

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Kaloti Metals & Logistics, LLC

v.

Republic of Peru

(ICSID Case No. ARB/21/29)

PROCEDURAL ORDER NO. 1

Members of the Tribunal

Prof. Donald McRae, President of the Tribunal
Prof. Dr. José Carlos Fernández Rozas, Arbitrator
Prof. Dr. Rolf Knieper, Arbitrator

Secretary of the Tribunal

Ms. Anneliese Fleckenstein

October 28, 2021

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Introduction

The first session of the Tribunal was held on October 27, 2021, by Zoom beginning at 9:00 a.m. EDT. The Session was adjourned at 10:04 a.m. EDT.

An audio recording of the session was made and deposited in the archives of ICSID. The recording was distributed to the Members of the Tribunal and the Parties.¹

Participating in the conference were:

Members of the Tribunal

Prof. Donald McRae, President of the Tribunal
Prof. Dr. José Carlos Fernández Rozas, Arbitrator
Prof. Dr. Rolf Knieper, Arbitrator

ICSID Secretariat:

Ms. Anneliese Fleckenstein, Secretary of the Tribunal

Participating on behalf of the Claimant:

Mr. Hernando Díaz-Candía, WDA Legal
Mr. Gilberto Guerrero-Rocca, WDA Legal
Mr. Ramón Azpúrua-Núñez, WDA Legal
Mr. Mikel Del Valle, WDA Legal
Mr. Awni K. Kaloti, Party Representative

Participating on behalf of the Respondent:

Ms. Vanessa Rivas Plata Saldarriaga, Ministerio de Economía y Finanzas
Ms. Mónica del Pilar Guerrero Acevedo, Ministerio de Economía y Finanzas
Ministerio de Economía y Finanzas
Mr. Giancarlo Peralta Miranda, Ministerio de Economía y Finanzas
Ministerio de Economía y Finanzas
Mr. Paolo Di Rosa, Arnold & Porter
Mr. Patricio Grané Labat, Arnold & Porter
Mr. Agustín Hubner, Arnold & Porter

The Tribunal and the Parties considered the following:

¹ In this Order, the term “Parties” is used to refer to the Claimant and the Respondent in this proceeding, and the term “Party” is used to refer to either the Claimant or the Respondent. It is noted that Chapter 10, Sections B and C of the US-Peru TPA refer to the Claimant and the Respondent together as the “disputing parties” and to either of them as a “disputing party.” In this Order, the State signatories of the TPA (United States and Peru) will be referred to as “TPA Party” or the “TPA Parties,” for clarity.

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- The Draft Procedural Order circulated by the Tribunal Secretary on September 30, 2021; and
- The Parties' comments on the Draft Procedural Order received on October 15, 2021, indicating the items on which they agreed and their respective positions regarding the items on which they did not agree.

Following the session, the Tribunal now issues the present Order:

Order

Pursuant to ICSID Arbitration Rules 19 and 20, this first Procedural Order sets out the Procedural Rules that govern this arbitration. The Procedural Calendar is attached as Annex B.

1. Applicable Arbitration Rules

Convention Article 44; US-Peru TPA Article 10.16(5).

- 1.1. These proceedings are conducted in accordance with the ICSID Arbitration Rules in force as of April 10, 2006, except to the extent provided otherwise by Section B of Chapter 10 of the Trade Promotion Agreement between the United States of America and the Republic of Peru signed on April 12, 2006, in force on February 1, 2009 (“**US-Peru TPA**”), in which case the US-Peru FTA provision shall apply.

2. Constitution of the Tribunal and Tribunal Members' Declarations

Arbitration Rule 6

- 2.1. The Tribunal was constituted on September 21, 2021, in accordance with the ICSID Convention and the ICSID Arbitration Rules. The Parties confirmed that the Tribunal was properly constituted and that no Party has any objection to the appointment of any Member of the Tribunal, based on information known to the Parties as of the date hereof.
- 2.2. The Members of the Tribunal timely submitted their signed declarations in accordance with ICSID Arbitration Rule 6(2). Copies of these declarations were distributed to the Parties by the ICSID Secretariat on September 21, 2021.
- 2.3. The Members of the Tribunal confirmed that they have sufficient availability during the next 24 months to dedicate to this case.

3. Fees and Expenses of Tribunal Members

Convention Article 60; Administrative and Financial Regulation 14; ICSID Schedule of

Fees

- 3.1. The fees and expenses of each Tribunal Member shall be determined and paid in accordance with the ICSID Schedule of Fees and the Memorandum on Fees and Expenses of ICSID Arbitrators in force at the time the fees and expenses are incurred.
 - 3.2. Under the current Schedule of Fees, each Tribunal Member receives:
 - 3.2.1. US\$3,000 for each day of meetings or each eight hours of other work performed in connection with the proceedings or *pro rata*; and
 - 3.2.2. subsistence allowances, reimbursement of travel, and other expenses pursuant to ICSID Administrative and Financial Regulation 14.
 - 3.3. Each Tribunal Member shall submit his/her claims for fees and expenses to the ICSID Secretariat on a quarterly basis.
 - 3.4. Non-refundable expenses incurred in connection with a hearing as a result of a postponement or cancellation of the hearing shall be reimbursed.
4. Presence and Quorum
Arbitration Rules 14(2) and 20(1)(a)
- 4.1. The presence of all Members of the Tribunal constitutes a quorum for its sittings, including by any appropriate means of communication.
5. Rulings of the Tribunal
Convention Article 48(1); Arbitration Rules 16, 19 and 20
- 5.1. Decisions of the Tribunal shall be taken by a majority of the Members of the Tribunal.
 - 5.2. ICSID Arbitration Rule 16(2) applies to decisions taken by correspondence except that where the matter is urgent and consultation with the other Members of the Tribunal is not practicable, the President may decide procedural matters without consulting the other Members, subject to possible reconsideration of such decision by the full Tribunal.
 - 5.3. The Tribunal shall issue all rulings, including the Award, within a reasonable time period.
 - 5.4. With the exception of the Award, if a decision on any matter has not been issued within two months of the final submission on that matter, the Tribunal will provide

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the Parties with status updates every month. The Tribunal shall endeavor to issue any award within six months of the hearing or any post-hearing briefs. If the Award has not been issued within six months of the final submissions, the Tribunal will provide the Parties with reasonably detailed status updates every month.

- 5.5. The President is authorized to issue Procedural Orders on behalf of the Tribunal.
- 5.6. The Tribunal's rulings on procedural matters may be communicated to the Parties by the Tribunal Secretary electronically in the form of a letter or email.
- 5.7. Any ruling of the Tribunal, including the certified copy of the Award, will be dispatched electronically to the Parties.

6. Power to Fix Time Limits
Arbitration Rule 26(1)

- 6.1. The President may fix and extend time limits for the completion of the various steps in the proceeding.
- 6.2. In exercising this power, the President shall consult with the other Members of the Tribunal. If the matter is urgent, the President may fix or extend time limits without consulting the other Members, subject to possible reconsideration of such decision by the full Tribunal.

7. Secretary of the Tribunal
Administrative and Financial Regulation 25

- 7.1. The Tribunal Secretary is Ms. Anneliese Fleckenstein, Legal Counsel, ICSID, or such other person as ICSID may notify the Tribunal and the Parties from time to time.
- 7.2. To send copies of communications by email, mail, and courier/parcel deliveries to the ICSID Secretariat, the contact details are:

Anneliese Fleckenstein
ICSID
MSN C3-300
1818 H Street, N.W.
Washington, D.C. 20433
USA
Tel.: + 1 (202) 458-2426
Fax: + 1 (202) 522-2615
Email: afleckenstein@worldbank.org
Paralegal name: Federico Guillermo Salon Kajganich

Paralegal email: fsalonkajganich@worldbank.org

7.3. For local messenger deliveries, the contact details are:

Anneliese Fleckenstein
ICSID
1225 Connecticut Ave. N.W.
(World Bank C Building)
3rd Floor
Washington, D.C. 20036
USA
Tel. 202-458-1534

8. Representation of the Parties
Arbitration Rule 18

8.1. Each Party shall be represented by its counsel (below) and may designate additional agents, counsel, or advocates by notifying the Tribunal and the Tribunal Secretary promptly of such designation.

For Claimant

Mr. Hernando Díaz-Candia
Mr. Gilberto Guerrero-Rocca
Mr. Ramón Azpúrua- Núñez
Mr. Mikel del Valle
WDA Legal
848 Brickell Ave., suite 1000
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Mikel.delvalle@wdalegal.com
Paralegal@wdalegal.com

For Respondent

Ms. Vanessa Rivas Plata Saldarriaga
Presidenta de la Comisión Especial
Ms. Mónica del Pilar Guerrero Acevedo
Mr. Giancarlo Peralta Miranda
Secretaría Técnica de la Comisión
Especial que Representa al Estado en
Controversias
Internacionales de Inversión
Sede Central
Ministerio de Economía y Finanzas
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vrivasplata@mef.gob.pe
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and

Mr. Paolo Di Rosa
Arnold & Porter Kaye Scholer LLP
601 Massachusetts Avenue NW

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and

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Arnold & Porter Kaye Scholer LLP
Tower 42
25 Old Broad Street
London EC2N 1HQ
United Kingdom
+44 020 7786 6174
Patricio.Grane@arnoldporter.com

8.2. Communications destined for the Republic of Peru shall also be sent to xPeruKaloti@arnoldporter.com.

9. Apportionment of Costs and Advance Payments to ICSID

Convention Article 61(2); Administrative and Financial Regulation 14; Arbitration Rule 28

9.1. The Parties shall cover the direct costs of the proceeding in equal parts, without prejudice to the final decision of the Tribunal as to the allocation of costs.

9.2. By letter of September 22, 2021, ICSID requested that each Party pay US\$250,000 to cover the initial costs of the proceeding. ICSID received Claimant's payment on October 5 and 18, 2021 and the Respondent's payment on October 13, 2021.

9.3. ICSID shall request further advances as needed. Such requests shall be accompanied by a detailed interim statement of account.

9.4. Within five business days of the date of this Procedural Order, each Party shall either declare that it (or its counsel) does not benefit from the provision of funds or other material support for the pursuit or defense of its case in these proceedings, by a natural or juridical person that is not a party to the dispute ("third-party funder"), or, as the case may be, disclose to the Centre that it has third-party funding, name the third-party funder, and provide the terms of the funding (including in relation to any award on costs).

9.5. The Claimant has confirmed that as of the date hereof, there are no third-party funding arrangements in place. Each Party shall have a continuing obligation to disclose any changes to the information referred to in the preceding paragraph,

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occurring after the initial disclosure mentioned therein, including termination of the third-party funding arrangement. The disclosure under the present paragraph shall be made within five business days of the occurrence of any such change.

10. Place of Proceeding

Convention Articles 62 and 63; Administrative and Financial Regulation 26; Arbitration Rule 13(3); US-Peru TPA Article 10.20(1)

- 10.1. Washington, D.C., United States of America, shall be the place of the proceeding.
- 10.2. The Tribunal may hold in-person hearings at any other place that it considers appropriate if the Parties so agree. The Tribunal, after consulting the Parties, may decide to hold the hearing by video conference, should it decide that an in-person hearing is not practicable or safe.
- 10.3. The Tribunal members may deliberate at any place and by any appropriate means it considers convenient.

11. Procedural Languages, Translation and Interpretation

Administrative and Financial Regulation 30(3) and (4); Arbitration Rules 20(1)(b) and 22

- 11.1. English and Spanish are the procedural languages of the arbitration.
- 11.2. Routine, administrative, or procedural correspondence addressed to or sent by the ICSID Secretariat shall be in English or with an English translation to be provided within three days.

For Parties' Pleadings

- 11.3. Any written requests and applications shall be submitted in either procedural language. If the request or application is submitted in Spanish, an English translation shall be filed within 5 days.
- 11.4. Pleadings (memorials), expert opinions, witness statements, and any other accompanying documentation may be submitted in either procedural language, provided if submitted in Spanish, a translation of such document into English is filed within 30 days thereafter.
- 11.5. Accompanying documentation (e.g., exhibits, legal authorities, annexes to expert opinions, etc.) in any language other than English or Spanish shall be translated into English. If a document is lengthy and relevant only in part, it is sufficient to translate only relevant parts, provided that the Tribunal may require a fuller or a complete translation at the request of any Party or on its own initiative.

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- 11.6. Translations need not be certified unless there is a dispute as to the translation provided and the Tribunal orders a certified version at the sole initial cost of the Party who submitted the relevant document, without prejudice to the Tribunal's authority to allocate such cost differently in the arbitral Award.
- 11.7. Documents exchanged between the Parties under §15 below (Production of Documents) may be produced in the original language and need not be translated.

For Hearing

- 11.8. The hearing shall be conducted in English and Spanish with simultaneous interpretation into the other procedural language throughout the hearing. Transcripts shall be taken in both procedural languages
- 11.9. The testimony of a witness called for examination during the hearing who prefers to give evidence other than in English or Spanish shall be interpreted into both procedural languages. Costs associated with such interpretation shall be advanced exclusively by the Party presenting the witness, without prejudice to the Tribunal's authority to allocate such cost differently in the arbitral award.
- 11.10. The Parties will notify the Tribunal, as soon as possible, and no later than at the pre-hearing organizational meeting (see §19 below), which witnesses or experts require interpretation.
- 11.11. The costs of the interpreter(s) will be paid from the advance payments made by the Parties, without prejudice to the decision of the Tribunal as to which Party shall ultimately bear those costs. ICSID will hire the interpreters for the hearing, but the Parties will be consulted about the interpreters whose hiring is proposed.

For Tribunal's Rulings Except the Award

- 11.12. The Tribunal may initially make any order or decision in English and subsequently issue that order or decision in Spanish. Both language versions shall be equally authentic.

For Tribunal's Award

- 11.13. The Tribunal shall render the Award in English and Spanish simultaneously. Both language versions shall be equally authentic.

12. Routing of Communications

Administrative and Financial Regulation 24

- 12.1. The ICSID Secretariat shall be the channel of written communications between the Parties and the Tribunal.
- 12.2. Each Party's written communications shall be transmitted by email or other electronic means to the opposing Party and to the Tribunal Secretary, who shall send them to the Tribunal.
- 12.3. Electronic versions of communications ordered by the Tribunal to be filed simultaneously shall be transmitted to the Tribunal Secretary only, who shall send them to the opposing Party and the Tribunal once both Parties' communications are received.
- 12.4. The Tribunal Secretary shall not be copied on direct communications between the Parties when such communications are not intended to be transmitted to the Tribunal.

13. Number of Copies and Method of Filing of Parties' Pleadings

Administrative and Financial Regulation 30; Arbitration Rules 20(1)(d) and 23

- 13.1. By the relevant filing date, the Parties shall:

- 13.1.1. submit by email to the Tribunal Secretary and the opposing Party an electronic version of the pleading with witness statements, expert reports and an updated index of all supporting documentation;² and
- 13.1.2. upload the pleading with witness statements, expert reports and updated index to the file sharing platform that will be created by ICSID for purposes of this case (§§13.1.1 and 13.1.2 together, the "**Electronic Filing**"). Exhibits shall be uploaded to ICSID's electronic file sharing platform three business days after the filing date.

For the avoidance of doubt, the Electronic Filing process indicated in this subparagraph is applicable both to the original language submission and to the submission of subsequent translations (subject to §11.4), if any.

² Please note that the World Bank server does not accept emails larger than 25 MB.

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- 13.2. Electronic files of pleadings, witness statements, expert reports, and (to the extent possible) exhibits and legal authorities shall be text searchable (i.e., OCR PDF or Word).
- 13.3. All pleadings shall be accompanied by a consolidated and updated index hyperlinked to all the supporting documentation that the Party has submitted up to the date of the pleading. The index shall indicate the document number, the pleading with which it was submitted and the language of the document. (Please follow the naming conventions contained in **Annex A**).
- 13.4. At the conclusion of the written phase of the proceeding, on a date to be determined by the Tribunal, or at any other time the Tribunal or the Secretariat so requests, the Parties shall courier to the ICSID Secretariat at the address indicated at §7.2 or 7.3 above and to each Member of the Tribunal at the addresses indicated at §13.5 below a USB drive containing an electronic copy of the entire case file (including pleadings, witness statements, expert reports, exhibits, legal authorities and Tribunal decisions and orders to date) with a consolidated and updated hyperlinked index of all documents.

- 13.5. The addresses of the Tribunal Members are as follows:

Donald McRae
402A 62 Donald Street,
Ottawa, Ontario, K1K
1N2, Canada

José Carlos Fernández
Rozas
C/ San Javier, 2
28224 Pozuelo de
Alarcón
Madrid, España

Rolf Knieper³
Reichsforststrasse 20
60528 Frankfurt am Main
Germany
Phone: +49 69 66162976

- 13.6. The official date of receipt of a pleading or communication shall be the day on which the electronic file is sent to the Tribunal Secretary by email.
- 13.7. A filing shall be deemed timely if sent by a party by 11:59 p.m., Washington, D.C. time, on the relevant date.

14. Number and Sequence of Pleadings
Arbitration Rules 20(1)(c), 20(1)(e), 29 and 31

- 14.1. The number and sequence of pleadings, and the dates on which they are to be filed, shall be as set out in **Annex B**.

³ Prof. Knieper has requested that hard copies of the English version only of each pleading, witness statement and expert report be sent to him three days after their electronic filing by each Party.

- 14.2. The Parties will submit the pleadings by the deadlines established in the Procedural Calendar.
 - 14.3. 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. Allegations of fact and legal arguments shall be presented in a detailed, specified, and comprehensive manner.
 - 14.4. In their second exchange of submissions (Reply and Rejoinder), the Parties shall limit themselves to responding to allegations of fact and legal arguments made by the other Party in its previous submission (viz., Counter-Memorial or Reply, as the case may be), unless new facts have arisen after the first exchange of submissions which justify new allegations of fact and/or legal arguments.
 - 14.5. Following each factual allegation, the Parties shall, whenever possible, identify the evidence adduced or to be adduced in support of that allegation. Following each legal argument, the Parties shall, whenever possible, identify the legal authority adduced or to be adduced in support of that argument
 - 14.6. All written submissions shall be divided into consecutively numbered paragraphs.
 - 14.7. A hearing will take place in accordance with the terms of §20 below and the Procedural Calendar (**Annex B**).
15. Production of Documents
Convention Article 43(a); Arbitration Rules 24 and 33-36
- 15.1. Notwithstanding §§15.2 and 15.6 below, the IBA (International Bar Association) Rules on the Taking of Evidence in International Arbitration (adopted by a resolution of the IBA Council on 17 December 2020) (“**IBA Rules**”), insofar as they are consistent with this Order, the ICSID Convention and ICSID Arbitration Rules, will be used as guidance in this case by the Tribunal and the Parties for any evidentiary question.
 - 15.2. Within the time limit set out in the Procedural Calendar in **Annex B**, any Party may submit to the other Party (without copying the Members of the Tribunal or the Secretary of the Tribunal) a request to produce a limited number of documents or narrow categories of documents within the other Party’s possession, custody or control in accordance with the IBA Rules. The request shall identify with precision each document or narrow category of documents sought and establish its relevance to the case and materiality to the outcome. The requests to produce, responses and replies and any applications to the Tribunal shall be made in the form of a Redfern

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Schedule in the format set out in **Annex C** hereto. An electronic MS Word version of the Redfern Schedule is to be transmitted to the Party to whom the request is made and, when requesting the Tribunal's decision, to the Tribunal.

- 15.3. Each request for a document shall contain:
 - 15.3.1. A description that is sufficient to identify the document and its subject matter, or else a sufficiently detailed description of the specific category of documents reasonably believed to exist;
 - 15.3.2. A declaration as to why the documents sought are relevant to the dispute and material to the outcome of the case; and
 - 15.3.3. A declaration that the documents sought are not within the requesting Party's possession, custody, or control, as well as a declaration stating the requesting Party's reasons for believing that the documents sought are within the other Party's possession, custody, or control.
- 15.4. Within the time limit set out in the Procedural Calendar, using column 4 of the schedule provided by the first Party (the "**Requesting Party**"), the Party to whom the request is made (the "**Requested Party**") shall either confirm that it will produce the requested documents that are in its possession, custody or control or set forth its objections to the production sought, and the reasons for such objections. At this stage, the Redfern Schedule should be sent to the first Party only (not to the Tribunal or the Tribunal Secretary).
- 15.5. Within the time limit set out in the Procedural Calendar, the Requesting Party shall reply to the Requested Party's objections in column 5 of the same schedule. Such reply shall be limited to answering specific objections made in column 4. Each Party shall then file simultaneously (in accordance with §12.3 *supra*) with the Tribunal the completed schedule (in both MS Word and PDF formats).
- 15.6. The Tribunal shall endeavor to resolve any contested document requests on or before the relevant date set out in the Procedural Calendar, having regard to all of the surrounding circumstances, as well as the requirements under this section and the IBA Rules (including specificity, materiality, and any rules on legal privilege and confidentiality).
- 15.7. Within the time limit set out in the Procedural Calendar, documents shall be produced which are responsive to requests for which no objection has been made, and where objections have been made, documents shall be produced to the extent directed by the Tribunal. Documents shall be produced to the Requesting Party without copying the Tribunal.
- 15.8. Documents produced in accordance with this Section (either voluntarily or pursuant to Tribunal order) shall not be considered to be part of the record unless and until a

Party subsequently files them as exhibits in accordance with the Procedural Calendar or with any other applicable procedural order or decision.

- 15.9. The Tribunal shall have discretion to order a Party to produce documents or other evidence without regard to whether the documents or evidence have been requested by the other Party. In the event the Tribunal intends to exercise that discretion, it will give due notice to the Parties and provide the Parties with an opportunity to make submissions as to whether the Tribunal should exercise its discretion in the particular circumstances.
 - 15.10. In case of the failure by a Party, without satisfactory explanation, to comply with an order of the Tribunal to produce a document, or a category of documents, the Tribunal may make any inferences it deems appropriate in light of the relevant circumstances.
 - 15.11. At any time in the proceeding, upon good cause shown, a Party can request the production of documents either by agreement of the Parties or by applying to the Tribunal.
 - 15.12. The Parties and the Tribunal take note of the provisions in Article 10.21(3) and 10.21(4) of the US-Peru FTA.
16. Submission of Documents
Convention Article 44; Administrative and Financial Regulation 30; Arbitration Rule 24
- 16.1. The Memorial and Counter-Memorial shall be accompanied by the documentary evidence relied upon by the Parties, including exhibits and legal authorities. Further documentary evidence relied upon by the Parties in rebuttal shall be submitted with the Reply and Rejoinder.
 - 16.2. The documents shall be submitted in the manner and form set forth in §[13] above.
 - 16.3. Neither Party shall be permitted to submit additional or responsive documents after the filing of its respective last written submission, unless the Tribunal determines that special circumstances exist based on a reasoned written request followed by observations from the other Party.
 - 16.3.1. Should a Party request leave to file additional or responsive documents, that Party may not annex the documents that it seeks to file to its request.
 - 16.3.2. To the greatest extent possible, the Parties shall abstain from presenting new documents in the period immediately preceding the hearing. As the hearing approaches, the Tribunal shall require increasingly exceptional circumstances to submit new documents.

- 16.3.3. If the Tribunal grants such an application for submission of an additional or responsive document, the Tribunal shall ensure that the other Party is afforded sufficient opportunity to make its observations concerning such a document.
- 16.4. The Tribunal may call upon the Parties to produce documents or other evidence in accordance with ICSID Arbitration Rule 34(2).
- 16.5. The documents shall be submitted in the following form:
- 16.5.1. The number of each Exhibit containing a document produced by Claimant shall be preceded by the letter “C-” for factual exhibits and “CL-” for legal exhibits containing authorities etc. The number for each Exhibit containing a document produced by Respondent shall be preceded by the letter “R-” for factual exhibits and “RL-” for legal exhibits containing authorities etc.
- 16.5.2. Exhibits and legal authorities shall be numbered consecutively throughout these proceedings, commencing with “C-0001” and “R-0001,” and “CL-001” and “RL-001” respectively. The numbering shall also indicate the language of the document *e.g.* C-0001-ENG for a document submitted only in English, C-0001-SPA for a document submitted only in Spanish and C-0001-ENG/SPA for a document submitted simultaneously in English and Spanish. The number of the exhibit or legal authority shall appear on the first page of the document, and shall be incorporated into the file name in accordance with § 16.5.4.
- 16.5.3. A Party may produce several documents relating to the same subject matter within one Exhibit, numbering each page of such Exhibit separately and consecutively.
- 16.5.4. Electronic files and the accompanying indexes shall follow the naming conventions contained in **Annex A**.
- 16.6. Copies of documentary evidence shall be assumed to be authentic unless specifically objected to by a Party, in which case the Tribunal will determine whether authentication is necessary.
- 16.7. The Parties shall file all documents only once by submitting them with their pleadings. Documents so filed need not be resubmitted with witness statements even if referred to in such statements. If a witness or expert refers to a document which is, or is to be, part of the record, they shall include the relevant document number whenever they make reference to that document.

- 16.8. Demonstrative exhibits (such as PowerPoint slides, charts, tabulations, etc.) may be used at any hearing, provided they contain no new evidence. Each Party shall number its demonstrative exhibits consecutively (preceded by “CD-” for Claimant, and “RD-” for Respondent), and indicate on each demonstrative exhibit the number of the document(s) from which it is derived. The Party submitting such exhibits shall provide them in electronic and, if requested, hard copy to the other Party, the Tribunal Members, the Tribunal Secretary, the court reporter(s) and interpreter(s) at the hearing at a time to be decided at the pre-hearing organizational meeting.
17. Witness Statements and Expert Reports
Convention Article 43(a); Arbitration Rule 24; US-Peru TPA Article 10.24
- 17.1. Copies of witness statements and expert reports shall be filed together with the Parties’ pleadings.
- 17.2. Neither Party shall be permitted to submit any testimony that has not been filed with the written submissions, unless the Tribunal determines that special circumstances exist based on a reasoned written request followed by observations from the other Party (following the procedure outlined in §16.3).
- 17.3. Each witness statement and expert report shall contain numbered paragraphs and be signed and dated by the witness.
- 17.4. Expert reports shall be accompanied by any documents or information upon which they rely, unless such documents or information have already been submitted as exhibits with the Parties’ submissions, in which case reference to such exhibits shall be sufficient. Such documents or information shall be subject to the rules on language set forth in §11 *supra*.
- 17.5. Pursuant to Article 10.24 of the US-Peru TPA, the “tribunal, at the request of a disputing party [*i.e.* Claimant or Respondent] or, unless the disputing parties disapprove, on its own initiative, may appoint one or more experts to report to it in writing on any factual issue concerning environmental, health, safety, or other scientific matters raised by a disputing party in a proceeding, subject to such terms and conditions as the disputing parties may agree.”
18. Examination of Witnesses and Experts
Arbitration Rules 35 and 36
- 18.1. Any person may present evidence as a witness, including a Party or a Party’s officer, employee, or other representative.
- 18.2. For each witness, a written, signed, and dated witness statement shall be submitted to the Tribunal.

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- 18.3. Each witness statement shall state the witness's name, date of birth, and involvement in the case.
- 18.4. Witness statements shall be submitted in either procedural language.
- 18.5. In accordance with §17.1 above, each Party will submit its witness statements together with its written submission. The witness statements shall be numbered independently from other documents and properly identified (including the language of the statement). If a Party submits more than one witness statement by the same witness, the subsequent witness statement shall be identified as "Second Witness Statement," "Third Witness Statement," and so on. It shall not be improper for counsel to meet witnesses and potential witnesses to establish the facts, identify relevant documents, or prepare the witness statements and the examinations.
- 18.6. Each Party shall be responsible for securing the appearance of its own witnesses to the hearing, except when the other Party has waived cross-examination of a witness and the Tribunal does not direct his or her appearance. If a witness or expert who was presented by a Party has not been called by the other party or by the Tribunal for examination at the hearing, the presenting Party may not call such witness or expert to testify at the hearing, except in exceptional circumstances. If a witness or expert who has been called by the other Party or by the Tribunal for examination at the hearing is not available for the hearing, for reasons that the Tribunal deems valid, the Tribunal shall decide what weight, if any, to give to the witness statement or expert report, taking into account the entire record and all the relevant circumstances, including whether to strike the witness statement or expert report from the record
- 18.7. Each Party shall notify the other Party of the witnesses or experts it intends to cross-examine by the date to be established by the Tribunal. The Tribunal shall then identify the remaining witnesses or experts (if any) that it wishes to call for examination.
- 18.8. The facts contained in the written statement of a witness or expert whose cross-examination has been waived by the other Party, or not called by the Tribunal, shall not be deemed to have been accepted or established by the sole fact that no cross-examination has been requested. The Tribunal will assess the weight of the witness statement or expert report taking into account the entire record and all the relevant circumstances.
- 18.9. Each Party shall be responsible for the practical arrangements, cost, and availability of any witness it offers. The Tribunal will decide upon the appropriate allocation of any related costs in the final Award.
- 18.10. The Tribunal may allow a witness to appear and be examined by videoconference, provided that there exist valid and exceptional reasons that prevents the witness

from appearing in person. In such an event, the Tribunal will issue appropriate directions for the witness's examination by videoconference.

- 18.11. As a general rule and subject to other arrangements made during the pre-hearing organizational meeting (§19 below), fact witnesses shall be examined prior to expert witnesses, with the Claimant's fact (and expert) witnesses being examined prior to the Respondent's fact (and expert) witnesses. The order in which the witnesses and experts shall be heard shall be discussed at the pre-hearing organizational meeting.
- 18.12. At the hearing, the examination of each witness shall proceed as follows:
- 18.12.1. A factual witness shall make the declaration provided in Rule 35(2) of the Arbitration Rules, while an expert witness shall make the declaration set out in Rule 35(3) of the Arbitration Rules.
- 18.12.2. Witnesses giving oral testimony shall do so in the same language of their written declaration; and may first be examined in direct examination for no longer than 10 minutes. Direct examination of witnesses shall be conducted only if and as necessary to introduce the witness, confirm the accuracy of and completeness of the witness's written statement(s), offer any corrections or clarifications that may be necessary to prevent a misunderstanding of that witness's written direct testimony, to highlight briefly the key points of his or her witness statement, and to address any relevant development that occurred after the witness signed the witness statement.
- 18.12.3. Cross-examination shall not go beyond the subject matter of the witness statements and matters affecting the witness's credibility. Upon request and only for a substantial reason, the Tribunal in its discretion may allow limited inquiry into additional matters.
- 18.12.4. The Party who has presented the witness may then re-examine the witness with respect to any matters or issues arising out of the cross-examination ("**redirect examination**"). A Party may request an opportunity to re-cross examine the witness with respect to any matters or issues arising out of the redirect examination and the Tribunal in its discretion may allow re-cross examination.
- 18.12.5. The Tribunal may examine the witness at any time, either before, during, or after examination by one of the Parties.
- 18.12.6. Subject to a different agreement by the Parties or decision of the Tribunal, a fact witness (other than a Party representative), prior to his or her examination, shall not be present in the hearing room during oral testimony

and arguments, read the transcript of oral testimony or argument, or be informed of its contents. Expert witnesses shall be allowed in the hearing room at any time, including during the cross-examination of other factual or expert witnesses. Party representatives who are also fact witnesses may be present during opening submissions, but not during the testimony of fact witnesses testifying before him or her. Such Party representatives should testify first, to the extent possible.

18.13. The Tribunal shall, at all times, have complete control over the procedure for the examination of witnesses. In particular, but without limiting the foregoing, the Tribunal may in its discretion:

18.13.1. Limit or refuse the right of a Party to examine a witness when it appears that a question has been addressed by other evidence or is irrelevant; or

18.13.2. Direct that a witness be recalled for further examination at any time.

18.14. The rules set forth above with respect to the examination of witnesses shall apply *mutatis mutandis* to the examination of Party-appointed experts, except that in lieu of direct examination the expert may provide a brief presentation of the key points of his or her report of no longer than 30 minutes.

19. Pre-Hearing Organizational Meetings
Arbitration Rule 13

19.1. Any pre-hearing organizational meeting shall be held on the date indicated in **Annex B**. It shall comprise a teleconference between the Tribunal, or its President, and the parties and should resolve any outstanding procedural, administrative, and logistical matters (including modality of interpretation and transcription, the order of examination of witnesses and experts and the allocation of time between the Parties) in preparation for the hearing.

19.2. At a date to be determined by the Tribunal, and in any event no later than the date of the pre-hearing conference, the Parties shall submit to the Tribunal jointly – or, where they are unable to agree, separately – a proposal regarding a daily schedule for the hearing.

20. Hearings
Arbitration Rules 20(1)(e) and 32; US-Peru TPA Article 10.21(2)

20.1. The oral procedure shall consist of a hearing for examination of witnesses and experts, if any, and for oral arguments.

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- 20.2. Hearings may be held, in whole or in part, in-person or by any other means of communication, including via videoconference, as determined by the Tribunal after consultation with the Parties. An in-person hearing shall be held at a place to be determined in accordance with §10 above.
- 20.3. The hearing shall take place on the date indicated in **Annex B**.
- 20.4. The Members of the Tribunal shall endeavor to reserve at least one day after the hearing to determine the next steps and to hold deliberations.
- 20.5. In principle, each Party will have an equal time allocation to examine witnesses and/or experts at the hearing, subject to adjustments if there is a severe imbalance in the number of cross-examinations or if due process so requires.
- 20.6. In accordance with Article 10.21(2) of the US-Peru TPA, hearings shall be open to the public and, in due course, the Tribunal “shall determine, in consultation with the disputing parties, the appropriate logistical arrangements”. However, “any disputing party [*i.e.* Claimant or Respondent] that intends to use information designated as protected information in a hearing shall so advise the tribunal. The tribunal shall make appropriate arrangements to protect the information from disclosure.”
- 20.7. Within four weeks of (a) the filing of the Counter-Memorial on the Merits and any Memorial on Preliminary Objections (in a non-bifurcated proceeding) or (b) the filing of the Counter-Memorial on Preliminary Objections (in a bifurcated proceeding), as the case may be, either Party may request the Tribunal to indicate whether the Parties will be required to submit to the Tribunal jointly –or, where they are unable to agree, separately–, at a date to be determined by the Tribunal, and in any event no later than two weeks prior to the hearing:
- 20.7.1. a chronology of relevant facts in tabular form;
- 20.7.2. a list and brief description of the individuals and entities who/which are part of the relevant factual background (“*dramatis personae*”); and
- 20.7.3. a list of the substantive issues required to be determined by the Tribunal.

The submissions required under paragraphs 20.7(1), (2) and (3) above, shall be non-argumentative and objective.

21. Records of Hearings and Sessions
Arbitration Rules 13 and 20(1)(g)

- 21.1. Sound recordings shall be made of all hearings and sessions. The sound recordings shall be provided to the Parties and the Tribunal Members.

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- 21.2. Verbatim transcript(s) in the procedural language(s) shall be made of any hearing and session other than sessions on procedural issues. Unless otherwise agreed by the Parties or ordered by the Tribunal, the verbatim transcripts shall, if possible, be available in real-time using LiveNote or similar software and electronic transcripts shall be provided to the Parties and the Tribunal on a same-day basis.
- 21.3. The Parties shall endeavor to agree on any corrections to the transcripts within 21 days of the later of the dates of the receipt of the sound recordings and transcripts. The agreed corrections shall be entered by the court reporter(s) in the transcripts (“Revised Transcripts”), subject to cost. The Tribunal shall decide upon any disagreement between the Parties and any correction adopted by the Tribunal shall be entered by the court reporter in the Revised Transcripts, subject to cost.
22. Post-Hearing Memorials and Statements of Costs
Convention Article 44; Arbitration Rule 28(2)
- 22.1. In consultation with the Parties, the Tribunal may dispense (waive) post-hearing submissions if the Parties were allowed to present oral conclusions during the hearing. Subject to the foregoing, Tribunal will decide the filing date, length, format, and content of any post-hearing submissions.
- 22.2. The Tribunal will issue directions on the Parties’ statements of costs at the end of the hearing.
23. Transparency / Publication
Convention Article 48(5), Administrative and Financial Regulation 22, Arbitration Rule 48(4); US-Peru TPA Article 10.21
- 23.1. In accordance with Article 10.21(4)(c) of the US-Peru TPA, any redactions to submissions must be submitted simultaneously with the Electronic Filing. Any objections to the scope of redactions must be filed with the Tribunal within 14 days of the submission. Any response to such objections must be filed with the Tribunal within seven days of the objection. The Tribunal will then promptly determine whether the redactions should be amended or removed.
- 23.2. If the Tribunal finds that information was improperly redacted under §23.1, within three business days of the Tribunal’s decision, and in accordance with Article 10.21(4)(d) of the US-Peru TPA, the Party that filed the redacted submission must either: (i) withdraw all or part of its submission containing the improperly redacted information; or (ii) agree to resubmit complete and redacted documents with corrected designations in accordance with the Tribunal’s determination, within the following seven business days.

- 23.3. In accordance with Rule 48(4) of the ICSID Rules, the Parties agree that after such documents have been made available to the public by Peru in accordance with Article 10.21 of the US-Peru TPA, and ICSID has been notified accordingly by Peru, ICSID may publish the redacted versions of: (a) the Notice of Intent; (b) the Notice of Arbitration; (c) pleadings, memorials, briefs, and *amicus* briefs (including U.S. submissions but excluding all supporting documentation) submitted to the Tribunal; (d) minutes or transcripts of hearings of the Tribunal, where available; and (e) orders, awards, and decisions of the Tribunal, as issued in this proceeding.
24. Submissions and Attendance to Hearing of the “non-disputing [TPA] Party”
US-Peru TPA Article 10.20(2)
- 24.1. Pursuant to Article 10.20(2) of the US-Peru TPA, the United States of America (the non-disputing TPA Party) may make oral and written submissions to the Tribunal regarding the interpretation of the US-Peru TPA in accordance with the Procedural Calendar in Annex A.
25. *Amicus Curiae* Submissions
Arbitration Rule 37(2); US-Peru TPA Article 10.20(3)
- 25.1. Pursuant to Article 10.20(3) of the US-Peru TPA, and in accordance with the Procedural Calendar in **Annex B**, the Tribunal shall have the authority to accept and consider *amicus curiae* submissions from a person or entity that is not a disputing party. Each submission shall identify the author and any person or entity that has provided, or will provide, any financial or other assistance in preparing the submission.
- 25.2. If the Tribunal grants leave to *amicus curiae*, it will set an appropriate deadline for the filing of the amicus brief, taking into account the Procedural Calendar at **Annex B**.
26. Proposed Decision or Award on Liability
US-Peru TPA Article 10.20(9)
- 26.1. In accordance with Article 10.20(9)(a) of the US-Peru TPA, at the request of a Party, the Tribunal shall, before issuing a decision or award on liability, transmit its proposed decision or award to the Parties and to the United States of America (the non-disputing TPA Party).
- 26.2. Within 60 days after the Tribunal transmits its proposed decision or award, the Parties may submit written comments to the Tribunal concerning any aspect of its proposed decision or award. The Tribunal shall consider any such comments and issue its decision or award not later than 45 days after the expiration of the 60-day comment period.

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- 26.3. A Party must make the request for the transmission of the proposed decision or award either 30 days after any hearing on liability or 30 days after the Parties' last post-hearing brief, whichever is later.



Prof. Donald McRae
President of the Tribunal
Date: October 28, 2021

ANNEX A

ELECTRONIC FILE NAMING GUIDELINES

Please follow these guidelines when naming electronic files and for the accompanying Consolidated Hyperlinked Index. The examples provided (in *italics*) are for demonstration purposes only and should be adapted to the relevant phase of the case.

All pleadings and accompanying documentation shall indicate the LANGUAGE in which they are submitted (e.g. SPA=Spanish; FR=French; ENG= English). Such indication should be reflected both i) in the name used to identify each individual electronic file and ii) in the Consolidated Hyperlinked Index (which shall be attached to each submission).

For cases with a single procedural language, the “LANGUAGE” designation may be omitted, except for documents in a language other than the procedural language and the corresponding translations.

SUBMISSION TYPE	ELECTRONIC FILE NAMING GUIDELINES
MAIN PLEADINGS	Title of Pleading–LANGUAGE
	<i>Memorial on Jurisdiction-FR</i>
	<i>Counter-Memorial on the Merits and Memorial on Jurisdiction-SPA</i>
	<i>Reply on Annulment-FR</i>
	<i>Rejoinder on Quantum-ENG</i>
SUPPORTING DOCUMENTATION Exhibits	C-####–LANGUAGE
	R-####–LANGUAGE
	To be produced sequentially throughout the case.
	CLAIMANT’S FACTUAL EXHIBITS
	<i>C-0001-ENG</i>
	<i>C-0002-SPA</i>
	RESPONDENT’S FACTUAL EXHIBITS
	<i>R-0001-FR</i>
<i>R-0002-SPA</i>	
Legal Authorities	CL-####–LANGUAGE
	RL-####–LANGUAGE
	To be produced sequentially throughout the case.
	CLAIMANT’S LEGAL AUTHORITIES
	<i>CL-0001-ENG</i>
	<i>CL-0002-FR</i>
	RESPONDENT’S LEGAL AUTHORITIES
	<i>RL-0001-SPA</i>
<i>RL-0002-ENG</i>	
Witness Statements	Witness Statement-Name of Witness-Name of Submission-LANGUAGE
	<i>Witness Statement-Maria Jones-Memorial on Jurisdiction-SPA</i>
	<i>Witness Statement-Maria Jones-Reply on Jurisdiction-[Second Statement]-ENG</i>
Expert Reports	Expert Report-Name of Expert-Type-Name of Submission-LANGUAGE
	<i>Expert Report-Lucia Smith-Valuation-Memorial on Quantum-ENG</i>
	<i>Expert Report-Lucia Smith-Valuation-Reply on Quantum-[Second Report]-ENG</i>
Legal Opinions	Legal Opinion-Name of Expert-Name of Submission-LANGUAGE

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	<i>Legal Opinion-Tom Kaine-Counter-Memorial on the Merits-FR</i>
	<i>Legal Opinion-Tom Kaine-Rejoinder on the Merits-[Second Opinion]-FR</i>
Exhibits to Witness Statements, Expert Reports, Legal Opinions	WITNESS/EXPERT INITIALS-###
	<i>For exhibits filed with the Witness Statement of [Maria Jones]</i>
	<i>MJ-0001</i>
	<i>MJ-0002</i>
	<i>For exhibits filed with the Legal Opinion of [Tom Kaine]</i>
	<i>TK-0001</i>
	<i>TK-0002</i>
	<i>For exhibits filed with the Expert Report of [Lucia Smith]</i>
	<i>LS-0001</i>
<i>LS-0002</i>	
INDICES	Consolidated Hyperlinked Index
	Index of Exhibits-C-#### to C-####
	<i>Index of Exhibits-C-0001 to C-0023</i>
	Index of Legal Authorities-RLA-### to RLA-###
<i>Index of Legal Authorities-RLA-0001 to RLA-0023</i>	
OTHER APPLICATIONS	Name of Application-[Party]-LANGUAGE
	<i>Preliminary Objections under Rule 41(5)-SPA</i>
	<i>Request for Bifurcation-ENG</i>
	<i>Request for Provisional Measures-[Respondent]-SPA</i>
	<i>Request for Production of Documents-[Claimant]-SPA</i>
	<i>Request for Stay of Enforcement-FR</i>
	<i>Request for Discontinuance-[Claimant]-ENG</i>
	<i>Post-Hearing Brief-[Claimant]-SPA</i>
	<i>Costs Submissions-[Respondent]-ENG</i>
<i>Observations to Request for [XX]-[Claimant]-SPA</i>	

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ANNEX B

Procedural Calendar

Description	By	Days	Date
First Session	All	0	Wed-27-Oct-2021
Memorial	Claimants	140	Wed-16-Mar-2022
Notice of Bifurcation	Respondent	29	Fri-15-Apr-2022
Counter-Memorial	Respondent	140	Wed-03-Aug-2022
Requests for Production of Documents	Claimants and Respondent	14	Wed-17-Aug-2022
Answer/objections to Requests	Claimants and Respondent	14	Wed-31-Aug-2022
Responses to Objections - Sent to Tribunal	Claimants and Respondent	12	Mon-12-Sep-2022
Decision on Requests	Tribunal	14	Mon-26-Sep-2022
Production of Non-Objected Documents and Documents as Ordered	Claimants and Respondent	14	Mon-10-Oct-2022
Reply	Claimants	91	Mon-09-Jan-2023
Rejoinder	Respondent	120	Tue-09-May-2023
Submission under Article 10.20(2) TPA; and applications for leave to file non-disputing party (<i>amicus</i>) submissions (if any) under Article 10.20(3) TPA	United States/TBD	14	Tue-23-May-2023
Comments on applications for leave to file non-disputing party (<i>amicus</i>) submissions (if any) under Article 10.20(3) TPA	Claimants and Respondent	10	Fri-02-Jun-2023

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Decision on applications for leave to file non-disputing party (<i>amicus</i>) submissions (if any) under Article 10.20(3) TPA	Tribunal	10	Mon-12-Jun-2023
Notification of Witnesses and Experts	Claimants and Respondent	4	Fri-16-Jun-2023
Pre-Hearing Organizational Meeting	All	10	Mon-26-Jun-2023
Hearing Commencement	All	28	Mon-24-Jul-2023
Hearing Ends	All	5	Sat-29-Jul-2023
Simultaneous Post-Hearing Submissions	Claimants and Respondent	TBD at the end of hearing	TBD
Simultaneous Costs Submissions	Claimants and Respondent	Within 4 weeks after hearing or Post-hearing Submissions	TBD
Award	Tribunal	Six months after hearing or Post-Hearing Submission	TBD