."); **RL-0170**, *ST-AD GmbH v. Republic of Bulgaria*, UNCITRAL, PCA Case No. 2011-06, Award on Jurisdiction, 18 July 2013 (Stern, Klein, Thomas), ¶¶ 394–396; **RL-0002**, *ICS Inspection and Control Services Ltd. v. Argentine Republic*, PCA Case No. 2010-9, Award on Jurisdiction, 10 February 2012 (Dupuy, Lalonde, Torres Bernárdez), ¶ 309.

[1296] **RL-0001**, Treaty [*Re-submitted version of CL-0001, with additional pages*], Art. 10.4, fn. 2.

[1297] *See* **RL-0001**, Treaty [*Re-submitted version of CL-0001, with additional pages*], Art. 10.18.

[1298] Reply, ¶¶ 282–83.

the MFN Footnote would open the door for claimant's to defeat that footnote by simply seeking to import the entirety of Section B *except* one or several specific and discrete provision(s) thereof, and on that basis claim that it is not importing the entire dispute resolution mechanism contained in Section B.

542. Furthermore, Claimant's argument is inconsistent with investment case law that has interpreted similar MFN provisions. In this respect, a consistent line of jurisprudence has found that an MFN provision can only be used to import elements of a dispute resolution clause (i.e., conditions of consent) if the MFN provision "clearly and ambiguously" provides for such application.[1299] This includes the *Plama v. Bulgaria* award, upon which Claimant relies:

> [The] MFN provision in a basic treaty **does not incorporate by reference dispute settlement provisions in whole or in part** set forth in another treaty, **unless the MFN provision in the** [treaty in question] **leaves no doubt** that the Contracting Parties intended to incorporate them.[1300] (Emphasis added)

543. Claimant's attempt to invoke the MFN Clause to avoid the application of the Temporal Limitations Provision and the resulting dismissal of several of its claims, thus fails by virtue of (i) the text of the MFN Clause, (ii) the text of the MFN Footnote,

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[1299] **RL-0289**, *Vladimir Berschader and Moïse Berschader v. Russian Federation*, SCC Case No. 080/2004, Award, 21 April 2006 (Sjövall, Weiler, Lebedev), ¶ 206 ("The starting point in determining whether or not an MFN clause encompasses the dispute resolution provisions of other treaties must always be an assessment of the intention of the contracting parties upon the conclusion of the original treaty. The Tribunal has applied the principle that an MFN provision in a BIT will only incorporate by reference an arbitration clause from another BIT where the terms of the original BIT clearly and unambiguously so provide or where it can otherwise be clearly inferred that this was the intention of the Contracting Parties."); **RL-0171**, *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award, 22 August 2012 (Dupuy, Brower, Bello Janeiro), ¶ 176; **CL-0140**, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, ¶ 223.

[1300] **CL-0140**, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, ¶ 223.

and (iii) the applicable case law. For all of these reasons,[1301] Claimant's argument must be rejected.

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544. In conclusion, Claimant has failed to establish the existence of a covered investment, such that all of its claims fall outside of the jurisdiction *ratione materiae* of the Tribunal. Furthermore, and in any event, most of Claimant's claims do not comply with the Temporal Limitations Period of the Treaty, such that the Tribunal lacks jurisdiction *ratione temporis*. For these reasons, all of Claimant's claims should be dismissed for lack of jurisdiction.

IV. MERITS

545. Even if the Tribunal had jurisdiction over any of Claimant's claims, such claims are meritless and should be rejected. In the sections that follow, Peru addresses Claimant's claims of breach of the MST Provision (**Section IV.A**), the National Treatment Provision (**Section IV.B**), and the Expropriation Provision (**Section IV.C**).

A. Claimant's claims under Treaty Article 10.5 lack merit

546. Claimant claims that Peru breached Article 10.5 of the Treaty (i.e., the MST Provision) by failing to accord Kaloti fair and equitable treatment.[1302] In the Memorial, Claimant had identified more than fifteen alleged acts and omissions by Peru that it claimed were attributable to Peru, and that purportedly: constituted a composite act,

[1301] For the record, Peru also notes that Peru's Schedule to Annex II of the Treaty precludes the application of the MFN Clause to "differential treatment to countries under any bilateral or multilateral international agreement in force or signed prior to the date of entry into force of this Agreement." **RL-0001**, Treaty [*Re-submitted version of CL-0001, with additional pages*], Annex II. (Peru expands upon its interpretation of this language in **Section IV.A.1** below.) Both the Peru-UK BIT and the Peru-Italy BIT entered into force before the Treaty, such that Claimant cannot invoke or rely upon the provisions of those agreements.

[1302] Reply, Title to § V.B.

amounted to a denial of justice, were discriminatory, and/or violated an alleged obligation to negotiate.[1303]

547. In the Counter-Memorial, Peru rebutted Claimant's claims, by demonstrating that (i) the MST Provision prescribes the MST under CIL, thereby imposing a high threshold for a finding of breach, (ii) Claimant failed to establish the existence of any composite act, and (iii) in any event, the alleged measures identified by Claimant do not satisfy—either individually or collectively—the high threshold for breach of the MST.[1304]

548. In the Reply, Claimant recycled its arguments from the Memorial, often without substantively addressing Peru's rebuttal arguments. In particular, Claimant (i) acknowledged that the Treaty prescribes the MST, but seeks to lower the threshold for a finding of breach by attempting to import provisions from other treaties;[1305] (ii) repeated its claims of composite breach, denial of justice, and discrimination;[1306] (iii) added a new claim of violation of what it contends were its legitimate expectations;[1307] and (iv) repeated its frivolous claim that Peru breached the MST Provision by failing to negotiate.[1308] All of these claims and arguments fail, for the following reasons:

a. the MST standard prescribed by Article 10.5 of the Treaty cannot be circumvented or diluted (**subsection A.1**);

b. there was no "composite act" (**subsection A.2**);

c. there was no denial of justice (**subsection A.3**);

[1303] *See* Memorial, ¶¶ 111, 115–119 (addressing Claimant's denial of justice claim), ¶ 122 (addressing Claimant's discrimination claim), ¶ 126 (addressing Claimant's claim with respect to an alleged obligation to negotiate).

[1304] Counter-Memorial, § IV.A.

[1305] *See* Reply, ¶¶ 311–314.

[1306] *See* Reply, ¶¶ 315–316, 319–342, 343–355.

[1307] *See* Reply, ¶¶ 375–379.

[1308] *See* Reply, ¶¶ 364–374.

d. there was no discriminatory treatment (**subsection A.4**);

e. the MST does not protect legitimate expectations; but in any event, none were frustrated here (**subsection A.5**); and

f. no obligation existed for Peru to negotiate with Claimant, but in any event Peru did in fact negotiate with Claimant (**subsection A.6**).

1. The applicable legal standard is the MST under CIL

549. The MST Provision contained in Article 10.5 of the Treaty provides in the relevant part that

> [e]ach Party shall accord to covered investments treatment **in accordance with customary international law**, including fair and equitable treatment and full protection and security.[1309] (Emphasis added)

550. Annex 10-A of the Treaty clarifies that

> [w]ith regard to Article 10.5, **the customary international law minimum standard of treatment** of aliens refers to all customary international law principles that protect the economic rights and interests of aliens.[1310] (Emphasis added)

[1309] **RL-0001**, Treaty [*Re-submitted version of CL-0001, with additional pages*], Art. 10.5.1.

[1310] **RL-0001**, Treaty [*Re-submitted version of CL-0001, with additional pages*], Annex 10-A. The United States—which is the other State party to the Treaty—has also expressly confirmed that Article 10.5 of the Treaty does not require treatment in addition to or beyond that which is required by the MST. *See* **RL-0260**, *Freeport-McMoRan Inc. v. Republic of Peru*, ICSID Case No. ARB/20/8, US Non-Disputing Party Submission, 24 February 2023 ("***Freeport-McMoRan* (USA Submission)**"), ¶ 14 ("The [provisions of Article 10.5 of the Treaty] demonstrate the Parties' express intent to establish the customary international law minimum standard of treatment as the applicable standard in Article 10.5. The minimum standard of treatment is an umbrella concept reflecting a set of rules that, over time, has crystallized into customary international law in specific contexts. The standard establishes a minimum 'floor below which treatment of foreign investors must not fall.'"). The agreed interpretation of the two States parties to the Treaty has persuasive authority. *See* **RL-0265**, VCLT, Art. 31.3 (providing that an interpreter must take into account "any subsequent agreement between the parties [to the treaty] regarding the interpretation of the treaty," and the "subsequent practice in the application of the treaty"); **RL-0142**, *Astrida Benita Carrizosa v. Republic of Colombia*, ICSID Case No. ARB/18/5 2018, Award of the Tribunal, 19 April 2021 (Kaufmann-Kohler, Fernández-Arroyo, Söderlund), ¶ 203 (determining that statements by the treaty parties during the course of a legal dispute can constitute subsequent practice within the meaning of the Vienna Convention).

551. The plain language of the relevant provisions of the Treaty thus makes clear that the applicable standard is the MST under CIL. Claimant appears to concede this.[1311]

a. The MST imposes a high threshold for breach

552. Peru had emphasized in the Counter-Memorial that the MST imposes a high threshold,[1312] relying in part on *Waste Management v. Mexico* for that proposition.[1313] Peru also recalled that investment tribunals have shown deference to domestic authorities with respect to the regulation of matters within their own borders.[1314]

553. Claimant does not dispute any of this in the Reply. Claimant appears to agree with Peru's articulation of the standard for breach of the MST, as Claimant itself relies in part on the *Waste Management v. Mexico* tribunal's summary of the MST.[1315]

554. Applying the MST standard as articulated by the *Waste Management* tribunal, Claimant must demonstrate that Peru engaged in conduct that was "arbitrary, grossly unfair, unjust or idiosyncratic, [wa]s discriminatory and expose[d] the claimant to sectional or racial prejudice, or involve[d] a lack of due process leading to an outcome

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[1311] *See* Memorial, ¶¶ 102–103; Counter-Memorial, ¶¶ 466–467; Reply, ¶ 311.

[1312] Counter-Memorial, ¶¶ 470–472. *See* **RL-0055**, *Gami Investments Inc. v. United Mexican States*, UNCITRAL, Final Award, 15 November 2004 (Paulsson, Lacarte-Muró, Reisman), ¶ 97; **RL-0006**, *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009 (Pryles, Caron, McRae) ("***Cargill* (Award)**"), ¶ 296.

[1313] **RL-0152**, *Waste Management, Inc. v. United Mexican States (II)*, ICSID Case No. ARB (AF)/00/3, Award, 30 April 2004 (Crawford, Civiletti, Magallón Gómez) ("***Waste Management* (Award)**") [*Re-submitted version of CL-0045, with English version of the award*], ¶ 98 ("[T]he minimum standard of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety – as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process.").

[1314] Counter-Memorial, ¶ 473. *See* **CL-0035**, *S.D. Myers, Inc. v. Canada*, Ad hoc—UNCITRAL, First Partial Award and SeparateOpinion, 13 November 2000, IIC 249 (2000), ¶ 263. *See also* **RL-0056**, *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award, 3 November 2015 (Williams, Brower, Thomas), ¶ 382.

[1315] Memorial, ¶ 103.

which offends judicial propriety."[1316] As will be demonstrated below, Claimant has not satisfied this standard.

b. Claimant cannot circumvent the MST Provision by invoking a different obligation from other treaties

555. Having conceded—as it must—that the Treaty prescribes the MST, Claimant in the Reply tries to circumvent the MST by arguing 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**" (emphasis in original).[1317] On that basis, Claimant argued in the Reply—for the first time in the present arbitration—that Peru "also breached other more specific or stringent standards of treatment agreed by Peru in other relevant treaties."[1318] Claimant is thus impermissibly and belatedly treaty-shopping for a lower legal standard (namely, an *autonomous* standard of FET) contained in other treaties to which Peru is a party. Specifically, Claimant seeks to incorporate by reference the fair and equitable treatment ("**FET**") provisions contained in Peru's bilateral investment treaties with Italy, Australia, and the United Kingdom.[1319]

556. Claimant's new argument fails because it: (i) is belated and thus inadmissible; (ii) falls outside of the scope of the MFN Clause; and (iii) in any event, lacks merit—even under the autonomous FET legal standard that Claimant impermissibly tries to import from other treaties. Each of these reasons is discussed in more detail in the following sections.

[1316] Memorial, ¶ 103. *See also* **RL-0152**, *Waste Management* (Award) [*Re-submitted version of CL-0045, with English version of the award*], ¶ 98.

[1317] Reply, ¶ 310.

[1318] Reply, ¶ 311.

[1319] Reply, ¶¶ 312–314.

(i) Claimant's new argument invoking an autonomous FET obligation is inadmissible

557. Claimant's new argument invoking and alleging the breach of one or more of the autonomous FET obligations contained in Peru's other investment treaties is inadmissible because it was not introduced until the Reply, as a result of which it is impermissibly late under the applicable procedural rules. Thus, pursuant to Article 31 of the 2006 ICSID Arbitration Rules ("**ICSID Rules**"), which govern this proceeding,[1320] a claimant's memorial must contain "a statement of the relevant facts; a statement of law, and the submissions;" whereas the reply is limited to "an admission or denial of the facts stated in the last previous pleading; any additional facts, if necessary; [and] observations concerning the statement of law in the last previous pleading."[1321] Procedural Order No. 1 likewise provides that "In the first exchange of submissions (Memorial and Counter-Memorial), the Parties shall set forth *all* the facts and legal arguments on which they intend to rely" (emphasis added),[1322] reserving the second round of submission for responsive arguments only, "unless new facts have arisen."[1323] This rule is consistent with international arbitral practice, which confirms that the reply is designed to be merely a responsive submission,[1324] and thus cannot serve as a Trojan horse for the introduction of new claims and arguments. Moreover, arbitral parties are expected to "conduct themselves in good faith during the[] arbitration proceedings,"[1325] and "sandbagging" the respondent

[1320] Procedural Order No. 1, 28 October 2021, ¶ 1.1.

[1321] ICSID Arbitration Rules, Art. 31(3).

[1322] Procedural Order No. 1, 28 October 2021, ¶ 14.3.

[1323] Procedural Order No. 1, 28 October 2021, ¶ 14.4.

[1324] **RL-0261**, Barton Legum, *et al.*, "*An Outline of Procedure in an Investment Treaty Arbitration – Strategy and Choices*," LITIGATING INTERNATIONAL INVESTMENT DISPUTES (2014), p. 12 ("The reply and the rejoinder are responsive pleadings, limited in content to responding to the points and evidence offered in the immediately preceding pleading. They are accompanied by responsive witness statements, expert reports, documentary evidence, and legal authorities.").

[1325] **RL-0226**, *Libananco Holdings Co. Ltd. v. Republic of Turkey*, ICSID Case No ARB/06/8, Decision on Preliminary Issues, 23 June 2008 (Hwang, Álvarez, Berman), ¶ 78 ("parties have an obligation to arbitrate fairly and in good faith and that an arbitral tribunal has the inherent jurisdiction to ensure

State with new arguments halfway through the proceeding is inconsistent with that principle.

558. With the submission of its new argument invoking autonomous FET, Claimant has flouted the above-noted rules of procedure, and expects this Tribunal to disregard due process. Specifically, rather than observe those basic rules of procedure, Claimant has advanced in the Reply, for the first time in the arbitration, the argument that Peru breached the FET obligations in its bilateral investment treaties with Italy, Australia, and the United Kingdom.

559. In the Reply, Claimant suggested that it had already made such argument in its Memorial.[1326] However, that is incorrect. Claimant had set out the legal basis of its FET claim in paragraphs 101 to 104 of the Memorial. The discussion in that passage makes *no reference* whatsoever to the MFN Clause.[1327] There is also *no reference* at all in the Memorial to any of the three bilateral investment treaties on which Claimant now purports to rely by means of the MFN Clause. Tellingly, such treaties had not even been submitted onto the record of the arbitration with the Memorial; instead, they were introduced with the Reply. The foregoing confirms that Claimant is seeking to submit entirely new arguments in the Reply, which are inadmissible in accordance with the applicable procedural rules and established practice. Claimant's claims based on Peru's alleged breach of autonomous FET obligations must therefore be rejected.

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that this obligation is complied with; this principle applies in all arbitration, including investment arbitration, and to all parties, including States (even in the exercise of their sovereign powers)."). *See also* **RL-0120**, *Methanex Corp. v. United States of America*, UNCITRAL, Final Award on Jurisdiction and Merits, 3 August 2005 (Veeder, Rowley, Reisman) ("***Methanex* (Final Award)**"), Part II, Chapter I, ¶ 54 ("In the Tribunal's view, the Disputing Parties each owed in this arbitration a general legal duty to the other and to the Tribunal to conduct themselves in good faith during these arbitration proceedings and to respect the equality of arms between them"); **RL-0262**, *EDF (Services) Ltd v Romania*, ICSID Case No ARB/05/13, Procedural Order No. 3, 29 August 2008 (Bernardini, Rovine, Derains), ¶ 38 (applying "the principles of good faith and fair dealing required in international arbitration").

[1326] *See* Reply, ¶ 310.

[1327] *See* Memorial, ¶¶ 102–104.

(ii) Claimant's attempted use of the MFN Clause to import an autonomous FET obligation is impermissible

560. Even if Claimant's new arguments were admissible (quod non), Claimant's attempt to import clauses from other treaties by means of the MFN Clause is impermissible, given the limited scope of the MFN Clause. That clause provides as follows:

> Article 10.4: Most-Favored-Nation Treatment
>
> 1. 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**.
>
> 2. 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**.[1328] (Emphasis added)

561. "[I]n accordance with the ordinary meaning to be given to the terms,"[1329] the MFN Clause is limited in scope, insofar as:

a. Article 10.4.1 applies only to the "treatment" of investors "with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory"—i.e., in the territory of Peru;

b. Article 10.4.2 applies only to the "treatment" of covered investments "in its territory"—i.e., in the territory of Peru—"with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments."[1330]

[1328] **RL-0001**, Treaty [*Re-submitted version of CL-0001, with additional pages*], Art. 10.4.

[1329] **RL-0265**, VCLT, Art. 31.1.

[1330] **RL-0001**, Treaty [*Re-submitted version of CL-0001, with additional pages*], Art. 10.4.

562. Claimant's MFN argument, at its core, is that (i) although the Treaty's FET obligation prescribes the MST under CIL, (ii) other Peru investment treaties include FET provisions that do not prescribe the MST, and (iii) the latter are more favorable to Claimant, as a result of which they should apply in the present proceeding by virtue of the MFN Clause in the Treaty. However, Claimant's arguments are untenable, for the reasons explained below.

563. *First*, substantive legal standards of protection (such as MST and autonomous FET obligations) do not amount to "treatment" under the MFN Clause. As explained by the tribunal in *Sirketi v. Turkmenistan* interpreted an analogous MFN provision,[1331] which referred to "treatment accorded in similar situations" (which is conceptually identical to the relevant language in the MFN Clause of the Treaty, which alludes to "treatment . . . accord[ed] in like circumstances").[1332] The tribunal in that case stressed that "the MFN treatment obligation requires a comparison of the **factual situation**" (emphasis added) of the identified comparator investor with that of the claimant.[1333] The *Sirketi* tribunal further observed that "differences between applicable legal standards cannot be said to amount to 'treatment accorded in similar situations.'"[1334] It explained that this is so because otherwise the phrase "in similar situations" would become redundant, as "there would be no difference between the clause 'treatment no less favourable than that accorded in similar situations […] to investments of investors of any third country' and 'treatment no less favourable than that accorded […] to

[1331] The most-favored-nation clause in *Sirketi v. Turkmenistan* stated: "Each Party shall accord to these investments [i.e., investments permitted into its territory pursuant to Article II(1)], once established, treatment no less favourable than that accorded in similar situations to investments of its investors or to investments of investors of any third country, whichever is the most favourable."). **RL-0263**, *Içkale Inşaat Ltd. Şirketi* (Award), ¶ 326.

[1332] **RL-0001**, Treaty [*Re-submitted version of CL-0001, with additional pages*], Art. 10.4.

[1333] **RL-0263**, *Içkale Inşaat Ltd. Şirketi* (Award), ¶ 329.

[1334] **RL-0263**, *Içkale Inşaat Ltd. Şirketi* (Award), ¶ 329. *See also* **RL-0121**, *Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan*, ICSID Case No. ARB/12/6, Award, 4 May 2021 (Lew, Hanotiau, Boisson de Chazournes), ¶ 793 ("The Tribunal has concluded that the MFN provision in Article II(2) BIT applies to de facto discrimination where two actual investors in a similar situation are treated differently. That is not the case here. Further, the wording of Article II(2), requiring such factually similar situation, does not entitle Claimants to rely on the MFN provision to import substantive standards of protection from a third-party treaty which are not included in the BIT.").

investments of investors of any third country.'"[1335] The tribunal in *Sirketi* added that the latter interpretation "would not be consistent with the generally accepted rules of treaty interpretation, including the principle of effectiveness, or *effet utile*, which requires that each term of a treaty provision should be given a meaning and effect."[1336] The tribunal thus concluded that "the Claimant's argument that it is entitled to import substantive standards of protection not included in the Treaty from other investment treaties concluded by [the host State], and to rely on such standards of protection in the present arbitration, must be rejected."[1337] The exact same textual analysis applies with respect to the MFN Clause of the Treaty.

564. Such conclusion is also consistent with the views on the subject by Peru and the United States—the two parties to the Treaty. Such States agree that the scope of the MFN Clause is limited, including with respect to the meaning of the treaty term "treatment" in that provision. For instance, in *Mamacocha v. Peru*, the United States made clear in a non-disputing party submission that the existence of an autonomous FET provision in a different treaty *does not constitute more favorable treatment for the purpose of an MFN provision*.[1338] Specifically, the United States asserted the following:

> **[A] Party does not accord treatment through the mere existence of provisions in its other international agreements such as** umbrella clauses or **clauses that impose autonomous fair and equitable treatment standards**. Treatment accorded by a Party could include, however, measures adopted or maintained by a Party in connection with carrying out its obligations under such provisions.[1339] (Emphasis added)

565. Thus, the existence of different FET obligations in other treaties does not constitute "treatment" for purposes of the MFN Clause. Claimant's attempt in the Reply to use the MFN Clause to assert new FET claims is therefore impermissible.

[1335] **RL-0263**, *Içkale Inşaat Ltd. Şirketi* (Award), ¶ 329.

[1336] **RL-0263**, *Içkale Inşaat Ltd. Şirketi* (Award), ¶ 329.

[1337] **RL-0263**, *Içkale Inşaat Ltd. Şirketi* (Award), ¶ 332.

[1338] **RL-0009**, *Mamacocha* (USA Submission), ¶ 42.

[1339] **RL-0009**, *Mamacocha* (USA Submission), ¶ 42.

566. *Second*, a treaty provision agreed between Peru and a third State does not (and cannot) constitute treatment of a U.S. investor or a covered investment "in the territory" of Peru.[1340] In this respect, the *Daimler v. Argentina* tribunal reasoned that

> [w]here an MFN clause applies only to treatment in the territory of the Host State, the logical corollary is that treatment outside the territory of the Host State does not fall within the scope of the clause.
>
> This observation is of critical importance. It is noteworthy that the resolution of an investor-State dispute within the domestic courts of a Host State would constitute an activity that takes place within its territory. . . .
>
> The same cannot be said, however, of international arbitration, which almost without exception takes place outside the territory of the Host State and which per definition proceeds independently of any State control.[1341] (Emphasis in original)

567. Other tribunals have agreed with the *Daimler* tribunal's interpretation of the term "in the territory." For instance, the *ST-AD v. Bulgaria* tribunal held that "a reference to the words "treatment in the territory of the other Contracting Party" cannot be reconciled with an international arbitral procedure, which is not rooted in the territory."[1342] The *ICS v. Argentina* tribunal similarly observed that the use of the term "in the territory" means that "the MFN guarantees are territorially limited,"[1343] and "international arbitration is not an activity inherently linked to the territory of the respondent State."[1344]

[1340] **RL-0001**, Treaty [*Re-submitted version of CL-0001, with additional pages*], Art. 10.4.

[1341] **RL-0171**, *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award, 22 August 2012 (Dupuy, Brower, Bello Janeiro), ¶¶ 226–228.

[1342] **RL-0170**, *ST-AD GmbH v. Republic of Bulgaria*, UNCITRAL, PCA Case No. 2011-06, Award on Jurisdiction, 18 July 2013 (Stern, Klein, Thomas), ¶ 394.

[1343] **RL-0002**, *ICS Inspection and Control Services Ltd. v. Argentine Republic*, PCA Case No. 2010-9, Award on Jurisdiction, 10 February 2012 (Dupuy, Lalonde, Torres Bernárdez), ¶ 305.

[1344] **RL-0002**, *ICS Inspection and Control Services Ltd. v. Argentine Republic*, PCA Case No. 2010-9, Award on Jurisdiction, 10 February 2012 (Dupuy, Lalonde, Torres Bernárdez), ¶ 306.

568. Consistent with the foregoing case law, the provisions of investment treaties between Peru and other States, upon which Claimant now purports to rely, do not constitute treatment of Claimant "in [the] territory" of Peru.

569. For all of these reasons, Claimant's new argument falls outside of the scope of the MFN Clause, and must therefore be dismissed.

(iii) In any event, Claimant's new argument based on an autonomous FET obligation would fail on the merits

570. Even if Claimant's new argument under the MFN Clause was admissible (quod non), they would be found meritless. As explained above, the MFN Clause is limited to "treatment . . . that [each Treaty Party] accords, in like circumstances" to "investors . . . of any non-Party" or to "investments in its territory of investors . . . of any non-Party."[1345] Investment tribunals applying similar MFN provisions have confirmed that a claimant invoking such a provision must: (i) identify some other investor or investment of a non-Party which is in "like circumstances;" (ii) establish the "treatment" accorded by the State to the comparator investor or investment; and (iii) show that the comparator received more favorable "treatment" than the claimant.[1346]

571. The United States has emphasized these requirements when interpreting the MFN Clause in this Treaty, as well as the similarly worded MFN provision contained in NAFTA.[1347] The two States Parties to the Treaty thus agree that such requirements (including the "in like circumstances" requirement) cannot be ignored. Thus, for example, the United States has emphasized in this regard that

> **[i]f a claimant does not identify investors or investments** of a non-Party or another Party as allegedly being "**in like circumstances**" with the claimant or its investment, **no violation**

[1345] **RL-0001**, Treaty [*Re-submitted version of CL-0001, with additional pages*], Art. 10.4.

[1346] **RL-0001**, Treaty [*Re-submitted version of CL-0001, with additional pages*], Art. 10.4.

[1347] **RL-0009**, *Mamacocha* (USA Submission), ¶ 39 ("To establish a breach of the obligation to provide most-favored-nation ('MFN') treatment under Article 10.4, a claimant has the burden of proving that it or its investments: (1) were accorded 'treatment'; (2) were in 'like circumstances' with identified investors or investments of a non-Party or another Party; and (3) received treatment 'less favorable' than that accorded to those identified investors or investments."); **RL-0264**, *Legacy Vulcan LLC v. United Mexican States*, ICSID Case No. ARB/19/1, Submission of the United States, 7 June 2021, ¶ 16.

> **of Article 10.4 [i.e., the MFN Clause] can be established**. The MFN clause of the U.S.-Peru TPA expressly requires a claimant to demonstrate that investors or investments of another Party or a non-Party "in like circumstances" were afforded more favorable treatment. **Ignoring the "in like circumstances" requirement would serve impermissibly to excise key words from the Agreement**.[1348] (Emphasis added)

572. In the present case, Claimant has not even attempted to identify a third-party State investor or investment which is "in like circumstances." Such failure is fatal to Claimants' new arguments under the MFN Clause, because it follows *a fortiori* from the foregoing that Claimant has not demonstrated more favorable treatment by Peru of any comparator investor or investment. As noted above, the mere fact that other investment treaties may be formulated in different terms from the treaty at issue does not amount to "treatment" with respect to the establishment, etc. of investments. Therefore, Claimant's new argument falls outside of the scope of the MFN Clause.

573. In any event, Claimant's claim that all of the treaties that it invokes contain "more specific or stringent standards of treatment" than the Treaty[1349] is actually substantively incorrect. The FET provisions from other treaties which Claimant seeks to incorporate by reference are not all in fact more favorable to Claimant than the MST Provision in the Treaty. For example, the Peru-Australia FTA (which is one of the three treaties invoked by Claimant) in fact prescribes exactly the same standard of treatment—i.e., the MST under CIL—as the present Treaty.[1350] And although the other two treaties on which Claimant relies (the Peru-Italy BIT and the Peru-United Kingdom BIT) do not make any reference to the MST under CIL, as explained above the mere fact that such treaties contemplate standards of protection which are

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[1348] **RL-0009**, *Mamacocha* (USA Submission), ¶ 40.

[1349] Reply, ¶ 311.

[1350] *See* **CL-0120**, Peru-Australia FTA, Art. 8.6 ("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. . . . " (emphasis added)).

different from those in the Treaty does not qualify as "treatment" under the MFN Clause.

574. Claimant has thus failed to satisfy any of the requirements for invoking the MFN Clause.

575. Finally, even if Claimant's argument could overcome all of the foregoing obstacles (which it cannot), Claimant's attempt to import an autonomous FET obligation would be barred by Article 10.13 of the Treaty. That article provides that the MFN Clause (along with other provisions) "do[es] not apply to any measure that a Party adopts or maintains with respect to sectors, subsectors, or activities, as set out in its Schedule to Annex II."[1351] As explained by the United States in the context of other arbitrations under the Treaty, Article 10.13 implies that "a claimant [invoking the MFN Clause] must also establish that the alleged non-conforming measures that constituted 'less favorable' treatment are not subject to the reservations contained in Annex II of the U.S.-Peru TPA."[1352] However, Peru's Schedule to Annex II provides that for "[a]ll Sectors,"

> Peru reserves the right to adopt or maintain any measure that accords differential treatment to countries under any bilateral or multilateral international agreement in force or signed prior to the date of entry into force of this Agreement.[1353]

576. Consequently, even if the Tribunal were to decide that the inclusion of a different FET obligation in another investment treaty constitutes "treatment" for the purpose of the MFN Clause (which it should not), Peru's Schedule to Annex II would serve to exclude from its scope measures under investment treaties that predate the Treaty. Here, both of the treaties invoked by Claimant that include an autonomous FET obligation—i.e.,

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[1351] **RL-0001**, Treaty [*Re-submitted version of CL-0001, with additional pages*], Art. 10.13.2.

[1352] **RL-0103**, *Gramercy* (USA Sumission), ¶ 56. *See also* **RL-0270**, *Latam Hydro LLC and CH Mamacocha S.R.L. v. Republic of Peru*, ICSID Case No. ARB/19/28, Oral submission of the United States, 16 March 2022, US Non-Disputing Party (N. Thornton), Tr. 1491:1 to 1491:11 ("a Claimant must establish that the alleged non-conforming measures that constituted less favourable treatment are not subject to the exceptions contained in annex 2 of the TPA").

[1353] **RL-0001**, Treaty [*Re-submitted version of CL-0001, with additional pages*], Annex II.

the Peru-Italy BIT and the Peru-United Kingdom BIT—predate the Treaty. As a result, even if the inclusion of these treaty provisions could be deemed to fall within the scope of the MFN Clause (quod non), Claimant's claims would be barred by Treaty Article 10.13.

577. For the foregoing reasons, Claimant's belated and impermissible effort to disregard the MST Provision and replace it instead with an autonomous FET obligation (by means of the Treaty's MFN Clause) must be rejected. In any event, Claimant has failed to satisfy the "high" threshold for breach of the MST Provision,[1354] and thus even if they were admissible its claims would need to rejected on that basis.

2. Claimant alleges a composite breach, but has failed to satisfy the threshold requirement to establish a composite act

578. Claimant expressly conceded that it "has not alleged that individual or isolated actions by Peru breached the Treaty."[1355] Claimant thus accepts that it is unable to identify any individual act or omission by Peru that, in and of itself, amounts to a Treaty breach.[1356] However, in an evident attempt to circumvent the limits of the Tribunal's jurisdiction *ratione temporis* (as explained in **Section III.B** above), Claimant attempts to resort to the composite acts doctrine by amalgamating all of the Challenged Measures.[1357] However, Claimant does not even clearly identify the

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[1354] *See* **RL-0248**, *Lone Pine Resources Inc. v. Government of Canada,* ICSID Case No. UNCT/15/2, Final Award, 21 November 2022 (van den Berg, Haigh, Stern), ¶ 611 ("[T]he Tribunal concludes that, notwithstanding an evolution from the Neer standard, **the customary international law minimum standard of treatment for FET continues to bear a high threshold**. This position has been consistently recognized by international arbitral tribunals. The Tribunal does not consider the Waste Management award as departing from this high threshold." (Emphasis added)). *See also* Counter-Memorial, ¶¶ 470–472; **RL-0152**, *Waste Management* (Award) [*Re-submitted version of CL-0045, with English version of the award*], ¶ 98; **RL-0055**, *Gami Investments Inc. v. United Mexican States*, UNCITRAL, Final Award, 15 November 2004 (Paulsson, Lacarte-Muró, Reisman), ¶ 97; **RL-0006**, *Cargill* (Award), ¶ 296.

[1355] Reply, ¶ 315.

[1356] In fact, Claimant expressly concedes, in no ambiguous terms, that (i) "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" and (ii) its allegation that Peru denied justice to Kaloti is "not an isolated breach" but merely a "part of the composite breach by Peru of Article 10.5 of the US-Peru [Treaty]." *See* Reply, ¶¶ 125, 324, fn. 416.

[1357] Reply, ¶ 203.

relevant composite act or acts that it invokes, instead untenably arguing that "the record as a whole" substantiates its claim of composite acts.[1358]

579. As Peru explained in the Counter-Memorial[1359] and in **Section III.B.3** above, the ILC Articles on State Responsibility confirm that a series of acts and omissions can only be deemed a "composite act" if such acts or omissions are "sufficiently numerous and inter-connected to amount not merely to isolated incidents or exceptions but to a pattern or system."[1360] Only if such underlying pattern or system exists, will the acts become what Professor Crawford called "a legal entity the whole of which represents more than the sum of its parts."[1361] Therefore, Claimant must prove that Peru's individual acts and omissions are connected, forming part of a pattern or system.

580. Claimant does not dispute—and indeed appears to acknowledge[1362]—that it must prove that the Challenged Measures were inter-connected, forming part of a pattern or system.[1363] Nonetheless, as addressed in **Section II.B.3** above, Claimant has made no effort, either in the Memorial or Reply, (i) to specify which of the many alleged acts and omissions of which it complains allegedly formed part of the purported

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[1358] Claimant acknowledges this approach in the Reply, when (i) it admits that "[Claimant] has not alleged several individualized breaches by Peru of Articles 10.3 [Claimant's National Treatment claim], 10.5 [Claimant's FET claim] and 10.7 of the Treaty [Claimant´s expropriation claim]," and (ii) makes the vague assertion that "the record as a whole . . . determines that Peru breached its national treatment and fair and equitable treatment obligations, and performed creeping expropriations." *See* Reply, ¶¶ 202–203.

[1359] *See* Counter-Memorial, § IV.A.2.

[1360] Counter-Memorial, ¶¶ 401, 478; **RL-0022**, ILC Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries, 2001 ("**ILC Commentary**"), Art. 15, Commentary 5 (*quoting Ireland v. United Kingdom*, European Court of Human Rights, Application No. 5310/71, Award, 18 January 1978, ¶ 159). *See also* **RL-0266**, *LSF-KEB Holdings* (Award), ¶¶ 354–355.

[1361] **RL-0150**, James Crawford, STATE RESPONSIBILITY: THE GENERAL PART (2014), p. 266 ("a composite act is more than a simple series of repeated actions").

[1362] *See* Reply, ¶ 316. Claimant relies on the *El Paso v. Venezuela* award, which addressed the requirements for a composite act under Article 15 of the ILC Articles (Claimant quotes **CL-0063**, *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, ¶ 516, but wrongly cites the award in the case *Wena Hotels v. Egypt* in fn. 282 of the Reply.).

[1363] Reply, ¶¶ 219–232, 315–316.

composite act or acts; (ii) to describe a scheme or pattern supposedly underlying the alleged acts or omissions; or (iii) to provide evidence of any such scheme or pattern.

581. The reasons for Claimant's conspicuous failure to address that threshold and fundamental issue are obvious: (i) there was no underlying scheme or pattern, and (ii) the relevant acts and omissions were not inter-connected. To the contrary, the complained-of conduct relates to alleged acts or omissions by different State entities, spanning a period of more than five years.[1364]

582. In sum, Claimant has failed to substantiate its claim of breach of the MST Provision on the basis of one or more composite acts, and such claim must therefore be dismissed.

3. Claimant's denial of justice claim is meritless

583. Claimant claims that Peru breached the MST Provision by committing a denial of justice under international law.[1365] In the Counter-Memorial, Peru had (i) recalled the high legal standard under international law for establishing a denial of justice claim; (ii) demonstrated that Claimant's claim fails at a threshold level because it is premised upon the existence of property rights that Kaloti never held; and (iii) demonstrated that Claimant's allegations do not even come close to satisfying the high legal standard that is applicable.[1366] In the Reply, Claimant did not dispute or even address many of these points, but instead repeated—sometimes verbatim—its allegations from the Memorial.[1367]

584. In the subsections that follow, Peru will (i) review briefly the legal standard applicable to a denial of justice claim under international law (**subsection a**); (ii) explain the false premise that underlies Claimant's denial of justice claim (**subsection b**); and (iii) demonstrate that, even if Kaloti had acquired the property rights on which its

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[1364] *See*, *e.g.*, Reply, ¶¶ 356, 368, 461. *See also* Section III.A.

[1365] Memorial, Title to § IV.B.a ("Peru breached its commitment to treat [Kaloti] fairly and equitably when it denied justice to [Kaloti]").

[1366] Counter-Memorial, § IV.A.3.

[1367] *See* Reply, ¶¶ 319–323; Memorial, ¶¶ 105, 109–111.

claim is based (quod non), there was no denial of justice by the Peruvian courts (**subsection c**).

a. As Claimant concedes, international law establishes a high legal standard for a denial of justice claim

585. The Parties agree that the MST Provision includes an obligation not to deny justice. Specifically, Article 10.5.2(a) provides that

> "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.[1368] (Emphasis added)

586. The Parties also appear to agree that the threshold for a denial of justice under international law "is a demanding one."[1369] In the Counter-Memorial, Peru cited well-settled case law recognizing the stringent legal standard applicable to a denial of justice claim. Such jurisprudence has established that:

a. judicial actions will only breach MST if they can be deemed to amount to a denial of justice;[1370]

b. denial of justice claims should not allow claimants to re-litigate substantive issues that have already been addressed by domestic adjudicatory bodies (including courts);[1371]

c. a wide measure of deference should be afforded to domestic adjudicatory bodies in adjudicating and interpretating a State's domestic law;[1372]

[1368] **RL-0001**, Treaty [*Re-submitted version of CL-0001, with additional pages*], Art. 10.5.2(a)

[1369] *See* Memorial, ¶ 114 (referring to the "high bar" for denial of justice, and citing to **CL-0053**, *Infinito Gold v. Costa Rica,* ICSID Case No. ARB/14/5, Award 3 June 2021, ¶ 483); Reply, ¶ 321.

[1370] *See* Counter-Memorial, ¶ 485.

[1371] *See* Counter-Memorial, ¶ 492.

[1372] *See* Counter-Memorial, ¶ 486.

d. decisions taken by domestic adjudicatory bodies on issues of domestic law are presumed to be valid;[1373]

e. proof of denial of justice "requires an extreme test: the error must be of a kind which no competent judge could reasonably have made"[1374]—i.e., the outcome of the domestic proceedings must "offend[] judicial propriety;"[1375]

f. even in the procedural context, the denial of justice standard is an extremely stringent one;[1376]

g. neither the Treaty nor general international law require domestic courts to allow foreign investors to participate in any and all local proceedings in which they may wish to make an intervention;[1377]

h. the applicable standard for due process depends on the type of the proceeding, and "[t]he administrative due process requirement is lower than that of a judicial process;"[1378]

[1373] *See* Counter-Memorial, ¶¶ 486–487. *See also* **RL-0154**, Zachary Douglas, "*International Responsibility for Domestic Adjudication: Denial of Justice Deconstructed*," INTERNATIONAL AND COMPARATIVE LAW QUARTERLY (2014), p. 878; **RL-0156**, *Flughafen Zürich* (Award), ¶ 637; **RL-0101**, *Manolium* (Award), ¶ 564; **RL-0155**, *Chevron* (Second Award), ¶ 8.41 (*citing* D.P. O'Connell, INTERNATIONAL LAW (1970), p. 948).

[1374] *See* Counter-Memorial, ¶ 490 (*citing* **RL-0159**, *Pantechniki S A. Contractors & Engineers (Greece) v. Republic of Albania*, ICSID Case No. ARB/07/21, Award, 28 July 2009 (Paulsson), ¶ 94; *see also* **RL-0219**, Jan Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW (2005), p. 89.

[1375] **RL-0152**, *Waste Management* (Award) [*Re-submitted version of CL-0045, with English version of the award*], ¶ 98. *See also* **RL-0260**, *Freeport-McMoRan* (USA Submission), ¶ 24 (expressing the United States' interpretation of the obligation not to deny justice under Treaty Article 10.5).

[1376] *See* Counter-Memorial, ¶ 493.

[1377] *See* Counter-Memorial, ¶ 500.

[1378] **RL-0021**, *International Thunderbird Gaming Corp. v. United Mexican States*, UNCITRAL, Arbitral Award, 26 January 2006 (van den Berg, Wälde, Portal) ("***Thunderbird* (Award)**"), ¶ 200. *See also* **RL-0165**, *Philip Morris Brand Sàrl (Switzerland), et al., v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, 8 July 2016 (Bernardini, Born, Crawford) ("***Philip Morris* (Award)**"), ¶ 569; **RL-0026**, *Cervin Investissements S.A. and Rhone Investissements S A. v. Republic of Costa Rica*, ICSID Case No. ARB/13/2, Final Award, 7 March 2017 (Mourre, Ramírez, Jana) ("***Cervin* (Award)**"), ¶ 655; **RL-0081**, *Convial Callao S.A. and CCI - Compañía de Concesiones de Infraestructura S.A. v. Republic of Peru*, ICSID Case No. ARB/10/2, Final Award, 21 May 2013 (Derains, Stern, Zuleta) ("***Convial Callao* (Award)**"), fn. 427.

i. to satisfy the "extreme test"[1379] for establishing a denial of justice, a claimant must demonstrate a systemic failure,[1380] "amounting to discreditable improprieties and the failure of the whole national system;"[1381] and

j. tribunals regularly have rejected denial of justice claims when the claimant has failed to exhaust local remedies.[1382]

587. Claimant does not contest or even address any of the legal authorities cited by Peru. Instead, Claimant submits a single argument with respect to the applicable legal standard.[1383] Specifically, Claimant contended that it can claim a denial of justice based on *any* act attributable to the State, including acts of a legislative nature.[1384] However, such argument is inconsistent with the terms of the Treaty, as it ignores the terms of Article 10.5.2(a). Such provision limits the scope of the denial of justice obligation, as it imposes only "the obligation not to deny justice **in criminal, civil, or administrative adjudicatory proceedings**" (emphasis added).[1385] Thus, pursuant to this treaty clause, a denial of justice may only occur in the context of "adjudicatory proceedings."

588. In arguing the contrary, Claimant relies on the reasoning of the *Iberdrola v. Guatemala* tribunal.[1386] However, that case is inapposite, for the simple reason that the treaty at issue there did not include limiting language of the sort quoted above from Treaty

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[1379] **RL-0159**, *Pantechniki S A. Contractors & Engineers (Greece) v. Republic of Albania*, ICSID Case No. ARB/07/21, Award, 28 July 2009 (Paulsson), ¶ 94.

[1380] *See* Counter-Memorial, ¶ 491.

[1381] **RL-0155**, *Chevron* (Second Award), ¶ 8.40. *See also* **RL-0157**, *Vannessa Ventures* (Award), ¶ 227; **RL-0101**, *Manolium* (Award), ¶ 539; **RL-0156**, *Flughafen Zürich* (Award), ¶ 639–40.

[1382] *See* Counter-Memorial, ¶ 499. *See also* **RL-0101**, *Manolium* (Award), ¶ 535; **RL-0165**, *Philip Morris* (Award), ¶ 503; **RL-0202**, *Apotex* (Award on Jurisdiction), ¶ 282. *See also* **RL-0016**, *The Loewen Group, Inc. and Raymond Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, 26 June 2003 (Mason, Mustill, Mikva), ¶ 156; **RL-0277**, *Gramercy Funds Management LLC, et al., v. Republic of Peru*, ICSID Case No. UNCT/18/2, Award, 6 December 2022 (Fernández-Armesto, Drymer, Stern), ¶¶ 1040, 1044; **RL-0219**, Jan Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW (2005), pp. 7–8.

[1383] Reply, ¶ 320.

[1384] *See* Reply, ¶¶ 320–321.

[1385] **RL-0001**, Treaty [*Re-submitted version of CL-0001, with additional pages*], Art. 10.5.2(a).

[1386] *See* Reply, ¶ 320.

Article 10.5.2(a).[1387] In any event, even if the *Iberdrola* case were apposite, that tribunal explained that an act of the executive or legislative branches will give rise to a denial of justice only when such act "prevents an investor's access to the courts of that State."[1388] Accordingly, even on the *Iberdrola* reasoning, a denial of justice claim must still refer to the administration of justice by the host State's judiciary. In the case *sub judice*, Claimant has not alleged any act of either the executive or legislative branch that supposedly prevented Kaloti's access to the courts of Peru.

589. Furthermore, investment tribunals have confirmed more generally that under the MST, the obligation not to deny justice concerns the State's *judicial* system. For instance, the *Infinito v. Costa Rica* tribunal stressed that

> a denial of justice occurs when there is **a fundamental failure in the host's State's administration of justice**. . . . The Tribunal thus concludes that a denial of justice may be procedural or substantive, and that in both situations the denial of justice is the product of **a systemic failure of the host State's judiciary taken as a whole**."[1389] (Emphasis added)

590. Similarly, the *Corona v. Dominican Republic* tribunal emphasized that "[t]he international delict of denial of justice rests upon a specific predicate, namely, the systemic failure of the State's justice system."[1390]

591. The only other legal authority concerning denial of justice that is cited by Claimant in the Reply is the award in *TECO v. Guatemala*.[1391] However, either negligently or deliberately, Claimant has cited that case incorrectly, as it has misrepresented what the tribunal stated in that award. According to Claimant, that tribunal "**identified denial of justice** under the minimum standard of treatment as 'a willful disregard of

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[1387] *See* **CL-0050**, *Iberdrola Energia S.A. v. Republic of Guatemala I*, ICSID Case No. ARB/09/5, Award, 17August 2012, ¶ 426 (*citing* Article 3.1 of the Guatemala-Spain BIT).

[1388] **CL-0050**, *Iberdrola Energia S.A. v. Republic of Guatemala I*, ICSID Case No. ARB/09/5, Award, 17 August 2012, ¶ 444.

[1389] **CL-0053**, *Infinito Gold v. Costa Rica,* ICSID Case No. ARB/14/5, Award 3 June 2021, ¶ 445.

[1390] **RL-0135**, *Corona* (Award), ¶ 254.

[1391] **CL-0051**, *TECO Guatemala Holdings LLC v. The Republic of Guatemala*, ICSID Case No. ARB/10/17, Award, 19 December 2013.

the fundamental principles upon which the regulatory framework is based, a complete lack of candor or good faith on the part of the regulator in its dealings with the investor, as well as a total lack of reasoning'" (emphasis added).[1392] However, in that passage of its award, the *TECO* tribunal was not referring to denial of justice specifically, but rather simply to the MST more generally. The correct and full paragraph (mis)quoted by Claimant is the following:

> Based on such principles, the Arbitral Tribunal considers that a willful disregard of the fundamental principles upon which the regulatory framework is based, a complete lack of candor or good faith on the part of the regulator in its dealings with the investor, as well as a total lack of reasoning, **would constitute a breach of the minimum standard**.[1393] (Emphasis added)

592. The principles that the tribunal was referring to thus pertained to the MST overall (not specifically denial of justice), and were discussed in the proceeding paragraphs (454–457) of that award.[1394] Claimant's characterization of the award is thus inaccurate.

593. In sum, the threshold to establish a denial of justice is a stringent one, and Claimant has not established otherwise.

b. Claimant's denial of justice claim is based upon a false premise

594. As a threshold matter, Claimant's claim of denial of justice should be dismissed because it is based on a false premise. Claimant alleged that Peru "deprived KML of **its property** without due process of law" (emphasis added).[1395] Its claim therefore rests upon the premise that Claimant had property rights over the Gold. However, as

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[1392] Reply, ¶ 321 (*citing* **CL-0051**, *TECO Guatemala Holdings LLC v. The Republic of Guatemala*, ICSID Case No. ARB/10/17, Award, 19 December 2013, ¶458).

[1393] **CL-0051**, *TECO Guatemala Holdings LLC v. The Republic of Guatemala*, ICSID Case No. ARB/10/17, Award, 19 December 2013, ¶458.

[1394] *See, e.g.*, **CL-0051**, *TECO Guatemala Holdings LLC v. The Republic of Guatemala*, ICSID Case No. ARB/10/17, Award, 19 December 2013, ¶454 ("The Arbitral Tribunal considers that the minimum standard of FET under Article 10.5 of CAFTA-DR [equivalent to the MST Provision] is infringed by conduct attributed to the State and harmful to the investor if the conduct is arbitrary, grossly unfair or idiosyncratic, is discriminatory or involves a lack of due process leading to an outcome which offends judicial propriety.").

[1395] Reply, Title to § IV.B.a.

Peru explained in the Counter-Memorial and in **Section II.A** above, Claimant has failed to prove (i) that Kaloti acquired legal title or ownership over the Gold, and (ii) that Kaloti complied with its due diligence obligations under Peruvian law.[1396] Kaloti thus was not a bona fide purchaser of the Gold, and accordingly had no property of which it could have been deprived by Peru. Absent such property rights, Claimant's denial of justice claim is unfounded and must be dismissed.

c. Peru did not deny justice to Kaloti

595. Even if Kaloti had acquired any property rights (which it did not), it has not demonstrated that there was a denial of justice under international law, in violation of the MST Provision. Claimant admits that no single act or omission attributable to Peru constitutes denial of justice. However, according to Claimant, Peru has denied justice to Kaloti through a composite act committed by SUNAT, the prosecutorial authorities, and the Criminal Courts. Specifically, Claimant claims that Peru committed a denial of justice by (i) depriving Kaloti of its property without due process through "temporary immobilization orders and temporary judicial seizures, which effectively became permanent on November 30, 2108 [sic];" and (ii) "neither charg[ing], nor exonerate[ing], KML with criminal wrongdoing."[1397] But as Peru demonstrated in the Counter-Memorial and in **Section IV.A.2** above, Claimant has utterly failed to prove the existence of a composite act. In fact, Claimant has made no effort to show that the disparate conduct by various State agencies constituted part of a coordinated pattern or scheme. Claimant's denial of justice claim must be rejected on this basis.

596. In any event, the acts or omissions attributable to Peru—taken collectively, as Claimant contends—, do not satisfy the high threshold for a denial of justice claim under international law. Such conduct, assessed on the basis of the evidence on the record of the present arbitration, does not in any way or even remotely reveal "'a

[1396] Counter-Memorial, § II.B.6.

[1397] Reply, ¶ 322.

willful disregard of the fundamental principles upon which the regulatory framework is based, a complete lack of candor or good faith on the part of the regulator in its dealings with the investor, as well as a total lack of reasoning.'"[1398] Specifically, as Peru demonstrated in the Counter-Memorial, and recalls in the subsections that follow, (i) SUNAT's actions were reasonable, proportionate, and consistent with Peruvian law[1399]—as Claimant now appears to concede; and (ii) the prosecutorial authorities and Criminal Courts acted at all times in accordance with the applicable procedural and substantive law, and their respective statutory mandates, in order to enforce Peru's legal framework, including in respect of money laundering and illegal mining.[1400]

(i) SUNAT acted reasonably and in accordance with Peruvian law

597. In the Counter-Memorial, Peru demonstrated that the threshold for a denial of justice in the context of administrative proceedings—such as those administered by SUNAT—is particularly high.[1401] Specifically, Claimant would have to show that SUNAT committed "administrative irregularities that were grave enough to shock a sense of judicial propriety and thus give rise to a breach of the minimum standard of treatment."[1402] Peru also demonstrated that:

a. in accordance with its statutory mandate, SUNAT identified objective risk indicators that strongly suggested that the Suppliers had engaged in illegal mining and/or money laundering;[1403]

[1398] Reply, ¶ 321 (*citing* **CL-0051**, *TECO Guatemala Holdings, LLC v. The Republic of Guatemala*, ICSID Case No. ARB/10/17, Award, 19 December 2013,¶ 458).

[1399] *See* Counter-Memorial, ¶¶ 507–515.

[1400] *See* Counter-Memorial, ¶¶ 554–557.

[1401] Counter-Memorial, ¶ 508; **RL-0021**, *Thunderbird* (Award), ¶ 200. *See also* **RL-0165**, *Philip Morris* (Award), ¶ 569; **RL-0026**, *Cervin* (Award), ¶ 655; **RL-0081**, *Convial Callao* (Award), fn. 427.

[1402] **RL-0021**, *Thunderbird* (Award), ¶ 200.

[1403] Counter-Memorial, § II.B.2; *see also* **Ex. R-0080**, Email from SUNAT ([redacted] to [redacted] ([redacted] et al.), 29 November 2013 (included in [redacted] Criminal Proceedings) p. 2; **Ex. R-0286**, Email from SUNAT ([redacted] to R. Huaytalla, *et al.*, 10 January 2014, p. 1; **Ex. R-0365**, Email from SUNAT ([redacted] to R. Huaytalla, *et al.*, 9 January 2014, p. 1; **Ex. R-0085**, Email from [redacted] to SUNAT ([redacted] et al.), 9 January 2014 (included in [redacted] Criminal Proceedings).

b. in accordance with its statutory mandate, SUNAT immobilized Shipments 1 to 4 (through the SUNAT Immobilizations, as defined above) on the basis of those risk indicators;[1404]

c. contrary to Claimant's arguments, SUNAT never immobilized Shipment 5; this shipment was subject to an attachment requested by [redacted] in the context of a civil action brought by [redacted] against Kaloti before the Civil Court for lack of payment;[1405]

d. after identifying further indicia of money laundering and related criminal activities, SUNAT notified its findings to the competent Peruvian authorities;[1406] and

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[1404] *See* Counter-Memorial, §§ II.B.3, II.B.5; *see also* **Ex. R-0052**, General Customs Law, Arts. 164–165; **Ex. R-0068**, SUNAT Inspection Order No. 316-0300-2013-001288, 29 November 2013 (included in [redacted] Criminal Proceedings) [*Re-submitted legible version of C-0055*]; **Ex. R-0086**, SUNAT Inspection Order No. 316-0300-2013-001289, 29 November 2013 (included in [redacted] Criminal Proceedings); **Ex. R-0162**, SUNAT Inspection Order No. 316-0300-2014-000038, 10 January 2014 (included in [redacted] Criminal Proceedings) [*Re-submitted legible version of C-0069*]; **Ex. R-0163**, SUNAT Inspection Order No. 316-0300-2014-000039, 10 January 2014 (included in [redacted] Criminal Proceedings) [*Re-submitted legible version of C-0070*]; **Ex. R-0366**, Inspection Order No. 316-0300-2014-000015, SUNAT, 10 January 2014; **Ex. R-0088**, SUNAT Inspection Order No. 316-0300-2014-000024, 9 January 2014 (included in [redacted] Criminal Proceedings); **Ex. R-0089**, SUNAT Inspection Order No. 316-0300-2014-000025, 9 January 2014 (included in [redacted] Criminal Proceedings); **Ex. R-0090**, SUNAT Inspection Order No. 316-0300-2014-000026, 9 January 2014 (included in [redacted] Criminal Proceedings).

[1405] *See* Counter-Memorial, §§ II.B, II.C.6.

[1406] *See* Counter-Memorial, § II.B.5; *see also* **Ex. R-0144**, Letter No. 004-2014-SUNAT/3X3000 from SUNAT (J. Romano) to Callao Provincial Criminal Prosecutor's Office, 15 January 2014 (included in [redacted] Criminal Proceedings); **Ex. R-0146**, Letter No. 015-2014-SUNAT/3X3200 from SUNAT (R. Guerrero) to Specialized State Attorney's Office (A. Principe), 17 January 2014 (included in [redacted] Criminal Proceedings); **Ex. R-0147**, Letter No. 13-2014-SUNAT-3X3000 from SUNAT (A. Alvarado) to Specialized State Attorney's Office (A. Principe), 6 March 2014 (included in [redacted] Criminal Proceedings); **Ex. R-0155**, Letter No. 21-2014-SUNAT-3X3000 from SUNAT (A. Alvarado) to Specialized State Attorney's Office (A. Principe), 12 March 2014 (included in [redacted] Criminal Proceedings); **Ex. R-0367**, Letter No. 54-2014-SUNAT-3X3000 from SUNAT (A. Alvarado) to Callao Provincial Criminal Prosecutor's Office, 11 April 2014; **Ex. R-0368**, Letter No. 55-2014-SUNAT-3X3000 from SUNAT (A. Alvarado) to Specialized State Attorney's Office (A. Principe), 11 April 2014.

e. consistent with Peruvian law, the SUNAT Immobilizations were temporary and remained in effect only until May 2014, at which point the Criminal Courts issued the Precautionary Seizures.[1407]

598. Thus, far from "shock[ing] a sense of judicial propriety,"[1408] SUNAT acted reasonably and in accordance with Peruvian law.

599. In the Reply, Claimant conceded—as it should—that "in and of themselves, the initial immobilizations by SUNAT . . . did not rise to the level of a breach of the TPA by Peru."[1409] The foregoing facts, and this admission by Claimant, are fatal to Claimant's claim with respect to SUNAT.

(ii) The prosecutorial authorities and Criminal Courts acted in accordance with their statutory mandates in order to enforce Peru's legal framework against money laundering and illegal mining

600. Claimant's composite denial of justice claim rests on the conduct of the prosecutorial authorities and Criminal Courts. In the Counter-Memorial, Peru rebutted Claimant's arguments, including by correcting Claimant's factual allegations, and showing that the prosecutorial authorities and Criminal Courts acted in accordance with Peruvian law and in pursuit of legitimate policy objectives.[1410] In the Reply, Claimant simply ignored Peru's rebuttal submissions, and instead merely summarized its allegations from the Memorial. Specifically, Claimant (i) criticized the issuance of the

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[1407] *See* Counter-Memorial, § II.B.5, II.B.2; *see also* **Ex. R-0171**, SUNAT Immobilization Lifting Order No. 316-0300-2014-000103, 26 February 2014 (included in [redacted] Criminal Proceedings); **Ex. R-0172**, SUNAT Immobilization Lifting Order No. 316-0300-2014-000104, 26 February 2014 (included in [redacted] Criminal Proceedings); **Ex. C-0091**, [redacted] Immobilization release No. 316-0300-2014-000043, p. 2; **Ex. R-0175**, SUNAT Immobilization Lifting Order No. 316-0300-2014-000108, 14 May 2014 (included in [redacted] Criminal Proceedings); **Ex. R-0195**, SUNAT Immobilization Lifting Order No. 316-0300-2014-000111, 14 May 2014 (included in [redacted] Criminal Proceedings); **Ex. R-0196**, SUNAT Immobilization Lifting Order No. 316-0300-2014-000112, 14 May 2014 (included in [redacted] Criminal Proceedings); **Ex. R-0369**, SUNAT Immobilization Lifting Order No. 316-0300-2014-000032, 1 April 2014; **Ex. R-0370**, SUNAT Immobilization Lifting Order No. 316-0300-2014-000034, 1 April 2014.

[1408] **RL-0021**, *Thunderbird* (Award), ¶ 200.

[1409] Reply, ¶ 125; Memorial, ¶ 49.

[1410] Counter-Memorial, § IV.A.3.

Precautionary Seizures, claiming that they "hav[e] become *de facto* permanent,"[1411] and that "Peru denied Claimant the opportunity to present a good faith buyer defense;"[1412] and (ii) alleged that Peru is "holding a prosecutorial sword of Damocles over KML's head" through the ongoing criminal proceedings.[1413]

601. Having provided detailed submissions on these issues in the Counter-Memorial[1414] and in **Section II.C** above, Peru respectfully refers the Tribunal to those pleadings. Nevertheless, Peru will briefly recall the following points herein, which further show that Claimant's denial of justice claim is baseless: (i) the Precautionary Seizures were requested, granted, and maintained in accordance with Peruvian law, and do not constitute a sanction against Kaloti (**subsection a**); (ii) Kaloti did not avail itself of the Peruvian law remedies available to it to challenge the Precautionary Seizures (**subsection b**); and (iii) the Criminal Proceedings have been conducted in accordance with Peruvian law (**subsection c**).

(a) The Precautionary Seizures were requested, granted, and maintained in accordance with Peruvian law

602. As described in the Counter-Memorial and in **Section II.C.1** above, following the issuance of the SUNAT Immobilizations, the Prosecutor's Office requested and obtained from the Criminal Courts the Precautionary Seizures of the Gold in Shipments 1 to 4.[1415] The purpose of the Precautionary Seizures was to avoid dissipation of the Gold during the Preliminary Investigations.[1416] Based on the

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[1411] Reply, ¶ 335; *see also* Memorial, ¶ 117.

[1412] Reply, ¶ 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) defense in order to show that they had no hand in the alleged wrongdoing. 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.").

[1413] Reply, p. 130.

[1414] Counter-Memorial, § IV.A.3.

[1415] *See* Counter-Memorial, § II.C.2.

[1416] *See* Counter-Memorial, ¶¶ 177, 188.

investigations, the prosecutorial authorities determined that there was sufficient indicia of money laundering offenses in relation to the four Suppliers to initiate the Criminal Proceedings; accordingly, the Prosecutor's Office filed a criminal complaint and requested the maintenance of the Precautionary Seizures.[1417] The Criminal Courts granted that request.[1418] Maintaining the Precautionary Seizures was justified, including because if the Gold was found to be part of a money laundering scheme, it would have to be permanently confiscated pursuant to Peruvian law.[1419] As Peru demonstrated in the Counter-Memorial and in **Section II.C.1** above, all of the foregoing measures were fully consistent with Peruvian law, including the Code of Criminal Procedure[1420] and the Money Laundering Decree.[1421]

603. In the Reply, Claimant admitted that the Precautionary Seizures, individually, did not breach the Treaty.[1422] However, Claimant argued that "Peru's measures deprived KML of the use and enjoyment of its gold assets,"[1423] and that, by ordering the Precautionary Seizures, the Criminal Courts imposed "a criminal sanction on an investor which was (1) never charged; (2) tried; or (3) convicted of having committed a crime."[1424] This is a word-for-word repetition of what Claimant argued in paragraph 112 of the Memorial.[1425] However, Peru had already demonstrated that Claimant's allegations are baseless.

[1417] *See* Counter-Memorial, § II.C.3.

[1418] *See* Counter-Memorial, § II.C.2.

[1419] *See* Counter-Memorial, § II.C.3, II.C.5; *supra* Section II.C.1.

[1420] **Ex. R-0223**, Law No. 9024, Criminal Procedure Code, 23 November 1939 [*Re-submitted version of CL-0006, with Respondent's translation*].

[1421] **Ex. R-0218**, Money Laundering Decree [*Re-submitted version of CL-0008, with Respondent's translation*].

[1422] Reply, ¶ 125.

[1423] Reply, ¶ 327.

[1424] Reply, ¶ 327.

[1425] Memorial, ¶ 112 ("Peru's measures have deprived KML of the use and enjoyment of certain 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 on an investor which was (1) never charged; (2) tried; or (3) convicted of having committed a crime. These measures amount to elemental denial of due process.")

604. *First*, as a threshold matter, Claimant's argument is based on the premise that the Criminal Courts issued the Precautionary Seizures as a "criminal sanction" against Kaloti. That premise is factually inaccurate; the Precautionary Seizures were no such thing, either de jure or de facto. Both the SUNAT Immobilizations and Precautionary Seizures were based upon the indicia of illegal activity by the Suppliers.[1426] And, as demonstrated in **Section II.A.2** above, Claimant has been unable to demonstrate that it acquired ownership over the Gold. And even if Kaloti had demonstrated that it had acquired the Gold, both the SUNAT Immobilizations and Precautionary Seizures would still have been justified pursuant to Peruvian legislation, as discussed below. There is therefore no factual basis for Claimant's claim that such measures constituted a sanction against Kaloti.

605. *Second*, even if Claimant had established that it had acquired legal ownership over the Gold (quod non), the Precautionary Seizures would have still been appropriate and justified. Claimant's argument is that "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."[1427] However, Peruvian law authorizes the issuance of provisional measures, including seizures, even where the owner of the assets is not a party to the criminal investigations or proceedings. Specifically, as explained in **Section II.C.1**, Article 2(3) of Law 27379 and Article 94 of the Code of Criminal Procedure authorize the adoption of precautionary seizures with respect to assets that are suspected to have been acquired directly or indirectly through crime.[1428] Furthermore, Article 94 of the Code of Criminal Procedure establishes that Peru's criminal courts may grant precautionary seizures over assets that are suspected to be the object, instrument or proceeds of crime, irrespective of whether or not the alleged

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[1426] *See* Counter-Memorial, §§ II.B.1–II.B.3, II.C.2, III.C.3.

[1427] Reply, ¶ 334.

[1428] *See supra* Section II.C.1. *See also* Missiego First Report, ¶¶ 90–91; **Ex. R-0106**, Law No. 27379, 20 December 2000 [*Re-submitted version of CL-0004, with Respondent's translation*], Art. 2(3); **Ex. R-0223**, Law No. 9024, Criminal Procedure Code, 23 November 1939 [*Re-submitted version of CL-0006, with Respondent's translations*], Art. 94.

legal owner of these assets is a defendant in the relevant criminal proceedings.[1429] Consistent with the above, Article 4 of Preliminary Investigations Law establishes that "bona fide third parties" may take appropriate action in relation to the measures regulated in that law, including the precautionary seizures set out in Article 2 thereof.[1430] As Claimant's own expert acknowledged, if the Preliminary Investigations Law "enables third parties in good faith to exercise their rights, it is because it recognizes that those may be affected by the imposition of measures limiting rights."[1431]

606. *Third,* as demonstrated in the Counter-Memorial, the Peruvian prosecutorial authorities sought and obtained the Precautionary Seizures in full compliance with the applicable legal requirements. In fact, in the Reply, Claimant did not deny that the Precautionary Seizures satisfied the requirements for the issuance of such measures under Peruvian law, including: (i) *fumus delicti comissi* (*prima facie* evidence of the commission of a crime); and (ii) *periculum in mora* (peril in delay).[1432] As Peru demonstrated, the Precautionary Seizures were requested, granted and maintained based on overwhelming indicia that the Gold was of unlawful origin and that the Suppliers had engaged in money laundering.[1433] Additionally, the Criminal Courts found that given "the nature and complexity of the investigations" a delay or extension is necessary "due to the need to carry out a variety of investigatory steps and document verification."[1434] Thus, the Criminal Courts concluded that not granting the precautionary measure could "result in the[] disposal [the proceeds of crime] or

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[1429] *See* Counter-Memorial, ¶¶ 195, 524; Second Missiego Report, ¶¶ 99–100.

[1430] *See* **Ex. R-0106**, Law No. 27379, 20 December 2000 [*Re-submitted version of CL-0004, with Respondent's translation*], Art. 4.

[1431] First [redacted] Report, p. 27, ¶ 6.1.

[1432] *See* First Missiego Report, ¶ 82.

[1433] *See* Counter-Memorial, §§ II.C.2, II.C.3; *see also supra* Section II.A.

[1434] **Ex. R-0134**, Precautionary Seizure against Shipment 1, 21 February 2014, p. 4 (*"la naturaleza y complejidad de los actos de investigacion . . . por tener que llevarse a cabo una variedad de actos de investigacion y verificacion de documentacion"*); **Ex. R-0135**, Precautionary Seizure against Shipment 2, 25 March 2014, p. 4; **Ex. C-0090**, [redacted] Ruling of the Superior Court of Justice of Callao – Permanent Criminal Court, April 30, 2014, p. 4; **Ex. R-0136**, Precautionary Seizure against Shipment 4, 1 May 2014, p. 5.

their transfer to other persons, which is why this [precautionary] measure is necessary."[1435]

607. *Fourth*, the Precautionary Seizures pursue legitimate public policy objectives. Specifically, such seizures: (i) ensure the availability of evidence during the preliminary investigation of a suspected crime; (ii) avoid the dissipation of potential proceeds of a crime; and (iii) ensure that any confiscation order at the conclusion of the criminal proceedings can be enforced.[1436] In this respect, Claimant even admitted that (i) "Peru could . . . take temporary, physical control of KML [Kaloti]'s [alleged] [G]old to investigate its origin, for a reasonable—and limited—period of time, based on realistic suspicions,"[1437] and (ii) each of the subsequent Precautionary Seizures, individually, "did not rise to the level of a breach of the TPA."[1438]

608. Claimant does not dispute the fact that investment tribunals have expressly acknowledged that precautionary measures issued under similar circumstances (i.e., in the context of criminal proceedings in relation to suspected money laundering) are legitimate exercises of the State's power. For example, Peru explained in the Counter-Memorial[1439] that the tribunal in *Belokon v. Kyrgyzstan* noted that "suspicion of money laundering alone may be enough to justify interlocutory measures by a host state in order to provide time for a thorough investigation of the allegedly suspicious activities."[1440] In the case *sub judice*, the Criminal Courts' decisions to order and maintain the Precautionary Seizures were based on overwhelming indicia that the

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[1435] **Ex. R-0134**, Precautionary Seizure against Shipment 1, 21 February 2014, p. 4 ("*asegura los efectos del delito, desaparecer o que puedan ser transferidos a otras personas, razón por la cual esta medida resulta de necesidad*"); **Ex. R-0135**, Precautionary Seizure against Shipment 2, 25 March 2014, p. 4; **Ex. C-0090**, [redacted] Ruling of the Superior Court of Justice of Callao – Permanent Criminal Court, April 30, 2014, p. 4; **Ex. R-0136**, Precautionary Seizure against Shipment 4, 1 May 2014, p. 5.

[1436] First Missiego Report, ¶¶ 80, 90, 154.

[1437] Reply, ¶ 148.

[1438] Reply, ¶ 125.

[1439] Counter-Memorial, ¶ 518.

[1440] **RL-0047**, *Valeri Belokon v. Kyrgyz Republic*, PCA Case No. AA518, Award, 24 October 2014 (Paulsson, Hobér, Schiersing), ¶ 161.

Gold was of unlawful origin, and that the Suppliers had committed the crime of money laundering.

609. For these reasons, Claimant's criticisms in the Reply of the Precautionary Seizures—all of which are a mere repetition of what it had argued in the Memorial—are baseless and misplaced. Far from demonstrating "'a willful disregard of the fundamental principles upon which the regulatory framework is based,'"[1441] the Precautionary Seizures were issued in accordance with Peruvian law and in pursuit of legitimate objectives. The Precautionary Seizures therefore did not constitute a denial of justice under international law.

(b) Kaloti failed to use any of the Peruvian law remedies available to it to challenge the Precautionary Seizures

610. Claimant also bases its denial of justice claim on the allegation that Peru violated Kaloti's due process rights. Claimant has modified this claim over time. In the Memorial, Claimant accused Peru of impeding it from "secur[ing] the release of its gold,"[1442] by preventing Kaloti from intervening in the investigations and the Criminal Proceedings.[1443] Kaloti based its claim on certain written submissions that it filed before SUNAT, the Prosecutor's Office, and the Criminal Courts.[1444] In the Reply, however, Claimant appeared to abandon its arguments concerning the submissions filed before SUNAT.[1445] Claimant's modified claim is that its submissions to the prosecutorial authorities and Criminal Courts "were simply *de facto* ignored by Peru."[1446] As discussed in **Section II.C.2** above, those submissions to the Peruvian authorities consisted of: (i) four written submissions filed before the Prosecutor's

[1441] Reply, ¶ 321 (*citing* **CL-0051**, *TECO Guatemala Holdings, LLC v. The Republic of Guatemala*, ICSID Case No. ARB/10/17, Award, 19 December 2013,¶ 458).

[1442] Memorial, ¶ 114.

[1443] *See, e.g.,* Memorial, ¶¶ 4, 136.

[1444] Memorial, ¶ 115.

[1445] Reply, ¶¶ 331, 339.

[1446] Reply, ¶ 331.

Office in connection with Shipments 2 and 3,[1447] and (ii) three requests regarding Shipment 3 filed before the Criminal Courts in the [redacted] Criminal Proceeding.[1448]

611. Claimant's complaints, even at face value, do not even approach the high threshold for a denial of justice under international law.[1449] Neither the Treaty nor general international law require domestic courts to allow foreign investors to participate in any and all local proceedings in which they may wish to make an intervention, except in accordance with rules on standing and procedure under applicable domestic law.[1450] As Peru explained in detail in the Counter-Memorial[1451] and in **Section II.C.2** above, Kaloti had several legal avenues for recourse that it could have pursued, but instead it sought to intervene in the local judicial proceedings without regard to domestic law. Claimant's arguments thus fail, for at least the following reasons.

612. *First,* as Peru explained in the Counter-Memorial and above, Kaloti could have—but did not—avail itself of *any* of the remedies available under Peruvian law to third parties affected by the issuance of precautionary seizures.[1452] Specifically, had Kaloti wished to challenge the Precautionary Seizures, Claimant could have submitted: (i) a

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[1447] **Ex. C-0086,** [redacted] KML appeal as the legitimate owner of the gold in the money laundering investigation against [redacted] 16 April 2014; **Ex. C-0089,** [redacted] Petition submitted by KML before the Ninth Provincial Prosecutor's Office of Callao, 29 April 2014; **Ex. C-0092,** [redacted] Petition submitted by KML before the Eleventh Provincial Prosecutor's Office of Callao, 5 August 2014; **Ex. C-0093,** [redacted] Petition submitted by KML before the Ninth Provincial Prosecutor's Office of Callao, 5 August 2014.

[1448] **Ex. C-0013**, Petition before the *Sexto Juzgado Penal del Callao*; **Ex. R-0228**, Kaloti's Request to Lift Precautionary Seizure, 3 May 2016 [*Re-submitted version of C-0014, with Respondent's translation*]; **Ex. R-0229**, Kaloti's Request to Lift Precautionary Seizure, 25 May 2016 [*Re-submitted version of C-0015, with Respondent's translation*].

[1449] Counter-Memorial, ¶¶ 548–553.

[1450] *See* Counter-Memorial, ¶ 500.

[1451] *See* Counter-Memorial, § II.C.4.

[1452] *See* Counter-Memorial, ¶¶ 213–216.

re-evaluation request;[1453] (ii) an appeal;[1454] and/or (iii) an amparo request.[1455] In the Reply, Claimant dismissed Peru's detailed and supported analysis of these potential remedies as "*post hoc* explanations."[1456] But that cursory and unsupported dismissal by Claimant is no answer, and does nothing to refute the existence of these available remedies under Peruvian law. As Prof. Missiego explains in his Second Expert Report, the right to be heard is not absolute, and the party submitting a claim or defense before the national courts must comply with all the legal requirements, including by using the correct available remedies and compliance with the applicable procedural rules.[1457] Kaloti failed to do so, and Claimant cannot transform Kaloti's failure into an alleged failure by the State.

613. In any event, if Kaloti considered that the failure of either the Prosecutor's Office or the Criminal Court in the [redacted] Criminal Proceeding to grant any of the Requests breached its rights, Kaloti had multiple remedies under Peruvian law, both administrative and judicial, to seek remedy for that alleged breach.[1458] As Prof. Missiego explains in his Second Expert Report, "Kaloti had at its disposal administrative remedies, known as "*queja*" [claim], to complain about any alleged violation of due process rights by the Prosecutor's Office or the Judiciary."[1459] Additionally, Prof. Missiego notes that Kaloti could have also filed an amparo request before the constitutional courts "not only for violations of its property rights, but also

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[1453] *See* Counter-Memorial, ¶ 214; *see also* **Ex. R-0152**, Plenary Agreement No. 5-2010/CJ-116, 16 November 2010, p. 6.

[1454] *See* Counter-Memorial, ¶ 215; *see also* **Ex. R-0152**, Plenary Agreement No. 5-2010/CJ-116, 16 November 2010, p. 6.

[1455] *See* Counter-Memorial, ¶ 216; Missiego Report, ¶ 127 ("*[A] través de una acción de amparo, que tiene por objeto proteger los derechos constitucionales, incluyendo el derecho a la propiedad*").

[1456] Reply, ¶ 332.

[1457] *See supra* Section II.C.2; Second Missiego Report, ¶ 85.

[1458] *See* Second Missiego Report, ¶¶ 91–92.

[1459] Second Missiego Report, ¶ 91; *see also* **Ex. JM-0053**, *Reglamento de Organización y Funciones del Ministerio Público, aprobado por Resolución de la Fiscalía de la Nación No. 3893-2017-MP-FN*; **Ex. JM-0052**, *Presentar quejas a la actuación fiscal, Ministerio Público Fiscalía de la Nación, último cambio 31 de julio de 2020*; **Ex. JM-0049**, *Resolución Administrativa No. 242-2015-CE-PJ, Reglamento de Organización y Funciones de la Oficina de Control de la Magistratura del Poder Judicial, 22 de julio de 2015*; **Ex. JM-0050**, *Funciones, Corte Superior de Justicia de Lima, ODECMA, último acceso 6 de mayo de 2023*.

if it considered that its right to due process and effective judicial protection was being violated."[1460] Kaloti, however, did not use any of those remedies in connection with the Requests—possibly because it knew that none of its rights had been breached.[1461]

614. Peru demonstrated in the Counter-Memorial that Kaloti was well aware that it could have filed an amparo request if it truly believed that its alleged property or due process rights had been violated by the Prosecutor's Office or the Criminal Courts.[1462] In the Reply, Claimant acknowledged that Kaloti had filed an amparo request on 11 March 2014 requesting the constitutional court to lift the SUNAT Immobilizations in respect of Shipments 2 and 3, and that it had then decided to withdraw that request on 14 May 2014.[1463] This confirms that the amparo was an additional recourse available under Peruvian law, and that Kaloti willingly and deliberately decided not to use it to challenge the measures that Claimant now argues in the present arbitration constitute a denial of justice.

615. *Second*, the actions that Kaloti did take to challenge the acts of the Prosecutor's Office or the Criminal Courts did not adhere to the Peruvian legal framework and suffered from serious flaws. In **Section II.C.2** above, Peru addressed various defects in Kaloti's Requests, and it now incorporates those submissions by reference. The fact that Kaloti failed to observe Peru's procedural laws and that this contributed to its Requests being unsuccessful does not demonstrate the "failure of the whole [Peruvian] national system."[1464] Rather, it demonstrates that the Peruvian legal framework is predictable, stable, and consistent, and that all parties (including Kaloti) must abide by the same

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[1460] Second Missiego Report, ¶ 92; **Ex. JM-0029**, *Ley No. 31307, Código Procesal Constitucional, 21 de julio de 2021*, Arts. 9, 39, 44; First Missiego Report, ¶ 148.

[1461] *See, e.g.*, **RL-0202**, *Apotex* (Award on Jurisdiction), ¶ 282; **RL-0016**, *The Loewen Group, Inc. and Raymond Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, 26 June 2003 (Mason, Mustill, Mikva), ¶ 156; **RL-0219**, Jan Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW (2005), pp. 7–8; **RL-0102**, *OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Award, 10 March 2015 (Fernández-Armesto, Orrego Vicuña, Mourre), ¶¶ 533–536.

[1462] Counter-Memorial, ¶ 228.

[1463] Reply, ¶¶ 257–258.

[1464] **RL-0155**, *Chevron* (Second Award), ¶ 8.40. *See also* **RL-0157**, *Vannessa Ventures* (Award), ¶ 227; **RL-0101**, *Manolium* (Award), ¶ 539; **RL-0156**, *Flughafen Zürich* (Award), ¶ 639–40.

set of rules and procedures to assert their rights. It also demonstrates either that Kaloti casually disregarded applicable Peruvian law or did not know what it was doing—or possibly both.

616. *Third*, Claimant's argument concerning the "good faith buyer defense" is meritless. To recall, Claimant argued in the Memorial that "Peru denied Claimant the opportunity to present a good faith buyer defense."[1465] In the Counter-Memorial, Peru refuted this argument by showing that the "good faith buyer defense" did not apply to Kaloti in the context of the Criminal Proceedings.[1466] In the Reply, Claimant merely repeated its complaint—verbatim—about this alleged defense, without ever addressing Peru's arguments.[1467] Peru will therefore summarize its previous submissions, even though they have not been contested by Claimant in the Reply:

a. The "good faith buyer defense" is based upon Articles 914 and 915 of the Peruvian Civil Code, which establish a rebuttable presumption of good faith ownership in favor of the individual in possession of an object.[1468]

b. In order for such defense to be applicable in this case, Kaloti would have to be the bona fide purchaser of the Gold. However, as demonstrated in **Section II.A** above, Claimant has been unable to show that Kaloti was the bona fide

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[1465] Reply, ¶ 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) defense in order to show that they had no hand in the alleged wrongdoing. 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.").

[1466] Counter-Memorial, ¶¶ 528–531.

[1467] *See* Reply, ¶ 328. *See also* Memorial, ¶ 113 ("*Peru has denied Claimant the opportunity to present a good faith buyer defense.* Defendants who are caught up in money laundering investigations generally have the ability to articulate a bona fide purchaser (or "good faith purchaser") defense in order to show that they had no hand in the alleged wrongdoing. A bona fide purchaser defense posits that the buyer acquired the asset without knowledge of any wrongdoing on the part of the seller. This defense is available in both common and civil law jurisdictions.").

[1468] Memorial, ¶ 113. *See also* **Ex. R-0222**, Legislative Decree No. 295, Civil Code, 24 July 1984 [*Re-submitted version of CL-0044, with Respondent's translation*].

purchaser of the Gold—including because it did not comply with the due diligence obligations applicable to gold purchasers in Peru.[1469]

c. In any event, the presumption established in Articles 914 and 915 is inapplicable pursuant to the principle of *lex specialis*.[1470] As explained in the Counter-Memorial, the provisions of the General Mining Law and Illegal Mining Controls and Inspection Decree are specific to the purchase of mineral resources and therefore supersede the general provisions of the Peruvian Civil Code in this context. These specific laws (i) establish that the purchaser has the obligation to verify the origin of mineral resources,[1471] and (ii) provide that the purchase of illegally mined products does not give rise to property rights over such products.[1472]

617. Thus, Claimant's argument that it should have been able to assert the good faith buyer defense but was prevented by Peru from doing so is incorrect.

618. *Fourth*, in any event, even assuming that Claimant had been prevented from intervening (quod non), the Requests on which Claimant bases its denial of justice claim were submitted by Kaloti in respect of Shipments 2 and 3. Claimant has provided no evidence whatsoever to show that it attempted to intervene in the investigations and Criminal Proceedings concerning Shipments 1, 4, and 5.

619. In conclusion, Claimant decided not to pursue the available remedies under Peruvian law to assert its alleged property rights, and instead submitted self-made remedies that did not comply with Peruvian law. This is fatal for Claimant's denial of justice claims. The fact that these misplaced Requests were not successful does not a denial

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[1469] *See supra* Section II.A.

[1470] **RL-0220**, Peruvian Civil Code, 25 July 1984, Preliminary Title, Art. IX.

[1471] **Ex. R-0013**, General Mining Law, Art. 4; **Ex. R-0049**, Illegal Mining Controls and Inspection Decree, Art. 11.

[1472] **Ex. R-0013**, General Mining Law, 3 June 1992, Art. 52.

of justice claim make: Claimant has not and cannot show a breach by Peru of Peruvian law, let alone "a systemic failure of the host State's judiciary taken as a whole."[1473]

(c) The Criminal Proceedings have been conducted in accordance with Peruvian law and, despite their inherent complexity, have continued to make progress

620. The final argument that Claimant makes in support of its denial of justice claim is that the Precautionary Seizures "hav[e] become *de facto* permanent,"[1474] allegedly due to the duration of the Criminal Proceedings, and on that basis Claimant accuses Peru (rather dramatically) of "holding a prosecutorial sword of Damocles over KML's head."[1475] This argument is—yet again—a repetition of Claimant's argument from the Memorial. As Peru explained in the Counter-Memorial, Claimant's argument is meritless, for at least the following seven reasons.

621. *First*, the Precautionary Seizures are not permanent. As Peru has explained, the Criminal Courts have the authority under Peruvian law to maintain precautionary seizures over relevant assets for the duration of the proceeding.[1476] If at the end of the Criminal Proceedings the defendants are acquitted of criminal wrongdoing or the Criminal Courts find that the seized Gold was not the object, instrument or proceeds of criminal activity, the Precautionary Seizures would be lifted and the Gold would be released to its rightful owners.[1477]

622. *Second*, Claimant has failed to substantiate its claim that the length of the Criminal Proceedings is unreasonable. In the Reply Claimant invoked the statute of limitations for money laundering in countries such as the United States, Germany, France, and

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[1473] **CL-0053**, *Infinito Gold v. Costa Rica,* ICSID Case No. ARB/14/5, Award 3 June 2021, ¶ 445.

[1474] Reply, ¶ 335; *see also* Memorial, ¶ 117.

[1475] Reply, p. 130.

[1476] *See* **Ex. R-0223**, Law No. 9024, Criminal Procedure Code, 23 November 1939 [*Re-submitted version of CL-0006, with Respondent's translation*] Art. 94; **Ex. R-0199**, Legislative Decree No. 635, Criminal Code, 3 April 1991 [*Re-submitted version of CL-0009, with Respondent's translation*], Art. 102.

[1477] *See* Counter-Memorial, ¶¶ 240–242; *see also* First Missiego Report, ¶ 92.

Japan[1478] to allege that "the normal statute of limitations for money-laundering crimes is approximately five years."[1479] However, as demonstrated in **Section II.C.3**, Claimant's reference to the statute of limitations for commencing criminal proceedings is misplaced and irrelevant, among other reasons, because: (i) the statute of limitations applicable to a particular crime (such as money laundering) to initiate criminal investigations is different and unconnected to the expected duration of criminal proceedings concerning that crime;[1480] (ii) even if the statute of limitations concerning a specific crime were relevant (quod non), the applicable statute of limitations under Peruvian law for the crime of money laundering is 15 years, and 20 years in the case of aggravated money laundering offenses;[1481] (iii) the Criminal Proceedings were launched well within that statute of limitations under Peruvian law, and Claimant has not even argued otherwise; (iv) the statute of limitations for money laundering in countries such as the United States, Germany, France, and Japan is completely irrelevant, and in any event those countries do not constitute adequate comparators.[1482]

623. *Third*, in any event, the duration of the Criminal Proceedings is objectively reasonable. As explained in detail in **Section II.C.3** above, the duration of the Criminal Proceedings is consistent with the duration of other criminal proceedings for money laundering before the same Criminal Courts in Peru.[1483] Moreover, the Criminal Proceedings required the performance of numerous investigative inquiries (*actos de investigación*) during the pre-trial phase, and also involve numerous defendants,

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[1478] Reply, ¶ 84.

[1479] Reply, ¶ 84.

[1480] Second Missiego Report, ¶ 68 ("[I]n Peru there is no direct relation between the statute of limitations of the criminal action for prosecuting a crime and the duration of the criminal proceeding itself. In other words, one thing is the time limitation that the Prosecutor's Office has for prosecuting a crime, and, another different thing is the duration of the criminal proceeding itself.").

[1481] **Ex. R-0218**, Money Laundering Decree [*Re-submitted version of CL-0008, with Respondent's translation*], Art. 1; **Ex. R-0199**, Legislative Decree No. 635, Criminal Code, 3 April 1991 [*Re-submitted version of CL-0009, with Respondent's translation*], Arts. 80, 102; Second Missiego Report, ¶ 70.

[1482] Second Missiego Report, ¶¶ 72–74.

[1483] Second Missiego Report, ¶¶ 76–79.

which among other reasons increases the Criminal Proceedings' complexity and duration.

624. *Fourth*, Claimant has failed to prove the existence of any irregularity in the Criminal Proceedings, let alone an irregularity that is serious enough to meet the high threshold for a denial of justice under international law. Indeed, Claimant cannot even identify a breach of Peruvian law. Claimant's own legal expert has publicly maintained that, to establish that the delays in a judicial proceeding are unjustified or undue, the affected party must prove that there has been an extremely abnormal administration of justice, which (i) has led to an unreasonable irregularity that (ii) is attributable to inaction or negligence by the courts.[1484] Claimant has proven no such thing.

625. *Fifth*, as explained in **Section II.C.3**, the Criminal Proceedings have continued to progress since the Counter-Memorial was submitted in August 2022.

626. *Sixth*, in an attempt to substantiate its claims, Claimant also argued in the Reply that "Peru did not even begin an eminent domain (*pérdida de dominio*) process in connection with the gold seized."[1485] Claimant does not explain how the absence of such proceeding would constitute denial of justice under international law. The reality is that it would not. As explained in **Section II.E**, the *pérdida de dominio* proceeding was only in force until 2018, and as Prof. Missiego explains "this proceeding was conceived as subsidiary of the criminal action, since its commencement was subject to the conclusion of the criminal proceeding."[1486] In 2018, this *pérdida de dominio* proceeding was replaced by the asset forfeiture proceeding, which is autonomous and independent from any other judicial proceeding, and has its own admissibility requirements.[1487] The Asset Forfeiture Decree expressly establishes that "[t]he asset

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[1484] **Ex. R-0333**, [redacted] "*Las garantías constitucionales del proceso penal*," ANUARIO DE DERECHO CONSTITUCIONAL LATINO AMERICAN (2006), p. 8; *see also* **Ex. R-0364**, Claimant's legal expert social media posts, undated.

[1485] Reply, ¶ 336.

[1486] **Ex. JM-0051**, *Exposición de Motivos del Decreto Legislativo No. 1373, 3 de agosto de 2018*, pág. 2.

[1487] Second Missiego Report, ¶¶ 119–122.

forfeiture proceeding is independent and autonomous from any criminal, civil or other proceeding of jurisdictional or arbitral nature."[1488]

627. Pursuant to the applicable Peruvian legislation, including the Asset Forfeiture Decree, the initiation of an asset forfeiture proceeding is neither mandatory nor necessary in order to determine that the Suppliers committed money laundering in connection with illegal mining.[1489] Therefore, Claimant's allegation that Peru should have commenced the respective *pérdida de dominio* proceeding, or even an asset forfeiture proceeding, is legally incorrect. In any event, as explained in **Section II.E**, Peru has in fact initiated an asset forfeiture proceeding in connection with Shipment 1, and a precautionary measure has been granted in that context.[1490]

628. *Seventh,* Kaloti has not exhausted the local remedies to challenge the duration of the Criminal Proceedings. If Kaloti considered that the duration of such proceedings breached any of its due process rights, it could have pursued multiple avenues before a range of Peruvian administrative and judicial bodies.[1491] For example, as Prof. Missiego explains in his Second Expert Report, Kaloti could have submitted an administrative claim (*queja*) against the prosecutors in charge of the investigations before the *Oficina Desconcentrada de Control Interno*.[1492] Likewise, Kaloti could have submitted an administrative claim (*queja*) against the judges before the *Organismo de Control de la Magistratura*. Additionally, Kaloti could have also filed an amparo request for the alleged violation of the constitutional right of due process,[1493] which encompasses *inter alia* the following protections "the obtention of a decision based on the law, access to the legal recourses, the prohibition of reopening concluded proceedings, **the adequate and timely execution of the judicial decisions**" (emphasis

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[1488] **Ex. R-0241**, Asset Forfeiture Decree, Art. 2.3.

[1489] Second Missiego Report, ¶¶ 121–122, 131.

[1490] **Ex. JM-0036**, *Sala de Apelaciones Transitoria Especializada en Extinción de Dominio de la Corte Superior de Justicia de Lima, Resolución No. 3, 24 de marzo de 2023*.

[1491] Second Missiego Report, ¶¶ 91–92.

[1492] Second Missiego Report, ¶ 91.

[1493] Second Missiego Report, ¶ 92.

added).[1494] However, Kaloti has again failed to use *any* of the domestic avenues to address the issues that it now raises before this Tribunal, nor has it shown that pursuing those local remedies would be futile. Claimant cannot allege a denial of justice if it has not exhausted local remedies, as the challenged judicial conduct would lack finality. This is so because, as explained in the Counter-Memorial,[1495] no systemic failure can be established if local remedies remain available to the claimant which could have allowed any judicial ill-treatment to be corrected by the domestic courts.

* * *

629. In conclusion, Claimant has been utterly unable to satisfy the "extreme test" for a denial of justice[1496]—i.e., by showing that the outcome of the domestic proceedings was so wrong as to "offend judicial propriety."[1497] Nor has Claimant been able to establish that any of the measures, whether considered individually or in the aggregate, are so serious as to reflect the failure of Peru's entire judicial system.[1498] By contrast and even though it does not bear the burden of proof, Peru has demonstrated that the Peruvian authorities acted reasonably, proportionally, and in accordance with their respective competencies under Peruvian law, such that there was no denial of justice under international law. For these reasons, Claimant's denial of justice claim is meritless and should be rejected.

[1494] **Ex. JM-0029**, *Ley No. 31307, Código Procesal Constitucional, 21 de julio de 2021*, Arts. 9, 39, 44.

[1495] Counter-Memorial, ¶ 497.

[1496] *See* Counter-Memorial, ¶ 490 (*citing* **RL-0159**, *Pantechniki S A. Contractors & Engineers (Greece) v. Republic of Albania*, ICSID Case No. ARB/07/21, Award, 28 July 2009 (Paulsson), ¶ 94; *see also* **RL-0219**, Jan Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW (2005), p. 89.

[1497] **RL-0152**, *Waste Management* (Award) [*Re-submitted version of CL-0045, with English version of the award*], ¶ 98. *See also* **RL-0260**, *Freeport-McMoRan* (USA Submission), ¶ 24 (expressing the United States' interpretation of the obligation not to deny justice under Treaty Article 10.5).

[1498] **RL-0155**, *Chevron* (Second Award), ¶ 8.40. *See also* **RL-0157**, *Vannessa Ventures* (Award), ¶ 227; **RL-0101**, *Manolium* (Award), ¶ 539; **RL-0156**, *Flughafen Zürich* (Award), ¶ 639–40.

4. *Claimant's FET claim regarding discrimination fails as a matter of law and fact*

630. Claimant also argues that Peru breached the MST Provision by allegedly treating other "foreign purchasers" of gold better than Kaloti, thereby engaging in discrimination.[1499] As Peru demonstrated in the Counter-Memorial,[1500] to establish a breach of the MST as a result of discriminatory conduct, a claimant must satisfy all three of the following requirements: (i) identify a comparator in like circumstances (see **sub-section a** below), (ii) prove that claimant was in fact treated less favorably than the comparator (see **sub-section b** below),[1501] and (iii) demonstrate that such differential treatment lacked reasonable justification (see **sub-section c** below).[1502] Peru also demonstrated in the Memorial that Claimant failed to satisfy *any* of these three requirements, let alone all of them.

631. In the Reply, Claimant did not contest that it must satisfy the aforementioned three requirements.[1503] Instead, it merely recited the unsupported allegations that it had made in the Memorial, which Peru already refuted in the Counter-Memorial. Although Claimant has said next to nothing new in the Reply, Peru briefly addresses below Claimant's regurgitated allegations, to confirm that Claimant's discrimination claim under the MST Provision is baseless and must be rejected.

[1499] Reply, ¶ 344. *See also* Memorial, ¶¶ 120–123.

[1500] *See* Counter-Memorial, ¶¶ 560–563. *See also* **RL-0098,** *Cengiz Insaat Sanayi ve Ticaret A.S. v. State of Libya*, ICC Case No. 21537/ZF/AYZ, Final Award, 7 November 2018 (Fernández-Armesto, Mayer, Khairallah), ¶ 525.

[1501] *See* **RL-0006**, *Cargill* (Award), ¶ 228; **RL-0091**, *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, NAFTA, Award, 25 August 2014 (Veeder, Rowley, Crook) ("***Apotex* (Award)**"), ¶ 8.21; **RL-0094**, *Merrill & Ring Forestry L. P. v. Government of Canada*, ICSID Case No. UNCT/07/1, Award, 31 March 2010 (Orrego Vicuña, Dam, Rowley) ("***Merrill & Ring* (Award)**"), ¶ 80.

[1502] *See* **CL-0025**, *Saluka Investments BV v. Czech Republic*, Partial Award (17 March 2006), PCA—UNCITRAL, IIC 210 (2006), ¶ 313; **RL-0095**, *Quiborax S A., et al., v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, 16 September 2015 (Kaufmann-Kohler, Stern, Lalonde), ¶ 247; **RL-0096**, *Enron Corp. and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007 (Orrego Vicuña, van den Berg, Tschanz), ¶ 282; **RL-0097**, *Plama* (Award), ¶ 184.

[1503] Reply, ¶ 343 ("Discriminatory conduct is unlawful 'where investors in like circumstances are subjected to different treatment without a reasonable justification'").

a. Claimant has not identified a comparator in like circumstances

632. The discrimination claim fails at the threshold because Claimant has failed to identify a similarly situated comparator—i.e., an entity that was in "like circumstances" at the time of the complained-of treatment.[1504]

633. Although Claimant insists that Peru treated multiple "foreign purchasers" more favorably, in the Reply Claimant purported to identify only one comparator: a foreign purchaser of gold named [redacted] ("[redacted][1505] Claimant insisted that the requirement of "like circumstances" is thereby satisfied because [redacted] and Kaloti are both non-Peruvian companies that sought to purchase gold in Peru. In *Vento v. Mexico*, the claimant had similarly argued that two entities were in "like circumstances" merely because they were engaged in the same type of business venture.[1506] In its 2020 award, the *Vento* tribunal rejected this argument, deeming it "simplistic."[1507] Instead, the tribunal assessed for each entity the applicable legal regime, the circumstances of its operation, and its legal rights.[1508] On the basis of that analysis, it concluded that the purported comparators were "in very different circumstances."[1509] Kaloti and [redacted] were likewise in very different circumstances, for at least the following four reasons.

[1504] *See* **RL-0058**, *Crystallex International Corp. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016 (Lévy, Gotanda, Boisson de Chazournes) ("***Crystallex* (Award)**"), ¶ 616; **RL-0091**, *Apotex (*Award), ¶ 8.54; **RL-0092**, *Invesmart, B.V. v. Czech Republic*, UNCITRAL, Award, 26 June 2009 (Pryles, Thomas, Bernardini), ¶ 415; **RL-0015**, *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability, 27 December 2010 (Sacerdoti, Alvarez, Marcano), ¶ 210; **RL-0093**, *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Award on the Merits of Phase 2, 10 April 2001 (Dervaird, Greenberg, Belman), ¶¶ 75–76; **RL-0006**, *Cargill* (Award), ¶¶ 203, 206; **RL-0038**, *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016 (Fernández-Armesto, Orrego Vicuña, Simma), ¶ 563. **RL-0019**, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009 (Kaufmann-Kohler, Böckstiegel, Berman), ¶ 402.

[1505] *See* Reply, ¶ 345.

[1506] **RL-0255**, *Vento Motorcycles, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/17/3, Award, 6 July 2020 (Sureda, Gantz, Perezcano) ("***Vento Motorcycles* (Award)**"), ¶ 244.

[1507] **RL-0255**, *Vento Motorcycles* (Award), ¶ 244.

[1508] *See* **RL-0255**, *Vento Motorcycles* (Award), ¶¶ 244–265.

[1509] **RL-0255**, *Vento Motorcycles* (Award), ¶ 265.

634. *First*, Claimant seeks to draw a comparison between situations that were governed by entirely separate legal regimes. The *Apotex v. United States* tribunal (and other investment tribunals in the context of claims of discrimination under national treatment provisions) concluded that for companies to be in like circumstances, they must be "subject to a comparable legal regime or regulatory requirements."[1510] Here, the shipments of gold related to Kaloti, on the one hand, and to [redacted] on the other hand, were seized pursuant to different legal regimes. As explained in the Counter-Memorial, SUNAT immobilized Kaloti's Shipments 1 to 4 pursuant to the *General Customs Law*.[1511] By contrast, and as Claimant appears to concede, the shipments of gold that [redacted] sought to purchase ("[redacted] **Shipments**") were immobilized pursuant to SUNAT's authority under *Article 56 of the Peruvian Tax Code*, in connection with a tax debt collection proceeding (*procedimiento de cobranza coactiva*).[1512] These two separate regimes provided for different grounds for seizure, as well as entirely different legal recourses for interested parties (as discussed below). Kaloti and [redacted] were therefore not in like circumstances.

[1510] **RL-0091**, *Apotex (*Award), ¶ 8.15. *See also* **RL-0218**, *Grand River Enterprises Six Nations Ltd., et al. v. United States of America*, NAFTA/UNCITRAL, Award, 12 January 2011 (Nariman, Anaya, Crook) ("***Grand River* (Award)**"), ¶ 166 ("NAFTA tribunals have given significant weight to the legal regimes applicable to particular entities in assessing whether they are in 'like circumstances' under Articles 1102 or 1103. While each case involved its own facts, tribunals have assigned important weight to "like legal requirements" in determining whether there were 'like circumstances.'"); **RL-0255**, *Vento Motorcycles* (Award), ¶¶ 255–259; **RL-0256**, *GPF GP S.à.r.l v. Republic of Poland*, SCC Case No. 2014/168, Final Award, 29 April 2020 (Kaufmann-Kohler, Williams, Sands), ¶¶ 577–578.

[1511] Counter-Memorial, ¶¶ 139, 570–571. *See also* **Ex. R-0052**, General Customs Law, 26 June 2008, Art. 165 and Art. 166(b); **Ex. R-0079**, Resolution of the National Deputy Superintendency of Customs No. 208-2013-SUNAT-300000, 27 August 2013, §VII.(A2).3.

[1512] Counter-Memorial, ¶¶ 570–571. *See also* **Ex. R-0234**, SUNAT Coercive Enforcement Resolution No. 0230072627598, 27 February 2014, p.1; **Ex. R-0206**, Supreme Decree No. 133-2013-ET, Tax Code, 22 June 2013, Art. 56 ("Exceptionally, when the behaviour of the taxpayer demands it or when there are reasons to presume that the tax collection will fail, before the commencement of the Coercive Tax Collection Process, the Administration may issue precautionary measures for the amount required to pay the debt, in order to secure the payment, in accordance with the norms of the Tax Code").

635. *Second*, and relatedly, the factual circumstances underlying the respective immobilizations were entirely different.[1513] Whereas SUNAT immobilized Shipments 1 to 4 based upon concerns of money laundering and illegal mining,[1514] the [redacted] Shipments were immobilized on the basis of Article 56 of the Peruvian Tax Code, based on suspected false information on the exporters' tax returns.[1515]

636. Seeking to overcome this material difference, Claimant denies that "KML's gold was seized for alleged money-laundering," arguing that "[t]he initial immobilizations of KML's gold were performed by Peru supposedly to check for documents."[1516] However, the evidence directly contradicts Claimant's assertion.[1517] As demonstrated by Peru in the Counter-Memorial, the immobilizations of Shipments 1 to 4 were in fact based on red flags of illegal mining and money laundering.[1518] SUNAT had prepared risk profiles for each of the Suppliers, which revealed various illegal mining risk

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[1513] *See* **RL-0255**, *Vento Motorcycles* (Award), ¶ 259 (noting that one entity's activities "were subject to the treaty's origin verification procedures," whereas the other entity's activities "were not subject to such procedures but neither were the imported parts and components because their origin was not in question").

[1514] Counter-Memorial, ¶¶ 133–139(a), 570–571. *See also* **Ex. R-0141**, SUNAT Report No. 217-2014-SUNAT-3X3200, 5 March 2014 (included in [redacted] Criminal Proceedings), ¶ 14 ("The aforementioned preventive measures correspond to the risk profile prepared by the Intelligence and Tactical Operations Division of the INCFA [National Intendancy for the Prevention of Smuggling and Customs Audit (*Intendencia Nacional de Prevención del Contrabando y Fiscalización Aduanera*)]. . ."); **Ex. R-0314**, SUNAT Report No. 303-2014-SUNAT-3X3200, 9 April 2014 [*Re-submitted version of C-0084, with Respondent's translation*], ¶ 2.2 ("The aforementioned preventive measure correspond to the risk profile prepared by the Intelligence and Tactical Operations Division of the INPCFA." [National Intendancy for the Prevention of Smuggling and Customs Audit (*Intendencia Nacional de Prevención del Contrabando y Fiscalización Aduanera*)]. . ."); **Ex. R-0142**, SUNAT Report No. 239-2014-SUNAT-3X3200, 11 March 2014 (included in [redacted] Criminal Proceedings), ¶ 2.2 ("The aforementioned preventive measures corresponds to the risk profile developed by the Intelligence and Tactical Operations Division of the INPCFA [National Intendancy for the Prevention of Smuggling and Customs Audit (*Intendencia Nacional de Prevención del Contrabando y Fiscalización Aduanera*)] . . .").

[1515] Counter-Memorial, ¶¶ 570–571. *See also* **Ex. R-0234**, SUNAT Coercive Enforcement Resolution No. 0230072627598, 27 February 2014, p. 2; **Ex. R-0206**, Supreme Decree No. 133-2013-ET, Tax Code, 22 June 2013, Art. 56.

[1516] Reply, ¶ 349.

[1517] *See, e.g.*, Counter-Memorial, ¶¶ 133, 135,.

[1518] Counter-Memorial, ¶ 139.

indicators.[1519] On this basis, and pursuant to Peruvian law[1520] and practice,[1521] SUNAT immobilized Shipments 1 to 4 in order to ascertain the true origin of the gold and verify its lawfulness.[1522] Accordingly, the SUNAT Immobilization Orders refer to "goods that are immobilized in order to determine their legal origin."[1523] SUNAT then requested additional documentation from the Suppliers,[1524] which provided

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[1519] *See* **Ex. R-0080**, Email from SUNAT ([redacted] to [redacted] ([redacted] *et al.*), 29 November 2013 (included in [redacted] Criminal Proceedings), p. 2; **Ex. R-0058**, Investigative Report No. 055-2014-SUNAT-3X2200, 8 April 2014, pp. 3–5; **Ex. R-0085**, Email from [redacted] to SUNAT ([redacted] *et al.*), 9 January 2014 (included in [redacted] Criminal Proceedings), p. 3.

[1520] Counter-Memorial, ¶ 133; **Ex. R-0052**, General Customs Law, 26 June 2008, Art. 163.

[1521] Counter-Memorial, ¶ 133; **Ex. R-0055**, Report No. 49-2014-SUNAT/2E4000, 28 April 2014, § III.

[1522] Counter-Memorial, ¶¶ 133–139.a. *See also* **Ex. R-0141**, SUNAT Report No. 217-2014-SUNAT-3X3200, 5 March 2014 (included in [redacted] Criminal Proceedings), ¶ 14; **Ex. R-0314**, SUNAT Report No. 303-2014-SUNAT-3X3200, 9 April 2014 [*Re-submitted version of C-0084, with Respondent's translation*], ¶ 2.2; **Ex. R-0142**, SUNAT Report No. 239-2014-SUNAT-3X3200, 11 March 2014 (included in [redacted] Criminal Proceedings), ¶ 2.2.

[1523] **Ex. R-0091,** SUNAT Immobilization Order No. 316-0300-2013-001497, 29 November 2013 (included in [redacted] Criminal Proceedings) [*Re-submitted version of C-0040, with Respondent's translation*]; **Ex. R-0092**, SUNAT Immobilization Order No. 316-0300-2013-001479, 29 November 2013 (included in [redacted] Criminal Proceedings) [*Re-submitted version of C-0040, with Respondent's translation*]; **Ex. R-0093**, SUNAT Immobilization Order No. 316-0300-2014-000110, 10 January 2014 (included in [redacted] Criminal Proceedings) [*Re-submitted legible version of C-0040*]; **Ex. R-0094**, SUNAT Immobilization Order No. 316-0300-2014-000111, 10 January 2014 (included in [redacted] Criminal Proceedings) [*Re-submitted legible version of C-0040*]; **Ex. C-0040**, [SUNAT Immobilization orders], p. 12 (including Immobilization Order no. 316-0300-2014-000002 concerning [redacted] Shipment); **Ex. R-0096**, SUNAT Immobilization Order No. 316-0300-2014-000020, 9 January 2014 (included in [redacted] Criminal Proceedings) [*Re-submitted legible version of C-0040*]; *See* similarly in **Ex. R-0097**, SUNAT Immobilization Order No. 316-0300-2014-000021, 9 January 2014 (included in [redacted] Criminal Proceedings) [*Re-submitted legible version of C-0040*]; **Ex. R-0098**, SUNAT Immobilization No. 316-0300-2014-000022, 9 January 2014 (included in [redacted] Criminal Proceedings) [*Re-submitted legible version of C-0040*].

[1524] Counter-Memorial, ¶ 139.b–c. *See also* **Ex. C-0056**, [redacted] [redacted] Notice N° 406-2013-SUNAT/3X3200, 2 December 2013; **Ex. R-0077**, SUNAT Notification No. 408-2013-SUNAT/3X3200, 2 December 2013 (included in [redacted] Criminal Proceedings); **Ex. R-0295**, Notifications, Immobilization Act, Results of the Requirement for C.G [redacted] S.A., SUNAT, 2013 [*Re-submitted version of C-0006, with Respondent's translation*], pp. 24–25; **Ex. R-0100**, SUNAT Notification No. 423-2013-SUNAT/3X3200, 5 December 2013 (included in [redacted] Criminal Proceedings); **Ex. R-0078,** SUNAT Notification No. 407-2013-SUNAT/3X3200, 2 December 2013 (included in [redacted] Criminal Proceedings); **Ex. R-0102**, SUNAT Notification No. 409-2013-SUNAT/3X3200, 2 December 2013 (included in [redacted] Criminal Proceedings); **Ex. R-0103**, SUNAT Notification No. 426-2013-SUNAT/3X3200, 5 December 2013 (included in [redacted] Criminal Proceedings); **Ex. R-0104**, SUNAT Notification No. 425-2013-SUNAT/3X3200, 5 December 2013 (included in [redacted] Criminal Proceedings); **Ex. R-0105**, SUNAT

documents that confirmed that the Suppliers had failed to comply with their obligation to establish the gold's lawful origin.[1525] Furthermore, those documents also revealed indicia of money laundering.[1526]

637. Thus, contrary to Claimant's argument, the factual circumstances underlying the immobilizations of the Five Shipments and the [redacted] Shipments confirms that Kaloti and [redacted] were not in like circumstances.

638. *Third*, the foregoing differences in legal regime and factual circumstances give rise to yet another differentiating factor between the circumstances of [redacted] and those of Kaloti: each had different legal rights under Peruvian law. Specifically:

a. [redacted] filed an objection to the immobilizations pursuant to Article 120 of the Peruvian Tax Code, which allows third parties to intervene in coercive tax debt

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Notification No. 428-2013-SUNAT/3X3200, 9 December 2013 (included in [redacted] Criminal Proceedings); **Ex. C-0007**, [redacted] document package, pp. 11–14; **Ex. C-0009**, [redacted] document package, pp. 10–11; **Ex. C-0008**, [redacted] document package, pp. 3–4, 7–8, 11–12.

[1525] Counter-Memorial, ¶¶ 140–146. *See also* **Ex. R-0140**, SUNAT Report No. 026-2014-SUNAT-3X3200, 15 January 2014 (included in [redacted] Criminal Proceedings), ¶ 2.8; **Ex. R-0141**, SUNAT Report No. 217-2014-SUNAT-3X3200, 5 March 2014 (included in [redacted] Criminal Proceedings), ¶¶ 17–19; **Ex. R-0314**, SUNAT Report No. 303-2014-SUNAT-3X3200, 9 April 2014 [*Re-submitted version of C-0084, with Respondent's translation*], ¶¶ 2.15, 2.17–2.21; **Ex. R-0142**, SUNAT Report No. 239-2014-SUNAT-3X3200, 11 March 2014 (included in [redacted] Criminal Proceedings), ¶¶ 2.20–2.24.

[1526] Counter-Memorial, ¶¶ 145, 155. *See also* **Ex. R-0140**, SUNAT Report No. 026-2014-SUNAT-3X3200, 15 January 2014 (included in [redacted] Criminal Proceedings), ¶¶ 3.1–3.2; **Ex. R-0141**, SUNAT Report No. 217-2014-SUNAT-3X3200, 5 March 2014 (included in [redacted] Criminal Proceedings), § III; **Ex. R-0314**, SUNAT Report No. 303-2014-SUNAT-3X3200, 9 April 2014 [*Re-submitted version of C-0084, with Respondent's translation*], § III; **Ex. R-0142**, SUNAT Report No. 239-2014-SUNAT-3X3200, 11 March 2014 (included in [redacted] Criminal Proceedings), ¶¶ 3.1–3.2; **Ex. R-0144**, Letter No. 004-2014-SUNAT/3X3000 from SUNAT (J. Romano) to Callao Provincial Criminal Prosecutor's Office, 15 January 2014 (included in [redacted] Criminal Proceedings); **Ex. R-0146**, Letter No. 015-2014-SUNAT/3X3200 from SUNAT (R. Guerrero) to Specialized State Attorney's Office (A. Principe), 17 January 2014 (included in [redacted] Criminal Proceedings); *see also* **Ex. R-0147**, Letter No. 13-2014-SUNAT-3X3000 from SUNAT (A. Alvarado) to Specialized State Attorney's Office (A. Principe), 6 March 2014 (included in [redacted] Criminal Proceedings); **Ex. R-0155,** Letter No. 21-2014-SUNAT-3X3000 from SUNAT (A. Alvarado) to Specialized State Attorney's Office (A. Principe), 12 March 2014 (included in [redacted] Criminal Proceedings).

collection proceedings (*procedimiento de cobranza coactiva*) to file a motion to suspend the auctioning of the assets (*intervención excluyente de propriedad*).[1527]

b. By contrast, the immobilization of Shipments 1 to 4 was not governed by the Tax Code, such that Kaloti did not have any right to file a motion to suspend under Article 120. However, as explained in the Counter-Memorial and herein,[1528] Kaloti could have pursued any of three different avenues of recourse before the Peruvian courts.

639. Claimant does not appear to dispute the foregoing; its only argument is that if "the procedures available to [redacted] were not legally available to KML . . . [t]hat, in and of itself, is evidence of discriminatory treatment."[1529] This argument is utterly illogical since, taken to its extreme, it amounts to the assertion that *any* difference—not just in treatment by the State—between the two entities can amount to discrimination. Naturally, where—as here—different legal regimes apply to each entity, it is to be expected that different legal rights and recourses will be available under each regime; however, such differences do not *ipso facto* constitute discrimination. The applicability to Kaloti and [redacted] of different legal regimes means that those two companies were not in like circumstances. As explained by the *Grand River v. United States* tribunal, investment case law recognizes "the identity of the legal regime(s) applicable to a claimant and its purported comparators to be a compelling factor in assessing whether like is indeed being compared to like."[1530]

640. *Fourth*, Claimant's attempt to compare itself to [redacted] also fails in respect of Shipment 5. As Peru explained in the Counter-Memorial, Shipment 5 was seized by order of the Lima Civil Court in the context of a private contractual dispute.[1531] In contrast, the

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[1527] Counter-Memorial, ¶ 574. *See also* **Ex. R-0206**, Supreme Decree No. 133-2013-EF, Tax Code, 22 June 2013, Art. 120.

[1528] *See* Counter-Memorial, ¶¶ 214–216; *supra* Section II.C.2.

[1529] Reply, ¶ 350.

[1530] **RL-0218**, *Grand River* (Award), ¶ 167.

[1531] Counter-Memorial, ¶ 572. *See also* **Ex. R-0210**, Resolution No. 1, Precautionary Seizure against Shipment 5, 20 March 2015.

[redacted] Shipments were immobilized by SUNAT on the basis of Article 56 of the Peruvian Tax Code connection with a tax debt collection proceeding (*procedimiento de cobranza coactiva*).[1532] Thus, the circumstances surrounding Shipment 5 and the [redacted] Shipments are incontrovertibly different. Claimant does not—and cannot—argue otherwise.

641. In conclusion, Claimant and [redacted] were not in "like circumstances" because the immobilization of their respective gold shipments was carried out based upon entirely different factual circumstances, pursuant to different legal regimes, which provided for entirely different rights and recourses under the law. Consequently, Kaloti and [redacted] cannot be deemed to be genuine comparators, contrary to what Claimant argues.

b. Claimant has not established any differential treatment

642. Claimant's discrimination claim also fails because it has not demonstrated that it received less favorable treatment than that accorded to [redacted] In the Memorial, Claimant had argued that Peru treated [redacted] more favorably than Kaloti on the basis that "the Peruvian courts [had] allowed [redacted] to assert its rights" and had "ordered SUNAT to return [Aram's] gold."[1533] However, as Peru noted in the Counter-Memorial, Claimant omitted to mention the key fact that the [redacted] Shipments were later subject to criminal proceedings, and then permanently confiscated, thereby ultimately leaving [redacted] in a *less* favorable position than Kaloti.[1534] Faced with this uncontroverted fact, Claimant changed tack in its Reply, dismissing as irrelevant the outcome of the [redacted] criminal proceedings, and arguing that "[w]hat is important is

[1532] Counter-Memorial, ¶¶ 570–571. *See also* **Ex. R-0234**, SUNAT Coercive Enforcement Resolution No. 0230072627598, 27 February 2014, p. 1; **Ex. R-0206**, Supreme Decree No. 133-2013-ET, Tax Code, 22 June 2013, Art. 56.

[1533] Memorial, ¶ 122.

[1534] Counter-Memorial, ¶¶ 577–578.

that [redacted] was given options and legal avenues"[1535] of which Kaloti was "in practice and *de facto* deprived of by Peru."[1536]

643. Claimant's new argument is equally meritless, as Kaloti was not deprived by Peru of any avenues for recourse. To the contrary, as described in the Counter-Memorial and in **Section II.C.2** above, Peruvian law provided legal avenues of which Kaloti could have availed itself to assert its alleged rights in respect of Shipments 1 to 4.[1537] Specifically, Kaloti could have submitted:

a. A *re-evaluation* request, whereby Kaloti could have requested the Criminal Courts that ordered the Precautionary Seizures of Shipments 1 to 4 to reconsider and lift these measures;[1538]

b. An *appeal*, whereby Kaloti could have requested the Court of Appeals to review and either annul or revoke the Precautionary Seizures of Shipments 1 to 4 ordered by the Criminal Courts;[1539]

c. An *amparo* request, whereby Kaloti could have requested the constitutional courts to declare Kaloti's purported right to property over Shipments 1 to 4.[1540]

644. However, as Claimant appears to concede, Kaloti never pursued any of these legal recourses. Instead, it (i) submitted three requests to SUNAT concerning Shipments 1 to 3 (which were rejected by SUNAT because the Suppliers had failed to prove the lawful origin of the gold, and because there were indicia of criminal activity);[1541] and

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[1535] Reply, ¶ 353.

[1536] Reply, ¶ 352.

[1537] Counter-Memorial, ¶¶ 214–216. First Missiego Report, ¶ 127.

[1538] Counter-Memorial, ¶ 214. *See also* **Ex. R-0152**, Plenary Agreement No. 5-2010/CJ-116, 16 November 2010, p. 6; First Missiego Report, ¶ 130.

[1539] Counter-Memorial, ¶ 215. *See also* **Ex. R-0152**, Plenary Agreement No. 5-2010/CJ-116, 16 November 2010, p. 6; First Missiego Report, ¶ 130.

[1540] Counter-Memorial, ¶¶ 216, 228. First Missiego Report, ¶¶ 147–148.

[1541] Two of these requests were submitted on behalf of Kaloti by the Suppliers. *See* Counter-Memorial, ¶¶ 147–153. *See also* **Ex. R-0140,** SUNAT Report No. 026-2014-SUNAT-3X3200, 15 January 2014 (included in [redacted] Criminal Proceedings), ¶¶ 3.1–3.2; **Ex. R-0141**, SUNAT Report No. 217-2014-

(ii) submitted requests to the Peruvian Prosecutor and Criminal Courts with regards to Shipments 2 and 3 (even though there was no legal basis for Kaloti to submit such requests, rendering them inadmissible under Peruvian law).[1542]

645. In sum, Peru did not treat Kaloti less favorably than [redacted] The two companies were subject to different legal regimes. Moreover, Kaloti had legal recourses under the applicable legal regime, but failed to avail itself of them. And unlike Kaloti's gold shipments, [redacted] Shipments were *permanently confiscated*, as Claimant concedes.[1543] This left [redacted] in a different situation than Claimant.

c. Claimant cannot demonstrate that any differential treatment lacked reasonable justification

646. Even assuming *arguendo* that Kaloti and [redacted] had been in like circumstances (quod non), and that Kaloti had in fact been treated less favorably than [redacted] (quod non), Claimant cannot seriously argue—let alone demonstrate—that such differential treatment lacked reasonable justification.[1544] As noted above, Claimant identified as the differential treatment the fact that "[redacted] was able to file an appeal before a tax tribunal in Peru,"[1545] whereas "KLM, in contrast, has had nothing against which to formally appeal before a tax tribunal."[1546] On that basis, Claimant argued that "[t]here was no reason for Peru to treat these two investors differently."[1547]

647. However, Claimant's argument fails on its face, because there is a specific and obvious reason why Kaloti was not able to file an appeal before a tax tribunal: unlike [redacted] Shipments—which had been immobilized due to suspected false information on its

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SUNAT-3X3200, 5 March 2014 (included in [redacted] Criminal Proceedings), § III; **Ex. R-0314**, SUNAT Report No. 303-2014-SUNAT-3X3200, 9 April 2014 [*Re-submitted version of C-0084, with Respondent's translation*], pp. 6–10.

[1542] Counter-Memorial, ¶¶ 217–230, 581.

[1543] Reply, ¶¶ 351–353.

[1544] **CL-0025**, *Saluka Investments BV v. Czech Republic*, Partial Award (17 March 2006), PCA—UNCITRAL, IIC 210 (2006), ¶ 313.

[1545] Reply, ¶ 347. *See also* Memorial, ¶ 122.

[1546] Reply, ¶ 347.

[1547] Reply, ¶ 355; *see also* Reply, ¶ 347.

exporters' tax returns[1548]—Shipments 1 to 5 were *not* immobilized for tax-related reasons, and there was no tax proceeding against Kaloti. Consequently, there was no reason why Kaloti could or would have filed any appeal under Article 120 of the Tax Code, as [redacted] did. Claimant is essentially arguing that it should be given the opportunity to raise an appeal under Article 120 of the Tax Code even though Shipments 1 to 4 were not subject to a coercive tax debt collection procedure (as the [redacted] Shipments were), but instead were subject to an entirely different legal remedy. Claimant's argument is therefore illogical on its face: Kaloti could not have had the same right of appeal because the legal regime applicable to it was different than that applicable to [redacted]

648. Furthermore, and as Peru has repeatedly stated, Kaloti had an opportunity of its own to assert its rights in the legal proceedings governing Shipments 1 to 4,[1549] but failed—either by choice or poor legal representation—to pursue *any* of the available remedies.

649. Claimant is thus unable to satisfy its burden of proving any of the three requisite elements of its claim of discrimination. Claimant's claim of breach of the MST Provision due to alleged discrimination should therefore be rejected.

5. Claimant's claim based on alleged legitimate expectations lacks legal and factual foundation

650. In the Memorial, Claimant had included a passing reference to Kaloti's alleged legitimate expectations. Specifically, in the context of its claim of arbitrary conduct, Claimant had argued that Kaloti "had a legitimate expectation that the seized gold was going to be . . . returned."[1550] In the Reply, however, Claimant changed tack, devoting an entire subsection of its discussion of the MST Provision to "KML's legitimate expectations."[1551] Therein it purported to identify a variety of alleged

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[1548] Counter-Memorial, ¶¶ 570–571. *See also* **Ex. R-0234**, SUNAT Coercive Enforcement Resolution No. 0230072627598, 27 February 2014, p. 2.

[1549] *See* Counter-Memorial, ¶¶ 214–216; First Missiego Report, ¶ 127.

[1550] Memorial, ¶ 70.

[1551] *See* Reply, p. 141.

expectations that had not been mentioned at all in the Memorial.[1552] However, Claimant's new arguments are meritless. In this section of the Rejoinder, Peru demonstrates that (i) the MST Provision does *not* protect investors' legitimate expectations (**subsection a**); and (ii) even if it did, Claimant has not identified *any* expectations that were legitimate *and* that were violated by Peru (**subsection b**).

a. The MST Provision does not protect an investor's legitimate expectations

651. As explained in **Section IV.A.1** above, Treaty Article 10.5 (i.e., the MST Provision) prescribes the MST under CIL.[1553] Annex 10-A of the Treaty, for its part, specifies the following: "'[C]ustomary international law' generally and as specifically referenced in Article 10.5 results from a general and consistent practice of States that they follow from a sense of legal obligation [(i.e., *opinio juris*)]."[1554] In order to demonstrate a breach of the MST Provision, the claimant must therefore demonstrate that there is sufficient State practice and *opinio juris* to support the proposition that the MST encompasses an obligation to protect investors' legitimate expectations.[1555]

652. A claimant's failure to prove the existence of an obligation under CIL (such as, in this case, the protection of legitimate expectations under the MST) requires dismissal of the claim. For example, in *Cargill v. Mexico*, the claimant had alleged that Article 1105

[1552] Reply, ¶¶ 375–379.

[1553] *See* Memorial, ¶¶ 102–103; Counter-Memorial, ¶¶ 466–467; Reply, ¶ 313.

[1554] **RL-0001**, Treaty [*Re-submitted version of CL-0001, with additional pages*], Annex 10-A. *See also* **RL-0280**, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, ICJ, Judgment, 3 February 2012, ¶ 55 ("[T]he existence of a rule of customary international law requires that there be 'a settled practice' together with *opinio juris*."); **RL-0281**, *North Sea Continental Shelf Cases (Federal Republic Of Germany/Denmark; Federal Republic of Germany/Netherlands)*, ICJ, Judgment, 20 February 1969, ¶¶ 77–78; **RL-0272**, *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Final Award, 8 June 2009 (Young, Hubbard, Caron),¶ 602.

[1555] *See* **RL-0260**, *Freeport-McMoRan* (USA Submission), ¶ 19 (interpreting Article 10.5 of the Treaty, and affirming that "[t]he burden is on the claimant to establish the existence and applicability of a relevant obligation under [CIL] that meets the requirements of State practice and *opinio juris*"); **RL-0009**, *Mamacocha* (USA Submission), ¶ 19.

NAFTA, which (like the Treaty) prescribes the CIL MST,[1556] required the State to provide a stable and predictable environment that does not frustrate investors' reasonable expectations.[1557] However, the claimant had failed to establish the existence under the CIL MST of an obligation to protect reasonable expectations, and the tribunal rejected the claimant's argument on that basis. In that regard, the tribunal stressed that it is for the claimant rather than the tribunal to show that the concept of CIL MST embraces a given "new element" (which in that case, as in the one *sub judice*, was the protection of legitimate expectations):

> The burden of establishing any new elements of this custom is on Claimant. . . . If Claimant does not provide the Tribunal with the proof of such evolution, it is not the place of the Tribunal to assume this task. Rather the Tribunal, in such an instance, should hold that Claimant fails to establish the particular standard asserted.[1558]

653. Because "[n]o evidence . . . ha[d] been placed before the [t]ribunal that there is such a requirement [i.e., to protect legitimate expectations] in the NAFTA or in customary international law,"[1559] the *Cargill* tribunal rejected the claimant's MST claim based on alleged legitimate expectations.[1560] Here, as in *Cargill*, Claimant has provided *no* evidence of any CIL obligation—whether under the MST or otherwise—to protect legitimate expectations. Claimant's claim should therefore be dismissed.

654. In any event, various international courts and tribunals have affirmatively confirmed that the CIL MST does *not* include an obligation to protect an investor's legitimate expectations. Notably, in its 2018 judgment in the case concerning *Obligation to*

[1556] **RL-0246**, North American Free Trade Agreement, 1 January 1994, Art. 1105.1 ("Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security."). *See* **RL-0001**, Treaty [*Re-submitted version of CL-0001, with additional pages*], Art. 10.5.1 ("Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.").

[1557] **RL-0006**, *Cargill* (Award), ¶ 290.

[1558] **RL-0006**, *Cargill* (Award), ¶ 273.

[1559] **RL-0006**, *Cargill* (Award), ¶¶ 289–290.

[1560] **RL-0006**, *Cargill* (Award), ¶ 296.

Negotiate Access to the Pacific Ocean (Bolivia v. Chile), the International Court of Justice ("**ICJ**") observed that

> references to legitimate expectations may be found in arbitral awards concerning disputes between a foreign investor and the host State that apply treaty clauses providing for fair and equitable treatment. **It does not follow from such references that there exists in general international law a principle that would give rise to an obligation on the basis of what could be considered a legitimate expectation**. Bolivia's argument based on legitimate expectations thus cannot be sustained.[1561] (Emphasis added)

655. The tribunal in *Mesa Power v. Canada* reached the same conclusion in an arbitration under NAFTA. After endorsing the relevant discussion in *Waste Management* as an accurate articulation of the MST under CIL, the *Mesa Power* tribunal held that this standard does *not* include among its component principles any requirement to protect legitimate expectations.[1562]

656. Furthermore, both of the parties to the Treaty—Peru and the United States—agree that the MST Provision thereof does not protect legitimate expectations. Thus, in interpreting the Treaty in its non-Disputing Party submission in a different case (*Freeport*), the United States unambiguously stated that

> the concepts of legitimate expectations and transparency are not component elements of "fair and equitable treatment" under customary international law and do not give rise to independent host State obligations.[1563]

657. Accordingly, the MST Provision does not impose an obligation to protect Claimant's legitimate expectations. Since by definition a State cannot breach a non-existent

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[1561] **RL-0273**, *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, ICJ, Judgment, 1 October 2018, ¶ 162.

[1562] **RL-0274**, *Mesa Power Group, LLC v. Government of Canada*, PCA Case No. 2012-17, Award, 24 March 2016 (Kaufmann-Kohler, Brower, Landau), ¶ 502.

[1563] **RL-0260**, *Freeport-McMoRan* (USA Submission), ¶ 28. *See also* **RL-0009**, *Mamacocha* (USA Submission), ¶ 27; **RL-0103**, *Gramercy* (USA Sumission), ¶ 38.

obligation,[1564] Claimant's legitimate expectations claim under the MST Provision must be dismissed.

b. In any event, Claimant has not identified any legitimate expectations

658. Even if the MST Provision protected legitimate expectations (quod non), Claimant has failed to identify any such expectation that Peru has violated. In the Reply, Claimant purported to identify—but failed to substantiate—a variety of alleged legitimate expectations. These include (inter alia) the alleged expectations (i) that "Peru was going to treat KML impartially, fairly, and even-handedly;"[1565] (ii) that "Peru was going to comply with its general regulatory framework in place at the time of KML's initial investments in 2012;"[1566] (iii) that Kaloti could "rely on buying gold only from sellers (suppliers) registered . . . in Peru;"[1567] (iv) that Peru would "proactively avoi[d] leaks to the press;"[1568] and (v) that "Peru would finish or end (one way or another), in a timely manner, investigations regarding KML's gold."[1569] On their face, many of these alleged expectations are merely repackaged versions of Claimant's other claims. As shown below, such alleged expectations (i) do not qualify as "legitimate," and (ii) in any event were not violated by Peru.

659. In assessing claims of legitimate expectations—typically under treaties prescribing the autonomous FET standard— investment tribunals have held that the claimant must satisfy certain requirements to establish that its expectations were in fact "legitimate" for FET purposes.[1570] In particular, a claimant must prove that its expectations:

[1564] **RL-0022**, ILC Commentary, Art. 2.

[1565] Reply, ¶ 375.

[1566] Reply, ¶ 376.

[1567] Reply, ¶ 376.

[1568] Reply, ¶ 378.

[1569] Reply, ¶ 378.

[1570] *See, e.g.*, **RL-0275**, *Duke Energy Electroquil Partners, et al., v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008 (Kaufmann-Kohler, Gómez Pinzón, van den Berg) ("***Duke Energy***

a. were reasonable, taking into account "all circumstances, including not only the facts surrounding the investment, but also the political, socioeconomic, cultural and historical conditions prevailing in the host State;"[1571]

b. arose from a specific assurance, commitment, or representation given by the State to the investor;[1572] and

c. were relied upon by Claimant when deciding to make its investment.[1573]

660. Claimant not only has been unable to satisfy any of these requirements, but in fact failed even to delineate any particular expectation with specificity. Instead, it contents itself with describing various alleged expectations at a high level of generality[1574] (e.g., that "Peru was going to comply with its general regulatory framework;"[1575] that Peru would "proactively avoi[d] leaks to the press").[1576]

661. Furthermore, Claimant made no effort to demonstrate that any of its purported expectations satisfied the above-mentioned requirements, as discussed briefly below.

662. *First*, Claimant made no effort to show that its alleged expectations were reasonable. For example:

a. Claimant argued that Kaloti expected that it could rely solely and exclusively upon the fact that a supplier was registered in Peru when purchasing gold. But such alleged expectation would have been wholly unreasonable: as described

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(Award)"), ¶ 340; **RL-0276**, *Frontier Petroleum Services Ltd. v. Czech Republic*, UNCITRAL, Final Award, 12 November 2010 (Williams, Alvarez, Schreuer), ¶¶ 285–288.; **CL-0063**, *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, ¶ 375.

[1571] **RL-0275**, *Duke Energy* (Award), ¶ 340.

[1572] **CL-0053**, *Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Award, 03 June 2021, ¶ 515. *See also* **RL-0131**, UNCTAD, Expropriation - UNCTAD Series on Issues in International Investment Agreements II, 2012, p. 68; **RL-0122**, *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002 (Kerameus, Gantz, Covarrubias Bravo), ¶¶ 148–149; **RL-0275**, *Duke Energy* (Award), ¶¶ 340, 347; **RL-0094**, *Merrill & Ring* (Award), ¶ 150.

[1573] **RL-0275**, *Duke Energy* (Award), ¶ 340. *See also* **RL-0094**, *Merrill & Ring* (Award), ¶ 150.

[1574] *See* Reply, ¶¶ 375–378.

[1575] Reply, ¶ 376.

[1576] Reply, ¶ 378.

in **Section II.A.3** above, Kaloti had a duty under Peruvian law to conduct due diligence with respect to its suppliers.[1577]

b. Claimant also appeared to argue that Kaloti expected that it would not be subject to regulatory actions or investigations after purchasing the Gold from the Suppliers.[1578] However, as Peru explained in the Counter-Memorial and in **Sections II.B and II.C**, under Peruvian law (i) SUNAT was empowered to immobilize Shipments 1 to 4 on the basis of the *Suppliers'* violations of regulations concerning money laundering and the trade and export of gold in Peru;[1579] and (ii) the Criminal Courts had the authority to issue the Precautionary Seizures, based upon the objective indicia that existed of money laundering and illegal mining.[1580]

663. The *second* requirement for legitimate expectations which Claimant fails to satisfy is that of identifying one or more specific assurances or representations by the State which gave rise to its alleged expectations. As affirmed by the *Crystallex v. Venezuela* tribunal, a breach of an FET obligation based upon legitimate expectations must be based upon "evidence . . . that a specific representation as to a substantive benefit has been frustrated."[1581] However, in the Reply, Claimant expressly admitted that in fact it had *not* received any such assurance or representation: "[Claimant] has <u>*not*</u> claimed that . . . [Kaloti] received a particularized or individualized assurance from Peru aimed specifically at [Kaloti], like a stabilization or investment agreement with Peru" (emphasis in original).[1582] This admission is fatal to Claimant's legitimate expectations claim (assuming *arguendo* that such a claim were even possible, which, as explained, it is not).

[1577] *See supra* Section II.A3.

[1578] *See* Reply, ¶¶ 376–378.

[1579] *See* Counter-Memorial, § II.B.

[1580] *See supra* Section II.C.1.

[1581] **RL-0058**, *Crystallex* (Award), ¶ 552.

[1582] Reply, ¶ 148.

664. In the absence of any assurance or representation by Peru, Claimant has resorted instead to arguing that it relied on "[Peru's] regulatory framework regarding the gold market."[1583] However, as affirmed in the investment jurisprudence, the mere existence of a regulatory framework does not by itself, and without more, serve to generate any legitimate expectations. For example, in *Crystallex v. Venezuela*, the tribunal ruled precisely that, rejecting the investor's claim of legitimate expectation based on the regulatory system.[1584] The tribunal reasoned that "[l]aws are general and impersonal in nature," and "will usually leave some degree of discretion to the state agencies for the making of their case specific decisions and, in fact, are rarely unconditional in their provisions."[1585]

665. Similarly, the tribunal in *Diaz Gaspar v. Costa Rica* observed that

> Every investor has always the expectation that the State will act in accordance with the applicable laws, and a violation of the regulatory framework by the State will always be a surprise to the investor. Such expectation, is not particularly relevant for the purposes of determining if the investor was not subject to a fair and equitable treatment. The fact that the State has violated the regulatory framework may, depending on the circumstances of the case, be a violation of international law, but the fact that the investor had the expectation of the State's conduct being adjusted to the law does not, in general, add nothing to the analysis that must be carried out to determine the existence of such violation.[1586]

666. Claimant's failure to identify any specific assurance or representation by the State is therefore fatal to its legitimate expectations claim, and it cannot salvage such claim simply by invoking an alleged reliance on the legal or regulatory framework generally.

[1583] Reply, ¶ 377.

[1584] **RL-0058**, *Crystallex* (Award), ¶ 552.

[1585] **RL-0058**, *Crystallex* (Award), ¶ 552.

[1586] **RL-0286**, *Alejandro Diego Díaz Gaspar v. Republic of Costa Rica*, ICSID Case No. ARB/19/13, Award, 29 June 2022 (Mourre, González García, Jiménez), ¶ 371.

667. *Third*, Claimant failed to demonstrate that it in fact relied upon the alleged expectations at the time that it made its alleged investment in the Gold.[1587] For some of its alleged expectations, Claimant did not—and cannot—argue that they existed at the time that it made its alleged investment. In particular, Claimant argued that it expected that "Peru would provide an answer (even if unfavorable) to KML's multiple petitions to the government of Peru," and that "Peru would finish or end (one way or another), in a timely manner, investigations regarding KML's gold."[1588] Claimant does not even attempt to show that Kaloti held such expectations before making the investment. (Indeed, to do so would amount to an admission that Kaloti knew from the outset that the Suppliers were suspect, and that the Gold would be seized on that basis.)

668. Claimant's only argument with respect to the timing of its alleged expectations is its claim that "Kaloti studied . . . [Peru's] regulatory framework" when it made its investment.[1589] To substantiate this allegation, Claimant pointed to a document that Claimant described as a "study on the Peruvian gold industry."[1590] As Mr. [redacted] admits, the date and author of this purported study are unknown.[1591] That fact renders the document useless as alleged evidence of Kaloti's legitimate expectations at the time that it made its alleged investments in Peru. In any event, the referenced study merely provided a general overview of "market data and projections,"[1592] and did not mention any specific commitments supposedly made by Peru to Kaloti. Moreover, in describing the political and legal environment in Peru, the study undermines Claimant's claims about its expectations:

[1587] **RL-0275**, *Duke Energy* (Award), ¶¶ 340, 347. *See also* **RL-0094**, *Merrill & Ring* (Award), ¶ 150.

[1588] Reply, ¶ 378.

[1589] Reply, ¶ 377.

[1590] Reply, ¶ 377 (*citing* **Ex. AK-0002**, Analysis of the Peruvian gold industry, 25 June 1999).

[1591] First [redacted] Witness Statement, ¶ 18 ("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)").

[1592] *See* First [redacted] Witness Statement, ¶ 18.

> **There is a national interest in Peru to regulate actions relating to countering illegal mining**, in order to guarantee tax collection, the well-being of the population, provide improvements in the communities where ancestral mining takes place, provide the security of the people who live in those areas, maintain the conservation of natural heritage and fragile ecosystems and the development of sustainable economic activities.[1593] (Emphasis added)

669. Since the study clearly identified illegal mining as an area of likely future regulation, Claimant cannot reasonably argue that Kaloti was under the understanding that the suppliers of gold would not be subject to regulation and enforcement measures in Peru.

670. In conclusion, Claimant has failed to demonstrate that any of its alleged expectations were legitimate, were subject to protection under the MST Provision, or were frustrated by Peru. Its claim of breach must be rejected on this basis.

6. Kaloti's FET claim regarding the Parties' negotiations fails as a matter of law and fact

671. Claimant continues to argue that "Peru refused to engage in good-faith negotiations with KML" after the present dispute arose, and on that basis claims that Peru failed to accord MST.[1594] In the Counter-Memorial, Peru demonstrated that such claim was manifestly meritless because (i) Peru was not under any obligation (under either the Treaty or CIL) to negotiate with Claimant with respect to the dispute;[1595] and (ii) in any event, Peru *did* in fact engage in good faith negotiations with Kaloti.[1596]

672. In the Reply, Claimant merely parroted its earlier—and meritless—submissions on the law, now arguing that an obligation to negotiate is "implied."[1597] And on the facts, Claimant now argues that Peru's negotiation efforts were inadequate.[1598] Both

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[1593] **Ex. AK-0002**, Analysis of the Peruvian gold industry, 25 June 1999, p. 5.

[1594] Reply, § V.B.e.

[1595] Counter-Memorial, ¶¶ 584–588.

[1596] Counter-Memorial, ¶¶ 589–595.

[1597] Reply, ¶ 366.

[1598] Reply, ¶ 370.

arguments, on the law and the facts, are not only meritless but also frivolous. Claimant's arguments must therefore be rejected.

a. Claimant remains unable to identify any obligation under MST on a State to engage in negotiations with an investor

673. It is a fundamental principle of State responsibility that there can be no internationally wrongful act without the breach of an international obligation of the State.[1599] On the basis of that principle, Claimant's claim can and should be dismissed, because Peru had no obligation to negotiate with Claimant.

674. In the Reply, Kaloti regurgitated its arguments from the Memorial, desperately pointing to various Treaty provisions and principles, in an attempt to find an obligation that simply does not exist.

(i) Neither Treaty Article 10.15 nor 10.16 imposed on Peru a duty to negotiate with Claimant

675. Kaloti wrongly argues that the Treaty imposes an obligation to negotiate. Claimant had made that argument in the Memorial, but had failed to point to the purported source of that obligation, either in the Treaty or in CIL. Confronted with the reality that no such obligation exists, in the Reply Claimant argued that Treaty Articles 10.15 and 10.16(3) creates—or at least implies—such obligation.[1600] Claimant's argument fails for at least the following two reasons.

676. *First*, the Treaty does not establish any binding legal obligation on the State to negotiate with an investor. Claimant points to Treaty Article 10.15,[1601] but that provision merely *exhorts* the parties to negotiate:

> In the event of an investment dispute, the claimant and the respondent **should** initially seek to resolve the dispute through

[1599] **RL-0022**, ILC Commentary, Art. 2.

[1600] Reply, ¶ 366.

[1601] *See* Reply, ¶ 366.

> consultation and negotiation, which may include the use of non-binding, third-party procedures.[1602] (Emphasis added)

677. Claimant also relies on Article 10.16.1 and 10.16.3,[1603] which provides for a "cooling-off" period:

> In the event that a disputing party **considers** that an investment dispute cannot be settled by consultation and negotiation:
>
> (a) the claimant, on its own behalf, may submit to arbitration under this Section a claim . . . .[1604] (Emphasis added)

678. Neither provision supports Claimant's submission. Investment tribunals have interpreted similarly worded provisions[1605] merely as ones that seek to *facilitate* the settlement of disputes, rather than creating a binding legal obligation on the State.[1606]

[1602] **RL-0001**, Treaty [*Re-submitted version of CL-0001, with additional pages*], Art. 10.15.

[1603] *See* Reply, ¶ 366

[1604] **RL-0001**, Treaty [*Re-submitted version of CL-0001, with additional pages*], Arts. 10.16.a(i)(A), 10.16.3.

[1605] *See, e.g.*, **RL-0181**, *Limited Liability Company Amto v. Ukraine*, SCC Case No. 080/2005, Final Award, 26 March 2008 (Cremades, Runeland, Söderlund), ¶ 50 (interpreting Articles 26(1) and (2) of the Energy Charter Treaty: "(1) Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III **shall, if possible, be settled amicably**. (Emphasis added)); (2) If such disputes cannot be settled according to the provisions of paragraph (1) within a period of three months from the date on which either party to the dispute requested amicable settlement, the Investor party to the dispute **may choose to submit** it for resolution. . . (emphasis added)); **RL-0237**, *Almasryia for Operating & Maintaining Touristic Construction Co. L.L.C. v. State of Kuwait*, ICSID Case No. ARB/18/2, Award on the Respondent Application under Rule 41(5) of the ICSID Arbitration Rules, 1 November 2019 (Ramírez Hernández, Dévaud, Knieper), ¶ 36 (interpreting Article 10 of the Egypt-Kuwait 2001 BIT: (1) Disputes which arise between a Contracting State and an investor belonging to the other Contracting State, in relation to an investment in the territory of the first State which returns to the latter, **shall be settled, as far as is possible, by amicable means**. (Emphasis added); (2) If that dispute cannot be settled within six months of the date on which either of the two parties to the dispute requested an amicable settlement by notifying the other party in writing, then **the dispute shall be referred for resolution** by one of the following means, to be chosen by the investor who is a party to the dispute. (Emphasis added)).

[1606] *See, e.g.*, **RL-0235**, *Alps Finance and Trade AG v. Slovak Republic*, UNCITRAL, Award (Redacted), 5 March 2011 (Crivellaro, Klein, Stuber) ("***Alps Finance and Trade* (Award (Redacted))**"), ¶¶ 205, 209; **RL-0027**, *Ronald S. Lauder v. Czech Republic*, UNCITRAL, Final Award, 3 September 2001 (Briner, Cutler, Klein), ¶187; **CL-0020**, *Biwater Gauff (Tanzania) Ltd. v. Tanzania*, ICSID Case No. ARB/05/22, Award and Separate Opinion (18 July 2008), IIC 330 (2008), ¶¶ 343, 345; **RL-0181**, *Limited Liability Company Amto v. Ukraine*, SCC Case No. 080/2005, Final Award, 26 March 2008 (Cremades, Runeland,

For example, the *Burlington v. Ecuador* tribunal held that a similar provision was "designed precisely to provide the State with an opportunity to redress the dispute before the investor decides to submit the dispute to arbitration."[1607] Similarly, the *Alps Finance and Trade AG v. Slovak Republic* tribunal interpreted a treaty providing that (i) the parties should first try to settle their dispute through consultations, and (ii) if the dispute was not settled within six months, the investor could resort to arbitration.[1608] The *Alps Finance* tribunal concluded that "the rationale of the BIT requirement [is] avoiding that a State be brought before an international investment tribunal all of a sudden, without being given the opportunity to discuss the matter with the other party."[1609] Both tribunals interpreted these provisions to decide jurisdictional objections raised by the respondent *State*, arguing that the *claimant* had failed to negotiate before commencing arbitral proceedings and had thereby violated the treaty provisions calling for friendly consultations.[1610]

679. Not surprisingly, Claimant is unable to identify a single investment tribunal that has held a State internationally liable for failure to negotiate based on similar treaty language (or any other treaty language, for that matter). There is simply no basis—

Söderlund), ¶ 50; **RL-0236**, *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction, 2 June 2010 (Kaufmann-Kohler, Stern, Orrego Vicuña), ¶ 315; **RL-0237**, *Almasryia for Operating & Maintaining Touristic Construction Co. L.L.C. v. State of Kuwait*, ICSID Case No. ARB/18/2, Award on the Respondent Application under Rule 41(5) of the ICSID Arbitration Rules, 1 November 2019 (Ramírez Hernández, Dévaud, Knieper), ¶¶ 39–40.

[1607] *See* **RL-0236**, *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction, 2 June 2010 (Kaufmann-Kohler, Stern, Orrego Vicuña), ¶¶ 312, 315.

[1608] **RL-0235**, *Alps Finance and Trade* (Award (Redacted)), ¶¶ 14, 200.

[1609] **RL-0235**, *Alps Finance and Trade* (Award (Redacted)), ¶ 209.

[1610] **RL-0236**, *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction, 2 June 2010 (Kaufmann-Kohler, Stern, Orrego Vicuña), ¶¶ 312, 315–318; **RL-0235**, *Alps Finance and Trade* (Award (Redacted)), ¶ 200. *See also* **RL-0027**, *Ronald S. Lauder v. Czech Republic*, UNCITRAL, Final Award, 3 September 2001 (Briner, Cutler, Klein), ¶¶ 181, 187; **CL-0020**, *Biwater Gauff (Tanzania) Ltd. v. Tanzania*, ICSID Case No. ARB/05/22, Award and Separate Opinion (18 July 2008), IIC 330 (2008), ¶¶ 338, 341, 343; **RL-0237**, *Almasryia for Operating & Maintaining Touristic Construction Co. L.L.C. v. State of Kuwait*, ICSID Case No. ARB/18/2, Award on the Respondent Application under Rule 41(5) of the ICSID Arbitration Rules, 1 November 2019 (Ramírez Hernández, Dévaud, Knieper), ¶¶ 34, 48.

either in the Treaty or in CIL—to argue that Peru can be held liable for failing to negotiate with Kaloti before the latter commenced arbitration.

680. *Second*, and in any event, even if Articles 10.15 and 10.16.1 and 10.16.3—invoked by Claimant as the basis for its claim—imposed on the State a binding obligation to negotiate (which it does not), this Tribunal would not have jurisdiction to adjudicate a claim of breach of such provisions. That is so because Treaty Article 10.16.1 specifies that the types of claims that can be submitted to arbitration are limited to those contained under Section A of the Treaty:

> 1. In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation:
>
> (a) the claimant, on its own behalf, **may submit to arbitration** under this Section **a claim**
>
> (i) that the respondent has breached
>
> **(A) an obligation under Section A . . . .**[1611] (Emphasis added)

681. Critically, and as a review of the relevant section of the Treaty easily reveals, Section A thereof is comprised solely of Articles 10.1 to 10.14, and thus does *not* encompass Articles 10.15 and 10.16.1. Accordingly, the Tribunal does not have jurisdiction over Claimant's claims of breach of the alleged negotiation obligation under Articles 10.15 or 10.16. Investment tribunals have consistently interpreted similar provisions as limiting the scope of States parties' consent to arbitration.[1612]

[1611] **RL-0001**, Treaty [*Re-submitted version of CL-0001, with additional pages*], Arts. 10.16(a)(i)(A), 10.16.3.

[1612] *See, e.g.*, **RL-0238**, *United Parcel Service of America, Inc. (UPS) v. Government of Canada*, Award on Jurisdiction, 22 November 2002 (Keith, Cass, Fortier), ¶¶ 60–62, 69. **RL-0239**, *David R. Aven, et al., v. Republic of Costa Rica,* ICSID Case No. UNCT/15/3, Final Award, 18 September 2018 (Siqueiros, Baker, Nikken), ¶ 407; **RL-0240**, *The Lopez-Goyne Family Trust and others v. Republic of Nicaragua*, ICSID Case No. ARB/17/44, Award, 1 March 2023 (Radicati di Brozolo, Stern, Martinez de Hoz), ¶¶ 591, 599.

(ii) Claimant's other attempts to manufacture an obligation to negotiate all fail

682. Claimant also argues (apparently in the alternative) that various principles and/or the MST Provision impose upon Peru an obligation to negotiate with Claimant. Peru rebutted these confused (and confusing) arguments in the Counter-Memorial, but Claimant simply regurgitated them in the Reply. Peru reiterates briefly herein its arguments, and respectfully refers the Tribunal to Section IV.A.5 of its Counter-Memorial for a more detailed discussion.

683. *First*, Claimant argued that there is a "duty to negotiate . . . implied by the principle of good faith."[1613] In the Counter-Memorial, Peru recalled—citing the ICJ—that the principle of good faith "is not in itself a source of obligation where none would otherwise exist."[1614] Claimant, however, appears to argue that there is a stand-alone obligation of good faith, relying for that proposition on an inaccurate and misleading description of the cases concerning *Nuclear Tests (Australia v. France, New Zealand v. France*).[1615] But contrary to Claimant's argument, the ICJ did not hold that there is any such thing as a stand-alone obligation of good faith, let alone that such alleged obligation creates a duty to negotiate. Instead, in those cases the ICJ was merely assessing whether certain unilateral declarations by a State can create binding legal obligations for such State, and held in that regard that

> [j]ust as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration.[1616]

[1613] Reply, ¶ 366.

[1614] Counter-Memorial, ¶ 587. *See also* **RL-0011**, *Case Concerning Border and Transborder Armed Actions (Nicaragua v. Honduras)*, ICJ, Judgment, 20 December 1988, ¶ 94. *See also* **RL-0013**, *Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, ICJ, Judgment, 11 June 1998, ¶ 39; **RL-0012**, *Mesa Power Group, LLC v. Government of Canada*, PCA Case No. 2012-17, Submission of the United States of America, 25 July 2014, ¶ 7.

[1615] Reply, ¶ 367, fn. 314.

[1616] **CL-0122**, *Nuclear Tests Case, Australia v. France*, International Court of Justice, Judgment of 20 December 1974, ¶ 46.

684. *Second*, Claimant appears to argue that the MST Provision of the Treaty imposed on Peru a duty to negotiate with Kaloti before the latter commenced arbitration.[1617] However, Claimant is wrong because the MST Provision states simply that "[e]ach Party shall accord to covered investments treatment in accordance with customary international law."[1618] By its terms, the Provision thus applies to the *treatment* of *covered investments*, and whether or not Peru negotiated with Claimant in advance of the arbitration does not qualify as "treatment of a covered investment."

685. Claimant retorts that the MST Provision implies a "commitment of transparency."[1619] However, as Peru demonstrated in the Counter-Memorial, there is no duty of transparency under the MST.[1620] And even if such duty did exist, it would without more serve to generate an obligation to negotiate with Claimant.

686. Claimant has not pointed to any case law that actually supports its claim that a duty of transparency somehow creates a duty to negotiate. The only case that Claimant invokes is *ConocoPhillips v. Venezuela*, which according to Claimant "made clear that the failure to negotiate compensation in good faith represented a breach of an international obligation."[1621] This is a gross mischaracterization of that award. In that case, the applicable treaty contained an expropriation provision that expressly identified negotiation of adequate compensation as a requisite element of a lawful expropriation.[1622] Thus, while the *ConocoPhillips* tribunal did assess whether the State had negotiated compensation,[1623] it hastened to clarify that "[b]eyond this function, it

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[1617] *See* Reply, ¶ 368.

[1618] **RL-0001**, Treaty [*Re-submitted version of CL-0001, with additional pages*], Art. 10.5.

[1619] Reply, ¶ 368.

[1620] *See* Counter-Memorial, ¶ 586. *See also* **RL-0006**, *Cargill* (Award), ¶ 294. *See also* **RL-0007**, *Mobil Investments Canada Inc. v. Government of Canada (II)*, ICSID Case No. ARB/15/6, Decision on Jurisdiction and Admissibility, 13 July 2018 (Greenwood, Rowley, Griffith), ¶ 168; **RL-0008**, *Vigotop Ltd. v. Hungary*, ICSID Case No. ARB/11/22, Award, 1 October 2014 (Sachs, Bishop, Heiskanen), ¶ 585; **RL-0009**, *Mamacocha* (USA Submission), ¶ 28.

[1621] Reply, ¶ 369.

[1622] **RL-0241**, *ConocoPhillips Petrozuata B.V., et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Interim Decision, 17 January 2017 (Zuleta, Bucher, Fortier) ("***ConocoPhillips* (Award)**"), ¶ 141.

[1623] **RL-0241**, *ConocoPhillips* (Award), ¶¶ 137–138.

[the requirement to negotiate] has no legal autonomy."[1624] Thus, the tribunal concluded that Venezuela's failure to negotiate in good faith the compensation to be provided to the investors "d[id] not have the effect of providing the aggrieved party with a claim for damages based on such breach."[1625] Rather, such failure merely "ha[d] the effect of rendering the expropriation . . . unlawful."[1626] It is therefore inaccurate and disingenuous for Claimant to invoke these findings—which were specific to an expropriation provision in another treaty—to argue that the MST Provision somehow encompasses a duty to negotiate. It simply does not.

687. *Third*, and finally, Claimant argued in passing—in a parenthetical—that the purported obligation to negotiate can somehow be implied from the MFN Clause.[1627] But Claimant provided absolutely no explanation or support for this proposition, and there is nothing at all in the MFN Clause that could be construed as imposing on Peru any obligation to negotiate.

688. In sum, Kaloti's varied, confusing, and frivolous attempts to create or divine an obligation to negotiate all fail. Peru was under no obligation to negotiate with Claimant before the initiation of the arbitration.

b. Although it was not obliged to do so, Peru *did* in fact engage in good faith negotiations with Claimant

689. In the Memorial, Claimant suggested that Peru failed to engage at all with Claimant before the commencement of the present arbitration.[1628] In the Counter-Memorial, Peru had disproved that claim, including by reference to evidence showing that Peru had indeed engaged in discussions with Claimant, devoting time and resources to studying the latter's claims and asking various follow-up questions. On that basis,

[1624] **RL-0241**, *ConocoPhillips* (Award), ¶ 141.
[1625] **RL-0241**, *ConocoPhillips* (Award), ¶ 142.
[1626] **RL-0241**, *ConocoPhillips* (Award), ¶ 147.
[1627] Reply, ¶ 373.
[1628] Memorial, ¶ 126.

Peru had concluded that Kaloti's claims were meritless, and communicated that position to Claimant in writing.[1629]

690. Confronted with those facts, Claimant changed tack in the Reply. It argued that discussions before a certain date "do not count," and that Peru's engagement amounted to no more than "[m]ere talking and sending dilatory correspondence."[1630] However, such accusation is misguided, as the facts show that after Peru received the First Notice of Intent on 6 May 2016, Peru took the following steps:

a. Representatives of Peru's Special Commission met with representatives of Claimant on 16 January 2017 to discuss the latter's claims;[1631]

b. On 1 February 2017, Peru sent a letter seeking follow-up information about Claimant's claims;[1632]

c. On 22 February 2017, Claimant responded to Peru's request; [1633]

d. Between February and June 2017, Peru reviewed the information provided by Claimant and gathered technical and legal information from the Peruvian entities involved in the dispute;[1634]

e. On the basis of all of the evidence and information collected, Peru concluded that Claimant's claims were meritless;[1635]

[1629] *See* Counter-Memorial, ¶¶ 589–594. *See also* **Ex. R-0031,** Letter No. 019-2017-EF/CE.36 from Special Commission (R. Ampuero) to Kaloti (▇▇▇▇▇▇), 1 February 2017; **Ex. R-0032**, Letter No. 118-2017-EF/CE-36 from Special Commission (R. Ampuero) to Kaloti (▇▇▇▇▇▇), 14 June 2017, p. 1.

[1630] Reply, ¶ 372.

[1631] Counter-Memorial, ¶¶ 312, 591; *See* **Ex. R-0031,** Letter No. 019-2017-EF/CE.36 from Special Commission (R. Ampuero) to Kaloti (▇▇▇▇▇▇), 1 February 2017, p.1.

[1632] **Ex. R-0031,** Letter No. 019-2017-EF/CE.36 from Special Commission (R. Ampuero) to Kaloti (▇▇▇▇▇▇), 1 February 2017.

[1633] **Ex. R-0030**, Letter from Kaloti (▇▇▇▇▇▇) to Special Commission, 22 February 2017.

[1634] **Ex. R-0032**, Letter No. 118-2017-EF/CE-36 from Special Commission (R. Ampuero) to Kaloti (▇▇▇▇▇▇), 14 June 2017, p. 1.

[1635] **Ex. R-0032**, Letter No. 118-2017-EF/CE-36 from Special Commission (R. Ampuero) to Kaloti (▇▇▇▇▇▇), 14 June 2017, p. 1.

f. On 14 June 2017, Peru sent a letter to Claimant stating its position, and noting that it remained available to receive further information and to engage in further consultations with Claimant in the future.[1636] Claimant did not respond to that letter.

g. On 22 June 2021, and in response to Claimants' Second Notice of Intent dated 12 April 2019, representatives of Peru's Special Commission met again with Claimant's representatives.[1637]

h. On 22 June 2021, Peru met with Kaloti once more but maintained its conclusion that Claimant's claims were baseless and that a negotiated solution would not be viable.[1638]

691. The facts and evidence thus show that Peru did in fact engage in good faith negotiations and consultations with Claimant, contrary to the latter's allegations. Peru's conduct in connection with the negotiations was entirely reasonable, and did not breach any international obligation. In the words in *Alps Finance v. Slovakia*:

> It is perfectly legitimate for a State to refrain from making concessions to an investor in order to avoid arbitration when it thinks that the investor is wrong: in such cases, there is simply nothing to negotiate from the State's viewpoint.[1639]

692. For the foregoing reasons, Claimant's claim that Peru breached an alleged obligation to negotiate must be rejected, because: (i) Peru was under no such obligation under the Treaty or CIL; and (ii) Peru in fact engaged in good faith negotiations with Claimant, so Claimant has nothing to complain about in any event.

[1636] *See, e.g.,* **Ex. R-0032**, Letter No. 118-2017-EF/CE-36 from Special Commission (R. Ampuero) to Kaloti ([redacted]), 14 June 2017, p. 2.

[1637] Counter-Memorial, ¶ 593.

[1638] Counter-Memorial, ¶¶ 316, 593.

[1639] **RL-0235**, *Alps Finance and Trade* (Award (Redacted)), ¶ 210.

B. Claimant's claim under Treaty Article 10.3 lacks merit

693. In the Memorial, Claimant had conflated a claim under Article 10.3 of the Treaty (i.e., the National Treatment Provision) with its claim under the MST Provision.[1640] In the Counter-Memorial, Peru (i) pointed out that the National Treatment Provision is a separate provision in the Treaty, which creates a legal obligation distinct from the MST Provision,[1641] and (ii) demonstrated that Claimant's passing remarks concerning an alleged breach of the National Treatment Provision did not even establish a *prima facie* case.[1642] Specifically, Peru demonstrated that Claimant had failed to establish any of the three requisite elements of a national treatment claim: (i) identifying a local comparator in "like circumstances;" (ii) demonstrating that Claimant was accorded treatment less favorable than the local comparator; and (iii) showing that such differential treatment was not objectively justified.[1643]

694. In the Reply, Claimant largely ignored Peru's rebuttal arguments in the Counter-Memorial. Instead, it inexplicably insisted on conflating the National Treatment Provision with the separate MST Provision.[1644] Further, while Claimant did not contest the legal standard identified by Peru in the Counter-Memorial with respect to the National Treatment Provision,[1645] Claimant utterly failed to satisfy that standard—both in the Memorial and the Reply. Instead, in the Reply, Claimant contented itself with simply reiterating various unsubstantiated allegations that it had already made in the Memorial. In the subsections that follow, Peru will (again) rebut those allegations, and demonstrate the reasons for which Claimant's national treatment claim is meritless and must be rejected.

[1640] Memorial, ¶ 124.

[1641] Counter-Memorial, ¶ 682.

[1642] Counter-Memorial, ¶¶ 681, 683.

[1643] *See* Counter-Memorial, ¶ 685.

[1644] *See* Reply, §. V.B.d. Claimant submitted its claim of an alleged violation of the National Treatment Provision (Article 10.3) in Section V.B of the Reply, under the heading "Peru failed to accord **fair and equitable treatment** to [Kaloti]" (emphasis added).

[1645] Reply, ¶¶ 357–362.

1. *Claimant's claim under the National Treatment Provision is based upon a false premise*

695. Claimant's national treatment claim is based on the assertion that "SUNAT only pursued asset seizures against the foreign purchasers, while none of the domestic purchasers had any of their gold seized."[1646] The claim is thus premised on the notion that Kaloti, *qua* "foreign purchaser," was actually subject to asset seizures by SUNAT. However, that factual premise is demonstrably false. As Peru demonstrated in the Counter-Memorial, adducing supporting and uncontested evidence, SUNAT did not take any action at all against Kaloti, but only *against the Suppliers* of Shipments 1 to 4.[1647]

696. The Customs Declarations for those Shipments listed the Suppliers as exporters.[1648] Accordingly, SUNAT (i) analyzed and prepared risk profiles for such Suppliers, (ii) identified red flags, and on that basis, (iii) immobilized Shipments 1 to 4.[1649] It is only the Suppliers, and the assets that they intended to export, that were the subject of the law enforcement actions taken by SUNAT. For this threshold reason, Claimant cannot claim differential treatment on the basis of seizures affecting the Suppliers—let alone differential treatment based on its condition as an alleged "foreign purchaser."

[1646] Reply, ¶ 356.

[1647] Counter-Memorial, § II.B.

[1648] Counter-Memorial, ¶ 130.

[1649] Counter-Memorial, ¶¶ 133, 138–139. *See also* **Ex. R-0141**, SUNAT Report No. 217-2014-SUNAT-3X3200, 5 March 2014 (included in [redacted] Criminal Proceedings), ¶ 14 ("The aforementioned preventive measures correspond to the risk profile prepared by the Intelligence and Tactical Operations Division of the INCFA [National Intendancy for the Prevention of Smuggling and Customs Audit (*Intendencia Nacional de Prevención del Contrabando y Fiscalización Aduanera*)]"); **Ex. R-0314**, SUNAT Report No. 303-2014-SUNAT-3X3200, 9 April 2014 [*Re-submitted version of C-0084, with Respondent's translation*], ¶ 2.2 ("The aforementioned preventive measure correspond to the risk profile prepared by the Intelligence and Tactical Operations Division of the INPCFA. [National Intendancy for the Prevention of Smuggling and Customs Audit (*Intendencia Nacional de Prevención del Contrabando y Fiscalización Aduanera*)]."); **Ex. R-0142**, SUNAT Report No. 239-2014-SUNAT-3X3200, 11 March 2014 (included in [redacted] Criminal Proceedings), ¶ 2.2 ("The aforementioned preventive measures corresponds to the risk profile developed by the Intelligence and Tactical Operations Division of the INPCFA [National Intendancy for the Prevention of Smuggling and Customs Audit (*Intendencia Nacional de Prevención del Contrabando y Fiscalización Aduanera*)]").

2. *Claimant has not identified a comparator in like circumstances*

697. In any event, even if the factual premise of the claim were not false (which it is), Claimant is required to satisfy the three elements of a claim under the National Treatment Provision. Thus, Claimant must, first, identify a local comparator that was in like circumstances to Kaloti at the time of the complained-of treatment.[1650] However, Claimant has not identified any such comparator. Instead, in the Reply, it repeated the baseless argument that "SUNAT only pursued asset seizures against the foreign purchasers while none of the domestic purchasers had any of their gold seized."[1651] Thus, according to Claimant, the appropriate comparator is "all Peruvian-national purchasers of mined and scraped gold in Peru in 2013 and 2014 for processing, assaying, and refining" (emphasis omitted).[1652] This argument fails, for at least the following two reasons.

698. *First*, a generic reference to "all Peruvian-national purchasers" of gold does not suffice to satisfy Claimant's burden of identifying a comparator "in like circumstances." As confirmed by the *Apotex v. United States* tribunal, the identification of a comparator in like circumstances "involves a highly fact-specific inquiry," which considers (inter alia) the particular economic sector and regulatory regime.[1653] Here, Claimant has not identified by name any domestic purchaser, nor has it purported to provide evidence with respect to the relevant market or regulatory regime to demonstrate that a domestic purchaser and Kaloti were in fact in like circumstances. Put simply, Claimant has failed to identify a comparator in like circumstances.

699. *Second,* even assuming that Claimant's passing reference to "all Peruvian-national purchasers" were sufficient (which it is not), such purchasers would not, in fact, have been in like circumstances to Kaloti. As Peru explained in the Counter-Memorial, investment tribunals have made clear that merely identifying an entity that operates

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[1650] *See, e.g.*, **RL-0019**, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan,* ICSID Case No. ARB/03/29, Award, 27 August 2009 (Kaufmann-Kohler, Böckstiegel, Berman), ¶ 399.

[1651] Reply, ¶ 356.

[1652] Reply, ¶ 357.

[1653] **RL-0091**, *Apotex (*Award), ¶ 8.15.

in the same economic sector is "too broad of a reference point," and that instead "[a]ll material circumstances need to be considered and weighed."[1654] Other factors must be considered, including—as noted above—whether the alleged comparator is subject to a "comparable legal regime or regulatory requirements."[1655] In this respect, the tribunal in *Apotex v. Unites States* held that

> [w]hen, as here, the only domestic comparators proposed by the Claimants could never have been subject to any similar measure, the Tribunal considers it to be impermissible to contend that such comparators are in "like circumstances" to the Claimants and their investments.[1656]

700. As noted above, SUNAT is the tax and customs authority in Peru, and as such oversees the imports and *exports* of goods into and out of Peru, and implements measures to prevent the *export* from Peru of illegally-mined gold.[1657] The purported comparators offered by Claimant, i.e, the alleged "domestic purchasers" of gold, were not exporting gold. They were therefore not subject to (i) the export regime that applied

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[1654] **RL-0255**, *Vento Motorcycles* (Award), ¶¶ 243–244. *See also* **RL-0268**, *Thomas Gosling, et al. v. Republic of Mauritius*, ICSID Case No. ARB/16/32, Award, 18 February 2020 (Sureda, Alexandrov, Stern), ¶ 254 ("NAFTA jurisprudence may be persuasive in a wider context than NAFTA cases and is not limited to the identity of economic or business sectors."); **RL-0092**, *Invesmart, B.V. v. Czech Republic*, UNCITRAL, Award, 26 June 2009 (Pryles, Thomas, Bernardini), ¶ 415 ("The Tribunal is not satisfied that Union Banka was in a situation comparable to that of any other Czech bank, let alone to all the other members of an identified class of Czech banks. The question of whether Union Banka was similarly situated to other banks requires more than an identification of single points of similarity, such as size, origin or private ownership. There must be a broad coincidence of similarities covering a range of factors."); **RL-0269**, *Renée Rose Levy de Levi v. Republic of Peru*, ICSID Case No. ARB/10/17, Award, 26 February 2014 (Oreamuno, Morales Godoy, Hanotiau), ¶ 396 ("[D]iscrimination only exists between groups or categories of persons who are in a similar situation, after having assessed, on case-by-case basis, the relevant circumstances. The banks cited by the Claimant are in the same sector (banking) and are regulated by a common entity, the SBS. Notwithstanding this common denominator, the Tribunal considers that, as the banking sector is a sensitive area for any country, there are marked differences between the various banks operating in it.").

[1655] **RL-0091**, *Apotex (*Award), ¶ 8.15. *See also* **RL-0218**, *Grand River* (Award), ¶ 166; **RL-0255**, *Vento Motorcycles* (Award), ¶¶ 255–258. **RL-0256**, *GPF GP S.à.r.l v. Republic of Poland*, SCC Case No. 2014/168, Final Award, 29 April 2020 (Kaufmann-Kohler, Williams, Sands),¶¶ 577–578.

[1656] **RL-0091**, *Apotex (*Award), ¶ 8.57; *See also* **RL-0094**, *Merrill & Ring* (Award), ¶¶ 91–93; **RL-0218**, *Grand River* (Award), ¶¶ 166–167.

[1657] Counter-Memorial, ¶¶ 107–109. S*ee also* **Ex. R-0052**, General Customs Law, Arts. 1, 10, 164.

to exporters of gold, (ii) oversight by SUNAT, or (iii) the type of asset seizures prior to exportation which were imposed on the Suppliers.

701. Claimant has thus failed to identify a comparator in like circumstances, which suffices to reject its claim under the National Treatment Provision.

3. Claimant has not established any differential treatment

702. Even if Claimant had identified a comparator in like circumstances (quod non), it has not demonstrated that Kaloti was subject to any differential treatment. In the Reply, Claimant repeats its allegation that SUNAT's immobilizations of Shipments 1 to 4 amounted to differential treatment.[1658] However, such argument fails, for the following four reasons.

703. *First*, as explained above, the claim of differential treatment is based on a false premise: Claimant argues that it was the target of immobilizations by SUNAT, but the evidence proves that what SUNAT immobilized was only the export of gold *by the Suppliers* (not by Kaloti). These Suppliers were Peruvian entities that displayed numerous red flags of illegal mining and money laundering—which had been either deliberately or negligently ignored by Kaloti.[1659] Since no Kaloti property was immobilized, by definition alleged differential treatment did not exist.

704. *Second*, Claimant's differential treatment claim is unsubstantiated. In the Reply, Claimant alleged 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)

[1658] Reply, ¶¶ 356–360.

[1659] Counter-Memorial, ¶¶ 109, 119, 129, 133, 138–139. *See also* **Ex. R-0055**, Report No. 49-2014-SUNAT/2E4000, 28 April 2014, p.1 ("As a result of the coordinated actions, **Customs has been performing gold immobilizations on the basis of a risk profile** that allows **to target control actions on those exporters** that present a higher risk of tax and customs breaches. In addition, the operative areas of Internal Taxes are in charge of carrying out control actions and **subsequent inspection of exporters** that present tax inconsistencies"(emphasis added)), pp. 2, 7–8; **Ex. R-0058**, Investigative Report No. 055-2014-SUNAT-3X2200, 8 April 2014; **Ex. R-0141**, SUNAT Report No. 217-2014-SUNAT-3X3200, 5 March 2014 (included in [redacted] Criminal Proceedings), ¶¶ 17–19; **Ex. R-0314**, SUNAT Report No. 303-2014-SUNAT-3X3200, 9 April 2014 [*Re-submitted version of C-0084, with Respondent's translation*], ¶¶ 2.15–2.22; **Ex. R-0142**, SUNAT Report No. 239-2014-SUNAT-3X3200, 11 March 2014 (included in [redacted] Criminal Proceedings), ¶¶ 2.19–2.25.

of gold."[1660] Claimant alleged that this is shown by "[n]ews articles and books," but did not even bother to identify any such news article or book. Claimant also argued that such alleged fact is proven by a Netflix documentary episode,[1661] but Claimant did not identify where in the episode the relevant alleged information is discussed, or any sourcing for such information. Vague references to secondary sources are manifestly insufficient to substantiate Claimant's sweeping allegations and claims.

705. *Third*, and in any event, Claimant's claim of differential treatment is factually inaccurate. As noted above, Claimant argued that only *foreign* purchasers of gold were subject to regulatory action. However, as Peru demonstrated in the Counter-Memorial, SUNAT has immobilized gold shipments of both *Peruvian* and foreign exporters of gold from 2013 to date.[1662] Indeed, the immobilization of Shipments 1 to 4 serves as an example: SUNAT immobilized Shipments by the Suppliers, *all of which were Peruvian entities*.[1663] Furthermore, the Prosecutor's Office,[1664] the State Attorney's Office, [1665] and the Criminal Courts[1666] have also investigated, charged and issued

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[1660] Reply, ¶ 359.

[1661] Reply, ¶ 359.

[1662] Counter-Memorial, ¶ 689. *See also* Counter-Memorial, ¶¶ 109, 689–690. *See also* **Ex. R-0055**, Report No. 49-2014-SUNAT/2E4000, 28 April 2014, pp. 2–7; **Ex. R-0056**, "*Aduanas decomisó media tonelada de oro de origen ilegal cuyo destino era EE.UU. y Europa*," ACTUALIDAD AMBIENTAL, 8 January 2014; **Ex. R-0058**, Investigative Report No. 055-2014-SUNAT-3X2200, 8 April 2014.

[1663] Counter-Memorial, ¶ 690.

[1664] Counter-Memorial,¶¶ 111–112. For a description of the Prosecutor's Office's powers *see* **CL-0002**, Official English translation of the Political Constitution of Peru, Arts. 158–59; **Ex. R-0059**, Legislative Decree No. 52, 16 March 1981, Art. 11; **Ex. R-0106**, Law No. 27379, 20 December 2000 [*Re-submitted version of CL-0004, with Respondent's translation*], Art. 2(3).

[1665] Counter-Memorial,¶ 113. For a description of the State Attorney's Office's powers *see* **CL-0002**, Official English translation of the Political Constitution of Peru, Art. 47; First Missiego Report, ¶¶ 81, 93.

[1666] Counter-Memorial,¶ 114. For description of the Criminal Courts' powers *see* First Missiego Report, ¶¶ 55.e, 93–94.

precautionary measures (including seizures) against *Peruvian* miners, transporters, storers or sellers of (illegal) gold.[1667]

706. *Fourth*, in the Reply, Claimant adds the new argument that "Peru allowed [the Suppliers of Shipments 1 to 4] to continue operating in Peru, and did not take any other gold from them, except for, conveniently, the gold sold to foreign nationals like [Kaloti]."[1668] Claimant's argument is baseless for the following reasons:

a. Claimant seems to suggests that SUNAT allowed the Suppliers to continue operating without any oversight after the immobilization of Shipments 1 to 4.[1669] However, the available evidence shows that the Suppliers did not make any further exports[1670] after the immobilization of their respective

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[1667] **Ex. R-0302,** "*Incautan más de tres kilos de oro en vía Puerto Maldonado-Cusco*," RPP NOTICIAS, 14 May 2013; **Ex. R-0303**, "*Peru fights gold fever with fire and military force*," THE WASHINGTON POST, 18 August 2014; **Ex. R-0304,** "*Incautan lingotes de oro por US$780 mil en almacén del Callao*," EL COMERCIO, 2 April 2015; **Ex. R-0305**, "*Pucusana: Incautan 3 lingotes de oro en camioneta blindada*," DIARIO COMERCIO, 28 August 2018; **Ex. R-0306**, "*Peru uncovers organized crime network laundering illegally mined gold*," MONGABAY, 23 March 2020.

[1668] Reply, ¶ 360.

[1669] Reply, ¶ 360.

[1670] *See* [redacted] Shipment 1 was immobilized on 29 November 2013. *See* **Ex. R-0341**, [redacted] Cumulative Export Activity Report, 2013–2022 (showing that [redacted] latest gold export was on November 2013); [redacted] Shipment 2 was immobilized on 10 January 2014. *See* **Ex. R-0343**, [redacted] Cumulative Export Activity Report, 2013–2022 (showing that [redacted] latest gold export was on December 2013); [redacted] Shipment 3 was immobilized on January 2014. *See* **Ex. R-0268**, [redacted] Cumulative Export Activity Report, 2013–2022 (showing that [redacted] latest export was on 10 January 2014); [redacted] Shipment 4 was immobilized on 9 January 2914. *See* **Ex. R-0342**, [redacted] Cumulative Export Activity Report, 2013–2022 (showing that [redacted] latest gold export was on December 2013).

Shipments.[1671] Had this been the case, any exports by the Suppliers would have been subject to the same oversight regime as Shipments 1 to 4.[1672]

b. Claimant seems to further suggest that the Suppliers also sold their gold domestically and that these sales were treated more favorably than the gold that the Suppliers sold abroad. In this line, Claimant affirms that Peru "did not take any other gold from [the Suppliers], except for, conveniently, the gold sold to foreign nationals like KML."[1673] However, Claimant has not provided any evidence that the Suppliers sold gold to domestic purchasers and that these sales were treated more favorably by Peru. In any case, Claimant's argument is flawed because it purposedly ignores that, as mentioned above, SUNAT only oversees the *export* of gold.[1674] Therefore, SUNAT only exercised its oversight powers (including immobilizations) over shipments that the Suppliers intended to export outside of Peru such as Shipments 1 to 4.[1675]

[1671] **Ex. R-0092**, SUNAT Immobilization Order No. 316-0300-2013-001479, 29 November 2013 (included in [redacted] Criminal Proceedings) [*Re-submitted version of C-0040, with Respondent's translation*]; **Ex. R-0093**, SUNAT Immobilization Order No. 316-0300-2014-000110, 10 January 2014 (included in [redacted] Criminal Proceedings) [*Re-submitted legible version of C-0040*]; **Ex. C-0040**, [SUNAT Immobilization orders], p. 12 (including Immobilization Order no. 316-0300-2014-000002 concerning [redacted] Shipment); **Ex. R-0096**, SUNAT Immobilization Order No. 316-0300-2014-000020, 9 January 2014 (included in [redacted] Criminal Proceedings) [*Re-submitted legible version of C-0040*]; **Ex. R-0097**, SUNAT Immobilization Order No. 316-0300-2014-000021, 9 January 2014 (included in [redacted] Criminal Proceedings) [*Re-submitted legible version of C-0040*]; **Ex. R-0098**, SUNAT Immobilization No. 316-0300-2014-000022, 9 January 2014 (included in [redacted] Criminal Proceedings) [*Re-submitted legible version of C-0040*].

[1672] Counter-Memorial, ¶¶ 107–108. *See also* **Ex. R-0052**, General Customs Laws, Art. 165.b ("The Customs Administration, in the exercise of its customs authority, may order the execution of control actions, before and during the release of the goods, after their release or before their exit from the customs territory, such as . . . [o]rder the preventive measures of immobilization and seizure of goods"); **Ex. R-0049**, Illegal Mining Controls and Inspection Decree, Art. 5 ("SUNAT shall proceed to seize the machinery, equipment and mining products that constitute the object of clandestine trade crimes, as well as the means of transport used for their transfer, when in the exercise of its administrative actions it detects the alleged commission of the crimes"), Art. 9 ("SUNAT may apply special oversight measures over the commercialization of mining products within the scope of its competence.").

[1673] Reply, ¶ 360.

[1674] Counter-Memorial, ¶¶ 107–109. S*ee also* **Ex. R-0052**, General Customs Law, Arts. 1, 10, 164.

[1675] Counter-Memorial, ¶¶ 107–109, 119. *See also* **Ex. R-0052**, General Customs Laws, Art. 165.b; **Ex. R-0049**, Illegal Mining Controls and Inspection Decree, Arts. 5, 9.

707. In sum, Claimant has failed to demonstrate the existence of any differential treatment between Kaloti and the "domestic purchasers." Claimant's claim under the National Treatment Provision should be rejected on this basis.

4. In any event, Claimant would not have been able to demonstrate that any alleged differential treatment lacked reasonable justification

708. Even if Kaloti and all "domestic purchasers" of gold had been in like circumstances (quod non), and even if the latter had in fact been treated more favorably (quod non), Claimant would still be unable to show that any alleged differential treatment lacked "reasonable justification."[1676] Peru explained in the Counter-Memorial that the national treatment obligation does not prohibit a State from adopting measures that result in a difference in treatment with respect to different investors, provided that such different treatment can be objectively justified.[1677] Claimant did not dispute this standard, but sweepingly (and baselessly) asserted that "SUNAT only pursued asset seizures against the foreign purchasers"[1678] and that "[i]n principle, there is no articulable reason for this difference in treatment."[1679]

709. That assertion is false: as already explained in some detail, SUNAT had clear and justified reasons for its immobilizations of Shipments 1 to 4. Specifically, SUNAT was authorized by the General Customs Law and the Illegal Mining Controls and Inspection Decree to apply special oversight measures (such as immobilizations) over mining products being exported from Peru.[1680] Consistent with that authority,

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[1676] *See, e.g.*, **RL-0018**, *Champion Trading Co. and Ameritrade International, Inc. v. Arab Republic of Egypt*, ICSID Case No. ARB/02/9, Award, 27 October 2006 (Briner, Fortier, Aynès), ¶¶ 133–134.

[1677] *See* **RL-0018**, *Champion Trading Co. and Ameritrade International, Inc. v. Arab Republic of Egypt*, ICSID Case No. ARB/02/9, Award, 27 October 2006 (Briner, Fortier, Aynès), ¶¶ 130, 133; **CL-0056**, *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, ¶ 368 .

[1678] Reply, ¶ 356.

[1679] Reply, ¶ 356.

[1680] Counter-Memorial, ¶¶ 107–108. *See also* **Ex. R-0052**, General Customs Laws, Art. 165.b ("The Customs Administration, in the exercise of its customs authority, may order the execution of control actions, before and during the release of the goods, after their release or before their exit from the

SUNAT identified indicators of money laundering and illegal mining by the Suppliers,[1681] and thus immobilized Shipments 1 to 4 in accordance with Peruvian law.[1682] With respect to Shipment 5, Peru has repeatedly explained that such shipment was seized not by SUNAT but rather through a Civil Attachment obtained by [redacted] against Kaloti, due to the latter's failure to pay for Shipment 5.[1683]

710. Importantly, Claimant does not and cannot dispute that SUNAT was authorized to immobilize Shipments 1 to 4.[1684] In fact, Claimant's own expert, Mr. Caro, conceded that the Preliminary Investigations, which were based on the irregularities identified by SUNAT,[1685] and the subsequent Criminal Proceedings were justified and initiated in accordance with Peruvian law.[1686]

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customs territory, such as . . . [o]rder the preventive measures of immobilization and seizure of goods . . . ."); **Ex. R-0049**, Illegal Mining Controls and Inspection Decree, Art. 5 ("SUNAT shall proceed to seize the machinery, equipment and mining products that constitute the object of clandestine trade crimes, as well as the means of transport used for their transfer, when in the exercise of its administrative actions it detects the alleged commission of the crimes…"), Art. 9 ("SUNAT may apply special oversight measures over the commercialization of mining products within the scope of its competence.").

[1681] Counter-Memorial, ¶¶ 109, 119, 129, 133, 138–139, 691–692. *See also* **Ex. R-0058**, Investigative Report No. 055-2014-SUNAT-3X2200, 8 April 2014; **Ex. R-0141**, SUNAT Report No. 217-2014-SUNAT-3X3200, 5 March 2014 (included in [redacted] Criminal Proceedings), ¶¶ 17–19; **Ex. R-0314**, SUNAT Report No. 303-2014-SUNAT-3X3200, 9 April 2014 [*Re-submitted version of C-0084, with Respondent's translation*], ¶¶ 2.15–2.22; **Ex. R-0142**, SUNAT Report No. 239-2014-SUNAT-3X3200, 11 March 2014 (included in [redacted] Criminal Proceedings), ¶¶ 2.19–2.25.

[1682] Counter-Memorial, ¶¶ 133–145, 691–692. *See also* **Ex. R-0052**, General Customs Law, Art. 165; **Ex. R-0049**, Illegal Mining Controls and Inspection Decree, Arts. 5, 9; **Ex. R-0079**, Resolution of the National Deputy Superintendency of Customs No. 208-2013-SUNAT-300000, 27 August 2013, §VII.(A2).3; First Missiego Report, ¶¶ 19–22.

[1683] Counter-Memorial,¶¶ 694, 695. *See also* **Ex. R-0215**, [redacted] Civil Lawsuit against Kaloti, 12 May 2014.

[1684] Reply, ¶ 148 ("Contrary to what Peru has tried to convey to the Tribunal in this arbitration, here KML has not claimed that: . . . 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.").

[1685] *See supra* Sections II.B–C.

[1686] Second [redacted] Report, p. 7.

711. In sum, in the Reply, Claimant maintains—apparently and inexplicably as part of its claim under the MST Provision[1687]—its claim of breach of the National Treatment Provision. Such claim is based on a false premise, and in any event is unsubstantiated and unmeritorious. Claimant thus has failed to satisfy any of the requisite legal elements of a claim under the National Treatment Provision. For these reasons, such claim must be rejected.

C. Claimant's creeping expropriation claims lack merit

712. In the Memorial, Claimant argued that "Peru's actions and omissions resulted in two distinct—but related—indirect expropriations . . . . First, Peru's seizure of the five gold shipments . . . . Second, the gold seizures triggered a downward spiral in KML's Peruvian business operations . . . from which the company never recovered. As a result, Peru's measures constitute an indirect expropriation of KML's going concern business enterprise" (emphasis omitted).[1688] In the Reply, Claimant repeated that argument verbatim.[1689]

713. Claimant recognizes that none of the alleged actions or omissions that it attributes to Peru, taken individually, constitute an expropriation; nevertheless, it argued that such alleged actions and omissions, "taken together," form creeping expropriations.[1690]

714. In the Counter-Memorial, Peru demonstrated—by reference to the Treaty and relevant legal authorities—the requisite elements of a creeping expropriation, namely:

[1687] *See* Reply, § V.B.d.

[1688] Memorial, ¶ 130.

[1689] Reply, ¶ 380.

[1690] Memorial, ¶ 137. *See also* Reply, ¶¶ 108 ("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"), 149, 203.

a. Pursuant to the Expropriation Provision,[1691] Claimant must identify the "covered investment" that it alleges was expropriated;[1692]

b. Pursuant to the ILC Articles on State Responsibility, Claimant must show that the Challenged Measures combined to form a "composite act;"[1693]

c. Pursuant to Annex 10-B of the Treaty, Claimant must show that the alleged government action "interfere[d] with distinct, reasonable investment-backed expectations;"[1694]

d. Also pursuant to Annex 10-B of the Treaty, Claimant must prove the "economic impact" of the government action[1695]—namely, that such action caused the permanent and complete or nearly complete deprivation of the value of the covered investment;[1696]

e. Further pursuant to Annex 10-B of the Treaty, Claimant must prove that "the character of the government action" was expropriatory.[1697]

715. Peru also demonstrated that Claimant did not satisfy any of these legal requirements, and therefore Claimant failed to establish a creeping expropriation.[1698]

716. In the Reply, Claimant did not appear to dispute any of the foregoing legal requirements, or the fact that it bears the burden of proof in establishing such

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[1691] **RL-0001**, Treaty [*Re-submitted version of CL-0001, with additional pages*], Art. 10.7 ("No Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization ('expropriation')," except if certain specified requirements are met).

[1692] *See* **RL-0001**, Treaty [*Re-submitted version of CL-0001, with additional pages*], Art. 10.7; Counter-Memorial, ¶ 607.

[1693] *See* **CL-0040**, ILC Articles on Responsibility of States for Internationally Wrongful Acts ("**ILC Articles**"), Art. 15; Counter-Memorial, ¶ 600.

[1694] *See* **RL-0001**, Treaty [*Re-submitted version of CL-0001, with additional pages*], Annex 10–B, ¶ 3(a)(ii); Counter-Memorial, ¶ 607.

[1695] *See* **RL-0001**, Treaty [*Re-submitted version of CL-0001, with additional pages*], Annex 10–B, ¶ 3(a)(i); Counter-Memorial, ¶ 607.

[1696] *See* Counter-Memorial, ¶ 644.

[1697] *See* **RL-0001**, Treaty [*Re-submitted version of CL-0001, with additional pages*], Annex 10–B, ¶ 3(a)(iii); Counter-Memorial, ¶ 607.

[1698] *See* Counter-Memorial, §§ IV.B.2–IV.B.6.

requirements.[1699] Indeed, Claimant largely ignored many of Peru's arguments on the subject. Instead, Claimant repeated—word for word[1700]—its summary allegations from the Memorial.

717. Notwithstanding the fact that Claimant's claim of creeping expropriation can be dismissed on the basis of the arguments and evidence contained in the Counter-Memorial, in the subsections that follow Peru will demonstrate that: (i) Claimant's expropriation claims are inadmissible (**subsection 1**); (ii) Claimant is unable to show that its expropriation claims concern a "covered investment" (**subsection 2**); (iii) Claimant has failed to establish the existence of a composite act under international law (**subsection 3**); (iv) Claimant has not shown any interference by Peru with "distinct, reasonable investment-backed expectations" (**subsection 4**); (v) Claimant has not shown the requisite economic impact on the relevant investment (**subsection 5**); and (vi) Claimant has not shown that the character of the measures was expropriatory (**subsection 6**).

1. Claimant's expropriation claims are inadmissible

718. In addition to being unmeritorious (as discussed further below), Claimant's expropriation claims are inadmissible. As explained in the Counter-Memorial, Annex 10-G of the Treaty ("**Fork-in-the-Road Provision**") establishes that

> [a]n investor of the United States may not submit to arbitration . . . a claim that a Party has breached an obligation under Section A . . . if the investor . . . has alleged that breach of an obligation under Section A in proceedings before a court or administrative tribunal of that Party.[1701]

719. Pursuant to this provision, Claimant is barred from advancing in this arbitration any claim of breach that Claimant had already submitted before a court or administrative

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[1699] *See, e.g.*, Reply, ¶¶ 261, 262, 387.

[1700] *See* Memorial, ¶¶ 130–143, 145–155; Reply, ¶¶ 380–388, 391–399, 401, 404–310. *Compare* Memorial, ¶¶ 130–155 *with* Reply, ¶¶ 380–410. In fact, the expropriation section of Claimant's Reply contains only five paragraphs that were not copied and pasted from the Memorial. *See* Reply, ¶¶ 389–400, 402–403.

[1701] **RL-0001**, Treaty [*Re-submitted version of CL-0001, with additional pages*], Annex 10–G.

tribunal in Peru.[1702] However, as Peru demonstrated in the Counter-Memorial, Claimant in fact already submitted its expropriation claim to a Peruvian court.[1703] Specifically, on 11 March 2014, Kaloti alleged in the Amparo Request submitted to the Peruvian Constitutional Court that the SUNAT Immobilizations of Shipments 2 and 3 had "constitute[d] a manifest violation [of] Article 10.7 [of the Treaty]."[1704] But Claimant is now alleging in the present arbitration that "the gold seizures"—including those of Shipments 2 and 3—violated Article 10.7 of the Treaty (i.e., the Expropriation Provision).[1705] Having already alleged such claim of breach before a Peruvian court, Claimant is barred from submitting that claim to this Tribunal.

720. In the Reply, Claimant did not appear to deny that the Fork-in-the-Road Provision precludes it from pursuing in international arbitration claims that it had already submitted before Peruvian courts. However, Claimant argued that the Amparo Request "did not, and could not, trigger the fork-in-the road provision of [the] Treaty" because, according to Claimant, it "did not request or claim payment of damages" before the Constitutional Court.[1706] This argument fails because the specific type of relief sought by Kaloti before the Constitutional Court is irrelevant. By its terms, the Fork-in-the-Road Provision requires only that the claimant have "alleged that [same] breach of an obligation under Section A"[1707] in a domestic proceeding. The clause thus does not impose any requirement that the claimant have sought compensation—or, for that matter, any other particular type of relief—in the domestic proceeding. Here, Claimant clearly alleged the same expropriation breach when it asserted in its Amparo Request to the Constitutional Court that Peru had committed "a manifest violation

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[1702] *See* **RL-0220**, *The Renco Group, Inc. v. Republic of Peru [I]*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, 15 July 2016 (Moser, Fortier, Landau), ¶ 92 ("Annex 10-G of the Treaty . . . contains a 'fork in the road' provision for Section A obligations (for example, the prohibition against expropriation without compensation in Article 10.7 . . . ").

[1703] Counter-Memorial, ¶ 515.

[1704] *See* Counter-Memorial, ¶ 425; **Ex. R-0230**, Amparo Request, Constitutional Court of Lima, 11 March 2014, pp. 2–3.

[1705] Memorial, ¶ 130.

[1706] Reply, ¶ 260.

[1707] **RL-0001**, Treaty [*Re-submitted version of CL-0001, with additional pages*], Annex 10–G.

[of] Article 10.7 [of the Treaty]."[1708] The Fork-in-the-Road Provision thus bars Claimant's indirect expropriation claims.[1709]

2. Claimant's expropriation claims do not concern any "covered investment" that Claimant legally owned under Peruvian law

721. Even if Claimant's expropriation claims were admissible (quod non), and even if they indeed related to a composite act (quod non), Claimant bears the burden of proving that such claims satisfy the requisite elements for a finding of expropriation under the Treaty and general international law.[1710] In the sections that follow, Peru will demonstrate that Claimant has not satisfied any of the relevant legal requirements.

722. The first such requirement is that each of Claimant's two creeping expropriation claims must relate to a "covered investment."[1711] The Expropriation Provision of the Treaty expressly and directly imposes this requirement: "No Party may expropriate or nationalize a **covered investment**" (emphasis added).[1712] Furthermore, the Expropriation Provision also provides that it "shall be interpreted in accordance with Annex 10-B" of the Treaty.[1713] Paragraph 1 of Annex 10-B specifies that "a series of actions by a Party cannot constitute an expropriation unless it interferes with a **tangible or intangible property interest in an investment**" (emphasis added).[1714]

[1708] *See* Counter-Memorial, ¶ 425; **Ex. R-0230**, Amparo Request, Constitutional Court of Lima, 11 March 2014, pp. 2–3.

[1709] Claimant adds—in a single sentence in a footnote—that "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." Claimant's Reply, fn. 232. But Claimant provides no explanation for this argument, which is groundless given that Article 10.18.3 identifies the specific the "Conditions and Limitations on Consent of Each Party," but nowhere does it exempt claimants from application of the Fork-in-the-Road Provision.

[1710] *See* Counter-Memorial, ¶ 607. *See also* **RL-0008**, *Vigotop Ltd. v. Hungary*, ICSID Case No. ARB/11/22, Award, 1 October 2014 (Sachs, Bishop, Heiskanen), ¶ 544; **RL-0109**, *Vincent J. Ryan, et al., v. Republic of Poland*, ICSID Case No. ARB(AF)/11/3, Award, 24 November 2015 (Ali Khan, Orrego Vicuña, von Wobeser), ¶ 491; **RL-0110**, *GEA Group Aktiengesellschaft v. Ukraine*, ICSID Case No. ARB/08/16, Award, 31 March 2011 (van den Berg, Landau, Stern), ¶ 226.

[1711] *See* Counter-Memorial, ¶¶ 610-611.

[1712] **RL-0001**, Treaty [*Re-submitted version of CL-0001, with additional pages*], Art. 10.7.

[1713] **RL-0001**, Treaty [*Re-submitted version of CL-0001, with additional pages*], fn. 4.

[1714] **RL-0001**, Treaty [*Re-submitted version of CL-0001, with additional pages*], Annex 10-B.

However, Claimant has failed to demonstrate that either of its two creeping claims satisfy either of the requirements above—a "covered investment" and a "property interest" in such investment—, as explained below.

723. Claimant's *first* expropriation claim concerns the alleged expropriation by Peru of the Shipments of Gold. However, as explained in the Counter-Memorial and above, Claimant has remained unable to establish that the Gold constituted a "covered investment" under the Treaty.[1715] In particular, Claimant has failed to demonstrate that it acquired ownership and/or legal title over the Gold. As explained in **Section II.A.1** above, to qualify as a bona fide purchaser under Peruvian law, Claimant must prove that it acquired ownership over the Gold and that it complied with its due diligence obligations.[1716] However, Claimant has failed to do so.[1717] In fact, Claimant had the opportunity, and was required, to submit with the Memorial, or at the latest, with its Reply, documentary evidence proving its ownership of the relevant gold. However, it failed to do so.[1718] Moreover, during document production Peru had requested Kaloti's sale and purchase agreements with the Suppliers, but Claimant failed to produce any purchase agreements for the Gold contained in the Five Shipments.[1719] The reason for the foregoing seems clear: it is because no such evidence exists.

724. Furthermore, Claimant also failed to comply with its due diligence obligations under Peruvian law.[1720]

725. Having failed to prove that it owned the relevant investment or that it complied with its due diligence requirements under Peruvian law, Claimant has not carried its

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[1715] *See supra* Section III.A; Counter-Memorial, § III.A.

[1716] *See supra* Section II.A.1.

[1717] *See supra* Section II.A.2–3.

[1718] As explained in Section II.A.2 above, the documents submitted by Claimant with the Reply (namely, Trading Terms allegedly executed with the Suppliers) do not demonstrate that Claimant acquired ownership over the Gold and, to the contrary, suggest that Claimant was merely acting as a broker.

[1719] *See supra* Section II.A.2.

[1720] *See supra* Section II.A.3.

burden of demonstrating the existence of a "covered investment." The foregoing is fatal to Claimant's first creeping expropriation claim (and indeed all of its other claims as well).

726. In any event, as explained in detail in **Section II.A.2** above, the evidence on the record affirmatively demonstrates that Kaloti never acquired ownership over the Gold. For example, Claimant has itself admitted that Kaloti made no payment whatsoever to acquire Shipments 3 and 5.[1721] Indeed, it was precisely for that reason that a Peruvian court concluded that Kaloti had *not* acquired ownership of Shipment 5.[1722]

727. In sum, Claimant's *first* expropriation claim does not concern a covered investment, and therefore must be dismissed.

728. Claimant's *second* expropriation claim consists of an allegation that Peru committed "an indirect creeping expropriation of the entirety of KML's global business operations."[1723] However, as Peru explained in the Counter-Memorial and in **Section III.A** above,[1724] such purported "global business operations" do not qualify as a "covered investment" under the Treaty because they do not constitute an investment located *in the territory* of Peru (as required by Treaty Article 1.3 and Article 25 of the ICSID Convention).[1725] However, in the section of its Reply devoted to this expropriation claim, Claimant altogether ignored the arguments that Peru had made in the Counter-Memorial. That means that Claimant has made *zero* effort to show that its second expropriation claim concerned a "covered investment."[1726]

729. For the foregoing reasons, it must be concluded that Claimant's *second* expropriation claim does not concern any "covered investment" as required by the Expropriation Provision of the Treaty, and therefore that claim, too, should be dismissed.

[1721] Reply, ¶ 31.

[1722] **Ex. R-0212**, Resolution No. 08, Lima Court of Appeal, Third Civil Chamber, 14 June 2022, pp. 5, 13–15; **Ex. R-0238**, Resolution No. 46, Judgment, 23 September 2019.

[1723] Reply, ¶ 394.

[1724] Counter-Memorial, § III.A.

[1725] *See supra* Section III.A.2.

[1726] Reply, ¶¶ 394–410.

3. *Kaloti has failed to establish the existence of a "composite act" under international law*

730. Peru explained in the Counter-Memorial[1727]—and Claimant does not contest—that in order to substantiate a claim of "creeping" expropriation, Claimant must demonstrate that the Challenged Measures constitute a "composite act" within the meaning ascribed to that term under international law. As also observed in the Counter-Memorial, and in **Sections III.B.3 and IV.A.2** above, establishing the existence of a composite act requires *inter alia* demonstrating that the alleged acts or omissions are "sufficiently numerous and inter-connected to amount not merely to isolated incidents or exceptions but to a pattern or system."[1728] Such a showing is necessary, as stressed by the late Professor James Crawford, because a composite act is "more than a simple series of repeated actions but, rather, a legal entity the whole of which represents more than the sum of its parts."[1729] Here, however, Claimant has failed to establish to meet these criteria for a composite act.

731. To the contrary, Claimant has not even clearly or consistently identified the Challenged Measures upon which its creeping expropriation claims are based. In the Memorial, Claimant had presented a list of 16 alleged acts and omissions that it claimed had configured a creeping expropriation.[1730] In response, in the Counter-Memorial Peru had addressed such list of 16 alleged acts and omissions, observing that Claimant had failed to allege or substantiate the existence of an underlying

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[1727] Counter-Memorial, ¶¶ 477, 600.

[1728] **RL-0022**, ILC Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries, 2001, Art. 15, Commentary 5 (*quoting Ireland v. United Kingdom*, ECHR, p. 64, ¶ 159). *See also* **RL-0216**, *EDF (Services) Ltd. v. Romania*, ICSID Case No. ARB/05/13, Award, 08 October 2009 (Bernardini, Rovine, Derains), ¶ 308; **RL-0057**, *RosInvestCo UK Ltd. v. Russian Federation*, SCC Case No. V079/2005, Final Award, 12 September 2010 (Böckstiegel, Steyn, Berman), ¶ 621; **RL-0266**, *LSF-KEB Holdings* (Award), ¶ 354; **CL-0125**, *Teinver S.A., Transportes de Cercanías S A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic*, ICSID Case No. ARB/09/1, Award, 21 July 2017, ¶ 949.

[1729] Counter-Memorial, ¶ 401. *See also* **RL-0150**, James Crawford, STATE RESPONSIBILITY: THE GENERAL PART (2014), p. 266.

[1730] Memorial, ¶ 136.

system or pattern that could transform the various discrete acts and omissions into a composite act or, in the words of Professor Crawford, "a legal entity."[1731]

732. In the Reply, Claimant appeared to change the basis of its argument, as it presented a revised list of 14 items.[1732] Claimant provided no explanation whatsoever for such change, nor did it even attempt to identify a system or pattern supposedly connecting the relevant set of alleged acts and omissions.[1733]

733. The reality is that there is no such underlying system or pattern. To the contrary, the acts or omissions by Peru invoked by Claimant are disjointed and unrelated ones that:

a. were allegedly undertaken by a myriad of State actors (e.g., SUNAT, the Prosecutor's Office, the Office of the President of Peru, the Ministry of Economy and Finance, the Special Commission, the Criminal Courts, such as the *Cuarta Sala Penal Reos Libre* and the Sixth Criminal Court of Callao);[1734]

b. took place over a time period of more than five years (i.e., from November 2013 to April 2019)[1735]—spanning three separate presidential administrations in Peru;[1736] and

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[1731] *See* Counter-Memorial, ¶ 600.

[1732] *Compare* Reply, ¶ 385 *with* Memorial, ¶ 136. Claimant appears to have withdrawn its complaints in respect of certain alleged conduct (e.g., that the Peruvian authorities never "interviewed or questioned" Mr. [redacted] and to have added new complaints (e.g., that Peru "never responded . . . to the multiple requests for return of the gold effectively delivered to Peru by [Kaloti]").

[1733] *See* Reply, ¶ 386. Peru's arguments below, including its reference to the Challenged Measures, are without prejudice to the fact that Claimant does not even identify the specific measures with specificity.

[1734] *See* Reply, ¶ 385.

[1735] Reply, ¶ 365.

[1736] Administration of President Humala until July 2016; administration of President Kuczynski until March 2018; and administration of President Vizcarra until November 2020. In this respect, for example, between November 2013 and April 2019, no less than four different National Superintendents led SUNAT. **Ex. R-0328**, Supreme Resolution No. 054-2011-EF, SUNAT, 13 August 2011; **Ex. R-0329**, Supreme Resolution No. 039-2015-EF, SUNAT, 9 August 2015; **Ex. R-0330**, Supreme Resolution No. 028-2016-EF, SUNAT, 15 September 2016; **Ex. R-0331**, Supreme Resolution No. 032-2018-EF, SUNAT, 27 December 2018.

c. in some instances, are not even attributable to Peru—for example, one entry on the list reads: "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)."[1737] A warning by Kaloti is not an act attributable to Peru.

734. Claimant's failure to discharge its burden of proving the existence of a composite act is dispositive, and its creeping expropriation claims can be dismissed on that basis alone.

4. Claimant has failed to show that Peru's alleged conduct interfered with any "distinct, reasonable investment-backed expectations"

735. Even if Claimant had established the existence of a covered investment and a composite act—which it has not—, Claimant would still be required to satisfy the other requisite elements of an expropriation. Pursuant to Annex 10-B of the Treaty, general principles of public international law, and applicable case law, Claimant must therefore prove that (i) the acts and omissions attributable to Peru interfered with "distinct, reasonable investment-backed expectations," (ii) such conduct caused the permanent deprivation of the total or near total value of Claimant's investment, and (iii) the character of the State's conduct was expropriatory.[1738] In the subsections that follow, Peru will demonstrate that Claimant has failed to satisfy these requisite elements for each of its expropriation claims.

a. <u>The Treaty requires Claimant to show that its distinct, reasonable investment-backed expectations were reasonable</u>

736. Annex 10-B of the Treaty requires the Tribunal to assess "the extent to which the government action interferes with distinct, reasonable investment-backed

[1737] Reply, ¶ 385.

[1738] **RL-0001**, Treaty [*Re-submitted version of CL-0001, with additional pages*], Annex 10-B, Art. 3(a)(ii).

expectations."[1739] As Peru demonstrated in the Counter-Memorial, Claimant must accordingly identify expectations that were:

a. unequivocal—i.e., arising from obligations, commitments or declarations by the State to the investor, which do not leave room for doubt or error;[1740]

b. reasonable, and not based on the investor's subjective expectations;[1741]

c. "investment-backed"—i.e., the expectation must have served as a basis for the investment;[1742] and

d. frustrated by conduct attributable to the State.[1743]

737. In the Reply, Claimant appeared to contest only one of the foregoing requirements, while accepting the rest. Specifically, Claimant argued that it "did not need to have an individualized representation or warranty from the government of Peru" as the basis for its reasonable expectations.[1744] Claimant's argument fails for two reasons. *First*, Claimant's argument is bereft of supporting legal authorities; by contrast, the applicable case law supports Peru's arguments. For example, as Peru explained in the Counter-Memorial, the *Ríos v. Chile* tribunal interpreted an identically-worded treaty provision,[1745] and concluded that an expectation is "distinct" (*inequívoca*, in Spanish) when it is unambiguous or unmistakable.[1746] The *Ríos* tribunal explained that "distinct

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[1739] **RL-0001**, Treaty [*Re-submitted version of CL-0001, with additional pages*], Annex 10-B, Art. 3(a)(ii).

[1740] Counter-Memorial, ¶ 628. *See also* **RL-0108**, *Carlos Ríos y Francisco Ríos v. Republic of Chile*, ICSID Case No. ARB/17/16, Award, 11 January 2021 (Kaufmann-Kohler, Garibaldi, Stern) ("***Ríos* (Award)**"), ¶ 254.

[1741] Counter-Memorial, ¶¶ 629–30. *See* **RL-0108**, *Ríos* (Award), ¶ 255; **RL-0119**, OECD, "'*Indirect Expropriation' and the 'Right to Regulate' in International Investment Law*," OECD WORKING PAPERS ON INTERNATIONAL INVESTMENT (2004), p. 19.

[1742] Counter-Memorial, ¶ 631. *See* **RL-0108**, *Ríos* (Award), ¶ 256; **RL-0120**, *Methanex* (Final Award), Part IV, Chapter D, ¶ 7.

[1743] **RL-0001**, Treaty [*Re-submitted version of CL-0001, with additional pages*], Annex 10-B, Art. 3(a)(ii). As Peru discusses in the following subsection, Claimant must also address the "character" of the government action and demonstrate that such action was expropriatory. *See* **RL-0001**, Treaty [*Re-submitted version of CL-0001, with additional pages*], Art. 3(a)(iii).

[1744] Reply, ¶¶ 389–390.

[1745] *See* Counter-Memorial, ¶ 628, fn. 1214.

[1746] *See* **RL-0108**, *Ríos* (Award), ¶ 254.

expectations" must result from clear and unmistakable commitments or statements by the host State.[1747] Claimant did not even address that legal authority in relation to its expropriation claim.

738. Furthermore, investment tribunals applying the more general concept of legitimate expectations (without treaty language requiring that such expectations be "distinct") have confirmed that for expectations to be legitimate, they must arise from specific commitments by the host State.[1748]

739. *Second*, Claimant's argument that no specific representations are necessary is not even supported by the lone case on which Claimant relied: *Electrabel v. Hungary*.[1749] Claimant reproduced a single paragraph (i.e., paragraph 179) of the *Electrabel* tribunal's award, without any context. That paragraph is inapposite and offers no guidance in respect of the issue at hand because (i) it interpreted the standard for "arbitrariness" under an autonomous FET obligation, which is wholly unrelated to the issue of relevant expectations in the context of an expropriation claim; and (ii) it offers no support for the proposition that a non-specific assurance by the State is protected or even relevant in the context of an expropriation analysis.[1750]

740. Claimant's attempt to lower the applicable standard for its expropriation claim thus fails.

b. Claimant has not identified any distinct, reasonable investment-backed expectations

741. In the Memorial, Claimant's only argument concerning its *first* expropriation claim, regarding the Five Shipments, was that Kaloti had the "distinct, reasonable

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[1747] **RL-0108**, *Ríos* (Award), ¶ 254.

[1748] *See, e.g.*, **RL-0120**, *Methanex* (Final Award), Part IV, Chapter D, ¶ 7; **RL-0271**, *Oxus Gold v. Republic of Uzbekistan*, UNCITRAL, Final Award, 17 December 2015 (Tercier, Lalonde, Stern), ¶ 744; **RL-0272**, *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Final Award, 8 June 2009 (Young, Hubbard, Caron), ¶ 620.

[1749] Reply, ¶ 390.

[1750] **CL-0126**, *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Award, 25 November 2015, ¶ 179.

investment-backed expectation" that it "would encounter no problems with buying, and later selling the gold," because it had previously undertaken "hundreds of . . . transactions with the same suppliers" and the Suppliers were allegedly "previously vetted by the State."[1751] In the Counter-Memorial, Peru disproved this argument, including by showing that:

a. Claimant is unable to point to any representation or assurance from the State that Kaloti would be able to buy and sell gold from suppliers (including the four Suppliers, as defined above) engaged in money laundering and/or illegal mining;[1752]

b. to the contrary, such expectation would be *unreasonable* because Peru's regulatory framework authorizes the immobilization and seizure of gold based upon legitimate concerns of money laundering and/or illegal mining;[1753]

c. Claimant made no effort to show that any such expectations served as a basis for its alleged investment;[1754] and

d. it is false to suggest that the Suppliers were "vetted" by the State—they were not.[1755]

742. Claimant made no argument with respect to any distinct, reasonable investment-backed expectations to substantiate its *second* expropriation claim, alleging the creeping expropriation of Kaloti's business enterprise.

743. The Reply is silent in respect of each of the rebuttal arguments listed above and addressed in detail in the Counter-Memorial. Instead, Claimant simply regurgitated its previous submissions.[1756] Peru therefore relies upon its submissions in the Counter-

[1751] Memorial, ¶ 139.
[1752] *See* Counter-Memorial, ¶¶ 633–634.
[1753] *See* Counter-Memorial, ¶¶ 633–634.
[1754] *See* Counter-Memorial, ¶ 637.
[1755] *See* Counter-Memorial, ¶ 637.
[1756] Reply, ¶ 391.

Memorial, which disproved Claimant's claim of allegedly (but inexistent) distinct, reasonable investment-backed expectations.

744. Claimant did add a new argument, namely: that Kaloti expected that investigations of Kaloti or its property would be conducted "with transparency" and within a "reasonable time period," and that it "would be able to appeal or challenge, at appropriate opportunities, any decision potentially adverse to KML in Peru."[1757] These vague claims are no more than a repackaged version of Claimant's denial of justice claim, which Peru rebutted in the Counter-Memorial[1758] and in **Section IV.A.3** above.

745. In any event, such repackaged arguments do not establish any "distinct, reasonable investment-backed expectations," for the following reasons:

a. Claimant remains unable to identify any assurance or commitment by Peru upon which it relied, and therefore has not established any "distinct" expectation.

b. Claimant's alleged expectation that it would receive responses from Peru to any and all "requests for return of the [G]old" is not reasonable, because (i) Kaloti cannot show that it acquired ownership of the Gold, and (ii) as explained in **Section II.C.2** above, Peruvian law provides specific mechanisms for remedy that Kaloti could have, but in fact did not, invoke.[1759] It is thus not reasonable to expect that a State would have to respond to all potential requests from a company, even when such requests are misplaced and do not comply with Peruvian law and procedure—as was the case for Kaloti's various requests.[1760]

c. Claimant has failed to demonstrate that it relied on these alleged expectations at the time of making its investment. Claimant's only argument in this respect

[1757] Reply, ¶ 389.

[1758] *See* Counter-Memorial, ¶¶ 481–557.

[1759] *See supra* Section II.C.2.

[1760] Counter-Memorial, § IV.A.3.b(iii).

is to point to an exhibit entitled "Analysis of the Peruvian gold industry,"[1761] the source and date of which are unknown.[1762] Such document plainly does not show that Kaloti relied upon a distinct expectation when making its investment.

746. Finally, even if Claimant's purported expectations were "distinct, reasonable investment-backed expectations" (quod non), Peru did not frustrate such expectations. To the contrary, as explained throughout its written submissions, Peru acted consistently with its obligations under international and Peruvian law.[1763]

747. In conclusion, Claimant has not made even a prima facie case that Peru violated any expectations that were based on a specific assurance or representation, were reasonable, and were "investment-backed."[1764] Its expropriation claims must be rejected on this basis.

5. Kaloti has failed to show that Peru's alleged conduct caused the requisite economic impact on Kaloti's alleged investments

748. The tribunal in *ADM, Tate & Lyle v. Mexico* noted that "the severity of the economic impact is the decisive criterion in deciding whether an indirect expropriation or a measure tantamount to expropriation has taken place."[1765] However, Claimant has not demonstrated that the Challenged Measures had the requisite economic impact on the value of its alleged investments. This is fatal to its two expropriation claims.

749. Consistent with settled case law—according to which an investor who claims an indirect expropriation bears the burden of establishing that the measure or measures have deprived virtually all value from, or effectively neutralized, an investment[1766]—

[1761] Reply, fn. 349.

[1762] First [redacted] Witness Statement, ¶ 18.

[1763] *See, e.g.*, *supra* Section II.C.1.

[1764] **RL-0001**, Treaty [*Re-submitted version of CL-0001, with additional pages*], Annex 10-B, Art. 3(a)(ii).

[1765] **RL-0105**, *ADM* (Award), ¶ 240.

[1766] *See, e.g.*, **RL-0124,** *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012 (Veeder, Kaufmann-Kohler, Stern),

Annex 10-B of the Treaty requires that the Tribunal take into account "the economic impact of the government action," but clarifies that

> 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.[1767]

750. To substantiate its indirect expropriation claims, Claimant must demonstrate that it suffered the "virtual annihilation, effective neutralization or factual destruction of . . . [an] investment, its value or enjoyment,"[1768] and that such loss was "the automatic consequence, *i.e.*, the only and unavoidable consequence, of [the State's] measures."[1769] Such "virtual annihilation" does not arise from the mere fact that a claimant did not earn its desired return.[1770] Instead, the loss must be of such a

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¶ 6.62. *See also* **RL-0041**, *BayWa r.e. Renewable Energy GmbH and BayWa r.e. Asset Holding GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/16, Decision on Jurisdiction, Liability and Directions on Quantum, 2 December 2019 (Crawford, Grigera Naón, Malintoppi), ¶ 423, fn. 554; **RL-0108**, *Ríos* (Award), fn. 480; **RL-0046**, *InfraRed Environmental Infrastructure GP Ltd., et al. v. Kingdom of Spain*, ICSID Case No. ARB/14/12, Award, 2 August 2019 (Park, Drymer, Dupuy), ¶ 505; **RL-0125,** *Silver Ridge Power BV v. Italian Republic*, ICSID Case No. ARB/15/37, Award, 26 February 2021 (Simma, Thomas, Cremades), ¶ 608.

[1767] **RL-0001**, Treaty [*Re-submitted version of CL-0001, with additional pages*], Annex 10-B, ¶ 3(a)(i).

[1768] **RL-0124**, *Electrabel S A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012 (Veeder, Kaufmann-Kohler, Stern), ¶ 6.62. *See also* Counter-Memorial, § IV.B.4; **CL-0022**, *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), ¶ 116; **RL-0041**, *BayWa r.e. Renewable Energy GmbH and BayWa r.e. Asset Holding GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/16, Decision on Jurisdiction, Liability and Directions on Quantum, 2 December 2019 (Crawford, Grigera Naón, Malintoppi), ¶ 423, fn. 554; **RL-0108**, *Ríos* (Award), fn. 480; **RL-0046**, *InfraRed Environmental Infrastructure GP Ltd., et al., v. Kingdom of Spain*, ICSID Case No. ARB/14/12, Award, 2 August 2019 (Drymer, Park, Dupuy), ¶ 505; **RL-0125**, *Silver Ridge Power BV v. Italian Republic*, ICSID Case No. ARB/15/37, Award, 26 February 2021 (Simma, Thomas, Cremades), ¶ 608.

[1769] **CL-0063**, *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, ¶ 270. *See also* **CL-0063**, *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, ¶ 272 ("Only if the [alleged loss] was the **only possible consequence** of the [State] measures could one consider that these measures were expropriatory . . ." (emphasis added)).

[1770] **RL-0282**, *RENERGY S.à.r.l. v. Kingdom of Spain*, ICSID Case No. ARB/14/18, Award, 6 May 2022, (Simma, Schreuer, Sands), ¶ 1000 (*citing* **RL-0290**, *AES Summit Generation Ltd. and AES-Tisza Erömü Kft*

magnitude "that it could be considered equivalent to a deprivation of property, or the loss of all attributes of ownership."[1771] In the Reply, Claimant did not dispute this requirement—to a large extent, Claimant merely copied and pasted its arguments from the Memorial.[1772] considering that the Parties seem to agree on the applicable legal standard, articulated by Peru in the Counter-Memorial, Peru respectfully refers the Tribunal to section IV.B.4.a thereof.[1773] In the following subsections, Peru will again point out—having done so already in the Counter-Memorial—Claimant's failure to demonstrate the requisite economic impact for each of its expropriation claims.

a. Claimant has failed to show that Peru's alleged conduct caused the requisite economic impact with respect to the Five Shipments of Gold

751. With respect to its first creeping expropriation claim, Claimant repeats incessantly that it was "entirely deprived of the use and enjoyment of its property during these

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v. Republic of Hungary, ICSID Case No. ARB/07/22, Award, 23 September 2010 (von Wobeser, Stern, Rowley), ¶ 14.3.1 ("[A] state's act that has a negative effect on an investment cannot automatically be considered an expropriation."); **RL-0283**, *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007 (Orrego Vicuna, Lalonde, Morelli Rico), ¶ 285 ("A finding of indirect expropriation would require more than adverse effects. It would require that the investor no longer be in control of its business operation, or that the value of the business have been virtually annihilated"); **RL-0133**, *Hydro Energy 1 S À R.L. A, et al., v. Kingdom of Spain*, ICSID Case No. ARB/15/42, Decision on Jurisdiction, Liability and Directions On Quantum, 9 March 2020 (Collins, Knieper, Rees), ¶ 536 (explaining that diminished returns on investment cannot not rise to the level of an expropriation, "unless the loss of value is such that it could be considered equivalent to a deprivation of the investment.").

[1771] **RL-0133**, *Hydro Energy 1 S.À R.L. A, et al., v. Kingdom of Spain*, ICSID Case No. ARB/15/42, Decision on Jurisdiction, Liability and Directions On Quantum, 9 March 2020 (Collins, Knieper, Rees), ¶ 531 (*citing* **RL-0284**, *Compañia del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award, 17 February 2000 (Fortier, Lauterpacht, Weil), ¶ 76; **RL-0285**, *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, Award, 30 March 2015 (Knieper, Banifatemi, Hammond), ¶ 566).

[1772] *Compare* Memorial, ¶¶ 130–155 *with* Reply, ¶¶ 380–410, Claimant has added only five new paragraphs which do not change the substance of its arguments in the Memorial.

[1773] *See generally* Counter-Memorial, § IV.B.4.a.

eight years"[1774] and that the gold "permanently lost all value on November 30, 2018."[1775] Claimant's arguments fail for at least the following reasons.

752. *First*, as discussed in **Section II.A**, Claimant has failed to establish that it ever acquired ownership over the Gold contained in the Five Shipments. Claimant cannot be deprived of the use or enjoyment of property that it did not own under Peruvian law.[1776] Far from the "property rights . . . disappear[ing],"[1777] they never existed. Put simply, there has been no deprivation, let alone a substantial and permanent one.

753. *Second*, even assuming that there has been any deprivation in Claimant's use or enjoyment (quod non), it is not permanent. As explained in **Section II.C.1** above, the Gold is currently subject to the Precautionary Seizures ordered by the Criminal Courts in accordance with Peruvian law. Such measures are *temporary* in nature,[1778] and the Gold will be returned to its legitimate owner(s) if and when the Criminal Courts determine that no crime has been committed in connection with the Gold.[1779] Conversely, if the Criminal Courts find that the Gold was indeed obtained through or used for criminal activity, the Courts may order the Gold to be permanently confiscated, pursuant to Peruvian legislation.[1780]

754. *Third*, Claimant's suggestion that the Five Shipments of Gold have been deprived of economic value contradicts Claimant's own submissions. Specifically, Claimant argues that the Gold "permanently lost all value on November 30, 2018."[1781] On Claimant's own case, that cannot be true, because Claimant itself seeks compensation

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[1774] Reply, ¶ 388. *See also* Memorial, ¶ 138.

[1775] Reply, ¶ 387. *See also* Memorial, ¶¶ 136, 138.

[1776] *See supra* Section II.A.

[1777] **CL-0063**, *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, ¶ 233.

[1778] *See supra* Section II.C.1. *See also* First Missiego Report, ¶¶ 14, 85–87, 92.

[1779] Counter-Memorial, ¶¶ 240–42. *See also* First Missiego Report, ¶ 92.

[1780] **Ex. R-0199**, Legislative Decree No. 635, Criminal Code, 3 April 1991 [*Re-submitted version of C-0009, with Respondent's translation*], Art. 102. *See also* **Ex. R-0013**, General Mining Law, Art. 4; **Ex. R-0049**, Illegal Mining Controls and Inspection Decree, Art. 11, which explain that illegally mined gold reverts to the Peruvian State.

[1781] Reply, ¶ 387. *See also* Memorial, ¶¶ 136, 138.

for the Gold by arguing that it is now more valuable than when it was seized.[1782] Indeed, in the Reply, Claimant alleged that the value of the Gold is USD 24,554,349.[1783] Therefore, there has been no deprivation in value.

755. Having failed to demonstrate the requisite economic impact, Claimant has *a fortiori* failed to demonstrate that such impact was caused by—i.e., was the "only and unavoidable consequence"[1784]—of the Challenged Measures. Nonetheless, Peru has explained in detail in **Section II.F** above and **Section V.A** below that Claimant has failed to demonstrate causation. For these reasons, Claimant's first creeping expropriation claim, concerning the Gold, is meritless and should be dismissed.

b. Claimant has failed to show that Peru's alleged conduct caused the requisite economic impact with respect to Kaloti's "global business operations"

756. Claimant has also failed to demonstrate the requisite economic impact in respect of its second creeping expropriation claim, concerning the alleged taking of Kaloti's "global business operations."[1785] Here, Claimant argued that the Challenged Measures caused (i) "a sharp decline in gold suppliers' willingness to sell to [Kaloti];"[1786] (ii) a negative impact on "[Kaloti]'s ability to maintain and use bank accounts;"[1787] and (iii) an "overwhelming debt burden;"[1788] leading to (iv) "the company's collapse in 2018."[1789] However, Claimant's arguments regarding the alleged impacts and their alleged causes are not only unproven but in fact inaccurate, for the reasons shown below.

[1782] Reply, ¶¶ 120, 142; Memorial, ¶¶ 35, 70.

[1783] Reply, ¶ 413, Table.

[1784] **CL-0063**, *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, ¶ 270.

[1785] Reply, ¶ 394. *See also* Reply, ¶ 380.

[1786] Reply, ¶ 394; Memorial, ¶ 142.

[1787] Reply, ¶ 405; Memorial, ¶ 151.

[1788] Reply, ¶ 406; Memorial, ¶ 152.

[1789] Reply, ¶ 398; Memorial, ¶ 147.

757. *First*, Peru did not cause Claimant to lose relationships with suppliers of gold in Peru.[1790] In the four years following the SUNAT Immobilizations, Kaloti traded large quantities of gold, amounting to an average of approximately 19,195 kg of gold per year. [1791] Further, any decline observed from 2013 to 2014 can be attributed to an unrelated situation: the group of companies operated by the [redacted] family supplied *almost 60%* of Kaloti's total volumes from Peru in 2013,[1792] but these companies could not have supplied gold to Kaloti from 2014 because they either shut down or stopped exporting after 2014.[1793] That fact cannot possibly be attributed to Peru or to the Challenged Measures.

758. In fact, during the period from 2013 to 2016 (excluding its purchases from the [redacted] family), 19% of Kaloti's total traded gold was from Peru.[1794] As discussed in **Section II.F** above, the evidence thus shows that Kaloti was able to maintain relationships with its suppliers after the SUNAT immobilizations.[1795] In other words,

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[1790] *See* Section II.D.3.

[1791] **Ex. C-0030**, KML transaction summary of all purchases between 2012 and 2018, p. 11-20, showing Kaloti traded 23,488 kg in 2014, 16,906 kg in 2015, 19,889 in 2016, and 16,498 in 2017.

[1792] *See* **Ex. C-0030**, KML transaction summary of all purchases between 2012 and 2018, pp. 7–9 showing the purchases from [redacted] [redacted] [redacted] and [redacted] totalling 9623.7 kg for 2013 and total purchases were 34,864.15 kg; *See also* Second Smajlovic Report, Table 13 showing that in 2013, 46.79% of Kaloti's gold purchases were from Peru which demonstrates that Kaloti purchased 16,312.29 kg from Peru in 2013. 9623.7 kg is 58.9% of 16,312.29 kg.

[1793] **Ex. R-0272**, [redacted] Cumulative Export Report by Exporter, Period, Agent, Customs and Country, SUNAT, 1 April 2023; **Ex. R-0339**, Prosecutorial Resolution No. 1, First Supra-Provincial Corporate Prosecutor's Office Specializing in Money Laundering and Loss of Domain Crimes, 20 September 2015 [*Re-submitted version of C-0052, with Respondent's translation*], pp. 57-58; **Ex. R-0251,** Victor Torres, "*La economía ilegal del oro en el Perú: Impacto socioeconómico*," PENSAMIENTO CRÍTICO (2015), p. 17; **Ex. R-0346**, Corporation Registration of [redacted] SUNARP, retrieved on 3 May 2023, p. 7; **Ex. R-0356**, Corporation Registration of [redacted] SUNARP, retrieved on 10 May 2023, p. 8; **Ex. R-0361**, [redacted] Gold Corporation S.A.C Cumulative Export Report by Exporter, Period, Agent, Customs and Country, SUNAT, 10 May 2023.

[1794] *See* **Ex. C-0030**, KML transaction summary of all purchases between 2012 and 2018, pp. 7–17. *See also* Second Smajlovic Report, Table 13 as above. 16,312.29 kg (total purchases from Peru) minus 9623.7 kg is 6,689.59 kg which represents 19.1% of the total gold purchased bought by Kaloti in 2013.

[1795] *See* **Ex. BR-0002**, Brattle Workpapers B, Tab B6 showing the years in which Kaloti purchased gold from each supplier where it can be observed that 229 of Kaloti's 286 suppliers worldwide sold supplied gold for no more than two years. *See generally,* **Ex. C-0030**, KML transaction summary of all purchases between 2012 and 2018.

Claimant was able to continue purchasing gold in Peru until Kaloti's own decision to stop operations.

759. Relatedly, Claimant's argument that Peru caused a decline in supplier relationships appears to rely on its claim that Peru leaked information to the press.[1796] But as explained in **Section II.F.2**, Claimant has failed to present *any* evidence to support the existence of such leaks, or to show that any alleged leak caused damage to Claimant's supplier relationships.[1797]

760. *Second*, Peru did not cause Kaloti to lose relationships with banking institutions. In fact, the evidence shows that Claimant was able to maintain its access to financial institutions throughout the relevant period (2012-2018) and was able to open at least *four* new accounts after the actions of Peru.[1798] In any event, as explained in **Section II.F.4** above, Claimant has provided no evidence that the termination by certain banks of their relationship with Kaloti was caused by Peru. To the contrary, the evidence suggests that those banks were concerned about the potential criminal activity and bad reputation of [redacted] and thus decided to do business or otherwise by associated with Kaloti.[1799]

761. *Third*, Claimant's argument that Peru caused Kaloti to experience an "overwhelming debt burden" is neither substantiated nor credible. Claimant argued that the seizure of the Five Shipments of Gold placed Claimant in a "financial bind: since KML could not sell the seized gold, it could not repay the loan [that it had received from [redacted] and as a result accrued interest that "ate into a very considerable portion of Claimant's profits."[1800] However, the Five Shipments (i.e., approximately 475 kg of gold) represented a paltry 0.8% of all gold that Claimant traded in 2013-2014.[1801] Furthermore, Kaloti traded more than 83,383 kg of gold—worth multiple *billions* of

[1796] Reply, ¶ 422.

[1797] *See supra* Section II.F.3.

[1798] *See supra* Section II.F.4.

[1799] *See supra* Section II.F.4.

[1800] Reply, ¶¶ 406–407; Memorial, ¶ 152.

[1801] **Ex. C-0030**, KML transaction summary of all purchases between 2012 and 2018, pp. 9, 11.

dollars—from 2014-2018.[1802] Claimant has not and cannot show—because it is simply not true—that the seizure of USD 17 million of alleged assets would cripple Claimant's allegedly stable and risk-free business model, of which it likes to boasts.[1803]

762. *Fourth*, and finally, the evidence contradicts Claimant's claim that Peru's conduct caused Kaloti to become insolvent in November 2018. As explained in **Section V.A** below, Kaloti's alleged that it decided to write off the value of the Five Shipments on 30 November 2018, at which point it became insolvent.[1804] However, Kaloti has not produced evidence to show that it actually wrote off the assets at the first time. In any event, the reality is that such write-off could have taken place at any time, as demonstrated by Brattle in its first report.[1805] To learn why Kaloti allegedly selected 30 November 2018 as the date on which to formalize its insolvency, Peru requested, and the Tribunal granted, the production of evidence that demonstrated "Kaloti's alleged decision to write off the value of the Five Shipments."[1806] But Claimant did not produce any evidence to explain this decision.[1807] The obvious inference that should be drawn from Claimant's failure is that the requested documents are adverse to Claimant's interest.

763. The evidence on the record suggests that Kaloti's decision to shutter its operations on 30 November 2018 had nothing to do with the Challenged Measures but rather was part of [redacted] deliberate strategy to create damages claims for this arbitration. A key element of that strategy was to set up [redacted] only *two* months prior

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[1802] **Ex. C-0030**, KML transaction summary of all purchases between 2012 and 2018, pp. 11, 14, 17, 20, 22.

[1803] Reply, ¶ 446.

[1804] Mr. Smajlovic does not test the reasonableness or the appropriateness of the decision to write down the inventory on 30 November 2018, he accepts it as a legal instruction and states without providing evidence or analysis that "[b]ased on my independent assessment, [he] confirmed that by 30 November 2018, the Measures resulted in a permanent and irreversible economic loss for KML." *See* Second Smajlovic Report, ¶¶ 2.14, 2.25.

[1805] First Brattle Report, ¶¶ 236–240.

[1806] Procedural Order No. 2, Annex 2, Request 15.

[1807] Procedural Order No. 2, Annex 2, Request 15 (where Claimant argued, again, that it could not find any responsive documents and/or that they were "left and lost" in Lima. As already discussed these self-serving excuses are not credible).

to the decision to write off the gold.[1808] Assets of Kaloti were transferred to [redacted] [1809] the latter's supplier list overlaps Kaloti's suppliers,[1810] and Kaloti's head trader is now the General Manager of [redacted] [1811]

764. Moreover, there are numerous other supervening causes for the failure of Kaloti's business, including (i) the widespread and serious allegations in relation to the [redacted] as well as specific investigations involving Kaloti *in other countries*;[1812] (ii) the downturn in the artisanal gold market from 2013-2014 in Peru;[1813] and (iii) Kaloti's own due diligence failures.[1814]

765. For all of these reasons, Claimant has failed to demonstrate that Peru caused the requisite economic impact on Kaloti as a "going concern business enterprise."

6. Peru's measures were non-discriminatory regulatory actions that pursued legitimate public welfare objectives, and fell within Peru's police powers

766. Even if Claimant had satisfied all of the foregoing requirements for each of its expropriation claims—which it has not—, Claimant's claims would still fail because the Challenged Measures were non-discriminatory regulatory actions that pursued legitimate public welfare objectives, as explained in the Counter-Memorial[1815] and below.

[1808] Reply, ¶¶ 503–504.

[1809] Second [redacted] Witness Statement, ¶ 7.

[1810] *Compare* **Ex. C-0134**, [redacted] list of suppliers from 2019 to 2020 *with* **Ex. C-0030**, KML transaction summary of all purchases between 2012 and 2018, where the following companies appear: [redacted]

[1811] **Ex. R-0344**, Articles of Amendment to Articles of Organization of [redacted] Florida Department of State Division of Corporations, 31 May 2021.

[1812] *See supra* Section II.F.

[1813] Counter-Memorial, § V.A.2.b.

[1814] *See supra* Section II.A.2; *see also* Counter-Memorial, § V.A.2.b.

[1815] *See* Counter-Memorial, ¶¶ 655–672.

767. Pursuant to Annex 10-B of the Treaty, a tribunal's assessment of an expropriation claim requires a fact-based inquiry that takes into account "the character of the government action."[1816] As explained by the United States in a formal submission (in another case) concerning that specific provision of the Treaty, the foregoing factor

> considers the nature and character of the government action, including whether such action involves physical invasion by the government **or whether it is more regulatory in nature** (*i.e.*, whether "it arises from some public program adjusting the benefits and burdens of economic life to promote the common good").[1817] (Emphasis added)

768. Annex 10-B of the Treaty further clarifies that

> [e]xcept 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.[1818]

769. As Peru explained in the Counter-Memorial, this treaty term codifies the principle of customary international law according to which regulatory acts within the State's police power will not give rise to unlawful expropriation.[1819]

[1816] **RL-0001**, Treaty [*Re-submitted version of CL-0001, with additional pages*], Annex 10-B, ¶ 3(a)(iii).

[1817] **RL-0103**, *Gramercy* (USA Sumission), ¶ 27. *See also* **RL-0009**, *Mamacocha* (USA Submission), ¶ 36; **RL-0278**, *Odyssey Marine Exploration, Inc. v. United Mexican States*, ICSID Case No. UNCT/20/1, Submission of the United States of America, 2 November 2021, ¶ 30 (with respect to a similarly worded annex in NAFTA); **RL-0279**, *Angel Samuel Seda, et al., v. Republic of Colombia*, ICSID Case No. ARB/19/6, Submission of the United States of America, 26 February 2021, ¶ 27 (with respect to a similarly worded annex in the United States-Colombia TPA).

[1818] **RL-0001**, Treaty [*Re-submitted version of CL-0001, with additional pages*], Annex 10-B, ¶ 3(b). *See also* **RL-0009**, *Mamacocha* (USA Submission), ¶¶ 33, 37 (interpreting this provision of the Treaty, and stating that "where an action is a bona fide, non-discriminatory regulation, it will not ordinarily be deemed expropriatory.").

[1819] *See* Counter-Memorial, ¶¶ 656–657. *See also* **CL-0025**, *Saluka Investments B.V. v. The Czech Republic*, Partial Award, 17 March 2006, PCA—UNCITRAL, IIC 210 (2006), ¶ 262. *See also* **RL-0120**, *Methanex* (Final Award), Part IV, Chapter D, ¶ 7; **RL-0119**, OECD, "'*Indirect Expropriation' and the 'Right to Regulate' in International Investment Law*," OECD WORKING PAPERS ON INTERNATIONAL INVESTMENT (2004), pp. 19–20, fn. 10; **RL-0153**, Chester Brown, "*United States*," COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES (2013), p. 791.

770. As Peru also explained, investment tribunals have recognized that measures adopted in the context of criminal investigations—including investigations carried out by public prosecutors and measures adopted by the State's tax authorities—fall within the scope of the State's police power.[1820]

771. Claimant does not appear to dispute any of the foregoing legal principles. Indeed, Claimant devoted no more than *two sentences* of the Reply to the character of Peru's measures. In the first of those two sentences, Claimant asserted that "Peru's actions do not constitute broadly applicable 'non-discriminatory regulatory actions . . . designed and applied to protect legitimate public welfare objectives.'"[1821] And in the second sentence, Claimant baldly concluded that "Peru's actions represent discriminatory conduct against one company completely contrary to the rule of law, and without a rational basis."[1822] In other words, Claimant's argument is that the measures were not non-discriminatory because they were discriminatory.

772. This circular, conclusory statement is utterly insufficient for Claimant to discharge its burden. Further, Claimant made no effort to respond to Peru's submissions in the Counter-Memorial, in which Peru proved that the various acts and omissions of which Claimant complained were non-discriminatory regulatory actions undertaken to advance legitimate policy objectives, and as such fell squarely within Peru's police powers.[1823] In particular, Peru demonstrated that:

a. SUNAT properly immobilized Shipments 1 to 4 on the basis of its authority to oversee and ensure compliance with Peru's customs laws, and in furtherance

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[1820] Counter-Memorial, ¶¶ 661–664. *See also* **RL-0121**, *Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd. Sti. V. Turkmenistan*, ICSID Case No. ARB/12/6, Award, 4 May 2021 (Lew, Hanotiau, Boisson de Chazournes), ¶¶ 941, 968; **RL-0132**, *WNC Factoring Ltd (WNC) v. The Czech Republic*, PCA Case No. 2014-34, Award, 22 February 2017 (Griffith, Volterra, Crawford), ¶¶ 394–395.

[1821] Reply, ¶ 392.

[1822] Reply, ¶ 392.

[1823] Counter-Memorial, ¶¶ 666–672.

of its duty to identify and combat illegal mining and related criminal activities;[1824]

b. Claimant's expropriation claims appear to target conduct by the Criminal Courts.[1825] However, judicial decisions cannot give rise to an expropriation, but can only form the basis for international responsibility in the context of a denial of justice;[1826]

c. in any event, in conducting the criminal investigations and Criminal Proceedings, the relevant State actors—namely, the Prosecutor's Office, the State Attorney's Office, and the Criminal Courts—were exercising the State's legitimate police power to prevent and address criminal activities, including money laundering and illegal mining;[1827] and

d. in any event, the SUNAT Immobilizations and Precautionary Seizures were directed *at the Suppliers* (not at Kaloti), and as addressed in **Section IV.A.4** above, Claimant is unable to demonstrate any discriminatory conduct by SUNAT (or any other Peruvian State entity).[1828]

773. Unable to rebut any of these points, Claimant's only argument in the Reply was that "[c]onduct by Peru, very similar to the prolonged measures explained in this memorial, has been found to be expropriatory . . . [i]n *Tza Yap Shum v. Peru*."[1829] However, Claimant's cursory comparison of the situations in the two cases is misleading. *First*, in *Tsa Yap Shum*, the applicable treaty (which was the China-Peru BIT) did *not* include a provision akin to that in Annex 10-B of the Treaty. In contrast, the U.S. Treaty (i.e., the Treaty) expressly cautions that "non-discriminatory

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[1824] *See* Counter-Memorial, ¶¶ 667–668 (*citing* **Ex. R-0052**, General Customs Laws, Arts. 10, 163–65; **Ex. R-0049**, Illegal Mining Controls and Inspection Decree, Art. 5).

[1825] *See, e.g.*, Reply, ¶ 385 (eighth bullet point).

[1826] Counter-Memorial, ¶ 601. *See also* **RL-0103**, *Gramercy* (USA Sumission), ¶ 28 ("Decisions of domestic courts acting in the role of neutral and independent arbiters of the legal rights of litigants do not . . . give rise to a claim for expropriation under Article 10.7.").

[1827] *See* Counter-Memorial, ¶ 670. *See also supra* Sections II.B–D.

[1828] *See* Counter-Memorial, ¶ 671.

[1829] Reply, ¶ 382.

regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives . . . do not constitute indirect expropriations."[1830] *Second*, in *Tza Yap Shum*, the measures that the claimant was challenging were preliminary precautionary measures that had been imposed by SUNAT in the exercise of its authority to enforce the Peruvian Tax Code.[1831] The tribunal there found that (i) the claimant had exhausted the legal recourses available to it under Peruvian law to oppose SUNAT's measures,[1832] and (ii) SUNAT had not complied with its own regulations when issuing those measures.[1833] Here, by contrast, SUNAT was exercising its statutory authority to enforce Peru's customs laws, and specifically to prevent the export of goods by entities involved in illegal activity (namely, money laundering and illegal mining).[1834] Moreover, as demonstrated in the Counter-Memorial and in **Section II.C.2** above, (i) Kaloti did *not* exercise the remedies available to it under Peruvian law,[1835] and (ii) SUNAT's issuance of the Immobilizations was fully consistent with Peruvian law.[1836] In this respect, Claimant itself has conceded that "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."[1837] Thus, Claimant's reliance on *Tza Yap Shum v. Peru* is misleading, and an application herein of the "case-by-case, fact-based inquiry" required by Annex 10-B[1838] reveals that the alleged conduct by Peru consisted of nondiscriminatory measures undertaken to

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[1830] **RL-0267**, *Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Award, 7 July 2011 (Kessler, Otero, Fernández-Armesto) ("***Tza Yap Shum* (Award)**") [*Re-submitted version of CL-0080, with Respondent's translation*], ¶ 141.

[1831] **RL-0267**, *Tza Yap Shum* (Award) [*Re-submitted version of CL-0080, with Respondent's translation*], ¶¶ 114–124.

[1832] **RL-0267**, *Tza Yap Shum* (Award) [*Re-submitted version of CL-0080, with Respondent's translation*], ¶¶ 164, 166, 224, 227.

[1833] **RL-0267**, *Tza Yap Shum* (Award) [*Re-submitted version of CL-0080, with Respondent's translation*], ¶¶ 126, 205, 218.

[1834] *See* Counter-Memorial, § II.B.

[1835] *See supra* Section II.C.2.

[1836] *See* Counter-Memorial, § II.B.

[1837] Reply, ¶ 125.

[1838] **RL-0001**, Treaty [*Re-submitted version of CL-0001, with additional pages*], Annex 10-B, ¶ 3(a).

advance legitimate public welfare objectives, and thus fell within Peru's police powers.

774. Peru has thus demonstrated that the alleged conduct underlying Claimant's expropriation claim was not expropriatory.

* * *

775. In sum, Claimant is unable to satisfy any of the requisite elements of an expropriation, for either of its two creeping expropriation claims. Such expropriation claims are therefore meritless and should be rejected.

V. CLAIMANT IS NOT ENTITLED TO ANY COMPENSATION

776. Even if Claimant had satisfied its burden of establishing jurisdiction (quod non), *and* had demonstrated a breach of the Treaty (quod non), Claimant would not be entitled to any compensation at all, for the reasons articulated herein.

777. Claimant has asserted three damages claims. Although the alleged bases of such claims have not changed, in the Reply Claimant significantly revised its damages estimate for each of these claims, as follows:

a. *First*, Claimant has revised its claim for alleged lost profits from 1 January 2014 to 30 November 2018, and now seeks the amount of USD 27,079,044 under this head of alleged damage ("**Lost Profits Claim**");

b. *Second*, Claimant has revised its claims for damages for the alleged expropriation of Kaloti "as a going concern enterprise," and now seeks USD 70,136,219 under this head of alleged damage ("**Going Concern Claim**");

c. *Third*, Claimant has revised the value it ascribes to the Five Shipments of Gold, and now claims USD 17,646,441 as of 30 November 2018, or alternatively USD 24,554,349 as of November 2022 ("**Inventory Claim**").[1839]

[1839] Reply, ¶ 413, Table.

778. Although Claimant has represented in its Reply that these revised damages calculations are "more conservative" than those previously advanced in its Memorial,[1840] Claimant has in fact almost *doubled* its Lost Profits Claim, and it has also increased its Going Concern Claim by USD 22,839,357.[1841] In total, Claimant has *increased* the total damage it seeks by USD 35,176,233 (taking into account the value of the Gold as of 30 November 2018) or by USD 42,084,141 (taking into account the value of the gold as of November 2022).[1842] Claimant further seeks (i) pre-award and post-award interest at a rate of LIBOR + 4%;[1843] and (ii) an award net of "any taxes."[1844] The cumulative total of Claimant's damages claim is now USD 160,645,291.[1845]

779. In the Counter-Memorial, Peru addressed Claimant's damages claims in detail. In particular, Peru demonstrated (i) that Claimant had failed to satisfy its burden of proving that the alleged breaches actually caused any of its alleged losses; (ii) that, in any event, the evidence revealed multiple supervening causes of the alleged loss; (iii) that Claimant's damages calculations were speculative, unreliable, and riddled with errors; (iv) that Claimant had failed to mitigate its losses; and (v) that Claimant's claims regarding the applicable interest rate and tax liability were misguided. Peru relied in part on the independent expert report submitted by Darrell Chodorow and Fabricio Nuñez of Brattle.

780. Although Claimant and its expert, Mr. Smajlovic, were forced to revise their damages estimates at the Reply stage, Claimant has not and cannot cure the fatal defects in its damages claims. For instance, Claimant remains unable to prove the requisite causal link between the measures and the harm that it alleges, and continues to ignore the evidence that contradicts its arguments on causation. Furthermore, *more than half* of Claimant's Lost Profits and Going Concern Claims—amounting to USD 75,192,729—

[1840] Reply, ¶ 413.

[1841] *See* Reply, ¶¶ 412–413.

[1842] *See* Reply, ¶¶ 412–413.

[1843] Reply, ¶ 514.

[1844] Reply, ¶ 502.

[1845] This figure assumes the alleged value of the Five Shipments as of 30 November 2018.

represents Kaloti's hypothetical future purchase of gold *outside* of Peru.[1846] However, as Peru demonstrated in the Counter-Memorial, such damages claim falls outside of the scope of this Tribunal's jurisdiction *ratione materiae*.[1847] In any event, even if it could recover such damages (quod non), Claimant has presented no evidence to show that such sales would in fact have taken place, or that the alleged measures had any impact whatsoever on its business outside of Peru..[1848]

781. The foregoing are but a few of the many defects in Claimant's damages claims. In the subsections that follow, Peru will (i) address Claimant's failure to establish causation (**Section V.A**); (ii) demonstrate that in any event Claimant has failed to substantiate its quantum claims, as its damages calculations are speculative and unreliable (**Section V.B**); (iii) show that Claimant has failed to mitigate its losses (**Section V.C**); and (iv) rebut Claimant's claims with respect to the applicable interest rate and tax liability (**Section V.D**).

A. Claimant's losses were not caused by any actions attributable to Peru

782. As Peru explained in the Counter-Memorial, the Treaty, fundamental principles of State responsibility, and investment case law all require a claimant to prove that its alleged losses were caused by the State's breach(es).[1849] In the Reply, Claimant did not dispute that it bears this burden, nor did it dispute the legal standard for causation. The tribunal in *Pawlowski v. Czech Republic*—which Peru quoted in the Counter-Memorial[1850]—described the relevant principles as follows:

[1846] *See* Reply, ¶ 412, Table.

[1847] Claimant did not contest this issue in the Reply. *See* Counter-Memorial, ¶¶ 383–387; **RL-0105**, *ADM* (Award), ¶¶ 273–274; **RL-0205**, Christopher R. Zheng, "*The Territoriality Requirement in Investment Treaties: A Constraint on Jurisdictional Expansionism*," SINGAPORE LAW REVIEW (2016), p. 167.

[1848] Second Brattle Report, ¶¶ 152–158.

[1849] *See* Counter-Memorial, § V.A (*citing, e.g.*, **RL-0001**, Treaty [*Re-submitted version of CL-0001, with additional pages*], Art. 10.16.1(a)(ii); **CL-0040**, ILC Articles, Arts. 18, 36.1; **RL-0023**, Meg Kinnear, "*Damages in Investment Treaty Arbitration*," ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO THE KEY ISSUES (2010), p. 556; **RL-0025**, *Gemplus S.A., et al., v. United Mexican States*, ICSID Case No. ARB(AF)/04/3, Award, 16 June 2010 (Fortier, Gómez, Veeder), ¶¶ 12–56).

[1850] Counter-Memorial, ¶ 713.

> **The duty to make reparation extends only to those damages** which have been proven by the injured party and **which are legally regarded as the consequence of the wrongful act**. It is a general principle of international law that **injured claimants bear the burden of demonstrating:**
>
> - That the claimed quantum of damage was actually suffered, and
>
> - that such **damages flowed from the host State's conduct, and that the causal relationship was sufficiently close (i.e., not 'too remote')**.[1851] (Emphasis added)

783. Claimant alleges that causation is "plainly and unmistakably self-evident."[1852] Contrary to Claimant's arguments, however, the requisite causal link is non-existent, and as Peru and Brattle previously established, the evidence on the record squarely contradicts Claimant's causation arguments.

1. Claimant has failed to establish the requisite causal link

784. In the Reply, Claimant argued that its Lost Profits and Going Concern Claims rest on "two independent premises:"[1853]

a. Premise 1: "The financial difficulties and inherent challenges caused directly by the seizure of the gold inventory by Peru . . . (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;" and

b. Premise 2: "The damage to the reputation caused to KML directly by Peru . . . prevented KML from buying more gold from several sellers in Peru, and other countries."[1854]

[1851] **RL-0089**, *Pawlowski AG and Project Sever s.r.o. v. Czech Republic*, ICSID Case No. ARB/17/11, Award, 1 November 2021 (Fernández-Armesto, Lowe, Beechey), ¶ 728.

[1852] Reply, ¶ 416.

[1853] Reply, ¶ 422.

[1854] Reply, ¶ 422.

785. Unfortunately for Claimant, and as Peru has shown, these premises are unsubstantiated, and do not withstand the slightest scrutiny.

786. Premise 1, which appears to be the basis for the Going Concern Claim,[1855] fails for at least the following reasons.

a. Claimant is unable to establish that it ever acquired **ownership** over, or was a bona fide purchaser of, any of the Five Shipments of Gold.[1856] The immobilization of assets to which Kaloti had no right could not have jeopardized its business in any way.

b. The evidence contradicts the notion that the **immobilization of the Five Shipments** paralyzed the company's operations. Specifically, after the SUNAT Immobilizations, and while the gold remained immobilized, Kaloti continued for years to operate and trade gold.[1857]

c. The evidence contradicts the notion that the **amount or value of gold immobilized** had any impact on Kaloti's operations. The Five Shipments comprised only 475.36 kg of gold.[1858] However, Kaloti traded *over 100 times that amount*—58,353 kg—during the period comprising and immediately following the SUNAT Immobilizations (i.e., 2013-2014).[1859] On its face, the immobilization of such a small proportion of Kaloti's alleged inventory would not have paralyzed Kaloti's business, and Claimant has provided no evidence to show otherwise. Moreover, the evidence contradicts the notion that the **value of the Five Shipments** had a financial impact on Kaloti. Such value was only approximately USD 17 million as at 30 November 2018.[1860] However, the

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[1855] Reply, ¶ 416 (which appears to demonstrate that the first premise relates to "KML's insolvency").

[1856] Section II.A.

[1857] **Ex. C-0030**, KML transaction summary of all purchases between 2012 and 2018, pp. 10–22.

[1858] Second Smajlovic Report, Table 8.

[1859] **Ex. C-0030**, KML transaction summary of all purchases between 2012 and 2018, pp. 6–11 (showing that Kaloti transacted 34,864,156.440 grams in 2013 and 23,488,360.321 grams in 2014).

[1860] Second Brattle Report, Table 7; Second Smajlovic Report, Table 8 (where Mr. Smajlovic uses the price of USD 1,223.6 per ounce of gold).

value of the gold that Kaloti traded from 2014 to 2018—83,383 kg[1861]—would have been worth the exponentially higher amount of approximately USD 3.6 *billion*.[1862] Thus, the financial impact of the immobilization of the Five Shipments would therefore have been minimal at most in the context of Kaloti's overall business.

787. In the Reply, Claimant argued that its situation is akin to that of the claimant in *Hydro v. Albania*.[1863] However, Claimant omitted to mention that in that case, the measures had frozen a company's accounts and seized the company's shareholdings, thereby preventing the company from operating.[1864] Here, as shown above, the immobilization of the Gold had no such impact on Kaloti's operations or sales.

788. Premise 1 thus fails, as does the Going Concern Claim that is based on that premise.

789. Premise 2, which appears to underpin Claimant's Lost Profits Claim,[1865] likewise fails. To recall, such premise is that Peru caused damage to Kaloti's reputation and that this prevented it from buying gold from several suppliers in Peru and elsewhere.[1866] The defects in this argument are manifold:

a. Claimant must first prove its allegation that Peru caused damage to Kaloti's reputation. It claims that Peru did so by leaking to the press certain information about the pending investigations.[1867] However, as explained in **Section II.F** above, such allegation is false. Kaloti alone is responsible for its sordid reputation, and Peru did not leak any confidential information to the press.

[1861] **Ex. C-0030**, KML transaction summary of all purchases between 2012 and 2018, pp. 9–21.

[1862] **Ex. BR-0030**, LBMA Gold Spot Prices (1980-2022), Bloomberg LP (the figure was calculated using the average spot price of gold for the period 2014—2018 (USD 1,240.56 an ounce)).

[1863] Reply, ¶ 422, fn. 378

[1864] **CL-0132**, *Hydro S.R.L. et al. v. Republic of Albania*, ICSID Case No. ARB/15/28, Award, 24 April 2019, ¶ 693.

[1865] Reply, ¶ 416 (which appears to demonstrate that the second premise relates to alleged damage to Kaloti's reputation which allegedly "prevented KML from buying more gold from several sellers in Peru").

[1866] Reply, ¶ 422.

[1867] Reply, ¶ 137.

b. Another purported link in this chain is that the alleged leaks caused Kaloti to lose relationships with suppliers, thus preventing Kaloti from buying gold. However, (i) Claimant has presented no evidence—beyond the self-interested and unsubstantiated testimony of its own witnesses—of any link between the alleged press leaks and any loss by Kaloti of supplier relationships;[1868] and (ii) as shown above, Kaloti continued to purchase significant amounts of gold in Peru even after the leaks were alleged to have taken place.[1869]

c. Claimant also claims as part of Premise 2 that the alleged (but non-existent) press leaks also caused Kaloti to lose relationships with banks (in addition to suppliers).[1870] However, (i) again, Claimant has provided no evidence other than witness testimony to support such alleged causal link;[1871] and (ii) as shown in **Section II.F.4** above, Kaloti in fact maintained banking relationships throughout the period from 2013 to 2018.[1872]

790. In sum, both of the premises that underpin Claimant's Lost Profits and Going Concern Claims are unsubstantiated—and in fact are affirmatively disproven by the evidence. Claimant has therefore failed to establish the requisite causal link between the alleged breaches of the Treaty and the alleged loss. As a result, Claimant's damages claims must be dismissed.

791. With respect to Claimant's Inventory Claim, Claimant has also failed to establish causation. Specifically, even if Kaloti had in fact been a bona fide purchaser of the Gold as Claimant alleges (quod non), the Precautionary Seizures by their very nature are temporary in nature, and could not have altered Kaloti's ownership rights.[1873] The evidence also directly contradicts the notion that Peru's alleged breaches caused Claimant's loss of Shipment 5: Kaloti had failed to pay the supplier, [redacted] for that

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[1868] *See supra* Section II.F.1–3. *See also* Second Brattle Report, ¶¶ 55–65.

[1869] *See* Section II.F.3.

[1870] Reply, ¶ 405.

[1871] *See supra* Section II.F.2. *See also* Second Brattle Report, ¶¶ 68–79.

[1872] *See supra* Section II.F.4. *See also* Second Brattle Report, ¶ 80, Figure 2.

[1873] *See* Counter-Memorial, ¶ 731.

shipment, and on that basis a Peruvian court confirmed that Kaloti never acquired ownership of the relevant gold.[1874] Faced with that evidence, Claimant argued in the Reply that this judicial decision "shows that title over such gold actually belonged to KML on November 30, 2018"(emphasis omitted).[1875] But that claim is false, as the court's ruling confirmed that Kaloti had never acquired ownership of Shipment 5 in the first place. Claimant also argued that Peru made it "impossib[le] [for Kaloti] to pay the purchase price" for Shipment 5.[1876] However, Claimant has provided no evidence to support that argument.[1877] Claimant has thus also failed to establish causation in respect of its Inventory Claim.

2. The evidence suggests that there were numerous supervening causes

792. Peru (in the Counter-Memorial) and Brattle (in its first expert report) identified multiple supervening causes that broke the chain of causation between the alleged breaches and the failure of Kaloti's business.[1878] As Peru explained, under such circumstances, Claimant cannot be awarded damages.[1879]

793. In the Reply, Claimant addressed only two of the supervening causes identified by Peru and Brattle—leaving the remainder undisputed. For the sake of completeness, Peru briefly addresses each of the supervening causes below.

794. *First*, Kaloti's business was negatively affected by scandals relating to its own business activities and those of the wider [redacted][1880] Specifically, Peru presented

[1874] *See supra* Section II.D.

[1875] Reply, ¶ 419.

[1876] Reply, ¶ 418.

[1877] *See supra* Section II.D.

[1878] Counter-Memorial, § V.A.2; First Brattle Report, § III.B.

[1879] **RL-0090**, *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011 (Armesto, Paulsson, Voss), ¶ 163. *See also* **RL-0027**, *Ronald S. Lauder v. Czech Republic*, UNCITRAL, Final Award, 3 September 2001 (Briner, Cutler, Klein), ¶ 234 ("Even if the breach [] constitutes one of several 'sine qua non' acts, this alone is not sufficient. In order to come to a finding of a compensable damage it is also necessary that there existed no intervening cause for the damage. In our case the [c]laimant therefore has to show that [a circumstance other than the treaty breach] did not become a superseding cause and thereby the proximate cause.").

[1880] *See* Counter-Memorial, ¶¶ 734–744; Second Brattle Report, ¶¶ 61, 75.

documentary evidence showing that the [redacted] had been the subject of criminal investigations and public accusations of misconduct, and had lost banking relationships due to its suspicious business practices.[1881] In the Reply, Claimant dismissed these scandals as irrelevant, insisting that they related to entities other than Kaloti and were outside of Peru.[1882] However, these arguments contradict (i) Claimant's own reliance on its relationship with other [redacted] entities for the purpose of its damages claims,[1883] and (ii) Claimant's insistence that it should be compensated for alleged loss outside of Peru.[1884] In any event, Peru provided detailed responses to Claimant's arguments in **Section II.F.1** above, including by showing that the investigations and scandals directly involved Kaloti.[1885]

795. *Second*, Kaloti's own due diligence failings caused whatever losses it may have suffered.[1886] Specifically, Peru demonstrated that Kaloti did not comply with its own obligations under Peruvian law to ensure that the gold that it purchased had been legally sourced.[1887] By failing to do so, Kaloti assumed the risk that the gold would be immobilized by the Peruvian authorities in accordance with Peruvian law.[1888] Claimant did not address or dispute this supervening cause in its Reply.

[1881] *See, e.g.*, **Ex. R-0119**, *Rihan* (Judgment); **Ex. R-0116**, "*EY ordered to pay whistleblower $11m in Dubai gold audit case*," THE GUARDIAN, 17 April 2020; **Ex. R-0160**, "*EY accountancy firm accused of facilitating money laundering by drug traffickers*," EU-OCS, 30 October 2019; **Ex. R-0260**, "*Los pagos bajo sospecha de acopiadora de oro de EE.UU. a empresas peruanas investigadas por lavado y minería ilegal*," CONVOCA, 21 September 2020; **Ex. R-0278**, [redacted] SAR [redacted] FINCEN, 23 February 2013; *see also* **Ex. R-0126**, "*US Treasury Department abandoned major money laundering case against Dubai gold company*," ICIJ, 21 September 2020. *See also* Second Brattle Report, ¶¶ 75–77; Counter-Memorial, ¶¶ 734–744.

[1882] Reply, ¶¶ 432–433, 437.

[1883] Claimant and its expert rely heavily on a letter from [redacted] which expresses a desire to purchase 45,000kg of gold from Kaloti. *See* Reply, ¶¶ 485–486; Second Smajlovic Report, ¶¶ 2.37, 5.6 (*citing* **Ex. C-0047**, [redacted] letter to KML, 10 September 2013).

[1884] Reply, ¶ 413 (the table shows in the last column the "Amount in US$," which totals the alleged damage and separates out sums which "relate[] to gold sourced inside Peru;" thus indicating that Claimant claims for volumes outside of Peru).

[1885] *See supra* Section II.F.1.

[1886] *See* Counter-Memorial, ¶¶ 745–746.

[1887] Counter-Memorial, § II.B. *See also supra* Section II.A.3.

[1888] Counter-Memorial, ¶ 746.

796. *Third*, the downturn in production from artisanal and small-scale gold producers from 2013–2014 negatively affected Kaloti's business.[1889] Again, Claimant did not address or dispute this supervening cause.

797. *Fourth*, Kaloti's shareholders redirected Kaloti's business activities to a new enterprise, [redacted] which resulted in the cannibalization of Kaloti's business.[1890] In the Reply, Claimant argued that the creation of [redacted] did not have any adverse effect on Kaloti's business.[1891] That argument is contradicted by the evidence: as discussed in **Section II.F** above, [redacted] (i) had the same registered address as Kaloti;[1892] (ii) took over Kaloti's supplier relationships;[1893] (iii) received Kaloti's assets;[1894] and (iv) inherited Kaloti's staff.[1895]

798. *Fifth*, Kaloti's business was affected during the relevant time period by significant volatility of the Peruvian gold market, and certain factors in overseas markets.[1896] Claimant did not address or dispute this supervening cause in its Reply.

799. *Sixth*, Kaloti's business was already in decline even prior to the seizure of the Five Shipments.[1897] Claimant did not address or dispute this supervening cause in its Reply.

800. *Seventh*, and finally, Kaloti's own alleged decision to write off the value of the Five Shipments of Gold on 30 November 2018 was, if indeed such write off occurred, a

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[1889] *See* Counter-Memorial, ¶¶ 747–749.

[1890] *See* Counter-Memorial, ¶¶ 750–753.

[1891] Reply, ¶¶ 504–506.

[1892] **Ex. BR-0005**, Florida Division of Corporations, Detail by Entity Name ("[redacted]

[1893] *Compare* **Ex. C-0134**, [redacted] list of suppliers from 2019 to 2020 *with* **Ex. C-0030**, KML transaction summary of all purchases between 2012 and 2018, pp. 21–22.

[1894] Second [redacted] Witness Statement, ¶ 7.

[1895] **Ex. R-0344**, Articles of Amendment to Articles of Organization of [redacted] Florida Department of State Division of Corporations, 31 May 2021.

[1896] *See* Counter-Memorial, ¶¶ 754–757.

[1897] *See* Counter-Memorial, ¶¶ 758–761; First Brattle Report, Figure 4.

supervening cause of the failure of the business.[1898] Any decisions by Kaloti to write off the value of the Five Shipments, would have resulted in Kaloti recording negative net equity.[1899] However, as Brattle explains, Kaloti has not demonstrated that it actually wrote off the value of the Five Shipments on 30 November 2018.[1900] In any event, even Kaloti had done so, there was no apparent basis for choosing that particular date.[1901] Indeed, Claimant's own expert, Mr Smajlovic, seemingly recognized that the value of the Five Shipments could have been written off at any time.[1902] And Claimant has failed to produce any evidence to explain why it would have made the write-off on 30 November 2018, specifically.[1903] (Indeed, if Kaloti had chosen to write off the Gold on 30 November 2018, such decision likely would have been made because Kaloti was ceding its business to [redacted] and needed to generate loss in order to request compensation for its contemplated Treaty claims.)

801. In sum, Claimant has failed to demonstrate that the alleged breaches caused its alleged loss. The evidence contradicts Claimant's arguments in that regard, and reveals the existence of multiple supervening causes. For these reasons, Claimant's Lost Profits and Going Concern Claims must be dismissed.

B. Claimant has failed to substantiate the damages it seeks

802. Even if Claimant had been able to establish a proximate causal link between the alleged breaches and alleged losses (quod non), Claimant would not be entitled to any

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[1898] Memorial, ¶ 163; First Expert Report of Almir Smajlovic, 4 March 2022 ("**First Smajlovic Report**"), ¶ 2.16.

[1899] *See* First Smajlovic Report, ¶ 6.13; First Brattle Report, ¶¶ 236–237; Second Brattle Report, ¶ 213.

[1900] First Brattle Report, ¶¶ 236–240 ("[A]ccording to the company's 2018 balance sheet, KML did not take any write-down of the seized inventories.").

[1901] First Brattle Report, ¶¶ 236–240 ("[A]ccording to the company's 2018 balance sheet, KML did not take any write-down of the seized inventories.").

[1902] Second Smajlovic Report, Annex 1, fn. 503. Mr. Smajlovic does not test the reasonableness or the appropriateness of the decision to write down the inventory on 30 November 2018. Instead, he accepts it as a legal instruction and states without providing evidence or analysis that "[b]ased on my independent assessment, [he] confirmed that by 30 November 2018, the Measures resulted in a permanent and irreversible economic loss for KML." *See* Second Smajlovic Report, ¶¶ 2.14, 2.25.

[1903] Procedural Order No. 2, Annex 2, Request 15, pp. 58–62 (where Claimant argued, again, that it could not find any responsive documents and/or that they were "left and lost" in Lima).

compensation because its damages calculations are defective. The Parties agree that the relevant standard of compensation for breaches of international law obligations is that of full reparation.[1904] As Peru demonstrated in the Counter-Memorial, such standard does not allow compensation for damages that are speculative, remote or uncertain.[1905] Yet Claimant's damages calculations suffer from precisely those defects, as they are riddled with unjustified assumptions, calculations errors, and other serious problems.[1906] In the Reply, rather than correct these errors, Claimant largely repeated its submissions from the Memorial.[1907] In this section, Peru will therefore (i) briefly recall the key defects in Claimant's damages calculations, and (ii) discuss Brattle's alternative calculations.

1. Claimant's damages claims are speculative, uncertain, and defective

803. Claimant relies on the analysis and calculations of its damages expert Mr. Smajlovic. However, in both of his reports, Mr. Smajlovic repeatedly states that his analysis relied heavily upon client instructions.[1908] By way of example, as described above, Mr. Smajlovic simply assumed that a causal link between the alleged measure and alleged loss in fact existed, and concluded on that basis that but for such measures, Kaloti

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[1904] *See* Counter-Memorial, ¶¶ 764–770 (*citing, e.g.*, **CL-0057**, *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, p. 47); Reply, ¶ 490.

[1905] *See* Counter-Memorial, ¶¶ 765–770 (*citing* **RL-0028**, *LG&E Energy Corp., et al., .v. Argentine Republic*, ICSID Case No. ARB/02/1, Award, 25 July 2007 (de Maekelt, van den Berg, Rezek), ¶ 89 ("[L]ost future profits have only been awarded when 'an anticipated income stream has attained sufficient attributes to be considered legally protected interests of sufficient certainty to be compensable.' Prospective gains which are highly conjectural, 'too remote or speculative' are disallowed by arbitral tribunals."); **CL-0058**, *Amoco International Finance Corporation v. Islamic Republic of Iran*, Iran-U.S. Claims Tribunal, Partial Award, 14 July 1987, ¶ 238 ("One of the best settled rules of the law of international responsibility of States is that no reparation for speculative or uncertain damage can be awarded.").

[1906] *See* Counter-Memorial, § V.B.

[1907] *Compare, e.g.,* Reply, ¶¶ 463–465 *with* Memorial, ¶¶ 190–192.

[1908] *See, e.g.*, First Smajlovic Report, ¶¶ 3.13–3.17; Second Smajlovic Report, ¶¶ 3.2–3.6.

would have enjoyed substantially increased volumes and extraordinary profit margins.[1909]

804. Although Peru and Brattle identified these unreasonable and unjustified assumptions, Mr. Smajlovic doubled down on them in his Second Report. And although he was forced to admit and correct certain errors,[1910] his calculations continue to suffer from serious defects. Peru addresses each of Claimant's three damages claims in turn below.

a. Claimant's Lost Profits Claim is flawed and highly speculative

805. With respect to its Lost Profits Claim, Claimant seeks USD 27,079,044 for Kaloti's alleged lost profits from 1 January 2014 to 30 November 2018.[1911] Mr. Smajlovic purports to calculate such lost profits using a discounted cash flow ("**DCF**") model.[1912]

806. A fundamental flaw in Mr. Smajlovic's analysis is the selection of the valuation date of 30 November 2018. Kaloti selected—and then instructed Mr. Smajlovic to use—this valuation date on the purported basis that it was the date on which Kaloti's net equity became negative, rendering Kaloti insolvent.[1913] As Peru and Brattle explained, however, such date was arbitrarily selected, including because (i) the alleged measures of which Claimant complains took place long before that date; (ii) Kaloti could have written down its inventory, and thereby caused net equity to become negative, at any time after 2014;[1914] and (iii) Kaloti did not in fact record any write down of the inventory in its 2018 balance sheet or at any other time.[1915] In his second report, Mr. Smajlovic does not deny that the inventory could have been written down

[1909] *See* Second Smajlovic Report, ¶ 6.39. *See also* Second Brattle Report, § IV.B.

[1910] *See, e.g.*, Reply, ¶ 460 (addressing the revisions that Mr. Smajlovic made to his calculations in his Second Report).

[1911] Reply, ¶ 413, Table.

[1912] First Smajlovic Report, ¶ 5.8.

[1913] Memorial, ¶¶ 17, 163.

[1914] *See* Counter-Memorial, ¶¶ 774–775.

[1915] First Brattle Report, ¶¶ 237–238.

at any time;[1916] indeed, he admits that he has no basis on which to conclude whether the write-off of the inventories should have been done sooner than 30 November 2018.[1917] Yet he continues to rely upon this arbitrarily selected valuation date as the basis for his damages calculations. Mr. Smajlovic's entire valuation thus rests on a valuation date that he did not (and could not) independently confirm or verify.

807. In addition to this fundamental flaw, Mr. Smajlovic's calculations continue to suffer from a number of other serious defects, including (but not limited to) the following:

a. his damages model assumes that but for the alleged breaches, Kaloti would have enjoyed the whopping rate of return of 221%.[1918] As Brattle observed, such an astronomical rate of return is "not seen by investors in even the one of the world's most successful companies, Apple."[1919]

b. Mr. Smajlovic assumes that but for the alleged breaches, Kaloti's purchase volumes in Peru would have grown by 132% from 2013 to 2016, and that Kaloti would thereafter have maintained the same market share over a 32-year period.[1920] But such assumption is unreasonable, because it was extrapolated from the purchase volumes achieved during a specific 3-month period in 2013. It was thus an unrepresentatively small sample on which to base a three year growth trajectory followed by 32-year sustained market share.[1921] Moreover, by the end of 2013, Kaloti had operated for only 15 months.[1922] As Brattle explains, this limited sample of historical performance, as well as other factors (e.g., the limited sector of the market to which Kaloti had access, the fact that this was a competitive market with no barriers to entry), render unreasonable

[1916] Second Smajlovic Report, Annex 1, fn. 503.
[1917] Second Smajlovic Report, ¶ 6.5.
[1918] Second Brattle Report, ¶ 94 (*citing* First Brattle Report, ¶¶ 110–111).
[1919] Second Brattle Report, ¶ 9.
[1920] Second Brattle Report, ¶ 19.
[1921] Second Brattle Report, ¶ 60.
[1922] Second Brattle Report, ¶¶ 114–115.

Mr. Smajlovic's assumption of regarding Kaloti's counterfactual purchase volumes.[1923]

c. Further, Mr. Smajlovic also ignores various risks faced by Kaloti, including with respect to gold prices, gold volumes, and Kaloti's reputation (due to its relationship with [redacted] and its relationships with suppliers that were being investigated and prosecuted for illegal mining).[1924]

d. Mr. Smajlovic's damages calculation also includes alleged lost profits deriving from purchases of gold that, in the "but for" scenario, would have occurred outside of Peru.[1925] In fact, 58% of Claimant's Lost Profits Claim is comprised of alleged lost profits that supposedly would have resulted from purchase volumes sourced from outside of Peru.[1926] Even if such alleged lost profits were compensable under the Treaty (which they are not),[1927] the analysis is based upon the *assumption* that Kaloti would have experienced 132% growth in its purchase volumes from outside of Peru (i.e., the exact same percentage that, as mentioned above, Mr. Smajlovic had assumed for purchase volumes *inside* Peru).[1928] In other words, Mr. Smajlovic took the same speculative and unreasonable forecast growth that he had assumed for purchase volumes inside of Peru, and applied it to other markets outside Peru. However, he did so without providing any supporting evidence (e.g., analyses of different markets, suppliers, or competition).[1929] This means that 58% of the Lost Profits Claim is based upon pure speculation.

[1923] Second Brattle Report, ¶¶ 116–124.

[1924] Second Brattle Report, § IV.F.

[1925] *See* Second Smajlovic Report, Table 1.

[1926] Second Brattle Report, ¶ 152.

[1927] *See* Counter-Memorial, ¶¶ 378–388 (*citing* **RL-0001**, Treaty [*Re-submitted version of CL-0001, with additional pages*], Art. 1.3; ICSID Convention, Art. 25, p. 35); **RL-0105**, *ADM* (Award), ¶¶ 273–274; **RL-0207**, *Hope Services LLC v. Republic of Cameroon*, ICSID Case No. ARB/20/2, Award, 23 December 2021 (Scherer, Ziadé, Garel), ¶ 215).

[1928] Second Brattle Report, ¶ 20.

[1929] Second Brattle Report, ¶ 20.

808. For these reasons, as well as those addressed in the Counter-Memorial and in Brattle's two expert reports, the calculation of Claimant's alleged lost profits is speculative and deeply flawed, and therefore cannot be relied upon by the Tribunal.

b. Claimant's Going Concern Claim is likewise flawed and highly speculative

809. For its Going Concern Claim, Claimant seeks USD 70,133,219 for the alleged expropriation of Kaloti as a "going concern business."[1930] Relying upon Mr. Smajlovic's reports, Claimant purports to calculate the fair market value ("**FMV**") of Kaloti as a going concern using the same DCF model that underlies the Lost Profits Claim. The resulting damages calculation is speculative and flawed, for at least the following reasons.

a. As discussed above, the valuation date of 30 November 2018—which Claimant also uses for purposes of its Going Concern Claim—was arbitrarily selected by Claimant.[1931]

b. Also as discussed above, Mr. Smajlovic's DCF analysis assumes that Kaloti would have experienced significant growth in purchase volumes until 2016, followed by a sustained market share over three decades, even though (i) Mr. Smajlovic failed to substantiate that assumption with any concrete evidence, and (ii) the evidence on the record actually belies such assumption.[1932]

c. As discussed above, more than half of Claimant's damages estimate is based upon hypothetical purchase volumes from outside of Peru, which are unsupported by any evidence or analysis.[1933]

d. The purported calculation of the FMV of Kaloti is not consistent with the standard articulated in the Treaty. Article 10.7.2 of the Treaty defines

[1930] Reply, ¶ 413, Table.

[1931] First Brattle Report, ¶¶ 236–240; Second Brattle Report, ¶¶ 81–82.

[1932] Second Brattle Report, ¶¶ 111–151.

[1933] Second Brattle Report, ¶¶ 152–158.

appropriate compensation for an expropriation as compensation that is "equivalent to the fair market value of the expropriated investment immediately before the expropriation took place."[1934] Accordingly, Mr. Smajlovic has conceded that he must adopt an ex ante approach to valuation.[1935] However, as explained by Brattle, Mr. Smajlovic used an ex post approach, by relying on gold prices *after* the valuation date, "resulting in an ex-post valuation that significantly overstates ex-ante damages"(emphasis omitted).[1936]

e. Mr. Smajlovic dismissed as irrelevant the creation of [redacted] by [redacted].[1937] Brattle demonstrates, however, that such fact is directly relevant to the calculation of damages, not least because "[redacted] ability to create a new business engaged in substantially the same business as KML diminishes the FMV of KML."[1938]

f. In support of his analysis of the FMV of Kaloti, Mr. Smajlovic relies heavily on a letter from its sister company, [redacted][1939] In that letter, [redacted] had expressed a desire to buy 45,000 kg of gold in Peru in the short term.[1940] Mr. Smajlovic uses that letter to corroborate his analysis of the but-for scenario. Such reliance is unreasonable and unjustified, however, including because (i) the mere expression of a desire by [redacted] to purchase gold does not prove that Kaloti actually would have effected the relevant sales in the end; (ii) the letter is not a contract and does not provide the terms of any future purchases, such that a buyer would not have placed significant weight

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[1934] **RL-0001**, Treaty [*Re-submitted version of CL-0001, with additional pages*], Art. 10.7; *see also* First Smajlovic Report, ¶ 4.1.

[1935] First Smajlovic Report, ¶ 5.4.

[1936] Second Brattle Report, ¶ 88.

[1937] Second Smajlovic Report, ¶¶ 2.55–2.60.

[1938] Second Brattle Report, ¶ 215.

[1939] Second Smajlovic Report, ¶¶ 6.25.

[1940] **Ex. C-0047**, [redacted] letter to KML, 10 September 2013. *See also* Second Brattle Report, § IV.C.5.

on such letter; and (iii) to the contrary, the apparent reliance of Kaloti on purchases from [redacted] was actually a source of risk, given the lack of firm commitment and Kaloti Jewellery's poor reputation.[1941]

810. For these reasons, and those addressed in the Counter-Memorial and in Brattle's two expert reports, the calculation of the alleged FMV of Kaloti as a going concern enterprise is speculative and flawed, and cannot be relied upon by the Tribunal.

c. Claimant's Inventory Claim is defective and overstates the alleged value of the Gold

811. Claimant's Inventory Claim consists of a claim of USD 17,646,441 for the alleged value of the Five Shipments of Gold as of 30 November 2018.[1942] This claim likewise suffers from serious defects, as detailed herein and in Brattle's Second Report.

812. For its Inventory Claim, Claimant relies on the following inputs and calculations from Mr. Smajlovic's second report:

Figure 4: Mr. Smajlovic's Calculation of the Value of the Five Shipments[1943]

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	C.G. Koenig	111,545	103,911	$ 39.34	$ 4,087,805
Purchase No.2	7-Jan-2014	Oxford	98,591	92,750	$ 39.34	$ 3,648,770
Purchase No.3	7-Jan-2014	San Serafin	38,601	36,220	$ 39.34	$ 1,424,870
Purchase No.4	7-Jan-2014	Sumaj	126,775	117,860	$ 39.34	$ 4,636,567
Purchase No.5	8-Jan-2014	Sumaj	99,843	97,826	$ 39.34	$ 3,848,429
Total			**475,356**	**448,566**	**$ 39.34**	**$ 17,646,441**

813. As a preliminary matter, awarding the requested damages would result in a windfall for Claimant. That is so for at least the following reasons.

[1941] Second Brattle Report, ¶¶ 137–151.

[1942] Reply, ¶ 413, Table.

[1943] Second Smajlovic Report, ¶ 5.86, Table 8.

a. As demonstrated in **Section II.A.2**, Claimant has failed to prove that it ever actually acquired ownership over the Five Shipments.

b. The evidence shows that Kaloti did not pay for Shipments 3 and 5.[1944] In fact, a Peruvian court has definitively determined that Kaloti failed to pay for Shipment 5 and did not acquire ownership over it.[1945]

c. Kaloti did not comply with its due diligence requirements under Peruvian law, and therefore did not qualify as a bona fide purchase of the Gold.[1946]

814. In any event, Mr. Smajlovic's damages calculations are unreliable and overestimate the value of the Gold, including because:

a. Mr. Smajlovic has relied on various different estimates of the volumes of gold in the Five Shipments, which renders it impossible for Peru, Brattle, or the Tribunal to determine which of those estimates is accurate;[1947] and

b. As Brattle explains, "Mr. Smajlovic overstates the value of the Seized Shipments by applying the price for refined gold" even though the Five Shipments are comprised of <u>un</u>refined gold.[1948]

815. In sum, Claimant's damages calculations are the product of unsupported assumptions, speculation, inaccurate information, and errors. These calculations accordingly cannot be used as the basis for any award of damages.

[1944] Reply, ¶ 31; **Ex. R-0242**, Kaloti's First Notice of Intent, filed with the General Office of International Economic Affairs, 3 May 2016 [*Re-submitted version of C-0158, with Respondent's translation*], fn. 3; **Ex. C-0022**, KML 8 April 2019, Notice of Intent, ¶¶ 33, 42.

[1945] **Ex. R-0212**, Resolution No. 08, Lima Court of Appeal, Third Civil Chamber, 14 June 2022, pp. 5, 8, 14–15; **Ex. R-0238**, Resolution No. 46, Judgment, 23 September 2019.

[1946] Section II.A.3.

[1947] Second Brattle Report, ¶ 276.

[1948] Second Brattle Report, ¶¶ 277–279.

2. *In the alternative, Brattle offers damages estimates that correct various calculation errors*

816. Notwithstanding (i) the absence of a proximate causal link between the alleged breaches and alleged losses, and (ii) the fact that any DCF analysis is speculative given Kaloti's short operating history,[1949] Peru requested that Brattle provide alternative damages estimates. Accordingly, Brattle corrected various errors in Mr. Smajlovic's calculations (as shown in Figure 5 below), and provided the alternative estimates shown in Figure 6 below.[1950]

817. In the Reply, Claimant criticized Brattle's alternative calculations,[1951] so in its second report Brattle has exposed Claimant's mischaracterizations and has refuted each of Claimant's criticisms.[1952] Brattle has also provided its corrections to Claimant's revised damages calculations, taking into account the various flaws and methodological problems identified in Peru's Counter-Memorial, Brattle's First Report and the foregoing paragraphs. Those corrections are as follows:[1953]

[1949] Second Brattle Report, ¶ 310.

[1950] *See* Second Brattle Report, § VII.

[1951] *See* Reply, ¶¶ 480–495.

[1952] *See* Second Brattle Report, § VII.

[1953] *See* Second Brattle Report, § VII.

Figure 5: Cumulative Impact of Changes on Damages

		Lost Profits [A] See note $	Damages from Alleged Expropriation (2019-2048) [B] See note $	Total Damages [C] [A]+[B] $	Reduction in Damages [D] %
Smajlovic Estimate	[1]	39,452,187	70,136,219	109,588,406	
Smajlovic Estimate (Without Interest)	[2]	33,282,228	70,136,219	103,418,447	-5.6%
#1: Adjusting But-For Peru Gold Volumes	[3]	14,454,044	27,444,968	41,899,012	-61.8%
#2: Removing Lost Gold Volumes Outside Peru	[4]	12,591,720	12,138,020	24,729,740	-77.4%
#3: Correcting Gold Prices	[5]	12,591,720	10,112,669	22,704,389	-79.3%
#4: Correcting Unreasonable Price Fixing Margin Assumption	[6]	11,579,088	8,829,789	20,408,877	-81.4%
#5: Correcting Unreasonable Interest Margin Assumption	[7]	10,642,002	8,256,120	18,898,122	-82.8%
#6: Correcting the Discount Rate	[8]	10,642,002	5,940,316	16,582,318	-84.9%
#7: Incorporating Income Taxes Mr. Smajlovic Ignores	[9]	10,341,974	3,953,758	14,295,733	-87.0%
#8: Deducting KML's Actual Enterprise Value	[10]	10,341,974	3,389,310	13,731,285	-87.5%

Sources and notes:
[A]-[B]: See BR-0108, Brattle Workpapers C and AS-0068-ENG, Appendix 3 - DCF (Updated). See 'Control Panel' tab to turn adjustments on/off. See Table C1 for values.

Figure 6: Total Estimated Damages with Pre-Award Interest at the Risk Free Rate

		Lost Profits & Alleged Expropriation [A] See note $	Seized Inventory Damages [B] See note $	Both Categories of Damages [C] See note $
Lost Profits	[1]	10,341,974	-	10,341,974
Damage from Alleged Expropriation (2019-2048)	[2]	3,389,310	-	3,389,310
Damages Before Seized Shipments	**[3]**	**13,731,284**	**-**	**13,731,284**
Seized Shipments	[4]		12,213,469	12,213,469
Adjustment to Avoid Double-Counting	[5]			-12,373,142
Pre-Award Interest at Risk-Free Rate	[6]	597,163	736,722	810,565
Total Damages at Risk Free Rate	**[7]**	**14,328,447**	**12,950,190**	**14,382,175**

Sources and notes:
[A]-[B]: See BR-0108, Brattle Workpapers C. See 'Control Panel' tab to turn adjustments on/off.
[1]: See Table C1, cell L110.

818. Thus, if the Tribunal were to find that it has jurisdiction over any of the claims (which it does not), *and* if it were to identify a breach of the Treaty (of which there was none),

and if it were to determine that there is a causal link between such breach and any alleged loss (which remains unproven), it would be Brattle's alternative damages estimates that would need to be used by the Tribunal to calculate compensation, given the unreliability of the damages methodology and calculations offered by Claimant and its damages expert.

C. Claimant has failed to mitigate its losses

819. As Peru demonstrated in the Counter-Memorial, it is a well established principle of international investment law that an investor must take reasonable steps to mitigate any losses resulting from a State's breach.[1954] In the Reply, Claimant did not dispute this requirement,[1955] but instead summarily alleged that it "was diligent, mitigated damages, and sought new suppliers of gold."[1956] Claimant also contended that the cash flows it took into account for the purposes of its Lost Profits Claim "includ[es] cashflows resulting from mitigation efforts."[1957] However, Claimant has not provided any evidence to support these allegations, and thus has not discharged its burden of proof.

820. In the Reply, Claimant was unable to rebut the evidence presented by Peru in the Counter-Memorial that Claimant failed to mitigate its losses. To recall, Peru has shown that Claimant could have—but did not—take any of the following steps. *First*, Kaloti could have pursued various avenues of available legal recourses under Peruvian law and practice to challenge the Precautionary Seizures and to assert any rights it claimed to have over the Gold.[1958] In the Reply, Claimant argued that it was within "its own discretion" to pursue such recourses, which "did not constitute affirmative burdens or obligations upon KML."[1959] Claimant seems to fundamentally

[1954] Counter-Memorial, ¶¶ 796–797.
[1955] Reply, ¶¶ 400, 445.
[1956] Reply, ¶¶ 400, 445.
[1957] Reply, ¶ 464.
[1958] *See supra* Section II.C.2.
[1959] Reply, ¶ 64.

misunderstand its duty to mitigate losses. To recall, a failure to exhaust available judicial remedies has been held to constitute a failure to mitigate damages.[1960] That is precisely what happened here: Claimant could have pursued relief before Peruvian courts through a variety of means, but declined to do so, and thereby failed to mitigate its losses.

821. *Second,* Kaloti could have addressed its accounting and operational deficiencies to mitigate the effect of the seizures of the Five Shipments. Claimant itself admits that "a significant portion of the net working capital was **unwillingly attached** to raw materials (gold) that were seized" (emphasis added).[1961] Indeed, as Mr. Smajlovic admits, "[t]ying cash to significant amount of seized inventory, had the most negative effect on the KML's working capital."[1962] Given that the Five Shipments were immobilized in 2013-2014, Kaloti could have made adjustments to improve its net working capital. For instance, Kaloti could have (i) stopped making pre-payments for inventory; (ii) conducted credit checks on suppliers to reduce the likelihood of bad debts; (iii) cut unnecessary expenses; or (iv) even sourced additional bank financing. However, it failed to take any of these actions.

822. *Third,* there is no evidence that Kaloti could not have continued to trade in gold past 30 November 2018, including by selling to its "one principal buyer"[1963]—[redacted] which by Claimant's own admission had "essentially agreed to buy as much gold from KML as it could source."[1964] Yet Kaloti did not do so; instead, it arbitrarily selected a date (30 November 2018) on which it would write off the Five Shipments of Gold, and then ceased operations on that date.[1965]

[1960] **RL-0033**, *Dunkeld International Investment Ltd. v. Government of Belize I*, PCA Case No. 2010-13, Award, 28 June 2016 (van den Berg, Beechey, Oreamuno), ¶ 197.

[1961] Reply, ¶ 118.

[1962] Second Smajlovic Report, ¶ 6.96.

[1963] Memorial, ¶ 146.

[1964] Reply, ¶ 396.

[1965] Reply, ¶ 447.

823. *Fourth*, and relatedly, Kaloti's CEO [redacted] failed to mitigate—and in fact contributed to—Kaloti's alleged losses by establishing [redacted] in September 2018.[1966] According to [redacted], [redacted] was "a company with operations similar to . . . those of KML [Kaloti] in the precious metal business"[1967] This led to the cannibalization of Kaloti's business—concretely, as a result of the migration from Kaloti to [redacted] of Kaloti's suppliers,[1968] assets,[1969] and staff.[1970]

824. *Fifth*, Kaloti failed to remedy its deficient due diligence practices, thus contributing to its alleged lost profits and the demise of its business. As discussed in **Section II.A** above, Kaloti was required by Peruvian law to conduct due diligence with respect to its suppliers. However, it did not do so. Such failure not only had an impact with respect to the Five Shipments of Gold (which were immobilized due to indicia of criminal activity), but continued to affect Kaloti thereafter. Indeed, for several suppliers, Kaloti would purchase large amounts of gold, only to then see those suppliers fold and suffer criminal prosecutions for illegal gold smuggling and money laundering.[1971] If Kaloti had complied with its due diligence obligations under

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[1966] **Ex. R-0161,** Certificate of Status of [redacted] 27 September 2018. *See also* **Ex. R-0348**, Electronic Articles of Organization for [redacted] 27 September 2018.

[1967] First [redacted] Witness Statement, ¶ 10.

[1968] *Compare* **Ex. C-0134**, [redacted] list of suppliers from 2019 to 2020 *with* **Ex. C-0030**, KML transaction summary of all purchases between 2012 and 2018 (where the following companies appear: [redacted]

[1969] Second [redacted] Witness Statement, ¶ 7.

[1970] **Ex. R-0344**, Articles of Amendment to Articles of Organization of [redacted] Florida Department of State Division of Corporations, 31 May 2021. *See also* **Ex. BR-0005**, Florida Divisions of Corporations, Detail by Entity Name ("[redacted]

[1971] *See supra* Section II.B (discussing [redacted] which dissolved in 2014, and [redacted] the owners of which were placed in pre-trial detention for the crimes of money laundering and smuggling illegal gold mined in Peru into Ecuador).

Peruvian law,[1972] or indeed even with the guidance in its own AML/CFT Manual,[1973] Kaloti would have sourced gold from reliable and consistent suppliers, thereby reducing the risk that its gold would be seized by Peruvian authorities or that its suppliers would go out of business.

825. The evidence thus shows that Claimant failed to mitigate its losses. For its part, Claimant's primary argument in respect of mitigation is that Kaloti sought new suppliers of gold after the alleged measures took effect.[1974] However, as demonstrated in **Section II.F**, constantly diversifying its supplier pool in fact was an essential aspect of Kaloti's chosen business model. Indeed, most of Kaloti's global suppliers only supplied Kaloti for short periods of time (i.e., less than two years).[1975] The ordinary operation of Kaloti's business model and practice does not serve to prove mitigation of the allegedly extraordinary damages that Claimant seeks in this arbitration.

826. For these reasons, any award of damages against Peru should be reduced to take into account Kaloti's failure to mitigate its losses. At a minimum, such reduction should be equivalent to the profits achieved by [redacted] as Kaloti's successor entity, for the period following its establishment.

D. Claimant's claims for interest and taxes are unsubstantiated and inappropriate

827. As Peru explained in the Counter-Memorial, Claimant sought to increase its already-unsubstantiated damages claims by (i) applying an artificially high pre- and post-award interest rate (namely, LIBOR + 4%),[1976] and (ii) seeking a "tax gross-up" in the amount of USD 25.6 million to account for any tax liability that Claimant might incur.[1977] In the Reply, Claimant insisted that the inflated interest rate should apply,

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[1972] Section II.A.3. *See also* Counter-Memorial, § II.B.6.

[1973] **Ex. C-0025**, KML AML/CFT Program Manual, January 2018, § 7.2.

[1974] Reply, ¶¶ 400, 445.

[1975] *See* **Ex. BR-0002**, Brattle Workpapers B, Tab B6 (showing the years in which Kaloti purchased gold from each supplier).

[1976] *See* Counter-Memorial, ¶¶ 802–804.

[1977] *See* Counter-Memorial, ¶¶ 805–815.

and while it purported to abandon its claim for a "tax gross-up" as such, it nevertheless requested an award net of "*any* taxes" globally (which amounts to the same thing as a tax gross-up).[1978] For the reasons below, Claimant's arguments with respect to the applicable interest rate and tax treatment should be rejected.

1. Claimant continues to inflate its pre- and post- award interest

828. Peru demonstrated in the Counter-Memorial that interest may be awarded on damages, but only at a rate that is reasonable.[1979] Although Claimant and Mr. Smajlovic have both conceded that point,[1980] they nevertheless insisted on the application of a rate that is *not* reasonable (namely, LIBOR+4%).[1981]

829. As Brattle has explained, the payment of interest is intended to compensate a claimant for the time value of money and for bearing the risk of any delay in payment of the arbitral award.[1982] However, Claimant has failed to establish that there is any risk that Peru would not comply with an eventual award of damages.[1983] Accordingly, a reasonable interest rate would reflect solely the time value of money, without any additional amount for the element of risk.[1984] Brattle concludes that a reasonable rate for an award in USD would therefore be the risk-free rate of short-term US Treasury securities.[1985]

[1978] Reply, ¶¶ 499, 502.

[1979] *See* Counter-Memorial, ¶ 803.

[1980] *See* Reply, ¶ 510; Second Smajlovic Report, ¶ 5.92.

[1981] Reply, ¶ 514.

[1982] First Brattle Report, ¶ 205.

[1983] *See* First Brattle Report, ¶ 206.

[1984] Second Brattle Report, ¶ 281.

[1985] Second Brattle Report, ¶ 281 (Brattle notes in the alternative that "if the Tribunal concludes that the Claimant became an effective creditor to Peru at the time of the alleged violations (i.e., it assumes KML was a forced lender), it would be appropriate to apply the interest rate at which market participants willingly become creditors for US-dollar obligations of the Peruvian government (because the Claimant is seeking compensation in US dollars). That is, in this case it would be appropriate to apply Peru's US-dollar-denominated borrowing rate."); Second Brattle Report, ¶ 282.

830. In the Reply, Claimant dismissed Brattle's analysis, and insisted that LIBOR+4% is a reasonable rate.[1986] Claimant's argument fails, however, for two reasons. *First*, Claimant's reasoning is flawed. Claimant insists that LIBOR+4% "approximates Claimant's short-term commercial borrowing rate for its operations in Peru which ranged from 4.75% to 7.50%."[1987] However, Claimant's own borrowing rate is not at all a relevant benchmark, for the simple reason that a damages award would not be a debt owed *by the Claimant*. As Brattle explains, "Claimant's borrowing rate is disconnected with the risk and delay of payment of an award issued (if any) by this Tribunal."[1988] Furthermore, an interest rate reflective of Claimant's alleged borrowing costs would provide compensation in excess of the risk-free rate, despite the fact that, as noted above, no risk exists here.[1989] Such an interest rate, then, would *not* be commercially reasonable.

831. *Second*, Claimant's proposed higher interest rate is not commercially reasonable because it would create a windfall for Claimant. Specifically, as explained by Brattle, Mr. Smajlovic's proposed interest rate exceeds the discount rate that he applied to his own DCF model:

> Mr. Smajlovic uses a discount rate of 5.19% to value KML as of the alleged expropriation date, but the average annual pre-award interest rate he applies to bring the forward is 5.9%. **This means that the economic position of KML is improved when payment of an award (if any) is delayed**.[1990] (Emphasis added)

832. Accordingly, Claimant's proposed interest rate is not reasonable, and should not be applied by the Tribunal to any damages award.[1991]

[1986] *See* Reply, ¶ 514.

[1987] Reply, ¶ 515.

[1988] Second Brattle Report, ¶ 283.

[1989] Second Brattle Report, ¶ 285.

[1990] Second Brattle Report, ¶ 40.

[1991] Second Brattle Report, ¶¶ 281–283, 285.

2. *Claimant's proposed treatment of the tax aspects is inappropriate and would amount to a "back-door" tax gross-up*

833. In the Memorial, Claimant had argued that a tax gross-up was necessary to account for any tax liability that could arise for Kaloti in Peru, the United States, or "anywhere" with respect to an eventual award in its favor.[1992] Such "tax gross-up" claim had the effect of increasing Kaloti's overall damages claim by USD 25.6 million.[1993] As Peru explained in the Counter-Memorial, such claim was not only unsound as a doctrinal and jurisprudential matter, but unsubstantiated, and speculative.[1994] In apparent acknowledgement of the foregoing, in the Reply Claimant abandoned the "tax gross-up" claim, and Mr. Smajlovic thus altogether ignored the issue of taxes in his DCF valuation.[1995] However, Claimant introduced in the Reply as an alternative argument that any damages award should be calculated, and should be payable, in an amount that is "net (free and clear) of *any* taxes" (emphasis in original).[1996] As shown below, Claimant's latest argument on taxes fares no better than its original one, and must be rejected.

a. Claimant's tactic of ignoring tax liability for the purpose of valuation results in an overestimation of the FMV of Kaloti

834. Mr. Smajlovic's revised approach—which, as noted, altogether ignores the issue of tax liability[1997]—results in an overestimation of the FMV. As Brattle explains, "[t]he FMV of an asset is a function of the cash flows that it generates for its owners after tax" (emphasis omitted).[1998] The FMV analysis therefore must take into account (i) the tax liability of Kaloti in Peru, and (ii) the tax liability of Kaloti's owners in the United States.[1999] Thus, by ignoring altogether Kaloti's tax liability, Mr. Smajlovic has

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[1992] Memorial, ¶¶ 221–224. *See also* First Smajlovic Report, ¶ 6.61.

[1993] First Smajlovic Report, ¶¶ 8.6–8.8.

[1994] *See* Counter-Memorial, ¶¶ 805–815.

[1995] Second Smajlovic Report, ¶¶ 4.1–4.2.

[1996] Reply, ¶¶ 499, 502.

[1997] Second Smajlovic Report, ¶ 4.1–4.2.

[1998] Second Brattle Report, ¶ 205.

[1999] *See* Second Brattle Report, ¶¶ 204–206.

overestimated FMV.[2000] Indeed, as Brattle explains, Mr. Smajlovic's new approach "is effectively a back-door method" to impose a tax gross-up on a damages award.[2001] In fact, Claimant's position contradicts Mr. Smajlovic's own assertion in his First Report, that KML was liable to pay Peruvian corporation tax on its earnings in Peru.[2002] To correct this error, Brattle applies the appropriate tax rate—namely 29.5%—in its own calculations.[2003]

b. Claimant's request for an award net of taxes is inappropriate

835. *Second*, Claimant's request for an award of damages "in an amount net (free and clear) of *any* taxes" (emphasis in original)[2004] is unsubstantiated and impermissible. Claimant has failed to provide any explanation of the legal basis for such request. That is presumably because there is no legal basis for such request. Claimant's new argument must be rejected, for at least the following three reasons.

836. *First*, the Treaty does not authorize an order restricting the application of taxes. Article 10.26(1) of the Treaty expressly limits the available relief:

> 1. Where a tribunal makes a final award against a respondent, the tribunal may award, separately or in combination, **only**:
>
> (a) monetary damages and any applicable interest; and
>
> (b) restitution of property, in which case the award shall provide that the respondent may pay monetary damages and any applicable interest in lieu of restitution.
>
> A tribunal may also award costs and attorney's fees in accordance with this Section and the applicable arbitration rules.[2005]

[2000] Second Brattle Report, ¶¶ 204–08.

[2001] Second Brattle Report, ¶ 209. When Mr. Smajlovic included a tax gross-up, his total estimate was USD 86.7 million (AS-0007, Tab 3.2, cell I4); when he removed the gross-up, but also removed any consideration of tax liability, his total estimate was USD 86.8 million (AS-0007, Tab 3.2, cell G4).

[2002] First Smajlovic Report, ¶ 6.60. *See also* Second Brattle Report, ¶ 204.

[2003] Second Brattle Report, ¶ 301.

[2004] Reply, ¶ 502.

[2005] **RL-0001**, Treaty [*Re-submitted version of CL-0001, with additional pages*], Art. 10.26(1).

The Treaty thus does not authorize a claimant to seek, or a tribunal to order, that a State forgo the application of its taxation laws with respect to a given person or entity.

837. *Second*, investment case law does not support the issuance of a damages award net of taxes, because such an award would infringe upon sovereign States' recognized right to regulate, including with respect to taxation.[2006] For example, as affirmed by the tribunal in *Ceskoslovenska obchodní banka, a.s. v. Slovak Republic*:

> Income taxes are an act of government ("fait du prince") that are out of the parties' control and are unrelated to the obligation of one party to fully compensate the other party for the harm done. Moreover, they are consequential to the compensation and do not affect its determination. Compensation will not increase or decrease according to whether the amount of income tax rates is increased or decreased.[2007]

838. *Third*, the principle of full reparation does not encompass a requirement that a claimant be exempt from potential tax liability. As explained by the tribunal in *Abengoa, S.A. v. Mexico*,

> the principle of full compensation only implies that the investor is placed in the same situation as if the wrongful act had not been committed, which does not necessarily imply that the investor is

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[2006] *See, e.g.*, **RL-0035**, *Abengoa, S.A. and COFIDES, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/09/2, Award, 18 April 2013 (Mourre, Fernández-Armesto, Siqueiros), ¶¶ 775–776; **RL-0037**, *Československá Obchodní Banka, A.S. v. Slovak Republic*, ICSID Case No. ARB/97/4, Award, 29 December 2004 (van Houtte, Bucher, Bernardini), ¶ 367; **RL-0065,** *Chevron Corp. (U.S A.) and Texaco Petroleum Corp. (U.S A.) v. Republic of Ecuador I*, PCA Case No. 2007-02/AA277, Partial Award on the Merits, 30 March 2010 (Böckstiegel, Brower, van den Berg), ¶¶ 552–553.

[2007] **RL-0037**, *Československá Obchodní Banka, A.S. v. Slovak Republic*, ICSID Case No. ARB/97/4, Award, 29 December 2004 (van Houtte, Bucher, Bernardini), ¶ 367 ("Income taxes are an act of government ('fait du prince') that are out of the parties' control and are unrelated to the obligation of one party to fully compensate the other party for the harm done. Moreover, they are consequential to the compensation and do not affect its determination. Compensation will not increase or decrease according to whether the amount of income tax rates is increased or decreased."). *See also* **RL-0065,** *Chevron Corp. (U.S.A.) and Texaco Petroleum Corp. (U.S A.) v. Republic of Ecuador I*, PCA Case No. 2007-02/AA277, Partial Award on the Merits, 30 March 2010 (Böckstiegel, Brower, van den Berg), ¶¶ 552–553.

> protected against any imposition [of taxation] on compensation.[2008]

839. For all of the foregoing reasons, the Claimant's request for an award "free and clear" of "any" taxes must be rejected.

VI. REQUEST FOR RELIEF

840. For the reasons set forth in this Rejoinder, the Republic of Peru respectfully requests that the Tribunal:

a. dismiss all of Claimant's claims for lack of jurisdiction and/or for inadmissibility;

b. dismiss for lack of merit any and all claims in respect of which the Tribunal may determine that it has jurisdiction and which it deems admissible;

c. reject in its entirety Claimant's request for compensation, should the Tribunal find that there is both jurisdiction over, and merit to, any of Claimant's claims;

d. order Claimant to pay all costs of the arbitration, including the totality of Peru's legal fees and expenses, expert fees and expenses, arbitrator and institutional fees and expenses, and any other expenses incurred in connection with Peru's defense in this arbitration, plus compounded interest on such amounts until the date of payment, calculated at the one-year risk-free US Treasury Bill rate; and

e. pursuant to Peru's previous requests, order Claimant to post security for costs.

[2008] **RL-0035**, *Abengoa, S.A. and COFIDES, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/09/2, Award, 18 April 2013 (Mourre, Fernández-Armesto, Siqueiros), ¶¶ 775–776.

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