

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 Memorial on
Jurisdiction and Counter-Memorial on Merits**

5 August 2022

Arnold & Porter

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GLOSSARY

Term	Description
31 May 2018 Decision	Decision issued by the <i>Cuarta Sala Penal</i> of the Superior Court of Justice of Callao concerning Aram
ACTO	Amazon Cooperation Treaty Organization
Amparo Request	Amparo request filed on 11 March 2014 by Kaloti before the Constitutional Court of Lima against SUNAT in which Kaloti claimed that SUNAT's immobilizations of Shipments 2 and 3 amounted to an indirect expropriation under Treaty Article 10.7.
AML/CFT Manual	Compliance and anti-money laundering manual submitted by Kaloti as Ex. C-0025
Aram	Aram Asset Management
Aram Shipments	The gold shipments that Aram claimed to have purchased
Bank Letters	Collectively, eight letters sent to Kaloti by US-based banks from 1 April 2014 to 10 August 2018 submitted by Kaloti as Ex. C-0027
Challenged Measures	The measures challenged by Kaloti in this arbitration and referred to, generally, in ¶ 136 of the Memorial
Civil Attachment	Attachment granted on 18 June 2014 by the Lima Civil Court over Shipment 5 in the civil proceedings brought by ██████ against Kaloti for the failure to pay for Shipment 5

Term	Description
Constitution	1993 Political Constitution of the Republic of Peru
Criminal Courts	Peru’s criminal courts
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 (<i>Declaración Aduanera de Mercancías (“DAM”)</i>)
Cut-off Date	30 April 2018
DEA	United States Drug Enforcement Administration
FATF	Financial Action Task Force
FATF Recommendations	FATF International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation
FinCen	Financial Crimes Enforcement Network, part of the United States Department of the Treasury
First Notice of Intent	Kaloti’s notice of intent to submit claims to arbitration dated 3 May 2016
Five Shipments	Jointly, Shipment 1, Shipment 2, Shipment 3, Shipment 4, and Shipment 5.

Term	Description
General Customs Law	Peruvian Legislative Decree No. 1053 approving the General Customs Law
General Mining Law	Peruvian Supreme Decree 014-92-EM, which governs all mining activities within Peru
Global American	Global American Consulting LLC
[REDACTED]	[REDACTED]
ICIJ	International Consortium of Investigative Journalists
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
Kaloti or Claimant	Kaloti Metals & Logistics, LLC.
[REDACTED]	Kaloti, [REDACTED] 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

Term	Description
Kaloti’s Intervention Requests	11 requests made by Kaloti to various authorities to either lift the SUNAT Immobilizations or the Precautionary Seizures, or to allow access to investigation files in relation to the criminal investigations against the Suppliers
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED] Criminal Proceeding	The criminal proceeding initiated by the Criminal Courts against [REDACTED] and its legal representatives for alleged money laundering offenses connected to illegal mining
[REDACTED] Investigation	The preliminary investigation opened by Peru’s Prosecutor’s Office against [REDACTED] and its legal representatives for alleged money laundering offenses connected to illegal mining
KYC	“Know Your Customer/Counterparty”
Law No. 27379	Peruvian Law No. 27379 which established the Procedure for the Adoption of Exceptional Measures for the Limitation of Rights in Preliminary Investigations
Money Laundering Decree	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
Illegal Mining Controls and Inspection Decree	Legislative Decree No. 1107, which established control and auditing measures in the distribution, transport and trade of machinery and equipment used in illegal mining, as well as the mineral obtained in this activity

Term	Description
MINEM	Ministry of Energy and Mines of the Republic of Peru (<i>Ministerio de Energía y Minas de la República del Perú</i>)
[REDACTED]	[REDACTED]
[REDACTED] Criminal Proceeding	The criminal proceeding initiated by the Criminal Courts against [REDACTED] and its legal representatives for alleged money laundering offenses connected to illegal mining
[REDACTED] Investigation	The preliminary investigation opened by Peru’s Prosecutor’s Office against [REDACTED] and its legal representatives for alleged money laundering offenses connected to illegal mining
PCIJ	Permanent Court of International Justice
[REDACTED]	[REDACTED], known drug trafficker and gold smuggler, linked with [REDACTED]
Precautionary Seizures	The precautionary seizures ordered by the Criminal Courts in relation to Shipments 1 to 4
Prosecutor’s Office	Office of the Peruvian prosecutor
RECPO	<i>Registro Especial de Comercializadores y Procesadores de Oro</i> , registry of individuals and companies engaged in the sale and/or refining of gold
[REDACTED]	[REDACTED]

Term	Description
██████████ Criminal Proceeding	The criminal proceeding initiated by the Criminal Courts against ██████████ legal representatives for alleged money laundering offenses connected to illegal mining
██████████ Investigation	The preliminary investigation opened by Peru’s Prosecutor’s Office against ██████████ legal representatives for alleged money laundering offenses connected to illegal mining
SARs	Suspicious Activity Reports
Second Notice of Intent	Notice of intent to submit claims to arbitration filed by ██████████ ██████████ Kaloti, ██████████ and Claimant, dated 8 April 2019
Shipment 1	Shipment of 111.54 kilograms of gold supplied by ██████████
Shipment 2	Shipment of 98.59 kilograms of gold supplied by ██████████
Shipment 3	Shipment of 38.61 kilograms of gold supplied by ██████████
Shipment 4	Shipment of 126.775 kilograms of gold supplied by ██████████
Shipment 5	Shipment of 99,84 kilograms of gold supplied by ██████████
Shipments 1 to 4	Jointly, Shipment 1, Shipment 2, Shipment 3, and Shipment 4
State Attorney’s Office	State Attorney’s Office of Peru

Term	Description
██████████	██
██████████ Criminal Proceeding	The criminal proceeding initiated by the Criminal Courts against ██████████ and its legal representatives for alleged money laundering offenses connected to illegal mining
██████████ Investigation	The preliminary investigation opened by Peru’s Prosecutor’s Office against ██████████ and its legal representatives for alleged money laundering offenses connected to illegal mining
SUNAT	Peruvian National Customs and Tax Management Agency (<i>Superintendencia Nacional de Aduanas y de Administración Tributaria</i>)
SUNAT Immobilizations	The SUNAT immobilizations of Shipment 1, Shipment 2, Shipment 3, and Shipment 4
Suppliers	Jointly, ██████████, ██████████, ██████████ and ██████████
Transaction History	List of financial transactions submitted by Kaloti for purposes of this arbitration, comprised in Exs. C-0030, C-0043, C-0050
██████████	██
Treaty	United States – Peru Free Trade Agreement
Financial Intelligence Unit	Financial Intelligence Unit of Peru (<i>Unidad de Inteligencia Financiera</i>)
Vienna Convention	Vienna Convention on the Law of Treaties

I. INTRODUCTION

1. Unlike most investment arbitrations, which are typically quite complex legally and/or factually, the present case can be summarized in rather simple terms, as follows.
2. Claimant (Kaloti) is part of a Dubai-based corporate group of dubious reputation (the ██████████). Kaloti was in the business of exporting from Peru gold that was mined there. However, it was not abiding by its obligation under Peruvian law to conduct due diligence to ascertain that the gold that it was purchasing had a lawful provenance. Kaloti itself admits that much of the gold trade in Peru is linked with criminal activities, and yet despite that it did not conduct even minimal due diligence on its suppliers.
3. Kaloti's claims in this arbitration are based on various measures adopted by the authorities of the Republic of Peru ("**Peru**") with respect to five specific shipments of gold. Based on objective indicators, and in the normal course of their duties, the Peruvian customs and tax authorities had identified those shipments, and their suppliers, as suspect and potentially associated with criminal activity. As a result, those authorities promptly ordered the immobilization of the relevant shipments, pending further investigation. The same authorities also notified prosecutors about the potential criminal activity related to those suppliers and shipments, as a result of which the prosecutors conducted their own investigation. Such investigation yielded sufficient evidence of criminality to persuade the prosecutors that the commencement of criminal proceedings against the suppliers was justified.
4. In connection with such criminal proceedings, the prosecutors asked the Peruvian criminal courts for orders for the seizure of the five shipments, in order to preserve evidence and prevent the potential dissipation of the shipments. The courts granted such requests, based on the evidence provided to them by the prosecutors. Judicial seizure orders were thus issued, at which point the initial (administrative) immobilization measures were lifted. The relevant criminal proceedings remain pending, and the five shipments remain seized pending resolution of such proceedings. In this arbitration, Kaloti is challenging many of the measures adopted

by the customs, tax, and prosecutorial authorities, as well as by the courts, with respect to the immobilization and seizure of the five shipments of gold.

5. Kaloti's claims should be dismissed, however, because as demonstrated below, it has not succeeded in establishing that the Tribunal has jurisdiction, and in any event there is nothing to Kaloti's claims on the merits. All of the measures adopted by the relevant authorities – both executive and judicial – with respect to the five shipments, and to Kaloti, were reasonable, proportionate, and justified, and designed to advance legitimate public welfare objectives.
6. The remainder of this Introduction provides additional general comments about various relevant strands,¹ and the body of the submission then demonstrates conclusively, and on the basis of concrete evidence, that the Tribunal lacks jurisdiction, and that, in any event, Kaloti's claims are meritless and its damages quantification untenable.

A. Overview

7. Like all sovereign States, Peru has a legitimate interest in combatting money laundering and illegal mining. Such crimes can have a devastating impact on socio-economic development, public health, and the environment. The measures that are at the core of this case relate to Peru's legitimate regulatory actions designed and applied precisely to tackle these crimes and thus protect *bona fide* public welfare objectives, in accordance with Peru's legal framework and international public policy. In particular, Peru's administrative and judicial authorities properly exercised their powers to order immobilizations and to issue interlocutory measures with respect to five particular shipments of gold that were suspected of being the product of illegal mining and a vehicle for money laundering ("**Five Shipments**"). Kaloti Metals & Logistics, LLC ("**Claimant**" or "**Kaloti**") claims ownership of the gold that was being transported in the Five Shipments.

¹ To avoid burdening this Introduction with too many citations, only a few are provided; however, all assertions herein are supported with evidence and citations later in the submission.

8. As this Counter-Memorial will demonstrate, Peru's actions were carried out fully in accordance with the Peru-United States Trade Promotion Agreement ("**Treaty**").² Moreover, such actions were adopted in accordance with Peruvian law and constitute a proper exercise of Peru's police powers. Pursuant to the Treaty and general public international law, the relevant measures therefore do not give rise to liability or any obligation by Peru to pay compensation to Claimant.
9. In the very first paragraph of its Memorial, dated 16 March 2022 ("**Memorial**"), Kaloti articulates what it believes this case is *not* about; however, it fails to recognize what this case truly *is* about: *dirty gold*. Although Kaloti does acknowledge that "the gold industry is susceptible to money laundering,"³ that is a gross understatement, as it is a well-known fact that gold is the preferred vehicle used by money launderers and other criminals to conceal and transfer the proceeds of crime. One example of this is noted in a book titled "*Dirty Gold: the Rise and Fall of an International Smuggling Ring*," which is cited by Kaloti itself in the Memorial.⁴ In that book, the authors note that in Colombia, one of Peru's closest neighbors, illicit mining generates about \$2.4 billion a year in criminal cash—"three times more than the country's notorious cocaine industry."⁵ The authors explain that the reason for that remarkable fact is a simple one:

The new nexus between criminals and gold helped fuel Latin America's destructive illegal mining boom. Some of the organized gangs began devoting more time and resources to gold than to cocaine. It was far safer: If you're caught carrying gold, all you need to do is pull out some forged papers saying it

² **RL-0001**, Peru - United States Trade Promotion Agreement, signed 12 April 2006, entered into force 1 February 2009 [*Re-submitted version of CL-0001, with additional pages*] ("**Treaty**").

³ Memorial, ¶ 1.

⁴ See **Ex. R-0235**, Jay Weaver, *et al.*, *Dirty Gold*, March 2021 [*Re-submitted version of C-0051, with additional pages*].

⁵ **Ex. R-0235**, Jay Weaver, *et al.*, *Dirty Gold*, March 2021 [*Re-submitted version of C-0051, with additional pages*], p. 33.

was mined legally. If you're caught carrying cocaine, no documents in the world can save you from prison.⁶

10. Illegal mining of gold has pernicious effects on societies and the environment, and is often closely linked to money laundering, as well as other crimes such as racketeering, child labor, sexual exploitation, other forms of violence and intimidation, tax evasion, and countless others. In Peru, organized crime is behind the illegal gold mining underworld.
11. Illegal gold mining can also lead to environmental damage, due in particular to the use of mercury in the extraction process, which can poison water supplies and cause severe health effects. The authors of *Dirty Gold* vividly describe the harmful effects of such contamination:

Every year, the miners dumped forty tons of mercury into Amazonian rivers, according to Perú's environment ministry. The fish that local people depended on especially in rural and indigenous communities – were loaded with toxins. The people needed the fish to survive, but each bite was poison. Scientists who took hair samples from residents found levels of mercury up to sixteen times greater than was considered safe. They estimated fifty thousand people had ingested unsafe levels of mercury, and those numbers would grow as mining spread.⁷

12. Thus, while money laundering and illegal mining, particularly in the gold sector, are a global scourge, it is especially so in Peru, given the nation's tremendous mineral wealth and the vast regions of Amazonia within its territorial borders.
13. Kaloti is an active participant in what it admits is the "'shady' underside" of the gold industry.⁸ Kaloti is the Florida-based arm of a Dubai-based precious metals conglomerate owned and operated by a family with the name Kaloti [REDACTED]. As discussed later in this submission, from 2012 until the present the Kaloti

⁶ Ex. R-0235, Jay Weaver, et al., *Dirty Gold*, March 2021 [Re-submitted version of C-0051, with additional pages], p. 33.

⁷ Ex. R-0235, Jay Weaver, et al., *Dirty Gold*, March 2021 [Re-submitted version of C-0051, with additional pages], p. 117.

⁸ Memorial, ¶ 1.

Group has been embroiled in a series of scandals in multiple jurisdictions, including allegations and investigations into its possible involvement in, or link to, suspected criminal activities, including money laundering, the provision of financial services to drug cartels, sourcing of conflict gold, and smuggling.

14. So flagrant is the [REDACTED] disregard for basic rules and procedures that plainly illegal conduct has not only been condoned within the organization, but even institutionalized. Notably, this fact was even commented on by the English High Court, in a formal reference that it made to [REDACTED] (“[REDACTED]”) – a [REDACTED] company that was also Kaloti’s main customer. Specifically, in a judgment issued in 2020, the English High Court emphatically stated that “there were reasonable grounds to suppose that Kaloti [REDACTED] could be involved in money laundering.”⁹ Such ruling was issued in a lawsuit brought by one of [REDACTED] auditors, Mr. Amjad Rihan, against the latter’s former employer, Ernst & Young.
15. The judgment of the English High Court highlights the many red flags of potential money laundering uncovered by Mr. Rihan during a 2013 audit of [REDACTED]. Such audit identified billions of dollars in cash transactions and multiple serious due diligence failings by [REDACTED]. The ruling also underscores the [REDACTED] casual disregard for compliance with the law. One of the auditor’s many damning findings was that [REDACTED] had been involved in the export of gold from Morocco which was coated in silver, for the purpose of evading export restrictions. It was revealed in the context of the English High Court case that [REDACTED] (who was and remains a shareholder in Kaloti and director of [REDACTED]), 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.”¹⁰ It appears, in other words, that for the [REDACTED], concealing goods to evade export

⁹ **Ex. R-0119**, *Amjad Rihan v. Ernst & Young Global Ltd., et al.*, Case No. 2020 EWHC 901 (QB), Judgment, 17 April 2020 (“**Rihan (Judgment)**”), ¶ 142.

¹⁰ **Ex. R-0108**, “*Billion dollar gold market in Dubai where not all was as it seemed*,” THE GUARDIAN, 25 February 2014, p. 1.

restrictions of a sovereign State is just ordinary business practice. With respect to that particular finding by the auditor, the English High Court disapprovingly observed that [REDACTED] management “did know about the practice and did collude with it, were relaxed about it and regarded it as not unusual or concerning.”¹¹

16. Kaloti’s laxity with regard to legal and compliance procedures is further demonstrated by its lax approach to its obligation under Peruvian law to verify that the gold that it purchased had been lawfully sourced. Not only is such verification legally required, but it is also consonant with business common sense, to avoid the risk of potential immobilizations and seizures in the event that there is insufficient information to determine that the gold was lawfully mined. Kaloti was, at best, willfully blind to such obligations and risks, and failed to carry out basic due diligence and compliance procedures with respect to the Five Shipments, and to the four suppliers from which Kaloti had allegedly purchased the Five Shipments (“**Suppliers**”). Had Kaloti carried out such procedures, it would have immediately noticed glaring red flags with respect to the Suppliers, which were the following companies: (i) [REDACTED]. ([REDACTED]); (ii) [REDACTED] (“[REDACTED]”); (iii) [REDACTED]. (“[REDACTED]”); and (iv) [REDACTED] (“[REDACTED]”). Some of these had links with well-known money launderers, drug-traffickers and gold-smugglers.
17. The risks that Kaloti had assumed by failing to conduct adequate due diligence materialized when the Peruvian authorities immobilized the Five Shipments, and thereafter commenced criminal proceedings against the Suppliers. Such proceedings were initiated on the basis of (i) the lack of evidence demonstrating the lawful origin of the gold in the Five Shipments; and (ii) significant indicia of money laundering and illegal mining in connection with the Suppliers and the shipments themselves.
18. Based on such evidence, and in the context of the referenced criminal proceedings, the Peruvian Courts granted precautionary seizures over the Five Shipments

¹¹ Ex. R-0119, *Rihan* (Judgment), ¶ 333.

("Precautionary Seizures"). All of the above actions were carried out in accordance with due process, and in pursuit of a legitimate and important aim: preventing the dissipation of potential proceeds of crime, and bringing suspected illegal miners and money launderers to justice.

19. In bringing its meritless claims in the present arbitration, Kaloti does not appear to recognize the applicable legal standard under the Treaty and customary international law, which establishes a high threshold for determining that a measure attributable to a host State constitutes an internationally wrongful act. This failing is particularly notable given that Kaloti's main challenge herein is against judicial measures, since it claims that Peru failed to provide the "customary international law minimum standard of treatment" through an alleged denial of justice.
20. Kaloti's submission is also riddled with factual errors, misleading characterizations of the facts, and omissions of crucial facts that undermine its case. Bereft of any evidentiary support for its claims, Kaloti relies on unsubstantiated conspiracy theories. For example, without offering a shred of evidence, Kaloti and its witnesses claim that the National Customs and Tax Management Agency (*Superintendencia Nacional de Aduanas y de Administración Tributaria*) ("SUNAT") targeted the Suppliers because it "allowed itself to be influenced . . . by domestic companies who did not like that KML was undercutting them in the gold market."¹² As demonstrated below, this assertion is utterly false. Kaloti also seeks to play the victim, alleging that it was specifically singled out or targeted by the Peruvian authorities. Like so many other allegations by Kaloti in this proceeding, that too is false, as SUNAT and the Peruvian courts enacted similar measures that applied across the entire gold sector. Such measures therefore affected numerous suppliers, including foreign and domestic companies alike.
21. Kaloti's misleading and speculative approach extends to its submissions on causation and damages. Notably, Kaloti's claims are based on the seizure of certain shipments

¹² Memorial, ¶ 6. See also Witness Statement of [REDACTED], 8 February 2022 ("[REDACTED] Witness Statement"), ¶¶ 47-48.

of gold, in circumstances in which such seizure was by its nature merely temporary. Moreover, Kaloti has not proven that it actually paid for some of the gold that forms the basis of its claims. Further still, Kaloti itself had estimated that the seized gold had a value of only USD 12.6 million, and yet in the present arbitration it is advancing a claim for more than USD 123 million.

22. Kaloti also asserts, again without a shred of evidence, that Peru leaked details of money-laundering investigations that implicated Kaloti, and that such alleged leak caused Kaloti's suppliers and banks to terminate their relations with it. In making this baseless assertion, Kaloti ignores the far more likely reasons for the collapse of its commercial operations, such as the scandals affecting the [REDACTED], and the shriveling of the segment of the Peruvian gold market from which Kaloti was sourcing its gold. Kaloti then presents a fanciful damages model that is based on a series of flawed inputs and speculative assertions, and that therefore cannot form a reliable basis for an award of damages.
23. The meritless nature of Kaloti's claims is consistent with, and indeed symptomatic of, its approach to business and risk in general. Just as Kaloti showed no scruples in disregarding its legal obligations and overcharging or not paying its suppliers, in the present proceeding it has concocted fanciful Treaty claims, misrepresented the facts, and ignored the applicable legal standards. In comparison with its normal business dealings, no doubt commencing a meritless arbitration was a comparatively low-risk proposition for Kaloti. However, as Peru demonstrates in this Counter-Memorial, its claims are factually and legally unfounded, and should be summarily dismissed.

B. Summary of key facts

24. Peru is Latin America's largest producer of gold. The gold industry is an important sector within Peru's economy, but also poses significant challenges for law enforcement agencies. In recent years, in parallel with the development of the sector and increasing gold prices, Peru has seen an increase in illegal mining, and in money laundering connected to gold mining. Illegal mining has had acutely damaging socio-

economic and environmental effects in Peru. It also has been depriving the Peruvian State of crucial taxation revenue, and depleting its finite resources.

25. In order to combat the twin scourges of illegal mining and money laundering, and in the context of coordinated efforts with other Latin American States and international organizations, starting in 2012 Peru introduced a robust new legal framework, to supplement and enhance the norms that already existed to address those crimes. The main requirements and regulatory powers under Peru's new framework were contained in (i) Legislative Decree No. 1106, entitled "Legislative Decree for the effective fight against money laundering and other crimes related to illegal mining and organized crime" ("**Money Laundering Decree**"); and (ii) Legislative Decree No. 1107 ("**Illegal Mining Controls and Inspection Decree**").
26. Various State authorities, including SUNAT, the Prosecutor's Office, the State Attorney's Office, and Peru's criminal courts ("**Criminal Courts**") have played a key role in enforcing the updated legal framework. As applicable, depending on their respective competencies under Peruvian law, such authorities were empowered to commence and conduct administrative investigations and proceedings, criminal investigations and prosecutions, and in those contexts to issue orders to preserve evidence and ensure the non-dissipation of proceeds of crime.
27. With respect to SUNAT, such agency had detected certain irregularities and red flags with respect to the Five Shipments and the Suppliers. Specifically, despite having ample opportunity to do so, neither the Suppliers nor Kaloti had provided sufficient information and documentation to confirm that the gold contained in the shipments had a lawful origin, as was required under Peruvian law. In addition, there were significant indicia of potential unlawful activity connected to such shipments, including evidence of (i) tax evasion 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 illegal exportation of gold.
28. For that reason, and exercising powers expressly conferred upon it under the Peruvian legal framework described above, in late 2013 and early 2014, SUNAT (i) pending

further investigation, issued immobilization orders with respect to four of the Five Shipments (“**SUNAT Immobilizations**”); such orders were proper and reasonable in light of the circumstances, and adopted in full accordance with Peruvian law; (ii) commenced an administrative investigation into potential customs and tax violations; and (iii) reported the relevant facts to the Prosecutor’s Office, the State Attorney’s Office, and the Financial Intelligence Unit of Peru (*Unidad de Inteligencia Financiera*) (“**Financial Intelligence Unit**”), for the purpose of evaluating whether actionable criminal activity was involved.

29. With respect to the SUNAT Immobilizations, Kaloti presented various complaints and requests to lift the relevant orders. However, its communications in that regard lacked any basis in law, and failed to provide evidence to allay SUNAT’s legitimate concerns regarding the potentially illicit provenance of the shipments. Moreover, the SUNAT Immobilizations had not been targeted at Kaloti or its suppliers, but rather were merely part of wider enforcement efforts by SUNAT with respect to the entire gold sector. Such efforts were designed to ensure that early warning signs of potential illegal mining and money laundering would be acted upon promptly and effectively. One illustrative statistic that contextualizes the SUNAT Immobilizations is the fact that the Suppliers of the Five Shipments were *only four of more than one hundred companies* in the gold sector that were identified by SUNAT at that time as having a high- or medium-risk profile. The SUNAT Immobilizations thus represented but a few of many similar measures taken by that agency over the course of 2012-2018.¹³
30. Based on the growing body of evidence regarding potential illegal mining and money laundering associated with the Five Shipments and the Suppliers, the Prosecutor’s Office ultimately decided to initiate criminal investigations into the Suppliers. Such investigations, in turn, revealed further incriminating evidence in relation to the Suppliers and the Five Shipments, including significant discrepancies in the information that the Suppliers had provided with respect to such shipments. Such discrepancies suggested that the relevant gold shipments had not actually originated

¹³ Ex. R-0055, Report No. 49-2014-SUNAT/2E4000, 28 April 2014.

from the sources identified in the Suppliers' documentation. In addition, several of the Suppliers had been only recently established, with minimal share capital, and yet had carried out large volumes of gold transactions – a fact pattern that is a classic red flag for money laundering.

31. Further, the founder and legal representative of the Supplier of two of the Five Shipments, namely [REDACTED] had links with the notorious drug-trafficker and smuggler [REDACTED] (also known as "[REDACTED]"). Moreover, [REDACTED] himself had (i) spent time in prison for money laundering and drug trafficking, and (ii) been investigated for fraud, and for the supply and possession of weapons and explosives.
32. In light of the evidence it had gathered in the above-mentioned investigations, the Prosecutor's Office commenced criminal proceedings against each of the Suppliers ("**Criminal Proceedings**"). In that context, the Prosecutor's Office requested, and the Criminal Courts granted, interlocutory measures for the seizure of the same four shipments that had been subject to the SUNAT Immobilizations, pending the outcome of the Criminal Proceedings. In accordance with Peruvian criminal law and procedure, such seizure orders were designed to preserve evidence and prevent the dissipation of suspected proceeds of crime.
33. Although it was not a party thereto, Kaloti made several attempts to intervene in the Criminal Proceedings, requesting that the Precautionary Seizures be lifted and that it be provided with access to information with respect to the criminal investigations against the Suppliers. However, Kaloti failed to either (i) establish that it had legal standing; or (ii) avail itself of any of the legal recourses available under Peruvian law to assert its alleged rights. In several instances, Kaloti's requests were directed to the Prosecutor's Office, who lacked the authority to lift the Precautionary Seizures (since only the Criminal Courts had such authority). In addition, because as noted Kaloti was not a party to the relevant criminal investigations, it lacked the right to access information regarding such investigations.

34. The Criminal Proceedings have been complex due to both (i) the nature itself of money laundering as a crime, which by definition involves the use of subterfuge and covert schemes; and (ii) the specific evidential and procedural complexities of the proceedings themselves. Despite these difficulties, and delays caused by the COVID-19 pandemic, the evidence shows that the Criminal Proceedings have been progressing in accordance with Peruvian law and procedure.
35. One of the important facts that Kaloti elided in its Memorial is that one of its shipments (“**Shipment 5**”) was not immobilized by SUNAT at all (at any time). Rather, such shipment was subject to an attachment requested by ██████ in the context of a civil action brought by ██████ against Kaloti in the Peruvian civil courts (“**Civil Attachment**”). In that proceeding, ██████ claimed –and ultimately proved– that Kaloti had failed to pay for Shipment 5. While that shipment also became subject to a precautionary attachment issued by the Criminal Courts, such attachment was only in place for a short period of time before it was discharged on jurisdictional grounds.
36. Kaloti further claims that it became “*de facto* bankrupt” as a result of Peru’s actions.¹⁴ However, this is yet another attempt to obfuscate the facts. Kaloti, and the broader ██████ to which it belongs, are solely responsible for the failure and ultimate demise of Kaloti’s business operation, both in Peru and abroad. Their unscrupulous conduct has caught up with them. Well before the relevant measures, and throughout the time period to which Kaloti’s claim relates, there were a series of well-publicized scandals involving the ██████ international business activities. These included high-profile allegations and investigations into suspected money laundering, smuggling, and sourcing of conflict minerals by the ██████. Such matters inevitably had a detrimental effect on Kaloti’s business. To illustrate, even before the first of the SUNAT Immobilizations, several large U.S. and international banks had filed suspicious activity reports (“**SARs**”) due to money laundering red flags with respect to transactions in which the ██████ was involved. As a result, such banks had taken steps to distance themselves from the ██████. The latter’s

¹⁴ Memorial, ¶ 163.

suspect activities had also caught the attention of the US Drug Enforcement Administration (“DEA”). In fact, such was the DEA’s level of concern regarding the [REDACTED] business activities, that it recommended that the [REDACTED] be designated as a primary money laundering threat.

37. In the context of the above scandals, it is simply not credible that the demise of Kaloti’s worldwide business operations was solely and specifically caused by the seizure of five gold shipments in one of the countries in which Kaloti operated. Nor is Peru responsible for the significant media attention to which the referenced scandals understandably gave rise. To the extent that Kaloti’s reputation was tarnished, it was entirely attributable to its own compliance failings, its association with the wider [REDACTED], and the damaging scandals of the latter, rather than to any actions attributable to Peru.

C. The reasons why Kaloti’s claims must be dismissed

38. In light of the above background, it is plain that Kaloti’s claims must fail. As explained in further detail in this Counter-Memorial, Peru’s actions in this case were entirely reasonable, consonant with due process, and taken in pursuit of legitimate public policy objectives. While Claimant seeks to lay the blame for the failure of its business entirely at Peru’s door, the evidence shows that such failure was caused by factors unrelated to any actions or omissions by Peru. Such factors include, amongst others, (i) Kaloti’s own acute due diligence failings, and/or its willful disregard of the possible illegal origin of the gold that it was buying; and (ii) the negative reputation of the [REDACTED], which as noted was the result of the [REDACTED] own unscrupulous business practices.
39. The measures that Kaloti challenges in the present arbitration are the SUNAT Immobilizations, the Precautionary Seizures, Peru’s alleged conduct in the Criminal Proceedings, and Peru’s alleged failure to negotiate with Kaloti (jointly, “the

Challenged Measures").¹⁵ Kaloti claims that such measures breached the following provisions of the Treaty:

- a. Article 10.5, entitled "Minimum Standard of Treatment" ("**MST Provision**"), which stipulates that "[e]ach Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment," and expressly cautions that the obligation to accord fair and equitable treatment ("**FET**") is limited to the "customary international law minimum standard of treatment of aliens."
- b. Article 10.7 ("**Expropriation Provision**"), which provides that "[n]o 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.
- c. Article 10.3 ("**National Treatment Provision**"), which provides that "[e]ach Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory."

1. *The Tribunal lacks jurisdiction over Kaloti's claims*

40. As a threshold matter, the Tribunal lacks jurisdiction over Kaloti's claims, in their entirety. *First*, the Tribunal lacks jurisdiction *ratione materiae*. Both the Treaty and the ICSID Convention limit the Tribunal's jurisdiction to disputes arising out of an "investment" that was made by the claimant in the territory of the respondent State. To prove that the Tribunal has jurisdiction *ratione materiae* over Kaloti's claims, Kaloti must establish that such claims arise out of assets that (i) qualify as "investments" under both the Treaty and the ICSID Convention; (ii) are owned or controlled by Kaloti itself; and (iii) are located in the territory of Peru.

¹⁵ See Memorial, ¶ 136. For the avoidance of doubt, Peru does not agree with the characterisation of Peru's actions in that paragraph.

41. However, Kaloti has failed to satisfy any of these three elements, given that (i) Kaloti's purported assets in Peru do not possess the requisite characteristics to qualify as an "investment" under the Treaty or the ICSID Convention; (ii) Kaloti has not even succeeded in establishing that it "owns or controls" any of the assets that form the basis of its claims; and (iii) with respect to Kaloti's claim that the whole Kaloti enterprise was expropriated, Kaloti cannot be considered a "covered investment" because the company itself is located in the U.S., and thus does not qualify as an investment *in the territory of Peru*.
42. *Second*, the Tribunal lacks jurisdiction *ratione temporis* over (i) two of Kaloti's FET claims; (ii) Kaloti's national treatment claim; and (iii) Kaloti's expropriation claims. Treaty Article 10.18.1 provides that "[n]o claim may be submitted to arbitration under this Section if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged . . . and knowledge that the claimant has incurred loss or damage."
43. However, Kaloti submitted the vast majority of its claims to arbitration *more than* three years after it first acquired knowledge of Peru's alleged breaches, *and* of the loss or damage that it claims to have suffered as a result of those breaches. Kaloti's claims therefore do not comply with the temporal limitation imposed by Treaty Article 10.18.1. While Kaloti argues that it was not until 30 November 2018 that it acquired knowledge of the *full* extent of the losses that it allegedly suffered as a result of Peru's alleged breaches, and that this means that the limitation period was not exceeded, such contention is (i) flatly inconsistent with both the text and spirit of Treaty Article 10.18.1, as well as the relevant jurisprudence (mainly, because the requirement of knowledge of loss is triggered upon awareness of the fact itself of *some* type of loss or damage, rather than of the precise *extent* of such loss or damage); and (ii) Kaloti's selection of 30 November 2018 as the alleged date on which all of Peru's alleged breaches materialized is unfounded, arbitrary, and contrary to the evidence in the record.

2. *Kaloti's claims fail on the merits*

44. Kaloti's claims are in any event baseless as a matter of law and fact. Importantly, Kaloti freely admits that none of the Challenged Measures, considered individually, constitutes a breach the Treaty. Kaloti's argument is rather that the Challenged Measures should be deemed a "composite act," such that those measures, in the aggregate, breached the MST Provision and the Expropriation Provision. However, Kaloti has failed to satisfy the relevant test for a composite act under international law. Such test requires that the relevant acts be "sufficiently numerous and interconnected" to amount to "a pattern or system."¹⁶ The Challenged Measures do not satisfy that test, as SUNAT, the Prosecutor's Office and the Criminal Courts acted independently of one another, in accordance with their respective competencies and powers, and on the basis of objective evidence.

a. Peru has not breached the MST Provision

45. Kaloti has manifestly failed to satisfy the legal standard that applies to its claims under the MST Provision. That provision is expressly limited to the minimum standard of treatment under customary international law ("MST"), which establishes a high threshold for establishing a breach. Moreover, Kaloti's claims for breach of the MST Provision center on an allegation of denial of justice, which would require the Tribunal to conclude that there has been a failing of the entire Peruvian judicial system. Kaloti's claims fall well short of meeting that high threshold.

46. The evidence shows instead that all of the relevant decisions of Peru's administrative and judicial authorities were taken in accordance with due process, in full compliance with Peruvian law, and in pursuit of the legitimate aims of combatting potential money laundering and illegal mining. The Criminal Proceedings have been conducted and progressed in accordance with Peruvian law and procedure, notwithstanding the

¹⁶ **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*, ECHR, p. 64, ¶ 159).

challenges posed by the procedural and evidentiary complexities of the relevant cases, and by the pandemic.

47. Kaloti also complains that its various attempts to intervene in the Criminal Proceedings against the Suppliers were rejected. However, Kaloti's allegation reflects either a deep misunderstanding or a sheer disregard of Peruvian law. Either consciously or through gross negligence, Kaloti failed to pursue any of the legal avenues at its disposal under Peruvian law to challenge the Precautionary Seizures, and to request the release of Shipments 1 to 4. For example, Kaloti affirmatively decided not to file an *amparo* request before the competent constitutional court, which was one of the legal remedies available to it to challenge the Precautionary Seizures. That decision is notable because Kaloti itself had earlier utilized that same legal recourse to challenge two of the SUNAT Immobilizations. In an *amparo* proceeding challenging the Precautionary Seizures, Kaloti could have sought protection of its property and due process rights—precisely the same rights on which its denial of justice claim rests. Importantly for present purposes, Kaloti's failure to pursue the proper legal avenues under Peruvian law demonstrates that Kaloti failed to exhaust domestic remedies—a fact that in and of itself scuppers Kaloti's denial of justice claim.
48. Kaloti also raises a claim for breach of the MST Provision based on alleged discrimination, asserting that Peru treated it less favorably than another foreign company, Aram Asset Management ("**Aram**"). Again, Kaloti's claim fails. That is so for several reasons, including (i) because Aram is not a similarly situated comparator for the purposes of a discrimination claim under international law; (ii) because Kaloti's claim of less favorable treatment is factually incorrect and fatally flawed on its face, insofar as Aram's gold shipments have been *permanently* confiscated (which indisputably means that Aram was *not* treated more favorably than Kaloti); and (iii) in any event, to the extent that there was differential treatment, that was objectively justified.
49. Finally, Kaloti raises an utterly frivolous claim that Peru failed to negotiate with it, and that such failure breached the MST Provision. Such claim fails for two very simple

reasons: (i) the MST Provision does not encompass any duty to negotiate with investors who intend to bring a Treaty claim; and (ii) the claim is inexplicable given that the evidence shows incontrovertibly not only that Peru *did* negotiate with Kaloti, but that moreover it did so in good faith.

b. Peru has not expropriated any investment made by Kaloti

50. Kaloti's expropriation claim is also fatally flawed. Kaloti has failed to prove that its expropriation claims concern a "covered investment" that Kaloti itself legally owns (or owned) under Peruvian law. In particular, (i) Kaloti has not demonstrated that it has (or had) a vested property right in the Five Shipments under Peruvian law; and (ii) Kaloti's "entire[] . . . business operations"¹⁷ do not constitute a "covered investment" under the Treaty, or a vested legal right under Peruvian law.
51. Annex 10-B contains a list of factors that an arbitral tribunal must consider when assessing whether an expropriation has taken place. None of those factors is present in the instant case. *First*, the Challenged Measures did not interfere with any distinct, reasonable investment-backed expectations of Kaloti. Indeed, Kaloti has not identified any such expectations, and in any event it could not reasonably have expected that it would be insulated from immobilizations or precautionary seizures in circumstances of legitimate doubt by the relevant authorities regarding (i) whether the origin of the Five Shipments was lawful, and (ii) possible illegal activity connected to such shipments. *Second*, Peru's measures neither caused any substantial deprivation of Kaloti's investment, nor caused its alleged bankruptcy. Rather, any losses suffered by Kaloti were caused either by the [REDACTED] own unscrupulous business practices, or by supervening causes unrelated to the Challenged Measures. *Third* and finally, the Challenged Measures fell squarely within the police powers exception under Annex 10-B to the Treaty and international law, and therefore do not give rise to an expropriation or to any obligation to pay compensation.

¹⁷ Memorial, ¶ 142.

c. Peru has not breached the National Treatment Provision

52. Kaloti also brings a national treatment claim, arguing that Peru treated Kaloti less favorably than domestic purchasers of gold. This claim is also unsubstantiated. As a threshold matter, Kaloti has not even attempted to identify the relevant legal standard. Such standard requires a claimant to identify a comparator in like circumstances for the purposes of the national treatment analysis, but Kaloti has failed to identify *any* domestic comparator—let alone one that is similarly situated. Moreover, the factual premise of Kaloti’s claim is flawed, because Peru’s efforts to combat money laundering and illegal mining affected *the entirety* of the gold mining sector, and thus encompassed both Peruvian and non-Peruvian companies. Moreover, there was ample objective justification for the Challenged Measures due to clear indicia of money laundering and illegal mining relating to the Five Shipments and the Suppliers.

3. *Kaloti has failed to demonstrate that it is entitled to damages*

53. Even if Kaloti were to establish the existence not only of jurisdiction but also of one or more breaches of the Treaty (*quod non*), it would not be entitled to *any* damages whatsoever, for two principal reasons. *First*, it has failed to establish a proximate causal link between any actions attributable to Peru and the losses that Kaloti alleges it has suffered. The central tenet of Kaloti’s causation analysis is that the Challenged Measures, and public statements made by Peru in relation to certain criminal investigations, caused Kaloti’s suppliers and banks to cease doing business with Kaloti. However, there is no evidence to support such a causation theory, and in fact much of the evidence directly contradicts that theory. In addition, there were numerous supervening causes for Kaloti’s losses, including: reputational damage resulting from scandals affecting the [REDACTED] overall; the downturn in the small-scale and artisanal gold market; and the decision of Kaloti’s own shareholder to set up a competing business to Kaloti.

54. *Second*, the damages model presented by Kaloti and its expert, Mr. Almir Smajlovic of Secretariat Consulting, is riddled with methodological and calculation errors,

speculative assumptions, and analytical flaws. For example, even though it had been trading in Peru for only one year, Kaloti inexplicably assumes that, but for the Challenged Measures, it would have obtained and maintained a market share of 70-90% of the relevant market in Peru (which is fancifully optimistic), and that it would have maintained such market share over a period of 35 years (which is downright incomprehensible). Such assumptions defy both economic logic and the laws of competition. In addition, Kaloti applies the same flawed assumptions to its counterfactual projections of its business in other countries, yet it provides no information or evidence regarding its business or the competitive environment in such countries to support those assumptions in that context.

55. In sum, due to the many flaws in Kaloti’s causation and quantum analysis, even if a breach were deemed to have taken place (*quod non*), no compensation would be payable.

D. Kaloti should be ordered to provide security for all costs ultimately incurred by Peru in this arbitration

56. If Peru were to be successful in this arbitration and Kaloti were ordered to pay Peru’s costs—a full recovery of which Peru expressly requests in this submission—there would be a very real risk that Kaloti would be either unwilling or unable to comply with such an order. Indeed, Kaloti itself asserts that it has been “*de facto*” bankrupt for nearly four years.¹⁸ Peru should not be forced to go to the expense of defending itself against Kaloti’s baseless claims if it would have no prospect of recovering such costs in the event of a costs award in its favor.

* * *

57. For the reasons identified above and elaborated further in this Counter-Memorial, Peru respectfully submits that the Tribunal should (i) dismiss all of Claimant’s claims for lack of jurisdiction and/or inadmissibility; (ii) dismiss for lack of merit any and all claims in respect of which the Tribunal may determine that it has jurisdiction; (iii)

¹⁸ Memorial, ¶ 163.

reject in its entirety Claimant's request for compensation; (iv) order Claimant to pay all costs of the arbitration (including all of Peru's legal and expert fees and expenses); and (v) order Claimant to post security for costs.

58. This Counter-Memorial is accompanied by the following supporting evidence:
- a. The expert report (with 30 exhibits) of Professor **Joaquín Missiego** (a leading expert on Peruvian criminal law and procedure), on certain Peruvian law aspects of Kaloti's claims;
 - b. The expert report (including 56 exhibits) of the **Brattle Group ("Brattle")** (a global financial advisory and consulting firm), on quantum issues ("**Brattle Report**");
 - c. 238 factual exhibits, numbered Ex. R-0001 to Ex. R-0238; and
 - d. 220 legal authorities, numbered RL-0001 to RL-0220.
59. The remainder of this Counter-Memorial is structured as follows:
- a. In **Section II**, Peru describes the facts that gave rise to the present dispute;
 - b. In **Section III**, Peru explains why the Tribunal lacks jurisdiction;
 - c. In **Section IV**, Peru explains why all of Kaloti's claims fail on the merits;
 - d. In **Section V**, Peru explains why, under any scenario, Kaloti would not be entitled to compensation;
 - e. In **Section VI**, Peru addresses its application for security for costs; and finally,
 - f. In **Section VII**, Peru articulates its request for relief.

II. FACTS

A. Before Kaloti started operating in the country, Peru strengthened its legal framework to combat the increasingly pernicious effects of illegal mining, money laundering and related criminal activities

60. The measures challenged by Kaloti in this arbitration ("**Challenged Measures**") were adopted by law enforcement and other Peruvian State organs in pursuit of legitimate

public welfare objectives. As explained below, starting in 2006, illegal mining in Peru (and other countries) rose exponentially, mainly as a result of the global boom in mineral prices. The statistic prepared by various Peruvian agencies at that time revealed that illegal mining was hindering the socio-economic development of Peru (**Section II.A.1**), fostering organized crime (**Section II.A.2**), and having devastating consequences on the country's environment and on the health of local communities (**Section II.A.3**). Starting in 2012, Peru therefore strengthened its legal framework to combat illegal mining, money laundering, and related criminal activities (**Section II.A.4**). SUNAT, the Prosecutor's Office, the State Attorney's Office, and Peru's criminal courts have since then played a key role in enforcing that legal framework (**Section II.A.5**).

1. *Illegal mining hinders the socio-economic development of Peru*

61. Mining is a key sector of Peru's economy. Peru is the world's second largest producer of copper and silver, and Latin America's largest producer of gold.¹⁹ Over the last ten years, mining has accounted for approximately 10% of the national GDP, and approximately 60% of the total value of Peruvian exports.²⁰ A report by the Organization of American States ("OAS") shows that "[g]old alone accounted for 17.8% of the country's export in 2019."²¹ Consequently, mining is a critical component of Peru's economy. Particularly in light of that, and as discussed below, illegal mining has a significant detrimental effect on Peru's socio-economic development.²²

¹⁹ Ex. R-0011, Mining Annual Report 2020, MINEM, May 2020, p. 16.

²⁰ Ex. R-0011, Mining Annual Report 2020, MINEM, May 2020, p. 3.

²¹ Ex. R-0012, On the Trail of Illicit Gold Proceeds: Strengthening the Fight Against Illegal Mining Finances, OAS, November 2021, p. 6.

²² Ex. R-0012, On the Trail of Illicit Gold Proceeds: Strengthening the Fight Against Illegal Mining Finances, OAS, November 2021, p. 7.

62. Pursuant to Article 66 of the Political Constitution of Peru (“**Constitution**”), the State is the exclusive owner of all mineral resources located in Peruvian territory.²³ The State may grant concessions to private parties for the extraction of mineral resources from public lands,²⁴ in exchange for payment by the concessionaire of fees, mining royalties and income taxes to the State.²⁵ Illegal mining (e.g., mining carried out without a valid concession) deprives Peru of finite mineral resources, and prevents the State from collecting revenues that are essential to its socio-economic development. For instance, a study on the impact of illegal mining in Peru noted that, in 2012 alone, the State forewent over USD 257.6 million in income taxes, due to illegal mining of gold:

The latest official figures from the MEM [(Ministry of Energy and Mines)] at the end of 2012 indicate that the estimated production of gold from informal and illegal sources is 40 tons per year (1286 ounces), which in value would be equivalent to US\$ 2,146,819,651 million. If this amount were subject to income tax, it would reach US\$ 257,618,358 million, which would represent a royalty of US\$ 128,809,179 million for regional governments.²⁶

63. The same study further noted that tax evasion in 2011 resulting from illegal gold mining deprived the State from revenue equivalent to “five times the budgets of the

²³ **CL-0002**, Official English translation of the Political Constitution of Peru, 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.”).

²⁴ **Ex. R-0013**, Supreme Decree No. 014-92-EM, General Mining Law, 3 June 1992 (“**General Mining Law**”), Art. 7 (“The activities of exploration, exploitation, benefit, general labor and mining transportation are executed by national or foreign natural and legal persons, through the concession system.”).

²⁵ **Ex. R-0011**, Mining Annual Report 2020, MINEM, May 2020, pp. 116–123.

²⁶ **Ex. R-0014**, The Reality of Illegal Mining in Amazonian Countries, June 2014, p. 187 (“*Las últimas cifras oficiales del MEM al cierre del 2012, señalan que la producción estimada de oro de procedencia informal e ilegal es de 40 toneladas anuales (1286 onzas), que en valor equivaldrían a US\$ 2 146 819.651 millones. Si este monto estuviera sujeto al pago del impuesto a la renta, alcanzaría los US\$ 257 618.358 millones, monto que representaría un canon de US\$ 128 809.179 millones para los gobiernos sub-nacionales.*”).

following provinces where illegal gold mining is present: Tambopata, Manu, San Antonio de Putina, Carabaya and Caravelí combined.”²⁷

64. The figures and impacts above are substantially higher if one considers illegal mining of other minerals, such as silver, copper and zinc.²⁸
65. Starting in 2006, illegal mining in Peru (and other countries) rose exponentially, mainly as a result of the boom in mineral prices.²⁹ The extent of the impact of this is illustrated in the graph below, which shows that by 2010 the value of exports of illegally mined gold had surpassed even that of all illicit narcotics exports *combined*.³⁰

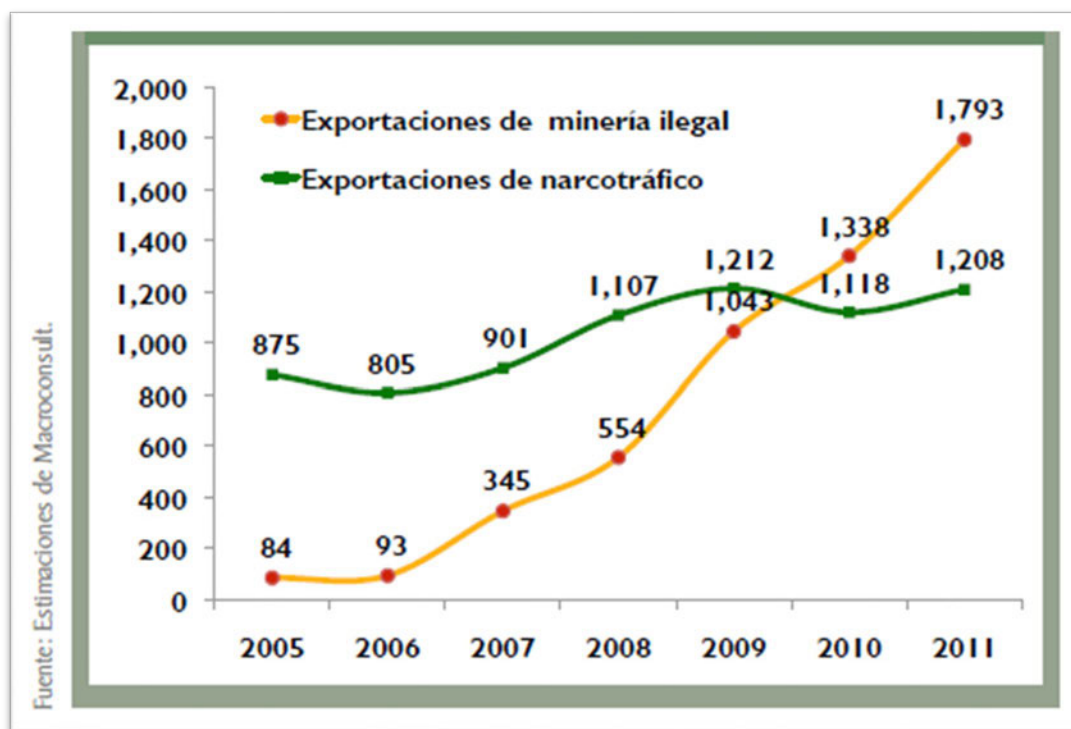
²⁷ **Ex. R-0015**, Special Report: Economic Projections 2012–2013, MACROCONSULT, 17 May 2012, p. 7 (“*cinco veces los presupuestos de las siguientes provincias con presencia de minería ilegal del oro: Tambopata, Manu, San Antonio de Putina, Carabaya y Caravelí, juntas.*”).

²⁸ See **Ex. R-0157**, “*Destroy, Rinse, Repeat – Peru’s Illegal Mining Struggles in Áncash*,” INSIGHT CRIME, 8 October 2020.

²⁹ **Ex. R-0015**, Special Report: Economic Projections 2012–2013, MACROCONSULT, 17 May 2012, p. 7.

³⁰ The illegal gold exports figure would have been even higher if this chart had included illegal mining in the Madre de Dios region, which was the region most significantly affected by illegal mining.

Figure 1: By 2010, illegal gold exports had surpassed drug trafficking exports ³¹



66. Due to its very nature, it is difficult to determine with certainty the extent of illegal mining and of its full socio-economic effects on the country. Nevertheless, a number of statistics indicate that the economic losses suffered by Peru as a result of illegal mining amount to several billions USD each year. For example, as reflected in **Figure 2** below, SUNAT's data confirms that the volume of gold *exports* regularly exceeds the reported volumes of gold *production*,³² which means *a fortiori* that significant gold production activity is being under-reported. Thus, while according to official statistics between 2015 and 2019 approximately 720 tons of gold were produced in Peru, more than three times that amount (*viz.*, 2,242 tons) were exported from the country.³³ Illegally mined gold accounts for that difference. These statistic suggest that, during

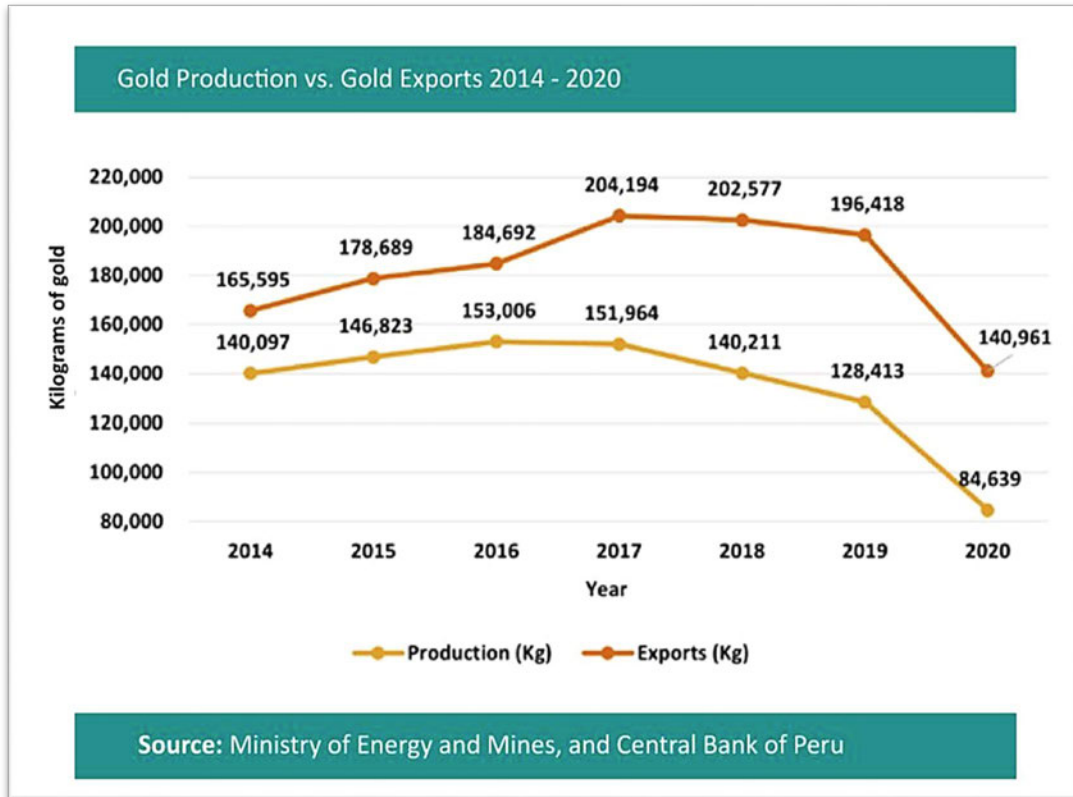
³¹ Ex. R-0015, Special Report: Economic Projections 2012–2013, MACROCONSULT, 17 May 2012, p. 7.

³² Ex. R-0012, On the Trail of Illicit Gold Proceeds: Strengthening the Fight Against Illegal Mining Finances, OAS, November 2021, p. 19.

³³ Ex. R-0016, "Más de 1500 toneladas de oro se exportaron desde el Perú sin que se sepa quién las extrajo," CONVOCA, 27 September 2020, p. 3.

that same period, the average value of illegal mining totaled at least USD 1.633 billion annually.³⁴

Figure 2: Gold Production vs. Gold Exports in Peru, 2014-2020³⁵



67. In addition, **Figures 3** and **4** below show that trading partners like the United States and the United Arab Emirates (two countries where the [REDACTED] operates) register gold imports from Peru that differ significantly from the gold exports to those countries reported by Peru:

³⁴ **Ex. R-0017**, Sectorial Risk Assessment on Money Laundering and Terrorism Financing, November 2018, p. 12.

³⁵ **Ex. R-0012**, On the Trail of Illicit Gold Proceeds: Strengthening the Fight Against Illegal Mining Finances, OAS, November 2021, p. 19.

Figure 3: Gold Exports vs. Gold Imports Reported by United Arab Emirates³⁶

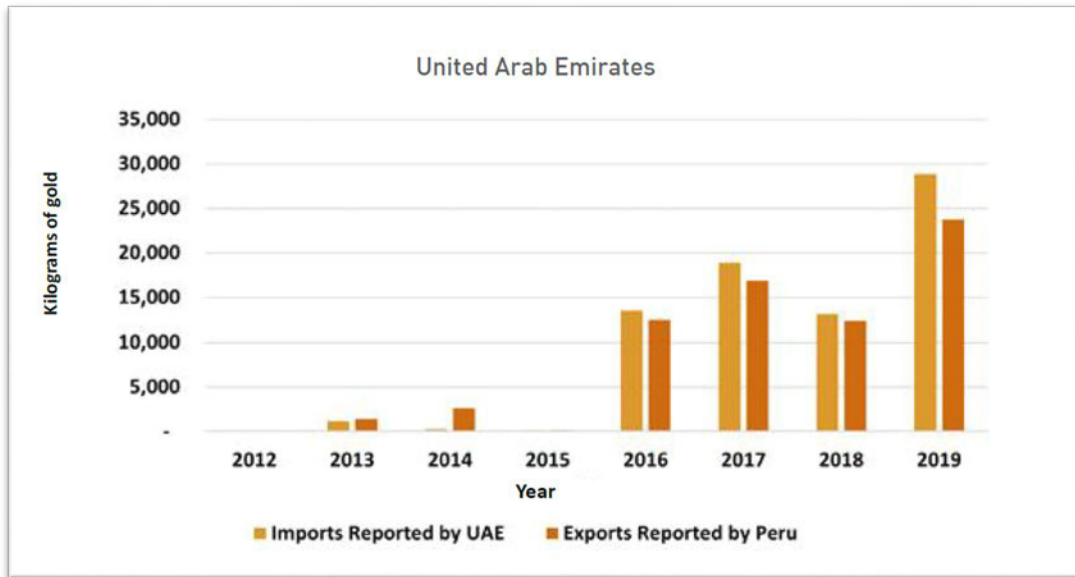
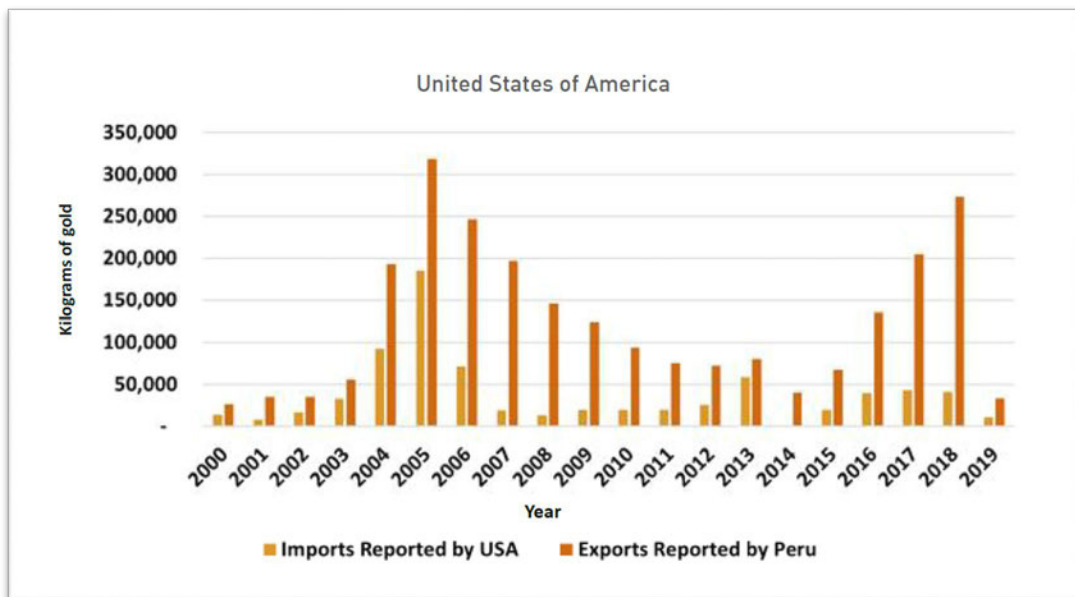


Figure 4: Gold Exports vs. Gold Imports Reported by United States of America³⁷



³⁶ Ex. R-0012, On the Trail of Illicit Gold Proceeds: Strengthening the Fight Against Illegal Mining Finances, OAS, November 2021, p. 21.

³⁷ Ex. R-0012, On the Trail of Illicit Gold Proceeds: Strengthening the Fight Against Illegal Mining Finances, OAS, November 2021, p. 22.

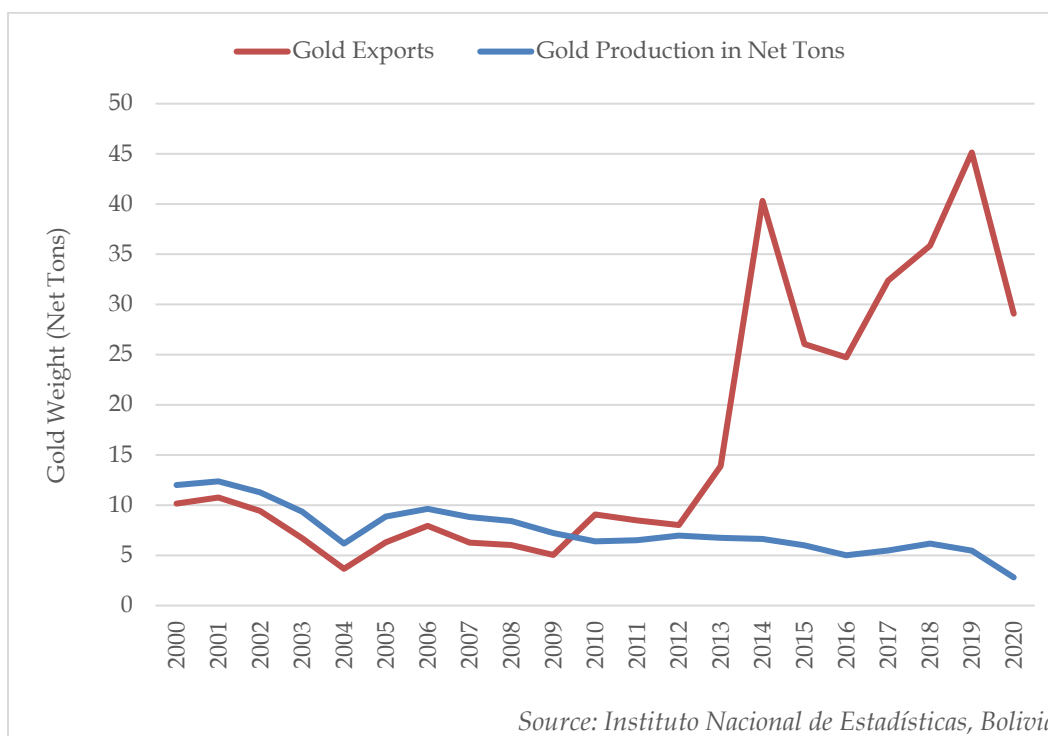
68. As the OAS has found, the disparities illustrated in the charts above suggest that criminals are using illegally mined gold to launder money.³⁸ In addition, the volume of illegally mined gold may in fact be far higher than these statistic suggest, given the high volume of gold that is smuggled out of Peru (and thus not recorded in official data) and then exported from neighboring countries.³⁹ As Peru stepped up its fight against illegal mining, criminal gangs smuggled illegally mined gold out of Peru and into Bolivia and other countries that have less effective export controls of illegal gold.⁴⁰ It is no coincidence, therefore, that Bolivia’s exports of gold started growing exponentially as Peru intensified its efforts to combat illegal mining in its territory (*see Figure 5 below*).

³⁸ **Ex. R-0012**, *On the Trail of Illicit Gold Proceeds: Strengthening the Fight Against Illegal Mining Finances*, OAS, November 2021, pp. 19–22.

³⁹ **Ex. R-0012**, *On the Trail of Illicit Gold Proceeds: Strengthening the Fight Against Illegal Mining Finances*, OAS, November 2021, pp. 33–36.

⁴⁰ **Ex. R-0060**, *Sectorial Risk Assessment Exposure to Money Laundering and Terrorism Financing of the Mining Sector in Peru*, January 2017, p. 28; **Ex. R-0017**, *Sectorial Risk Assessment on Money Laundering and Terrorism Financing*, November 2018, p. 12; **Ex. R-0235**, Jay Weaver, *et al.*, *DIRTY GOLD*, March 2021 [*Re-submitted version of C-0051, with additional pages*], p. 53 (“In the year following the airport raid in Lima, NTR’s imports from Ecuador tripled to \$337 million and its deals in Bolivia jumped tenfold to \$270 million. Meanwhile, its purchases from Perú plummeted 92 percent, from \$980 million in 2013 to a piddling \$79 million in 2014.”); **Ex. R-0018**, “*Los vuelos secretos del oro ilegal*,” OJO PÚBLICO, 5 December 2014; **Ex. R-0019**, “*Peru crackdown on illegal gold leads to new smuggling routes*,” REUTERS, 25 November 2014.

Figure 5: Gold Exports vs. Gold Production in Bolivia, 2000–2020⁴¹



2. *Illegal mining is closely linked to other forms of criminal activity*

69. Illegal mining is often directly related to money laundering, to drug, arms and human trafficking, as well as to labor and sexual exploitation. Kaloti itself admits in its Memorial that “the gold industry has a ‘shady’ underside”⁴² and “is susceptible to money laundering.”⁴³ In 2016, Peru’s Superintendency of Banking, Insurance and Pension Funds (*Superintendencia de Banca, Seguros y AFP*) identified illegal mining as one of the most significant predicate crimes for money laundering.⁴⁴ Similarly, a 2007 Sectorial Assessment on the Risks of Money Laundering and Terrorism Financing co-

⁴¹ Ex. R-0020, Bolivia: Export According to Economic Activity and Main Products by Month, INE, 1992–2022 compared with information in Ex. R-0021, Bolivia: National Mineral Production by Type of Mineral, According to Year and Month, INE, 1990–2022.

⁴² Memorial, ¶ 1.

⁴³ Memorial, ¶ 1.

⁴⁴ Ex. R-0022, National Risk Assessment on Money Laundering and Financing of Terrorism, Superintendency of Banking, Insurance and Pension Funds, November 2016, p. 13; see also Ex. R-0017, Sectorial Risk Assessment on Money Laundering and Terrorism Financing, November 2018, p. 23.

authored by the Financial Intelligence Unit of Peru had identified close links between illegal gold mining, money laundering and funding of terrorism.⁴⁵ The study also found that the steep increase of money laundering in the country was directly connected to the growth of illegal mining activities.⁴⁶

70. Further, a November 2021 report by the OAS that measured the volume of funds generated by illegal mining in Peru noted that approximately 50% of all illicit transactions in Peru are linked to illegal mining:

Nearly \$7 billion of a total of \$14.164 billion in illicit transactions detected during this period [i.e., January 2011 to January 2020] were linked to illegal mining. Between February of 2019 and January of 2020, approximately \$977 million of the \$1.955 billion in detected illicit transactions were linked to illegal mining, compared to \$794 million linked to tax fraud, and \$69 million linked to drug trafficking.⁴⁷

71. Organized crime groups use illegal gold mining not only as a source of funding in itself, but also to launder proceeds from other criminal activities, such as drug, arms, and human trafficking.⁴⁸ The sharp increase in gold prices experienced since 2005 and the relative ease with which gold can be exported – particularly in comparison with illicit drugs – has rendered illegal mining far more lucrative than drug trafficking.⁴⁹
72. One typical scheme used by organized crime groups is the following: (i) they use cash proceeds from drug trafficking and other illegal activities to buy illegally mined gold,

⁴⁵ **Ex. R-0060**, Sectorial Risk Assessment Exposure to Money Laundering and Terrorism Financing of the Mining Sector in Peru, January 2017, pp. 20–21.

⁴⁶ **Ex. R-0060**, Sectorial Risk Assessment Exposure to Money Laundering and Terrorism Financing of the Mining Sector in Peru, January 2017, p. 19.

⁴⁷ **Ex. R-0012**, On the Trail of Illicit Gold Proceeds: Strengthening the Fight Against Illegal Mining Finances, OAS, November 2021, p. 23.

⁴⁸ **Ex. R-0023**, Money Laundering from Environmental Crime, FATF, July 2021, p. 62; *see also Ex. R-0235*, Jay Weaver, *et al.*, *DIRTY GOLD*, March 2021 [*Re-submitted version of C-0051, with additional pages*], p. 9 (“Drug traffickers, always seeking ways to launder their money and appear to the outside world as legitimate businessmen, had started investing their cocaine cash in South America’s informal gold-mining industry.”).

⁴⁹ **Ex. R-0012**, On the Trail of Illicit Gold Proceeds: Strengthening the Fight Against Illegal Mining Finances, OAS, November 2021, p. 23.

(ii) that gold is then illegally exported; (iii) such gold is sold as “lawful” in countries like the United Arab Emirates; and (iv) the proceeds of those gold sales are then transferred back to the drug dealers and other criminals as “clean” money, through a complex net of international banking transactions.⁵⁰ Notably, a three-minute video prepared by the BBC explains this process, using as an example a USD 250 million international money laundering operation by a criminal organization that sold illegally mined gold in the United Arab Emirates⁵¹ – i.e., the very same mineral and very same country in which Kaloti trades.

73. As explained by the independent inter-governmental anti-money laundering and anti-terrorism body known as the Financial Action Task Force (“**FATF**”), trade in gold is an effective vehicle for money laundering, among other reasons because (i) the gold market is cash-intensive; (ii) gold can be traded anonymously and the relevant transactions are difficult to trace and verify; (iii) gold is a form of global currency, and itself often serves as a medium for exchange in criminal transactions; and (iv) gold is easily smuggled and traded (both physically and virtually).⁵² In other words, “[gold] provides a mechanism for organised crime groups to convert illicit cash into a stable, anonymous, transformable and easily exchangeable asset to realise or reinvest the profits of their criminal activities.”⁵³
74. INTERPOL has explained that the *modus operandi* of criminal groups engaged in illegal mining includes: (i) the use of false declarations of the mineral’s origins, (ii) the use of front companies, and (iii) the concealment of precious minerals (most commonly,

⁵⁰ **Ex. R-0014**, *The Reality of Illegal Mining in Amazonian Countries*, June 2014, p. 184; *see also* **Ex. R-0025**, “*How Money Laundering Works*,” BBC STORIES, 28 October 2019 ([Link](#)); **Ex. R-0047**, *DIRTY MONEY*, NETFLIX, 2020, Season 2, Episode 4 “*Dirty Gold*.”

⁵¹ **Ex. R-0025**, “*How Money Laundering Works*,” BBC Stories, 28 October 2019 ([Link](#)).

⁵² **Ex. R-0026**, *Money Laundering/Terrorist Financing Risks and Vulnerabilities Associated with Gold*, FATF, July 2015, pp. 6–14.

⁵³ **Ex. R-0026**, *Money Laundering/ Terrorist Financing Risks and Vulnerabilities Associated with Gold*, FATF, July 2015, p. 3.

adding a silver coating to conceal gold).⁵⁴ False declarations concerning the origin of minerals usually involve (i) fraudulent purchase receipts provided by intermediaries to conceal the true origin of the gold; and/or (ii) fraudulent receipts overstating production from a legal source.⁵⁵ The difference between (i) and (ii) is that the latter type of receipts mix legal and illegal gold, which hinders State agencies' ability to identify illegally mined gold. The use of front companies has been the subject of several US investigations into illegal gold mining from Peru. In 2012, Manhattan's District Attorney accused the Peruvian Sanchez-Paredes drug trafficking organization of using bank accounts of shell companies and of two major international gold refineries to launder proceeds from cocaine trafficking,⁵⁶ and of then using the laundered money to finance various businesses, including mining companies in Peru.⁵⁷

75. In addition to money laundering, illegal mining begets other types of crimes. For instance, in conflict regions, mining sites have become hotspots for violence and various forms of abuse. Since illegal mines operate clandestinely, the workers employed therein are marginalized and more vulnerable to extreme forms of labor exploitation, including forced labor and human trafficking.⁵⁸ Common practices include false promises about the terms of employment, physical confinement,

⁵⁴ **Ex. R-0027**, *"The Devastating Impact of Illegal Gold Mining in Latin America,"* INTERPOL, 28 April 2022; **Ex. R-0158**, *Illegal Mining and Associated Crimes*, INTERPOL, April 2022, p. 15.

⁵⁵ **Ex. R-0028**, *Organized Crime and Illegally Mined Gold in Latin America*, Global Initiative against Transnational Organized Crime, April 2016 [*Re-submitted version of C-0051, with additional pages*], p. 17.

⁵⁶ **Ex. R-0029**, *"Manhattan U.S. Attorney Announces Seizure of Over \$31 Million in Connection With an International Drug Trafficking and Money Laundering Scheme,"* U.S. ATTORNEY'S OFFICE, 10 October 2012, pp. 1-2.

⁵⁷ **Ex. R-0029**, *"Manhattan U.S. Attorney Announces Seizure of Over \$31 Million in Connection With an International Drug Trafficking and Money Laundering Scheme,"* U.S. ATTORNEY'S OFFICE, 10 October 2012 p. 2.

⁵⁸ **Ex. R-0035**, *Risk Analysis of Indicators of Forced Labor and Human Trafficking in Illegal Gold Mining in Peru*, VERITÉ, last accessed 5 July 2022, p. 39.

withholding of wages, and indentured servitude.⁵⁹ Children are often recruited by organized crime groups to illegally mine gold, and young girls and women are victims of labor exploitation and sexual abuse.⁶⁰ In October 2014, Peru's Ministry of Environment estimated that "[a]round 4,500 adult women and girls are sexually exploited in areas close to illegal mining camps in the region."⁶¹

3. *Illegal mining causes environmental degradation and pernicious health effects on local communities*

76. Illegal mining has also caused irreversible environmental damage in Peru, as well as devastating health effects on local communities.⁶² Illegal gold mining is generally conducted through what is known as alluvial mining. This mining technique involves clearing and burning large areas of forest, flooding these areas to soften the land, and then extracting the gold using mercury, which is highly toxic for humans and animals. Mercury combines with gold to form an amalgam, and is therefore used to recover minute pieces of gold that are mixed in soil and sediments. The gold is then extracted by vaporizing the mercury. The Netflix documentary "Dirty Gold" illustrates well this process.⁶³
77. A 2013 scientific report prepared by the Carnegie Institute for Science found that, in the Peruvian region of Madre de Dios alone, between 1999 and 2012 the surface area

⁵⁹ **Ex. R-0034**, State Management of Informal and Illegal Mining in Peru, *Defensoría del Pueblo*, January 2013, pp. 7, 14; *see also* **Ex. R-0035**, Risk Analysis of Indicators of Forced Labor and Human Trafficking in Illegal Gold Mining in Peru, VERITÉ, last accessed 5 July 2022, pp. 39–42.

⁶⁰ **Ex. R-0036**, "Gold-mining in Peru: Forests Razed, Millions Lost, Virgins Auctioned," *THE GUARDIAN*, 1 May 2016; **Ex. R-0037**, "Inside La Pampa: The Illegal Mining City Peru is Trying to Wipe Out," *THE GUARDIAN*, 25 March 2019.

⁶¹ **Ex. R-0038**, Environmental Dialogue with the Press: Illegal Mining, MINAM, 25 October 2013, ("*Alrededor de 4.500 mujeres adultas y niñas son explotadas sexualmente en zonas cercanas a los campamentos de mineros ilegales de la región*"), p. 5.

⁶² *See* **Ex. R-0039**, "Operación Mercurio 2019: Perú combate la minería ilegal y el crimen en La Pampa," CNN, last accessed 5 July 2022; *see also* **Ex. R-0033**, Jennifer Swenson, et al., "Gold Mining in the Peruvian Amazon: Global Prices, Deforestation, and Mercury Imports," *PLOS ONE*, 11 April 2011, pp. 4–5; *see also* **Ex. R-0235**, Jay Weaver, et al., *DIRTY GOLD*, March 2021 [*Re-submitted version of C-0051, with additional pages*], p. 6 ("In Perú alone, an area bigger than all five boroughs of New York City has been stripped to bare, mottled earth.").

⁶³ **Ex. R-0047**, *DIRTY MONEY*, NETFLIX, 2020, Season 2, Episode 4 "Dirty Gold," 19:10.

of Amazon rainforest destroyed due to illegal mining had increased *fivefold*, from 10,000 hectares to 50,000 hectares.⁶⁴ The report noted that, “[i]n this period, the geographic extent of gold mining increased 400%.”⁶⁵

78. **Figures 6** and 7 below illustrate the level of devastation caused by illegal mining.

Figure 6: Photos of Rainforest Destruction, Madre de Dios. Source: Peruvian Air Force⁶⁶



⁶⁴ **Ex. R-0040**, Gregory P. Asner, *et al.*, *Elevated rates of gold mining in the Amazon revealed through high-resolution monitoring*, PNAS, 30 September 2013, p. 2; see also **Ex. R-0235**, Jay Weaver, *et al.*, *DIRTY GOLD*, March 2021 [*Re-submitted version of C-0051, with additional pages*], p. 5 (“Madre de Dios (Mother of God), support some of the richest wildlife found anywhere on Earth, La Pampa has been transformed into a hostile, alien planet. For every ounce of gold the miners extract, researchers estimate that they leave behind nine tons of waste, amid giant craters filled with chemical-tainted water colored in unearthly shades of electric blue and metallic orange.”)

⁶⁵ **Ex. R-0040**, Gregory P. Asner, *et al.*, *Elevated rates of gold mining in the Amazon revealed through high-resolution monitoring*, PNAS, 30 September 2013, p. 1.

⁶⁶ **Ex. R-0042**, *Operación Harpía 2018: Madre de Dios*, YOUTUBE, 28 August 2018, 1:59; see also **Ex. R-0041**, *Operación Harpía II 2018*, CEVAN, last accessed 6 July 2022.

Figure 7: Photos of Rainforest Destruction, Madre de Dios. Source: Peruvian Air Force⁶⁷



79. The use of mercury is extremely detrimental to human and animal life.⁶⁸ The World Health Organization has confirmed that mercury is one of the top ten chemicals of major public health concern,⁶⁹ and illegal gold mining is the largest source of mercury poisoning in the world.⁷⁰ Mercury contaminates the water, soil and air, which in turn has the effect of polluting the food chain.⁷¹ Mercury affects the nervous, digestive and immune system, and can cause irreversible brain damage in fetuses and children.⁷²

⁶⁷ **Ex. R-0042**, *Operación Harpía 2018: Madre de Dios*, YOUTUBE, 28 August 2018, 2:55; see also **Ex. R-0041**, *Operación Harpía II 2018*, CEVAN, last accessed 6 July 2022.

⁶⁸ **Ex. R-0043**, “Alarming Levels of Mercury are Found in Old Growth Amazon Forest,” NEW YORK TIMES, 28 January 2022.

⁶⁹ **Ex. R-0044**, “Mercury and health,” WORLD HEALTH ORGANIZATION, 31 March 2017.

⁷⁰ **Ex. R-0045**, Technical Background Report for the Global Mercury Assessment, AMAP, 2013, p. 4.

⁷¹ **Ex. R-0045**, Technical Background Report for the Global Mercury Assessment, AMAP, 2013, pp. 4–5.

⁷² **Ex. R-0044**, “Mercury and health,” WORLD HEALTH ORGANIZATION, 31 March 2017, pp. 1–2; **Ex. R-0046**, “Illegal gold mining exposing Peru’s indigenous tribes to mercury poisoning,” THE GUARDIAN, 9 September 2013.

Over the last 20 years, more than 3,000 tons of mercury have been found in the rivers of the Amazon.⁷³

80. In 2016, Peru declared a health emergency because the bodies of 40% of inhabitants who had been tested in 97 villages in the Madre de Dios region showed dangerously high levels of mercury.⁷⁴ The extensive use of mercury has had a significant health impact on indigenous communities in particular.⁷⁵ For example, in 2013, the Carnegie Amazon Mercury Project found that children in native communities had mercury levels more than five times the safe limit.⁷⁶ Workers involved in illegal mining naturally are exposed to even higher levels of mercury.
81. As explained in the following section, the devastating effects of illegal mining in Peru, particularly from 2006 onwards, led the State to take decisive action to address more aggressively that particular form of criminal activity. Thus, in addition to strengthening its legislation, Peru conferred on several Peruvian entities the legal mandate to intensify controls on gold exports, and to combat illegal mining and money laundering.

4. *Measures adopted by Peru during 2012 to strengthen its legal framework against illegal mining, money laundering and related criminal activities*

82. As discussed below, starting in 2012, various intergovernmental organizations in South America intensified their efforts to tackle the devastating consequences of

⁷³ **Ex. R-0014**, *The Reality of Illegal Mining in Amazonian Countries*, SPDA, June 2014, p. 190 (For example, in Madre de Dios, it is estimated that 16000–18000 kilos of gold are produced yearly and for each kilo of gold 2.8 kilos of mercury is used.)

⁷⁴ **Ex. R-0043**, *“Alarming Levels of Mercury are Found in Old Growth Amazon Forest,”* NEW YORK TIMES, 28 January 2022.

⁷⁵ **Ex. R-0046**, *“Illegal gold mining exposing Peru’s indigenous tribes to mercury poisoning,”* THE GUARDIAN, 9 September 2013; see also **Ex. R-0235**, Jay Weaver, *et al.*, DIRTY GOLD, March 2021 [*Re-submitted version of C-0051, with additional pages*], p. 27 (“Rural indigenous communities in this part of Perú have about three times higher mercury levels than ‘nonnative’ city dwellers, according to investigators. And the children in those villages have mercury levels 3.5 times higher than average.”).

⁷⁶ **Ex. R-0046**, *“Illegal gold mining exposing Peru’s indigenous tribes to mercury poisoning,”* THE GUARDIAN, 9 September 2013.

illegal mining and related criminal activities in the Andean region.⁷⁷ One such organization was the Andean Community⁷⁸, which in Decision 774 of May 2012 articulated the following objectives: (i) to “[e]stablish sufficiently dissuasive sanctions for those who carry out illegal mining and related illicit activities . . .;”⁷⁹ (ii) to “regularize small-scale, artisanal or traditional mining;”⁸⁰ (iii) to “[o]ptimize the oversight and surveillance of the importation, exportation, transportation, . . . commercialization and any other type of transaction . . . of minerals . . . originating from illegal mining;”⁸¹ (iv) to “[s]trengthen and implement the mechanisms for the termination of the right of ownership or its equivalent, over the . . . products of illegal mining activities, money laundering and related crimes;”⁸² and (v) to “[i]mplement enforcement actions against illegal mining . . . such as the seizure or confiscation of the goods” used for illegal mining.⁸³

83. Along similar lines, in March 2012, the Amazon Cooperation Treaty Organization

⁷⁷ See, e.g., **Ex. R-0001**, Decision No. 774, Andean Community, 3 May 2012; **Ex. R-0002**, Lima Declaration including the Declaration on Illegal Mining in the Amazon Basin, 21 March 2012.

⁷⁸ Bolivia, Colombia, Ecuador, Peru.

⁷⁹ **Ex. R-0001**, Decision No. 774, Andean Community, 3 May 2012, Art. 5.3 (“ . . . [e]stablecer sanciones suficientemente disuasivas a quienes realicen minería ilegal y actividades ilícitas conexas . . .”); see also **Ex. R-0002**, Lima Declaration including the Declaration on Illegal Mining in the Amazon Basin, 21 March 2012, pp. 9–10.

⁸⁰ **Ex. R-0001**, Decision No. 774, Andean Community, 3 May 2012, Art. 5.1 (“ . . . [f]ormalizar o regularizar la minería en pequeña escala, artesanal o tradicional”); see also **Ex. R-0002**, Lima Declaration including the Declaration on Illegal Mining in the Amazon Basin, 21 March 2012, pp. 9–10.

⁸¹ **Ex. R-0001**, Decision No. 774, Andean Community, 3 May 2012, Art. 2.2 (“ . . . [o]ptimizar el control y vigilancia de la importación, exportación, transporte, . . . comercialización y cualquier otro tipo de transacción . . . de minerales . . . provenientes de la minería ilegal”); see also **Ex. R-0002**, Lima Declaration including the Declaration on Illegal Mining in the Amazon Basin, 21 March 2012, pp. 9–10.

⁸² **Ex. R-0001**, Decision No. 774, Andean Community, 3 May 2012, Art. 5.6 (“ . . . [f]ortalecer e implementar los mecanismos de extinción del derecho de dominio o su equivalente, sobre los . . . productos de las actividades de minería ilegal, lavado de activos y delitos conexos”); see also **Ex. R-0002**, Lima Declaration including the Declaration on Illegal Mining in the Amazon Basin, 21 March 2012, pp. 9–10.

⁸³ **Ex. R-0001**, Decision No. 774, Andean Community, 3 May 2012, Art. 5.2 (“ [e]jecutar acciones contra la minería ilegal . . . tales como el decomiso o incautación de los bienes”); see also **Ex. R-0002**, Lima Declaration including the Declaration on Illegal Mining in the Amazon Basin, 21 March 2012, pp. 9–10.

(“ACTO”) had adopted a “Declaration on Illegal Mining in the Amazon Basin.”⁸⁴ Among other things, that declaration acknowledged the proliferation of illegal mining in the Amazon region, and recommended joining forces to combat that activity through a common strategy.⁸⁵

84. For its part, on a national level Peru has taken decisive steps to eradicate the scourge of illegal mining and associated criminal activities. The OAS and other organizations have recognized that, over the last 12 years, Peru has enacted numerous “laws elaborating and bolstering the nation’s framework against illegal mining,”⁸⁶ in order to “guarantee the population’s health, personal safety, tax collection, conservation of the natural heritage, and the development of sustainable economic activities.”⁸⁷
85. More specifically, Peru has strengthened its legal framework by: (i) criminalizing illegal mining and strengthening prison sentences for money laundering; (ii) developing concrete mechanisms to fight these illegal activities, including by increasing export controls and placing a stronger focus on the seizure of proceeds from criminal activity; and (iii) granting the relevant State agencies the legal and financial means to implement those mechanisms.
86. Until 2011, mining in Peru had been primarily governed by Supreme Decree 014-92-EM (“**General Mining Law**”) of 1992.⁸⁸ Although that law is still in force, it has been complemented by other laws, as discussed below. The General Mining Law does not include a mechanism for the State to trace or guarantee the lawful origin of mineral resources traded in any given transaction, but rather imposes that “the purchaser is

⁸⁴ **Ex. R-0002**, Lima Declaration including the Declaration on Illegal Mining in the Amazon Basin, 21 March 2012, pp. 9–10.

⁸⁵ **Ex. R-0002**, Lima Declaration including the Declaration on Illegal Mining in the Amazon Basin, 21 March 2012, pp. 9–10.

⁸⁶ **Ex. R-0012**, On the Trail of Illicit Gold Proceeds: Strengthening the Fight Against Illegal Mining Finances, OAS, November 2021, p. 9.

⁸⁷ **Ex. R-0003**, Emergency Decree No. 012-2010, 17 February 2010, Art. 1 (“*garantizar la salud de la población, la seguridad de las personas, la recaudación tributaria, la conservación del patrimonio natural, y el desarrollo de actividades económicas sostenibles.*”); see also **Ex. R-0004**, Legislative Decree No. 1100, 18 February 2012, Art. 1.

⁸⁸ See **Ex. R-0013**, General Mining Law.

obligated to verify the origin of the mineral resources.”⁸⁹ In addition, that law provides that illegally mined minerals must be returned to the State.⁹⁰ In other words, the General Mining Law: (i) requires purchasers of mineral resources to conduct their own due diligence; and (ii) precludes the purchase of illegally mined products from granting property rights over the illegally mined mineral.

87. Promulgated in 2010 as a norm to implement the General Mining Law, Supreme Decree No. 055-2010-EM attempted to establish a mechanism to trace the origin of the minerals⁹¹, inter alia, by requiring the purchaser of unrefined minerals (i.e., the type of gold purchased by Kaloti) to keep an updated registry with detailed information of the origin of the acquired minerals.⁹²
88. Another relevant norm is Law No. 27651 (“**Formalization Law**”), which starting in 2002 began regulating small-scale and artisanal mining,⁹³ but proved ineffective in preventing and combating illegal mining. Such was the scale of the problem posed by illegal mining that in December 2011, Peru’s Congress delegated to the Executive Branch, for a period of 120 days, the power to enact legislation to fight illegal mining and attendant criminal activities,⁹⁴ including the “[i]nvestigation, prosecution and

⁸⁹ **Ex. R-0013**, General Mining Law, Art. 4 (“*El comprador está obligado a verificar el origen de las sustancias minerales.*”).

⁹⁰ **Ex. R-0013**, General Mining Law, Art. 52.

⁹¹ **Ex. R-0005**, Supreme Decree No. 055-2010-EM, 21 August 2010, Preamble (“[A]s established in Article 4 . . . of the General Mining Law, in relation to the purchase of mineral products and the consequences of such acquisition, it is necessary to establish a procedure that reliably establishes the origin of the mineral products to be commercialized.” (“[S]egún lo establecido en el Artículo 4 . . . de la Ley General de Minería, en relación con la compra de productos minerales y las consecuencias de dicha adquisición, se hace necesario establecer un procedimiento que establezca fehacientemente el origen de los productos minerales a ser comercializados.”)).

⁹² **Ex. R-0005**, Supreme Decree No. 055-2010-EM, 21 August 2010, Art. 3.

⁹³ **Ex. R-0006**, Law No. 27651, 21 January 2002, Art. 1 (“. . . to introduce into the mining legislation a legal framework that allows for an adequate regulation of mining activities carried out by small-scale and artisanal miners.” (“. . . introducir en la legislación minera un marco legal que permita una adecuada regulación de las actividades mineras desarrolladas por pequeños productores mineros y mineros artesanales . . .”)).

⁹⁴ **Ex. R-0007**, Law No. 29815, 21 December 2011, Art. 2.2 (“. . . fighting against the criminality associated with illegal mining” (“. . . [l]ucha contra la criminalidad asociada a la minería ilegal.”)).

punishment of persons linked to money laundering and other crimes related to organized crime linked to illegal mining”⁹⁵ The power delegated to the Executive Branch included the authority to amend

the legislation that regulates the process of loss of ownership to extend its scope to crimes related to illegal mining, to strengthen the investigation and the procedures, and to improve the seizure, confiscation and destruction of the objects, instruments or products of crime and its administration.⁹⁶

89. Pursuant to that mandate, the Executive Branch swiftly adopted several legislative decrees. Notably, in February 2012, Peru issued decrees that proscribed illegal mining throughout the Peruvian territory,⁹⁷ banned certain machinery commonly used by illegal miners,⁹⁸ and empowered several State agencies to combat illegal mining and other related criminal activities,⁹⁹ including through the “[d]ecommissioning of prohibited goods, machinery, equipment and supplies.”¹⁰⁰ Also in February 2012, stronger sentencing guidelines for crimes concerning the unauthorized exploration, extraction, and exploitation of mineral resources were adopted and incorporated into Peru’s Criminal Code.¹⁰¹

⁹⁵ **Ex. R-0007**, Law No. 29815, 21 December 2011, Art. 2.2.b (“*[i]nvestigación, procesamiento y sanción de personas vinculadas con el lavado de activos y otros delitos relacionados al crimen organizado vinculados a la minería ilegal . . .*”).

⁹⁶ **Ex. R-0007**, Law No. 29815, 21 December 2011, Art. 2.2.c (“*[L]a legislación que regula el proceso de pérdida de dominio para ampliar sus alcances a los delitos vinculados a la minería ilegal, fortalecer la investigación y procedimiento, así como perfeccionar la incautación, decomiso y destrucción de los objetos, instrumentos o efectos del delito y su administración.*”).

⁹⁷ **Ex. R-0004**, Legislative Decree No. 1100, 18 February 2012, Arts. 1–5.

⁹⁸ **Ex. R-0004**, Legislative Decree No. 1100, 18 February 2012, Art. 5.

⁹⁹ **Ex. R-0004**, Legislative Decree No. 1100, 18 February 2012, Arts. 6–8.

¹⁰⁰ **Ex. R-0004**, Legislative Decree No. 1100, 18 February 2012, Art. 7.1 (“*. . . [d]ecomiso de los bienes, maquinaria, equipos e insumos prohibidos.*”).

¹⁰¹ See **Ex. R-0008**, Legislative Decree No. 1102, 28 February 2012.

90. Further, in April 2012, Peru adopted a legislative decree that distinguished between illegal and informal mining,¹⁰² and authorized the Executive Branch to further regulate small and artisanal miners.¹⁰³ Pursuant to that decree, in May 2012 the MINEM created the *Registro Especial de Comercializadores y Procesadores de Oro* (“RECPO”), which is a registry of all individuals and companies engaged in the sale and/or refining of gold.¹⁰⁴ Inclusion in RECPO, which is mandatory for these individuals and companies, is obtained by filling out a simple registration form.¹⁰⁵
91. Kaloti argues that the fact that the Suppliers were registered with RECPO gave it “great confidence,” as it believed that such fact guaranteed that these suppliers were in “good standing with the Peruvian Government.”¹⁰⁶ Kaloti also argues that registration with RECPO “enabled KML to trace . . . the origin of minerals”¹⁰⁷ (although it does not explain how it enabled such tracing). On that basis, Kaloti repeatedly relies on the Suppliers’ registration with RECPO to argue that it met

¹⁰² Both informal and illegal mining involve activities that (i) use “equipment and machinery that does not correspond with the characteristics of the mining activity being carried out”, or (ii) fail to comply with “the requirements of the administrative, technical, social and environmental regulations governing such activities” (e.g., mining activities conducted without a mining concession) (see **Ex. R-0226**, Legislative No. 1105, 18 April 2012 (“**LD 1105**”) [*Re-submitted version of CL-0003, with Respondent’s translation*], Art. 2.a (“equipment and machinery that is not consistent with the characteristics of the mining activity that is being developed . . . or does not comply with the requirements of the administrative, technical, social and environmental regulations governing such activities.”). However, unlike informal mining, illegal mining is carried out in zones where mining is prohibited, such that illegal miners are not entitled to benefit from the formalization process. By contrast, informal mining is carried out “in areas not prohibited for mining activities and by a natural person or legal entity, or group of persons organized to carry out such activities and that have initiated a formalization process.” (see **Ex. R-0226**, LD 1105, Art. 2.b).

¹⁰³ **Ex. R-0226**, LD 1105, Seventh Final Supplementary Provision (“The Executive Power, in order to promote the formalization of Small Mining Producers and Artisanal Mining Producers, may, by means of a Supreme Decree . . . issue complementary norms regarding the commercialization of gold coming from the mining activity of the aforementioned Producers.”).

¹⁰⁴ **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.

¹⁰⁵ **Ex. R-0009**, Ministerial Resolution No. 249-2012-MEM-DM, 25 May 2012.

¹⁰⁶ Memorial, ¶ 15.

¹⁰⁷ Memorial, ¶ 22.

relevant due diligence requirements under the various Peruvian laws and regulations identified in this section. However, Kaloti's arguments lack any basis in Peruvian law, and grossly overstate the purpose and significance of RECPO.

92. Registering with RECPO is a simple and straightforward process: the registrant only needs to fill out a form containing basic information concerning its identity (e.g., name, identification number, address) and the type of commercial activity it conducts (e.g., buying, selling, and/or refining gold).¹⁰⁸ In fact, subsequent legislative proposals to reform RECPO have expressly noted the limitations of RECPO, including the fact that its registration form “does not establish any additional requirement to register in RECPO, nor does it contemplate a report of sale and purchase operations.”¹⁰⁹
93. Importantly, MINEM does not verify, authenticate or guarantee the veracity of the information provided in the RECPO registration form, let alone the lawfulness of the gold being traded by registered entities. RECPO was established as an initial, interim step to promote formalization of the mining activities of small and artisanal miners, and to provide the State with a database to “identify the agents involved in the sale and purchase and/or refining of gold, being conceived as a complementary and temporary measure until a certification procedure of environmental quality and origin of the gold had been implemented.”¹¹⁰ However, such certification proceeding

¹⁰⁸ **Ex. R-0009**, Ministerial Resolution No. 249-2012-MEM-DM, 25 May 2012.

¹⁰⁹ **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 (“no establece ninguna exigencia adicional para inscribirse en el RECPO, tampoco contempla un reporte de operaciones de compra o venta.”); see also **Ex. R-0061**, Ministerial Resolution No. 190-2021-MINEM-DM, 28 June 2021 which authorized the publication of “*Proyecto de Decreto Supremo que establece disposiciones reglamentarias para el Registro Especial de Comercializadores y Procesadores de Oro-RECPO*,” **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.

¹¹⁰ **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 (“... identificar a los agentes que se dedican a la compra, venta y/o refinación de oro, siendo concebido como una medida complementaria y temporal mientras ‘no se haya implementado un procedimiento de certificación de la calidad ambiental y procedencia del oro.’”).

has not yet been established.

94. Contrary to Kaloti’s arguments, the Suppliers’ registration with RECPO did *not* in any way guarantee – or even imply, or suggest – that the Suppliers were in “good standing with the Peruvian government.”¹¹¹ Anybody could register with RECPO. In fact, the State has expressly confirmed that “the RECPO does not have interoperability with other State administrative registries, in order to be able to cross-check information held by them.”¹¹² That is, RECPO does not exchange information with other State registries concerning issues such as criminal records or administrative proceedings initiated against entities registered with RECPO.
95. Importantly, the fact that a supplier of gold is registered with RECPO does not release in any way a purchaser of gold from its obligation to conduct due diligence. To the contrary, Supreme Decree No. 012-2012-EM (which was the legal basis for the creation of RECPO) expressly notes 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.¹¹³ Similarly, the Illegal Mining Controls and Inspection Decree (Legislative Decree No. 1107) expressly states that the purchaser of gold must verify the gold’s lawful origin,¹¹⁴ and keep a record of the documentation proving that origin.¹¹⁵ Such Legislative Decree also delineates the verification process that a purchaser must conduct to satisfy itself of the lawful provenance of the gold, and such process does not even mention the supplier’s registration with RECPO.¹¹⁶

¹¹¹ Memorial, ¶ 18.

¹¹² **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 (“*el RECPO no tiene interoperabilidad con otros registros administrativos del Estado, con la finalidad que se pueda cruzar información respecto de la información que ellas posean*”).

¹¹³ **Ex. R-0010**, Supreme Decree No. 012-2012-EM, 8 May 2012, Preamble.

¹¹⁴ **Ex. R-0049**, Legislative Decree No. 1107, 19 April 2012 (“**Illegal Mining Controls and Inspection Decree**”), Art. 11.

¹¹⁵ **Ex. R-0005**, Supreme Decree No. 055-2010-EM, 21 August 2010, Art. 3.

¹¹⁶ **Ex. R-0049**, Illegal Mining Controls and Inspection Decree, Art. 11.

96. Kaloti alleges that, “[b]eginning in 2012, KML significantly researched and conducted its due diligence about the Peruvian gold market”¹¹⁷ and that ██████ himself “learned about . . . the legal and regulatory framework prevailing in Peru”¹¹⁸ and met with “local lawyers in Lima in 2012.”¹¹⁹ If that is so, that means Kaloti knew or should have known that registration with RECPO could not possibly 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. Kaloti also argues that SUNAT acted arbitrarily by committing what they characterize as a *volte face* on its justification for immobilizing the Five Shipments. It claims that SUNAT (i) first froze such shipments on the asserted basis that Kaloti’s Suppliers had failed to prove the gold’s lawful origin, but then (ii) changed tack, contending instead “that seizure of the gold was necessary to support a money-laundering investigation.”¹²⁰ Kaloti even speculates that “[i]t could be that SUNAT was overly aggressive in seizing KML’s assets, and then could not think of an appropriate way to return Claimant’s property without facing embarrassment.”¹²¹ However, as explained in **Section II.B** below, SUNAT did not act arbitrarily – or even inconsistently – and Kaloti’s argument to the contrary fails for numerous reasons.
98. Kaloti’s argument also ignores the close connection that exists between illegal mining and money laundering. The Money Laundering Decree (Legislative Decree No. 1106)¹²² acknowledges that close connection:

Illegal mining activities represent a considerable source of the crime of money laundering, which is currently one of the most complex criminal phenomena of financial criminal law and is undoubtedly one of the most damaging to the legal-social order,

¹¹⁷ Memorial, ¶ 18.

¹¹⁸ ██████ Witness Statement, ¶ 17; *see also* ██████ Witness Statement, ¶¶ 18–24.

¹¹⁹ ██████ Witness Statement, ¶ 20.

¹²⁰ Memorial, ¶ 136.

¹²¹ Memorial, ¶ 6.

¹²² **Ex. R-0218**, Legislative Decree No. 1106, 18 April 2012 (“**Money Laundering Decree**”) [*Re-submitted version of CL-0008, with Respondent’s translation*] (“*Decreto Legislativo de lucha eficaz contra el lavado de activos y otros delitos relacionados a la minería ilegal y crimen organizado.*”)

consequently the State's fight against these illegal activities must be approached in a comprehensive manner, both in terms of prevention and prosecution.¹²³

99. On that basis, the Money Laundering Decree strengthened Peru's legal framework to investigate and prosecute money laundering offences linked to illegal mining and other crimes. For instance, Article 10 thereof specifically confirms that

[m]oney laundering is an autonomous crime and therefore for its investigation and prosecution it is not necessary for the criminal activities that produced the money, goods, effects or profits to have been uncovered, or be subject to investigation or judicial process or have previously been admitted as proven or the subject of a conviction.¹²⁴

100. The Money Laundering Decree also established a legal obligation for SUNAT to report to the Financial Intelligence Unit any indicia of money laundering that it detects in the exercise of its functions.¹²⁵

101. Similarly, the above-referenced Illegal Mining Controls and Inspection Decree notes that illegal mining is often used to launder money,¹²⁶ and mandates that SUNAT

¹²³ **Ex. R-0218**, Money Laundering Decree, Preamble (. . . *“las actividades de minería ilegal representan una considerable fuente del delito de lavado de activos que actualmente constituye uno de los fenómenos delictivos más complejos del Derecho penal económico y es, sin duda, uno de los más lesivos del orden jurídico-social, por lo que la lucha del Estado contra estas actividades ilícitas debe abordarse de forma integral, tanto en un plano de prevención, como de represión.”*).

¹²⁴ See **Ex. R-0218**, Money Laundering Decree, Art. 10 (. . . *“[e]l lavado de activos es un delito autónomo por lo que para su investigación y procesamiento no es necesario que las actividades criminales que produjeron el dinero, los bienes, efectos o ganancias, hayan sido descubiertas, se encuentren sometidas a investigación, proceso judicial o hayan sido previamente objeto de prueba o de sentencia condenatoria.”*).

¹²⁵ **Ex. R-0218**, Money Laundering Decree, Supplementary Amending Provision 1 (“External Audit . . . b) The supervisory agencies of the reporting entities shall issue to UIF-Peru [the Financial Intelligence Unit of Peru] Suspicious Transaction Reports (STR) related to money laundering or financing of terrorism, when they detect grounds to suspect money laundering or financing of terrorism during the exercise of their supervisory functions”) read in conjunction with Supplementary Amending Provision 5 (“9.A.2. The following are supervisory and control agencies, among others: . . . h) The National Customs and Tax Management Agency (SUNAT).”); see also Supplementary Provisions 1 and 4.

¹²⁶ **Ex. R-0050**, Statement of Reasons for Legislative Decree No. 1107, 9 December 2016, p. 1.

supervise and oversee the transport and trade of mineral products.¹²⁷ Specifically, it provides: (i) that SUNAT shall oversee “the distribution to and from the customs territory and within the national territory . . . of mining products;”¹²⁸ (ii) that “SUNAT shall proceed to seize . . . mining products that constitute the object of clandestine trade crimes;”¹²⁹ and (iii) that “under no circumstances shall the goods’ value be compensable,” unless a Court orders their reimbursement.¹³⁰ In order to allow the State to trace the lawful origin of the minerals (e.g., to ascertain that the minerals have been lawfully extracted and transported), the Illegal Mining Controls and Inspection Decree also provides that the transportation of mining products must be carried out through pre-established routes proposed by SUNAT and authorized by the Ministry of Transport and Communications through ministerial resolutions.¹³¹

102. Further, and importantly, the Illegal Mining Controls and Inspection Decree expressly requires that

[a]ny acquirer 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.¹³²
(Emphasis added)

¹²⁷ **Ex. R-0049**, Illegal Mining Controls and Inspection Decree; *see also* **Ex. R-0050**, Statement of Reasons for Legislative Decree No. 1107, 9 December 2016, p. 6.

¹²⁸ **Ex. R-0049**, Illegal Mining Controls and Inspection Decree, Art. 3 (“*la distribución, hacia y desde el territorio aduanero y en el territorio nacional . . . de los productos mineros*”).

¹²⁹ **Ex. R-0049**, Illegal Mining Controls and Inspection Decree, Art. 5 (“*SUNAT procederá a la incautación . . . de los productos mineros que constituyan objeto del delito de comercio clandestino*”).

¹³⁰ **Ex. R-0049**, Illegal Mining Controls and Inspection Decree, Art. 5 (“*[e]n ningún caso procederá el reintegro del valor de los mismos, salvo que por mandato judicial se disponga la devolución*”).

¹³¹ **Ex. R-0049**, Illegal Mining Controls and Inspection Decree, Arts. 2 and 4, and Second Final Supplementary Provision; *see also* **Ex. R-0156**, Ministerial Resolution No. 350-2013-MTC/02, 17 June 2013.

¹³² **Ex. R-0049**, Illegal Mining Controls and Inspection Decree, Art. 11 (“*[t]odo adquirente de productos mineros . . . cualquiera sea su estado, sin importar que la adquisición se realice en forma temporal o permanente, deberá verificar el origen de los mismos, solicitando los documentos que correspondan, debiendo verificar la autenticidad de los datos consignados en los sistemas de información que correspondan.*”).

103. The Illegal Mining Controls and Inspection Decree also establishes requirements for “the minimum data to be verified”¹³³ by purchasers of mineral products, including (i) detailed information concerning the “real seller of the minerals;” (ii) proof of payment and a description of the minerals; and (iii) proof of the route of the transport of the minerals (“*guía de remisión*”) and of the identity of the carrier.¹³⁴ The Illegal Mining Controls and Inspection Decree also provides that “the acquisition of illegal mining products does not generate any rights or tax benefits.”¹³⁵ As explained in **Section IV**, the fact that Peruvian law imposes these due diligence obligations on gold purchasers, and that the purchase of illegal gold does not grant any rights, is fatal for Kaloti’s arguments in the present arbitration.
104. Peru’s legislative reforms to combat illegal mining and its associated crimes (including money laundering) were consistent with internationally accepted standards. For instance, in 2012, the FATF, an “independent inter-governmental body that develops and promotes policies to protect the global financial system against money laundering,”¹³⁶ issued the International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation (“**FATF Recommendations**”).¹³⁷ The FATF Recommendations emphasize the need to provide State authorities with sufficient powers to investigate, trace and confiscate criminal assets.¹³⁸ FATF Recommendation 4 specifically states that authorities should have far-reaching powers to prevent actions that prejudice the country’s ability to freeze, seize

¹³³ **Ex. R-0049**, Illegal Mining Controls and Inspection Decree, Art. 11 (“[l]os datos mínimos a verificar”).

¹³⁴ **Ex. R-0049**, Illegal Mining Controls and Inspection Decree, Art. 11.

¹³⁵ **Ex. R-0049**, Illegal Mining Controls and Inspection Decree, Art. 11 (“[l]a adquisición de productos mineros ilegales no genera ningún derecho ni beneficio tributario”).

¹³⁶ **Ex. R-0180**, International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation Recommendations: The FATF Recommendations, February 2012, p. 1 (“**FATF Recommendations 2012**”); see also **Ex. R-0051**, International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations, March 2022 (“**FATF Recommendations 2022**”) p. 1.

¹³⁷ **Ex. R-0180**, FATF Recommendations 2012, p. 8.

¹³⁸ **Ex. R-0180**, FATF Recommendations 2012, p. 38.

or recover those assets.¹³⁹ The legal regime established by Peru since 2012 is consistent with the FATF Recommendations.¹⁴⁰

105. In sum, Peru's legislative reforms described above were necessary and in accordance with the concerns and concerted efforts of the international community to combat illegal mining and associated financial crimes. As rising mineral prices fueled illegal mining, money laundering and related criminal activities, Peru stepped up its efforts to combat such practices, including through the adoption and enforcement of the strengthened legal framework described above.

5. *SUNAT, the Prosecutor's Office, the State Attorney's Office, and the Criminal Courts play a key role in enforcing Peru's legal framework against illegal mining and money laundering*

106. The Challenged Measures were adopted mainly by SUNAT and Criminal Courts. This Section briefly sets out their respective competences, as well as those of the Prosecutor's Office and the State Attorney's Office, which also are essential in the fight against illegal mining and money laundering.

107. **SUNAT** (*Superintendencia Nacional de Aduanas y de Administración Tributaria*) is the tax authority responsible for collecting national taxes and overseeing the import and export of goods to and from the Peruvian territory.¹⁴¹ The General Customs Law sets out SUNAT's customs powers,¹⁴² and specifies that such agency may adopt ordinary and extraordinary oversight measures.¹⁴³ Pursuant to Article 165 of that law, such oversight measures may include the inspection of goods, the verification of information and supporting documentation, and "preventive immobilizations and seizures over goods and means of transport,"¹⁴⁴ based mainly on risk indicators and

¹³⁹ Ex. R-0180, FATF Recommendations 2012, pp. 28–31.

¹⁴⁰ Ex. R-0159, "¿Qué es el Gafilat?," GALIFAT, last accessed 26 July 2022.

¹⁴¹ Ex. R-0052, Legislative Decree No. 1053, General Customs Law, 26 June 2008 ("General Customs Laws"), Arts. 10, 164.

¹⁴² Ex. R-0052, General Customs Laws, Art. 164.

¹⁴³ Ex. R-0052, General Customs Laws, Art. 2.

¹⁴⁴ Ex. R-0052, General Customs Laws, Art. 165.b ("*medidas preventivas de inmovilización e incautación de mercancías y medios de transporte*").

profiles.¹⁴⁵

108. As expressly emphasized in its institutional webpage,¹⁴⁶ and in Law No. 27693,¹⁴⁷ SUNAT plays a key role in the fight against illegal mining and money laundering. The Illegal Mining Controls and Inspection Decree enhanced SUNAT's powers to combat illegal mining,¹⁴⁸ including by allowing it to "apply special oversight measures over the commercialization of mining products."¹⁴⁹ In addition, SUNAT's compilations of export data is the primary mechanism to oversee illegal mining and prevent the outflow of illegal gold.¹⁵⁰
109. Beginning in 2013, SUNAT enhanced its oversight measures over the export of gold, intensifying its inspections of shipments, its requests for documents proving the origin of gold, and its immobilization of gold shipments. These actions included, but were not limited, to Kaloti's Suppliers.¹⁵¹ SUNAT analyzed tax compliance and risk factors of companies exporting gold in the period 2012 to February 2014, and concluded that 113 out of 152 exporters fell under the category of high risk.¹⁵² SUNAT also identified a suspicious increase in the number of new companies exporting gold

¹⁴⁵ **Ex. R-0052**, General Customs Laws, Art. 163 ("in the exercise of customs control, the Customs Administration mainly uses risk management techniques to focus control measures on high-risk activities or areas. . . ." (*Para el ejercicio del control aduanero, la Administración Aduanera emplea, principalmente las técnicas de gestión de riesgo para focalizar las acciones de control en aquellas actividades o áreas de alto riesgo. . .*)).

¹⁴⁶ **Ex. R-0053**, "Finalidad," SUNAT, last accessed 8 July 2022.

¹⁴⁷ **Ex. R-0054**, Law No. 27693, 21 March 2002, Art. 9.A.

¹⁴⁸ **Ex. R-0049**, Illegal Mining Controls and Inspection Decree, Arts. 5, 9.

¹⁴⁹ **Ex. R-0049**, Illegal Mining Controls and Inspection Decree, Art. 9 (*"aplicar controles especiales para la comercialización de los productos mineros"*).

¹⁵⁰ See, e.g., **Ex. R-0012**, On the Trail of Illicit Gold Proceeds: Strengthening the Fight Against Illegal Mining Finances, OAS, November 2021, p. 19.

¹⁵¹ **Ex. R-0055**, Report No. 49-2014-SUNAT/2E4s000, 28 April 2014, pp. 7-8; **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-0057**, "Sunat incautó oro ilegal por US\$17 millones durante 2014," GESTIÓN, 15 January 2015.

¹⁵² **Ex. R-0055**, Report No. 49-2014-SUNAT/2E4000, 28 April 2014, p. 3.

in 2013.¹⁵³ From 2013 to date, SUNAT has immobilized gold from dozens of exporters. These figures demonstrate that, contrary to Kaloti's allegations,¹⁵⁴ SUNAT did not specifically target Kaloti or Kaloti's Suppliers.

110. When SUNAT's oversight measures uncover activities that may constitute criminal offenses – including illegal mining and money laundering – SUNAT must notify the Prosecutor's Office and other relevant authorities, such as the Financial Intelligence Unit¹⁵⁵ and the State Attorney's Office.¹⁵⁶ As will be discussed in **Section II.B** below, this is precisely what SUNAT did in respect of Shipments 1 to 4.¹⁵⁷
111. The **Prosecutor's Office** (*Ministerio Público*) is an autonomous State organ that, amongst other court-related mandates, conducts criminal investigations and prosecutes cases before the Criminal Courts.¹⁵⁸ It may prosecute criminal action *ex officio* or at the request of an aggrieved party¹⁵⁹ Prosecutors (*Fiscales*) serve as

¹⁵³ **Ex. R-0058**, Investigative Report No. 055-2014-SUNAT-3X2200, 8 April 2014, p. 6; *see also* **Ex. R-0235**, Jay Weaver, *et al.*, DIRTY GOLD, March 2021 [*Re-submitted version of C-0051, with additional pages*], p. 103 (“But the Peruvian gold was coming from companies that appeared out of thin air. After shipping the gold – sometimes tens of millions of dollars’ worth – the companies would vanish. Poof. Then another exporter would pop up in the old one’s place. When Maderal broke down his spreadsheet into three-month quarters, he saw the companies weren’t even sticking around for an entire year. They’d be gone and replaced after a single quarter.”).

¹⁵⁴ *See, e.g.*, Memorial, ¶ 140.

¹⁵⁵ The Financial Intelligence Unit (*Unidad de Inteligencia Financiera*) is a specialized unit of the Peruvian Regulator for Banks, Insurance Companies and Pension Funds. The Financial Intelligence Unit is in charge of receiving, analyzing, processing, and transmitting information for the detection of money-laundering activities. Peruvian law requires a variety of entities at risk of exposure to money laundering to monitor and report suspicious activities. The Financial Intelligence Unit analyses the information provided by these reporting entities and notifies the Prosecutor's Office of potential money laundering activities. *See* **Ex. R-0054**, Law No. 27693, 21 March 2002, Arts. 3, 8, 11.

¹⁵⁶ **Ex. R-0069**, Supreme Decree No. 010-2009-EF, General Customs Law Regulation, 15 January 2009, Art. 247; **Ex. R-0049**, Illegal Mining Controls and Inspection Decree, Art. 5; **Ex. R-0054**, Law No. 27693, 21 March 2002, Art. 8.3.1; **Ex. R-0218**, Money Laundering Decree, Fourth Final Supplementary Provision; Expert Report of Joaquín Missiego, 4 August 2022 (“**Missiego Report**”), ¶¶ 55.a, 57.

¹⁵⁷ *See* Section II.B.

¹⁵⁸ **CL-0002**, Official English translation of the Political Constitution of Peru, Arts. 158–159; **Ex. R-0059**, Legislative Decree No. 52, 16 March 1981, Art. 11.

¹⁵⁹ **Ex. R-0059**, Legislative Decree No. 52, 16 March 1981, Art. 11.

representatives of the Prosecutor's Office.

112. As explained in **Section II.C**, between 16 January 2014 and 14 March 2014, the Prosecutor's Office received information from SUNAT concerning transactions by Kaloti's Suppliers. On that basis, it considered that there were sufficient grounds (i) to initiate criminal investigations for money laundering, and (ii) to request precautionary seizures, and then, after gathering additional evidence, also to (iii) request the commencement of criminal proceedings against Kaloti's Suppliers and/or their representatives.
113. The **State Attorney's Office** (*Procuraduría*) 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.¹⁶⁰ Prof. Missiego explains that the State Attorney's Office often seeks "economic relief in favour of the State to mitigate the damages suffered as a consequence of the crime."¹⁶¹ During criminal investigations and judicial proceedings, the State Attorney is entitled to submit evidence and request precautionary measures.¹⁶² The State Attorney's Office often interacts with the Prosecutor's Office, but these institutions maintain complete autonomy and independence from each other.¹⁶³
114. Peruvian **Criminal Courts** conduct criminal proceedings, in which context they can issue interim and final decisions and rulings. As explained by Prof. Missiego, the criminal courts are in charge of the conviction of individuals responsible of crimes, as well as of the issuance of the measures necessary to prevent the use and enjoyment of goods which are a product of illegal activities, such as illegal mining.¹⁶⁴ As was the case in the prosecution against Kaloti's Suppliers, the Criminal Courts may grant

¹⁶⁰ CL-0002, Official English translation of the Political Constitution of Peru, Art. 47.

¹⁶¹ Missiego Report, ¶ 55.c ("*[R]eparación civil que tiene por objeto resarcir al Estado de los daños sufridos con ocasión del delito.*")

¹⁶² Missiego Report, ¶¶ 81, 93.

¹⁶³ Missiego Report, ¶¶ 55.d, 58.

¹⁶⁴ Missiego Report, ¶ 55.e.

precautionary measures at any stage of the proceeding.¹⁶⁵

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

* * *

116. As the following sections demonstrate, in the present dispute each of the above Peruvian authorities acted reasonably, diligently, and in accordance with their respective legal mandates, and their actions complied fully with Peru's obligations under public international law (including the Treaty).

B. SUNAT properly immobilized the gold in Shipments 1 to 4 because the Suppliers failed to prove that the origin of such gold was lawful

117. In late 2013 and early 2014, SUNAT immobilized Shipments 1 to 4¹⁶⁷, in full accordance with applicable Peruvian laws and regulations. Further, as explained below and contrary to Kaloti's arguments, SUNAT never immobilized Shipment 5.
118. SUNAT immobilized Shipments 1 to 4 expressly for the purpose of verifying the gold's "lawful origin"¹⁶⁸ and the shipments' "compliance with tax and customs requirements."¹⁶⁹ It is undisputed between the Parties that Peruvian law allowed SUNAT to immobilize gold shipments for these purposes.¹⁷⁰ In fact, Kaloti readily concedes that the SUNAT Immobilizations "did not, in and of themselves, breach the TPA [i.e., the Treaty],"¹⁷¹ and that "a country has a right to take reasonable, proportionate, and temporary measures against a company pending a decision to

¹⁶⁵ Missiego Report, ¶¶ 93-94.

¹⁶⁶ Missiego Report, ¶¶ 55-58.

¹⁶⁷ See definition of each shipment in the glossary of this Counter-Memorial.

¹⁶⁸ See, for instance, Ex. C-0040, [SUNAT Immobilization orders], p. 12 (including Immobilization Order No. 316-0300-2014-000002 concerning ██████████ Shipment).

¹⁶⁹ See, for instance, Ex. C-0040, [SUNAT Immobilization orders], p. 12 (including Immobilization Order No. 316-0300-2014-000002 concerning ██████████ Shipment).

¹⁷⁰ See Section II.A.4 and 5.

¹⁷¹ Memorial, fn. 300; see also Memorial, ¶ 49.

charge.”¹⁷² These statements prove that Kaloti is not challenging in this arbitration the SUNAT Immobilizations themselves. Nevertheless, because Kaloti misrepresents the SUNAT Immobilizations in several ways, and because such misrepresentations seemed designed to inform their other claims or lend “color” to them, Peru feels compelled to rebut such misrepresentations, and it does so below.

119. *First*, Kaloti contends that the SUNAT Immobilizations allegedly targeted Kaloti (specifically),¹⁷³ and that SUNAT should have proactively (i) notified Kaloti of relevant developments, and (ii) treated it as a party to the relevant proceedings.¹⁷⁴ These statements are entirely baseless, however, amongst other reasons because the SUNAT Immobilizations self-evidently did *not* target Kaloti. Rather, they were directed *exclusively* at the Suppliers (i.e., ██████, ██████, ██████ and ██████).¹⁷⁵ It was the Suppliers who had filed the customs declarations that were needed for the export of Shipments 1 to 4, and who were thus the proper targets of the relevant immobilization proceedings. Kaloti never declared itself to be the exporter of any of those shipments, and it has not established that it otherwise had standing under Peruvian law to be a party to the immobilization proceedings (*see Section II.B.1*).
120. *Second*, Kaloti falsely accuses SUNAT of being “arbitrary, overzealous and capricious,”¹⁷⁶ and of acting based on improper motivations.¹⁷⁷ It claims that the reason invoked by SUNAT to inspect and immobilize the gold was “baseless”, an “excuse” or a “pretext,”¹⁷⁸ because—so it argues—Kaloti “had already presented origin verification documents to SUNAT” when Shipments 1 to 4 were inspected and immobilized.¹⁷⁹

¹⁷² Memorial, ¶ 1.

¹⁷³ See, for instance, Memorial, ¶¶ 4, 6, 52, 55; ██████ Witness Statement, ¶ 48.

¹⁷⁴ See, for instance, Memorial, ¶¶ 123, 127, 136.

¹⁷⁵ See Sections II.B.1-3 below.

¹⁷⁶ Memorial, ¶ 71.

¹⁷⁷ See for instance, Memorial, ¶¶ 6, 124.

¹⁷⁸ Memorial, ¶¶ 49, 136.

¹⁷⁹ Memorial, ¶ 136.

121. However, these assertions too are demonstrably false. The inspection of Shipments 1 to 4 was based on objective and well-founded risk profiles prepared by SUNAT on each of the Suppliers. Based on red flags identified initially, SUNAT concluded that the inspection and temporary immobilization of Shipments 1 to 4 was fully warranted, since the Suppliers had not established the lawful origin of the gold contained in those shipments (*see* **Section II.B.2**). On the basis of such conclusion, SUNAT then requested additional documentation from the Suppliers. The documentation subsequently provided by the Suppliers and reviewed by SUNAT not only confirmed that the Suppliers had failed to comply with their obligation to establish the gold's lawful origin, but also revealed indicia of money-laundering (*see* **Section II.B.3**). In those circumstances, Peruvian law prevented SUNAT from lifting the immobilizations (*see* **Section II.B.4**), and moreover required SUNAT to notify the Prosecutor's Office and other Peruvian State entities about the indicia of criminal activity that SUNAT had identified (*see* **Section II.B.5**).
122. Based on an independent review of the information submitted by SUNAT, the Prosecutor's Office decided to initiate preliminary investigations (*investigaciones preliminares*)¹⁸⁰ concerning the Suppliers and Shipments 1 to 4, to assess whether money laundering offenses had been committed. Such preliminary investigations led to the initiation of the Criminal Proceedings against each of the Suppliers and their representatives.¹⁸¹ The competent Criminal Court then ordered the provisional seizure of each of the four shipments, as a precautionary measure pending a final judgment in the Criminal Proceedings.¹⁸²

¹⁸⁰ Missiego Report, ¶¶ 62-77.

¹⁸¹ The sole exception was the criminal proceeding concerning Shipment 3, as it was initiated solely against the representatives, not against the Supplier itself (which was ██████████).

¹⁸² **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**, ██████████. Ruling of the Superior Court of Justice of Callao – Permanent Criminal Court, April 30, 2014; **Ex. R-0136**, Precautionary Seizure against Shipment 4, 1 May 2014.

123. Kaloti mischaracterizes the foregoing facts, claiming that SUNAT first immobilized the shipments “on the pretext that it needed to verify the origin for the gold”,¹⁸³ but then later changed its justification, “alleg[ing] that the seizure of the gold was necessary to support a money-laundering investigation involving gold suppliers”.¹⁸⁴ Contrary to Kaloti’s argument, however, the fact that the Criminal Courts ordered the Precautionary Seizures does *not* in any way imply that SUNAT changed the justification that it had initially provided for the immobilization of Shipments 1 to 4 (viz., the need establish the gold’s lawful origin and the shipments’ compliance with tax and customs requirements). To the contrary, SUNAT’s original justification never changed. The indicia of money laundering was the justification for the Precautionary Seizures, not for the SUNAT Immobilizations; Kaloti is thus misleadingly conflating the two sets of measures.
124. *Third*, Kaloti falsely claims that, “[f]or close to eight years, SUNAT consistently refused to return Claimant’s gold.”¹⁸⁵ Here, Kaloti is again improperly conflating the SUNAT Immobilizations with the Precautionary Seizures,¹⁸⁶ in an attempt to support its claim that the “seizure of KML’s assets has become de facto permanent without a court order making it so.”¹⁸⁷ But the fact is that, as soon as the Criminal Courts ordered the Precautionary Seizures, SUNAT lifted its own immobilizations (since at that point Shipments 1 to 4 had become precautionarily seized by judicial mandate, rendering the SUNAT Immobilizations redundant). Thus, by 1 May 2014 the Criminal Court had ordered the Precautionary Seizures, and by 14 May 2014 all of SUNAT Immobilizations had been lifted (*see Section II.B.5*). Given the foregoing, Kaloti is mistaken when it asserts that SUNAT did not return the gold for eight years. Of those

¹⁸³ Memorial, ¶ 136.

¹⁸⁴ Memorial, ¶ 136.

¹⁸⁵ Memorial, ¶ 4.

¹⁸⁶ As Peru discusses in more detail in Section II.C below, these precautionary seizures were the Precautionary Seizures of Shipments 1 to 4 (which were granted in the Criminal Proceedings), and the Civil Attachment of Shipment 5 (which was ordered in a private civil proceeding brought by ██████ against Kaloti).

¹⁸⁷ Memorial, ¶117.

eight years, each of the SUNAT Immobilizations lasted *less than five months*; the remainder of the time the shipments were *provisionally* seized based on the judicially ordered Precautionary Seizures. The foregoing means that, contrary to what Kaloti alleges, (i) the seizures have not become “permanent”, and (ii) the seizures were not effected “without a court order.”

125. Kaloti also erroneously conflates SUNAT’s proceedings and the judicial proceedings by repeatedly claiming that “SUNAT seized **five shipments** of gold”(emphasis added).¹⁸⁸ However, as Kaloti’s own 3 May 2016 Notice of Intent (“**First Notice of Intent**”) acknowledges,¹⁸⁹ the only shipments that SUNAT immobilized were Shipments 1 to 4. For its part, Shipment 5 was subject to a separate and distinct precautionary measure, namely an attachment granted by a court in the context of a private judicial proceeding between Kaloti and ██████;¹⁹⁰ SUNAT had nothing to do with that.
126. *Fourth*, contrary to Kaloti’s arguments, the evidence shows that either Kaloti knew that it was buying potentially illegal gold, or it simply failed to conduct any meaningful due diligence on its Suppliers or on the origin of the Five Shipments (*see Section II.B.6*). Either way, Kaloti failed to comply with its due diligence obligations under Peruvian law, and is solely responsible for any loss that it may have suffered as a result of the SUNAT Immobilizations and the subsequent Precautionary Seizures.
127. In response to Kaloti’s numerous and significant misrepresentations, the sections immediately below provide an objective summary of the proceedings concerning SUNAT’s immobilization of Shipments 1 to 4, which shows that SUNAT at all times acted reasonably and in accordance with its mandate under Peruvian law. Peru then addresses, in **Section II.C**, the judicial actions concerning the Precautionary Seizures of Shipments 1 to 4, and shows that those, too, were reasonable and justified.

¹⁸⁸ Memorial, ¶ 136.

¹⁸⁹ First Notice of Intent, ¶ 17.

¹⁹⁰ *See* Section II.C.6 below.

1. SUNAT correctly corresponded only with the Suppliers and/or their appointed customs brokers

128. Kaloti suggests that, merely because Kaloti was the ultimate intended recipient of the shipments, SUNAT was under an obligation to notify it of developments in SUNAT's investigation, and to inform it of "when, or under what circumstances" the SUNAT Immobilizations would be lifted.¹⁹¹ As explained in this Section, Kaloti's expectation was a misguided one, and its argument lacks any basis in the relevant Peruvian customs regulations.

129. In Peru, exporters must file a customs declaration prior to the export of goods.¹⁹² Such declaration is known as a *Declaración Aduanera de Mercancías* ("**Customs Declaration**").¹⁹³ Every Customs Declaration must identify the individual or company that files the declaration ("**Declarant**").¹⁹⁴ SUNAT then addresses any communications concerning the goods to the Declarant¹⁹⁵ and/or to its customs broker (who acts on behalf of the Declarant in the customs proceedings).¹⁹⁶ Such

¹⁹¹ Memorial, ¶ 136.

¹⁹² See **Ex. R-0052**, General Customs Laws, Art. 134 ("The customs destination is requested by means of a customs declaration which is filed or transmitted electronically and is accepted with the numbering of the customs declaration."); Art. 2 (defining "Customs destination" as "[d]eclarant's statement of intent expressed in the customs declaration of goods, which indicates the customs regime to which the goods under customs control are to be subjected").

¹⁹³ See **Ex. R-0052**, General Customs Laws, Art. 2 (defining "Customs Declaration" as "Document by means of which the declarant indicates the customs procedure to be applied to the goods, and provides the details required by the Customs Administration for its application") ; see also **Ex. R-0052**, General Customs Law, Art. 134. The Customs Declaration was previously called *Declaración Única de Aduanas* ("**DUA**"), and the forms currently used for this purpose continue to refer to that term.

¹⁹⁴ See **Ex. R-0052**, General Customs Law, Art. 2 (defining the term "Declarant").

¹⁹⁵ See, e.g., **Ex. R-0069**, Supreme Decree No. 010-2009-EF, Regulation of the General Customs Law, 15 January 2009, Art. 226 (noting that SUNAT's extraordinary control measures are notified to the individual or company that is responsible for the goods and/or means of transport); **Ex. R-0052**, General Customs Law, Art. 166(b) (noting that SUNAT may request that the Declarant submit additional documents to enable SUNAT to assess whether the goods were properly dispatched).

¹⁹⁶ See **Ex. R-0052**, General Customs Law, Art. 23 (explaining that the customs brokers are authorized to represent third parties in customs proceedings).

communications include any notifications and requests concerning the immobilization of the goods identified in the Customs Declaration.

130. The Customs Declarations for the exports of Shipments 1 to 4 were filed by the following two custom brokerage companies, which were acting on behalf of the Suppliers: Agencia Afianzada de Aduana J.K.M. S.A.C. (for Shipments 1 and 2) and Mega Customs Logistic S.A.C (for Shipments 3 and 4).¹⁹⁷ Accordingly, SUNAT correctly addressed its communications (i) to the Declarants (i.e., the Suppliers) and/or (ii) to the relevant custom brokers.¹⁹⁸ SUNAT was *not*, however, required to communicate with Kaloti, for the simple reason that, pursuant to the Customs Declarations, Kaloti was neither a Declarant nor a customs broker acting on behalf of a Declarant.

2. *SUNAT decided to inspect Shipments 1 to 4 based on objective risk indicators*

131. Without offering a shred of evidence, Kaloti and its witnesses claim that SUNAT targeted the Suppliers because it “allowed itself to be influenced . . . by domestic companies who did not like that KML was undercutting them in the gold market.”¹⁹⁹ However, as demonstrated below, SUNAT decided to inspect Shipments 1 to 4 based on purely objective risk indicators.

¹⁹⁷ See **Ex. R-0070**, Customs Declaration No. 235-2013-40-116367-01-9-00, 27 November 2013 (included in █████ Criminal Proceedings); **Ex. R-0071**, Customs Declaration No. 235-2013-40-116370-01-1-00, 27 November 2013 (included in █████ Criminal Proceedings); **Ex. R-0072**, Customs Declaration No. 235-2014-40-002241-01-5-00, 9 January 2017 (included in █████ Criminal Proceedings); **Ex. R-0074**, Customs Declaration No. 235-2014-40-001919-01-8-00, 8 January 2014 (included in █████ Criminal Proceedings); **Ex. R-0075**, Customs Declaration No. 235-2014-40-001920-01-6-00, 8 January 2014 (included in █████ Criminal Proceedings); **Ex. R-0076**, Customs Declaration No. 235-2014-40-001921-01-2-00, 8 January 2014 (included in █████ Criminal Proceedings).

¹⁹⁸ For example, in the case of █████, SUNAT sent document requests to both the Declarant (█████) and its customs agent including, among others, the following: **Ex. R-0077**, SUNAT Notification No. 408-2013-SUNAT/3X3200, 2 December 2013 (included in █████ Criminal Proceedings); **Ex. R-0078**, SUNAT Notification No. 407-2013-SUNAT/3X3200, 2 December 2013 (included in █████ Criminal Proceedings).

¹⁹⁹ Memorial, ¶ 6; see █████ Witness Statement, ¶ 48.

132. SUNAT has discretion under Peruvian law to decide whether or not to inspect a given shipment.²⁰⁰ An inspection is an extraordinary control measure (*acción de control extraordinario*) that SUNAT may undertake to verify the goods' compliance with the applicable obligations, and to prevent customs or administrative offenses.²⁰¹ In particular, the applicable regulations provide that the customs official may proceed to inspect the goods based, among others, on (i) general "risk indicators," (ii) any prior accusation against the exporter concerning any type of violation, and (iii) any other relevant information.²⁰² Accordingly, SUNAT does not inspect *all* shipments, but rather only those that appear suspicious or potentially problematic, based on the factors mentioned above. On the basis of risk indicators drawn from data available to SUNAT (including customs and tax data), SUNAT prepares a risk profile for each relevant Declarant.

²⁰⁰ **Ex. R-0052**, General Customs Law, Art. 165 ("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 customs territory, such as . . . [o]rder the preventive measures of immobilization and seizure of goods . . .") (emphasis added).

²⁰¹ **Ex. R-0052**, General Customs Law, Art. 165; **Ex. R-0079**, Resolution of the National Deputy Superintendency of Customs No. 208-2013-SUNAT-300000, 27 August 2013, § VI.1 ("The inspection of goods in the primary zone, whether they are destined for customs or not, is an extraordinary control measure"); **Ex. R-0052**, General Customs Law, Art. 2 (defining "extraordinary control measure" as "[t]hose measures that the customs authority may provide in addition to ordinary measures, to verify the compliance with obligations and the prevention of customs criminal offenses or administrative infractions, which can be, among others, special operations or audit actions. The performance of those measures does not formally operate in the regular customs procedures, and may be arranged before, during or after the clearance process . . .").

²⁰² **Ex. R-0079**, Resolution of the National Deputy Superintendency of Customs No. 208-2013-SUNAT, 27 August 2013, §VII.(A1)(2).

133. Prior to the export of Shipments 1 to 4 and in accordance both with its customs control duties under Peruvian law²⁰³ and with its customary practice,²⁰⁴ SUNAT prepared a risk profile on each of the Suppliers. These risks profiles revealed a number of red flags concerning the Suppliers.²⁰⁵ For example, the risk profile prepared by SUNAT regarding ██████ in connection with Shipment 1 indicated that (i) immediately prior to starting its foreign trade operations, ██████ had been transferred to two individuals.²⁰⁶ Such transfers are a common mechanism used by companies engaged in illegal gold trade; such mechanism operates as follows: (i) existing companies are transferred to new owners, or entirely new companies are incorporated; (ii) such companies declare to SUNAT that they are devoted to a specified corporate activity

²⁰³ **Ex. R-0052**, General Customs Law, Art. 163 (“For the exercise of customs control, the Customs Administration mainly uses risk management techniques to focus the control actions on activities or areas of high risk, respecting the confidential nature of the information obtained for this purpose. . . .”).

²⁰⁴ **Ex. R-0055**, Report No. 49-2014-SUNAT/2E4000, 28 April 2014, § III (“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.”).

²⁰⁵ See, e.g., **Ex. R-0080**, Email from SUNAT ██████ to ██████ ██████ *et al.*), 29 November 2013 (included in ██████ Criminal Proceedings), p. 2; **Ex. R-0085**, Email from ██████ to SUNAT ██████ *et al.*), 9 January 2014 (included in ██████ Criminal Proceedings), p. 3; see also **Ex. R-0141**, SUNAT Report No. 217-2014-SUNAT-3X3200, 5 March 2014 (included in ██████ Criminal Proceedings), ¶ 14 (“The aforementioned preventive measures correspond 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*)]. . . .”); **Ex. C-0084**, ██████. Inform N° 303-2014-SUNAT-3X3200, April 09, 2014, ¶ 2.2 (“Said preventive measure corresponds 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 ██████ 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*)]. . . .”).

²⁰⁶ **Ex. R-0080**, Email from SUNAT ██████ to ██████ ██████ *et al.*), 29 November 2013 (included in ██████ Criminal Proceedings), p. 2 (“As of 22/05/2013 it started its export operations . . . The exporting company was transferred on 28/12/2013 to ██████ [] ██████ and ██████”).

(which is generally one that is entirely unrelated to gold production or trade);²⁰⁷ (iii) those companies engage, over a short period of time, in the trade of significant volumes of illegally mined gold;²⁰⁸ and (iv) the companies are then dissolved before paying the corresponding taxes.

134. At the time that the risk profile was prepared for Shipment 1, SUNAT noted that ██████ had already been flagged for tax evasion,²⁰⁹ and that 32 of the 54 Customs Declarations previously filed by that company had failed to comply with the applicable customs requirements.²¹⁰ Given such background, it was entirely justified for SUNAT to decide that Shipment 1 should be inspected.
135. Similarly, the risk profile that SUNAT prepared on ██████, in connection with the export of Shipment 4, showed that although ██████ had been in operation for only four months, in that short timeframe it had already exported multiple gold shipments, and at the time was trying to export more than 47 kg of gold.²¹¹ As noted above, the export of high volumes of gold in a short period of time by newly incorporated companies is considered a red flag for illegal mining. Importantly, ██████ shareholders and managers were all relatives of ██████ who, as explained in **Section II.B.6**, was

²⁰⁷ **Ex. R-0058**, Investigative Report No. 055-2014-SUNAT-3X2200, 8 April 2014, p. 3 (analyzing a number of irregularities in the gold export sector and noting that “[o]f this group of companies, it has become evident that many were incorporated in earlier periods, however, recently in the 2013 period they have started their exports of GOLD, and it has been confirmed that many of them recorded an ACTIVITY that is not related to the exploitation of GOLD when registering in the RUC [Single Taxpayers’ Registry].”).

²⁰⁸ See **Ex. R-0081**, “*Ya no se exporta más oro ilegal por las aduanas, afirma Urresti*,” LA REPÚBLICA, 26 April 2014.

²⁰⁹ **Ex. R-0080**, Email from SUNAT ██████ to ██████ (██████████ *et al.*), 29 November 2013 (included in ██████ Criminal Proceedings), p. 2 (“The company has been flagged for tax evasion of more than 10 million Peruvian soles”).

²¹⁰ **Ex. R-0080**, Email from SUNAT ██████ to ██████ ██████████, *et al.*), 29 November 2013 (included in ██████ Criminal Proceedings), p. 2 (“To date, 54 customs declarations have been filed for more than US\$ 77 million, of which 32 customs declarations are still pending regularization.”).

²¹¹ **Ex. R-0085**, Email from ██████████ to SUNAT ██████████, *et al.*), 9 January 2014 (included in ██████ Criminal Proceedings), p. 3.

a notorious gold smuggler and drug trafficker.²¹² Moreover, [REDACTED] had the same registered address as other high-risk gold traders, and some of those traders were connected to [REDACTED] or his relatives. Such facts proved the existence of corporate links among these companies,²¹³ as a result of which SUNAT had more than a reasonable basis to be suspicious of Shipment 4, and accordingly to conduct an inspection thereof.

136. Likewise, based on the risk profiles it had prepared on [REDACTED] and [REDACTED], SUNAT had similar reasons to be suspicious of Shipments 2 and 3.²¹⁴

137. In sum, SUNAT's decision to conduct an inspection of all four of Shipments 1 to 4 was made on the basis of the various objective red flags and irregularities identified above with respect to each of the Declarants of the Customs Declarations relating to those shipments.

3. *SUNAT's inspections not only confirmed that the Suppliers had failed to establish the lawful origin of Shipments 1 to 4, but also revealed indicia of criminal activity*

138. Contrary to Kaloti's arguments,²¹⁵ SUNAT's inspections of Shipments 1 to 4 confirmed that the supporting documents submitted by the Suppliers had failed to

²¹² Ex. R-0085, Email from [REDACTED] to SUNAT [REDACTED] *et al.*), 9 January 2014 (included in [REDACTED] Criminal Proceedings), p. 3.

²¹³ Ex. R-0085, Email from [REDACTED] to SUNAT ([REDACTED], *et al.*), 9 January 2014 (included in [REDACTED] Criminal Proceedings), p. 3 (noting that [REDACTED] shared a registered address with Business Investments S.A.C., Minerales de la Mano de Dios and Comercializadora de Minerales Rivero S.A.C.).

²¹⁴ 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. C-0084, [REDACTED]. Inform N° 303-2014-SUNAT-3X3200, April 09, 2014, ¶ 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*)]. . ."); *see also*, Section II.B.6.

²¹⁵ *See, e.g.*, Memorial ¶ 136.

establish the lawful origin of the gold contained in those shipments.²¹⁶ If, during an inspection, SUNAT identifies an irregularity—as occurred upon its inspection of Shipments 1 to 4—, it proceeds to immobilize the goods until the irregularity is remedied.²¹⁷ In practice, the immobilization of a shipment means that, pending additional control measures, the relevant goods or assets (i) cannot be transported out of the country; and (ii) must remain in the custody of an entity, and in a location, designated by the customs authority.²¹⁸ In this case, Shipments 1 to 4 remained in the storage facilities of [REDACTED] while the SUNAT Immobilizations were in force.²¹⁹ [REDACTED] is a private company that provides a wide

²¹⁶ **Ex. R-0086**, SUNAT Inspection Order No. 316-0300-2013-001289, 29 November 2013 (included in [REDACTED] Criminal Proceedings); **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-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-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).

²¹⁷ **Ex. R-0079**, Resolution of the National Deputy Superintendency of Customs No. 208-2013-SUNAT, 27 August 2013, §VII.(A2).3 (“If the designated customs officer detects an incident, the officer must formulate an Immobilization-Seizure Order accordingly”).

²¹⁸ **Ex. R-0052**, General Customs Law, Art. 2 (“Immobilization.- . . . the Customs Authority provides that the goods must remain in a specific place and under the responsibility of a designated person, in order to subject the goods to any control actions it deems necessary”).

²¹⁹ **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 Lifting 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

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.

139. In the present case, SUNAT took a number of steps that were fully in accordance with the General Customs Law,²²⁰ and that were entirely reasonable and justified in light of the information available to it at the time. Such steps included :
- a. its determination that Shipments 1 to 4 should be provisionally immobilized based on the irregularities identified during the inspections (as explained above);²²¹

(included in █████ Criminal Proceedings) [*Re-submitted legible version of C-0040*]; **Ex. R-0098**, SUNAT Immobilization Record No. 316-0300-2014-000022, 9 January 2014 (included in █████ Criminal Proceedings) [*Re-submitted legible version of C-0040*].

²²⁰ **Ex. R-0052**, General Customs Law, Art. 165 (“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”); Art. 166(b) (“The customs authority may, for the purpose of verifying the accuracy of the data contained in a customs declaration, . . . [r]equire the declarant to present other documents that allow to conclude the release of the goods.”); *see also* **Ex. R-0079**, Resolution of the National Deputy Superintendency of Customs No. 208-2013-SUNAT-300000, 27 August 2013, §VII.(A2).3.

²²¹ **Ex. R-0091**, SUNAT Immobilization Order No. 316-0300-2013-001497, 29 November 2013 (included in █████ 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 █████ 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 █████ Criminal Proceedings) [*Re-submitted legible version of C-0040*]; **Ex. R-0094**, SUNAT Immobilization Lifting Order No. 316-0300-2014-000111, 10 January 2014 (included in █████ 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 █████ Shipment); **Ex. R-0096**, SUNAT Immobilization Order No. 316-0300-2014-000020, 9 January 2014 (included in █████ 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 █████ Criminal Proceedings) [*Re-submitted legible version of C-0040*]; **Ex. R-0098**, SUNAT Immobilization Record No. 316-0300-2014-000022, 9 January 2014 (included in █████ Criminal Proceedings) [*Re-submitted legible version of C-0040*].

- b. its request, after immobilizing the shipments, that the Suppliers and their respective customs brokers provide additional documents to demonstrate the lawful origin of the gold;²²² and
- c. in parallel, its inquiries to other State entities to verify relevant information.²²³
140. Based on the additional information subsequently provided by the Suppliers²²⁴ and by other State agencies, between January and March 2014 SUNAT issued four reports that identified numerous irregularities and suspicious factors in Shipments 1 to 4. The principal ones amongst them are described below *seriatim* for each of the four shipments.
141. **Findings in SUNAT's report on Shipment 1** [REDACTED]:

²²² See Ex. C-0056, [REDACTED]. Notice N° 406-2013-SUNAT/3X3200, December 2, 2013; Ex. R-0077, SUNAT Notification No. 408-2013-SUNAT/3X3200, 2 December 2013 (included in [REDACTED] Criminal Proceedings); Ex. C-0006, [REDACTED]. document package, pp. 23-24, 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 Notification No. 428-2013-SUNAT/3X3200, 9 December 2013 (included in [REDACTED] Criminal Proceedings); Ex. C-0007, [REDACTED] document package, pp. 11-12, 13-14; Ex. C-0009, [REDACTED] document package, pp. 10-11 Ex. C-0008, [REDACTED] document package, pp. 3-4, 7-8, 11-12.

²²³ For example, SUNAT requested MINEM to provide information on whether [REDACTED] was authorized as a gold producer or trader, or held any mining concession. See Ex. R-0107, Letter No. 55-2013-SUNAT/3X3000 from SUNAT (J. Romano) to MINEM (E. Alva), 9 December 2013 (included in [REDACTED] Criminal Proceedings).

²²⁴ According to Kaloti, the Suppliers and their respective custom brokers submitted the following responses: Ex. C-0057, [REDACTED]. Petition submitted to lift immobilization declared by immobilization order N°316-0300-2013-001479, December 2, 2013; Ex. C-0006, [REDACTED] document package, pp. 11-17; Ex. C-0061, [REDACTED]. Communication sent by [REDACTED] to SUNAT in reference to notice No. 424-2013-SUNAT/3X3200, December 9, 2013; Ex. C-0007, [REDACTED] document package, pp. 15-16, 17-19; Ex. C-0009, [REDACTED] document package, pp. 3-5, 6. Kaloti has not filed any submissions concerning [REDACTED] responses to SUNAT's requests.

- a. While the relevant shipping documents stated that the courier company [REDACTED] had transported Shipment 1 from the alleged extraction site to [REDACTED]' facilities in Lima, the owner of the vehicle used for the transport was not a [REDACTED] employee or otherwise related to [REDACTED];²²⁵
- b. Although [REDACTED] claimed to have produced the gold that was being transported in Shipment 1, it failed to submit any evidence that it had acquired the supplies necessary for the production of gold. This fact was a red flag because [REDACTED] had exported 51 gold shipments worth USD 73 million—as a result of which it should have been easy for it to produce such evidence.²²⁶ Its failure to do so suggested to SUNAT that [REDACTED] in fact had *not* produced the gold that it claimed to have produced; and
- c. [REDACTED] corporate address did not even appear in SUNAT's taxpayer registry.²²⁷

142. **Findings in SUNAT's report on Shipment 2 ([REDACTED]):**

- a. [REDACTED] had issued eight purchase statements (*liquidaciones de compra*) for the acquisition of the gold involved in Shipment 2. The suspicious aspect of that was that, although all eight of those statements had been issued on the exact

²²⁵ **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 [REDACTED] . . . Likewise, the company [REDACTED] 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.

²²⁶ **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, and has thus not met this request. However, the company exported gold during 2013 (51 exports) with a value of seventy-three (73) million USD according to the attached Annex.”).

²²⁷ **Ex. R-0140**, SUNAT Report No. 026-2014-SUNAT-3X3200, 15 January 2014 (included in [REDACTED] Criminal Proceedings), ¶ 2.8 (“We have consulted the Lima Regional Intendancy's registry regarding the tax domicile . . . which indicates that said company was “Not Found”.”).

same date, and from the very same checkbook, they had been issued in different areas of the country which were distant from one another. Such incongruence struck SUNAT as “clearly illogical,”²²⁸ as the foregoing suggested that the checkbook holder had travelled to considerably distant locations on the same day (which seemed improbable, and suggested instead that intended to conceal the unlawful origin of the gold);²²⁹

- b. ██████ had failed to provide any evidence concerning the transport of Shipment 2 from its alleged place of origin (Puna, Ica, and Pisco) to the storage facilities of the company ██████ in Lima;²³⁰
- c. in breach of Peruvian regulations on tax evasion, ██████ had failed to show that it had paid for the gold in Shipment 2 through bank transactions (even though the overall sum was a sizable one, of more than USD 3.6 million). This suggested that (i) the transactions either were made solely in cash—always a red flag in and of itself—or were fictitious;²³¹ and (ii) ██████ had failed to pay

²²⁸ **Ex. R-0141**, SUNAT Report No. 217-2014-SUNAT-3X3200, 5 March 2014 (included in ██████ 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).

²²⁹ **Ex. R-0141**, SUNAT Report No. 217-2014-SUNAT-3X3200, 5 March 2014 (included in ██████ 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).

²³⁰ **Ex. R-0141**, SUNAT Report No. 217-2014-SUNAT-3X3200, 5 March 2014 (included in ██████ Criminal Proceedings), ¶ 17 (noting that ██████ “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 ██████ temporary storage facility . . .”).

²³¹ **Ex. R-0141**, SUNAT Report No. 217-2014-SUNAT-3X3200, 5 March 2014 (included in ██████ Criminal Proceedings), ¶ 18 (“[P]ursuant 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 ██████

the corresponding financial transaction taxes, which constituted indicia of money laundering and/or tax evasion;²³²

- d. ██████ had links with other companies that: (i) had previously raised suspicions; (ii) had recently exported more than USD 500 million in gold; and (iii) already had some of their own gold shipments immobilized by SUNAT;²³³ and
- e. one of ██████ main shareholders was subject to three criminal complaints.²³⁴

143. **Findings in SUNAT's report on Shipment 3 (██████):**

- a. in breach of Peruvian law, the shipping documents relating to Shipment 3 were incomplete (e.g., they lacked critical information regarding the identity of the driver, the vehicle, and the company used to transport the gold);²³⁵
- b. the official records of the tolls located in the route between the alleged gold extraction point and ██████ premises in Lima showed that the vehicle identified in the shipping documents presented by ██████ had not

██████ 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)).

²³² Ex. R-0141, SUNAT Report No. 217-2014-SUNAT-3X3200, 5 March 2014 (included in ██████ Criminal Proceedings), § III (" . . . ██████ has not been able to prove to SUNAT the legal origin, ownership and/or purchase of the immobilized goods . . . therefore, its illegal origin would be presumed, and the following could be considered among other crimes: Money Laundering and other related crimes").

²³³ Ex. R-0141, SUNAT Report No. 217-2014-SUNAT-3X3200, 5 March 2014 (included in ██████ Criminal Proceedings), ¶ 19 (showing ██████ links with other gold exporting companies, one of which also had a shipment immobilized).

²³⁴ Ex. R-0141, SUNAT Report No. 217-2014-SUNAT-3X3200, 5 March 2014 (included in ██████ Criminal Proceedings), ¶ 19.

²³⁵ Ex. C-0084, ██████. Inform N° 303-2014-SUNAT-3X3200, April 09, 2014, ¶ 2.15 ("[P]resents as evidence for the domestic transfer of the immobilized gold ore from its tax domicile (Miraflores-Lima) to ██████ temporary storage facility, the waybill . . . with the fields for ("transport vehicle and driver") and ("Transport Company") left blank . . .") (emphasis in original); Ex. C-0009, ██████ ██████ document package, pp. 19-20.

transited through that route at the relevant times,²³⁶ which suggested that the gold did not come from the alleged extraction point;

- c. the ownership documents of the vehicle in which the gold had allegedly been transported contained various inconsistencies;²³⁷
- d. [REDACTED] was trying to export more than 38 kg of gold that it allegedly produced itself, yet it had failed (i) to submit proof of acquisition of any gold production supplies, and (ii) to report its annual gold production for 2013;²³⁸ and
- e. in breach of Peruvian regulations on tax evasion, [REDACTED] had failed to show that the sale of Shipment 3 to Kaloti was effected through the financial system (i.e., the relevant transaction was conducted in cash, or in some other form that did not involve transfers of funds via banks or other financial institutions).²³⁹

144. Findings in SUNAT's report on Shipment 4 ([REDACTED]):

²³⁶ Ex. C-0084, [REDACTED]. Inform N° 303-2014-SUNAT-3X3200, April 09, 2014, ¶ 2.17 (“[T]he use of the SUBARU vehicle with license plate A4B573 and driven by the Manager of the company [REDACTED] . . . 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, p. 21.

²³⁷ Ex. C-0084, [REDACTED]. Inform N° 303-2014-SUNAT-3X3200, April 09, 2014, ¶ 2.18 (“[T]here is inconsistency as to the legitimacy of the selling party, given that the seller in said contracts . . . is not the owner and therefore could not have transferred the ownership of the property . . . especially as there is no contract and/or document . . . that shows he is the owner of the aforementioned vehicle.”) (emphasis in original).

²³⁸ Ex. C-0084, [REDACTED]. Inform N° 303-2014-SUNAT-3X3200, April 09, 2014, ¶ 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).

²³⁹ Ex. C-0084, [REDACTED]. Inform N° 303-2014-SUNAT-3X3200, April 09, 2014, ¶ 2.21 (“[T]here is no evidence that the sale of the immobilized gold ore was made through the financial system . . . [REDACTED] HAS NOT PROVIDED EVIDENCE OF THE FORM OF PAYMENT BY THE PURCHASER OF THE AFOREMENTIONED COMMERCIAL INVOICE”) (emphasis in original).

- a. contravening the applicable regulations, ██████ had not filed any shipping documents proving the transport of the gold from the alleged extraction point to Lima;²⁴⁰
 - b. despite SUNAT's requests, and in breach of Peruvian law, ██████ had not filed (i) any shipping documents for the supplies allegedly used for the production of the gold,²⁴¹ or (ii) any proof that it had actually paid for those supplies;²⁴² and
 - c. ██████ tax domicile was also the address of Peruvian gold traders that (i) had previously failed to comply with their obligations under Peruvian tax and customs regulations, and (ii) were linked to the above-mentioned ██████ and other individuals who were under investigation for criminal activities.²⁴³
145. Given the findings and irregularities mentioned above, it was entirely reasonable for SUNAT to conclude (i) that the Suppliers had failed to establish the lawful origin of Shipments 1 to 4; (ii) that there were indicia of money laundering and related criminal

²⁴⁰ Ex. R-0142, SUNAT Report No. 239-2014-SUNAT-3X3200, 11 March 2014 (included in ██████ Criminal Proceedings), ¶ 2.20 (“█████] 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).

²⁴¹ Ex. R-0142, SUNAT Report No. 239-2014-SUNAT-3X3200, 11 March 2014 (included in ██████ Criminal Proceedings), ¶ 2.21 (“█████ 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 the purchase of raw materials acquired in the city of Lima, it has not evidenced their transportation . . .**”) (emphasis in original).

²⁴² Ex. R-0142, SUNAT Report No. 239-2014-SUNAT-3X3200, 11 March 2014 (included in ██████ Criminal Proceedings), ¶ 2.22 (“█████ 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).

²⁴³ Ex. R-0142, SUNAT Report No. 239-2014-SUNAT-3X3200, 11 March 2014 (included in ██████ Criminal Proceedings), ¶ 2.24 (showing ██████ links with other gold trading companies, some of them related with ██████).

offenses; and (iii) that the matters should be referred to the Prosecutor's Office for appropriate law enforcement action.²⁴⁴

146. The segment below explains why under Peruvian law, and given the circumstances, SUNAT was required to maintain the immobilizations it had imposed on Shipments 1 to 4.

4. *Peruvian law prevented SUNAT from lifting the immobilizations, given the circumstances*

147. Kaloti argues that Peru "ignored" 11 requests for the release of the gold "made by, or on behalf or for the benefit of" Kaloti.²⁴⁵ Seven of those requests were filed in the context of judicial proceedings, and will therefore be addressed in **Section II.C** below. This Section will address the other four requests, which were filed during the pendency of SUNAT's immobilization proceedings.

148. As explained in the following paragraphs, one of those four requests was not addressed to SUNAT or to any other State agency at all, but rather solely to a private company. And with respect to the other three requests, contrary to what Kaloti asserts, Peru did *not* ignore such requests. Rather, SUNAT considered them and concluded that it could not lift the immobilizations, for two separate reasons: (i) because the Suppliers had failed to prove the lawful origin of the gold, and (ii) because there were indicia of criminal activity.

149. The four requests filed during the pendency of SUNAT's immobilization proceedings were the following: (i) Proprietary Excluding Intervention from ██████ to ██████ on 27 December 2013 ("**First Request**"); (ii) a request to lift the immobilization of Shipment 2 from ██████ to SUNAT on 20 January 2014 ("**Second Request**"); (iii) a request to lift the immobilization from ██████ to SUNAT on 21 January 2014

²⁴⁴ **Ex. R-0140**, SUNAT Report No. 026-2014-SUNAT-3X3200, 15 January 2014 (included in ██████ Criminal Proceedings), ¶¶ 3.1., 3.2; **Ex. R-0141**, SUNAT Report No. 217-2014-SUNAT-3X3200, 5 March 2014 (included in ██████ Criminal Proceedings), § III; **Ex. C-0084**, ██████ Inform N° 303-2014-SUNAT-3X3200, April 09, 2014, § III; **Ex. R-0142**, SUNAT Report No. 239-2014-SUNAT-3X3200, 11 March 2014 (included in ██████ Criminal Proceedings), ¶¶ 3.1., 3.2.

²⁴⁵ Memorial, ¶ 115.

(“**Third Request**”); and (iv) a request to lift the immobilization from [REDACTED] and Kaloti (jointly) to SUNAT on 12 February 2014 (“**Fourth Request**”).²⁴⁶ The following paragraphs address each of these requests in turn.

150. **First Request (from [REDACTED] to [REDACTED] for release of Shipment 1):** This is the request that was not even addressed to SUNAT, but rather to a private sector company (which was inexplicable, given that private sector companies lack the legal authority to lift SUNAT immobilization orders). Specifically, on 27 December 2013, [REDACTED] addressed a communication to the storage facility company [REDACTED], requesting that the latter lift the provisional seizure of gold imposed by SUNAT in the context of tax enforcement proceedings.²⁴⁷ That seizure had been ordered by SUNAT because [REDACTED] owed approximately over PEN 4 million (approximately USD 1 million) in tax debts.²⁴⁸ Such seizure co-existed with, but was unrelated to, the immobilization of Shipment 1 by SUNAT described in the previous Sections. Thus, Kaloti’s argument is disingenuous for two reasons: (i) because the request to [REDACTED] in fact did not relate at all to the immobilization of Shipment 1, but rather to a seizure order that is not the subject of claims in this arbitration; and (ii) because it is self-evidently untenable for Kaloti to claim that Peru “ignored” a request that was not even sent to SUNAT or any other State agency.
151. **Second request [REDACTED] request to SUNAT, regarding Shipment 2):** On 20 January 2014, [REDACTED] filed a request with SUNAT asking the latter to lift the immobilization of Shipment 2: “[H]aving proved the lawful origin of the gold sold, by producing the relevant purchase settlements and waybills, WE REQUEST the lifting of such immobilization”²⁴⁹ However, as explained above, SUNAT’s report on Shipment 2

²⁴⁶ Memorial, ¶ 115.

²⁴⁷ Ex. C-0065, [REDACTED]. Proprietary Excluding Intervention submitted by [REDACTED] in favor of KML, December 27, 2013.

²⁴⁸ Ex. R-0143, SUNAT Coactive Resolution No. 0230072504966, 20 December 2013 (included in [REDACTED] Criminal Proceedings), p. 1.

²⁴⁹ Ex. C-0082, [REDACTED]. Notarized petition submitted by [REDACTED] requesting the lift of immobilization order No. 316-0300-2014-000110, January 20, 2014; p. 2.

indicated (i) that, contrary to the above-quoted statement, ██████ in fact had *not* established the lawful origin of the gold, and (ii) that moreover there were indicia of criminal activity with respect to Shipment 2. Therefore, SUNAT could not—and accordingly did not—grant ██████ request.

152. **Third request (██████████ request to SUNAT, regarding Shipment 3):** On 21 January 2014, ██████ filed a request with SUNAT seeking that it lift the immobilization of Shipment 3: “Having proved the legal origin of the gold sold, by producing the relevant documentation as mining producer for the gold, WE REQUEST the lift of such immobilization . . .”²⁵⁰ However, as discussed above, SUNAT’s investigation into Shipment 3 had revealed (i) that ██████ had not proven the lawful origin of the gold, and (ii) that there were indicia of criminal activity concerning Shipment 3.²⁵¹ As a result, SUNAT did not grant ██████ request.

153. **Fourth request (Kaloti and ██████████ request to SUNAT, regarding Shipment 3):** Kaloti asserts that on 14 February 2014, Kaloti and ██████ (jointly) filed a request to SUNAT asking for release of Shipment 3.²⁵² However, Kaloti has failed to submit a copy of such request, and instead relies solely on SUNAT’s report concerning Shipment 3.²⁵³ In any event, the express reference to Kaloti’s request in that SUNAT report *ipso facto* confirms that, contrary to Kaloti’s argument, SUNAT *did* in fact consider such request. SUNAT concluded, however, that ██████ (which was the Declarant for Shipment 3) had failed to establish the lawful origin of the relevant shipment.²⁵⁴ Therefore, pursuant to Peruvian law, SUNAT could not—and accordingly did not—lift the provisional immobilization of that shipment.

154. In sum, contrary to what Kaloti contends SUNAT *did* in fact consider each of the four requests that it had received for the lifting of the immobilization of three of the four

²⁵⁰ Ex. C-0083, ██████████. Petition submitted by ██████████ requesting the lift of immobilization order No. 316-0300-2014-000002, January 21, 2014, p. 2.

²⁵¹ Ex. C-0084, ██████████ Inform N° 303-2014-SUNAT-3X3200, April 09, 2014, p. 10.

²⁵² Memorial, ¶ 115.

²⁵³ Ex. C-0084, ██████████. Inform N° 303-2014-SUNAT-3X3200, April 09, 2014, p. 6.

²⁵⁴ Ex. C-0084, ██████████. Inform N° 303-2014-SUNAT-3X3200, April 09, 2014, p. 10.

shipments. However, it had no legal basis to accept such requests, and therefore it properly maintained the immobilizations until Shipments 1 to 4 became the subject of the Precautionary Seizures by the competent Criminal Courts (as explained below).

5. *SUNAT properly notified its findings to the Prosecutor's Office and other competent authorities, and ultimately lifted the immobilizations*

155. As discussed in **Section II.A.5** above, when SUNAT identifies activities that might constitute a crime, it must notify the Prosecutor's Office, as well as other competent Peruvian authorities, so that they can investigate and determine whether to bring charges, and eventually to commence criminal proceedings.²⁵⁵ It is for that reason that SUNAT notified its findings concerning Shipments 1 to 4 to the Prosecutor's Office and the State Attorney's Office, amongst other competent Peruvian authorities.²⁵⁶
156. Based on the findings in SUNAT's reports, as well as on additional information identified by the State Attorney's Office,²⁵⁷ the Prosecutor's Office determined that there was a sufficient basis on which to open criminal investigations of the Suppliers

²⁵⁵ **Ex. R-0069**, Supreme Decree No. 010-2009-EF, Regulation of the General Customs Law, 15 January 2009, Art. 247; **Ex. R-0049**, Illegal Mining Controls and Inspection Decree, Art. 3.

²⁵⁶ See, e.g., in the case of [REDACTED], the notifications sent by SUNAT to both the Prosecutor's Office and the States Attorney's Office. **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)

²⁵⁷ **Ex. R-0073**, State Attorney's Request for the Initiation of [REDACTED] Preliminary Investigation for the Crime of Money Laundering, 22 January 2014; **Ex. R-0082**, State Attorney's Request for the Initiation of [REDACTED] Preliminary Investigation for the Crime of Money Laundering, 7 March 2014; **Ex. C-0068**, [REDACTED] [State Attorney's] Request for Preliminary Investigation for the crime of money laundering filed by the Prosecutor's Office Specializing in Money Laundering Crimes and Loss of Domain Proceedings before the Ninth Provincial Criminal Prosecutor's Office of Callao; **Ex. R-0084**, State Attorney's Request for the Initiation of [REDACTED] Preliminary Investigation for the Crime of Money Laundering, 18 March 2014.

for possible money laundering activity.²⁵⁸ It was in that context that the Prosecutor's Office asked the competent Criminal Court to order the Precautionary Seizures.²⁵⁹ Such requests were granted, and the Precautionary Seizures were issued.²⁶⁰ These court-ordered Precautionary Seizures superseded SUNAT Immobilizations. Accordingly, by 14 May 2014, SUNAT had lifted all of its own immobilizations of the four shipments.²⁶¹

157. Immediately after SUNAT lifted the administrative immobilizations, the Prosecutor's Office proceeded to seize Shipments 1 to 4,²⁶² in compliance with the Precautionary Seizures.²⁶³ The gold seized from those shipments was transferred to Peru's National

²⁵⁸ **Ex. R-0087**, Prosecutor's Office Initiation of [REDACTED] Preliminary Investigation, Intake No. 37-2014, 27 January 2014; **Ex. R-0095**, Prosecutor's Office Initiation of [REDACTED] Preliminary Investigation, Intake No. 140-2014, 13 March 2014; **Ex. R-0099**, Prosecutor's Office Initiation of [REDACTED] Preliminary Investigation, Intake No. 187-2014, 21 April 2014; **Ex. R-0101**, Prosecutor's Office Initiation of [REDACTED] Preliminary Investigation, Intake No. 151-2014, 21 March 2014.

²⁵⁹ See Section II.C.1.

²⁶⁰ **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, April 30, 2014; **Ex. R-0136**, Precautionary Seizure against Shipment 4, 1 May 2014.

²⁶¹ See **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).

²⁶² See **Ex. R-0176**, Execution Order under the Special Proceeding No. 34-2014-JPTP-CSJ-CL-ML-INCAUTACION, 29 February 2014 (included in [REDACTED] Criminal Proceedings); **Ex. R-0177**, Execution Order under the Special Proceeding No. 51-2014-JPTP-CS-JCL-ML, 1 April 2014 (included in [REDACTED] Criminal Proceedings); **Ex. C-0091**, [REDACTED]. Immobilization release No. 316-0300-2014-000043, pp. 3-12; **Ex. R-0178**, Execution Order of Seizure, Unpacking, Verification and Delivery of Goods, 14 May 2014 (included in [REDACTED] Criminal Proceedings), p. 8.

²⁶³ See Section II.C.2.

Bank,²⁶⁴ where seized assets remain under the National Program of Seized Goods (*Programa Nacional de Bienes Incautados*) (“**PRONABI**”).²⁶⁵ PRONABI is a Peruvian State agency under the aegis of the Ministry of Justice and Human Rights, but that operates independently. Its functions are to receive, register, and keep custody of seized assets that are subject to investigations and criminal proceedings.²⁶⁶

158. The lifting of the relevant administrative immobilizations marked the conclusion of SUNAT’s oversight measures with regard to Shipments 1 to 4.

6. *Kaloti did not comply with its obligation to conduct appropriate due diligence on the Suppliers and the Five Shipments*

159. As explained in **Section II.A.4** above, Peruvian law requires gold purchasers to (i) verify the lawful origin of the gold that they acquire, (ii) conduct due diligence on their suppliers, and (iii) keep updated records demonstrating that they have complied with the obligations in (i) and (ii).²⁶⁷ Similarly, international organizations such as the Organization for Economic Co-operation and Development (“**OECD**”) and the FATF advise that mineral dealers must conduct detailed “know your counterparty” (“**KYC**”) reviews.²⁶⁸

²⁶⁴ See **Ex. R-0176**, Execution Order under the Special Proceeding No. 34-2014-JPTP-CSJ-CL-ML-INCAUTACION, 29 February 2014, p. 20; **Ex. R-0177**, SUNAT Execution Order under the Special Proceeding No. 51-2014-JPTP-CS-JCL-ML, 1 April 2014 (included in ██████ Criminal Proceedings), p. 11; **Ex. C-0091**, ██████. Immobilization release No. 316-0300-2014-000043, p. 12; **Ex. R-0178**, SUNAT Execution Order of Seizure, Unpacking, Verification and Delivery of Goods, 14 May 2014 (included in ██████ Criminal Proceedings), p. 8.

²⁶⁵ At the time the Preliminary Seizures took place, in 2014, the competent Peruvian entity in charge of receiving, registering, and keeping custody of seized assets was the Commission of Seized Goods (*Comisión Nacional de Bienes Incautados*) (CONABI). CONABI was replaced by PRONABI in 2017.

²⁶⁶ **Ex. R-0217**, Supreme Decree No. 011-2014-JUS, 12 May 2017.

²⁶⁷ See **Ex. R-0013**, General Mining Law, 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.

²⁶⁸ See **Ex. R-0197**, OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, 20 March 2013, pp. 86–97; see also **Ex. R-0180**, FATF Recommendations 2012, Recommendations No. 22 and 23, pp. 19–21.

160. Kaloti itself seems to recognize the need for thorough and careful due diligence in the gold trade.²⁶⁹ It admits, for example, that the “gold industry has a ‘shady’ underside” and “is susceptible to money laundering”.²⁷⁰ But despite that recognition, Kaloti largely disregarded its due diligence obligations with respect to the Five Shipments.
161. Kaloti claims that it was entitled to assume that the Suppliers “were registered and in good standing with the Peruvian government when KML purchased gold from them”²⁷¹ because they “were registered [with RECPO]”.²⁷² However, as explained in **Section II.A.4** above, mere registration with RECPO did not in any way guarantee – or even imply – that the Suppliers were in good standing with the Peruvian government. In any event, Kaloti has not submitted any evidence proving that it checked the RECPO *before* it started dealing with its Suppliers in 2013. Instead, it has only submitted a list of companies that were registered with RECPO in 2020.²⁷³
162. Likewise, the documents that Kaloti cites in an attempt to demonstrate that it verified the lawful origin of the gold are the exact same documents that the Suppliers submitted to SUNAT *after* the immobilizations had already taken place.²⁷⁴ There is no evidence that Kaloti obtained or reviewed those documents *prior* to the immobilizations. Importantly, Peru has already explained that these documents in

²⁶⁹ See **Ex. C-0025**, KML AML/CFT Program Manual, p. 4.

²⁷⁰ Memorial, ¶ 1.

²⁷¹ Memorial, ¶ 15.

²⁷² Memorial, ¶ 15. See also Memorial, ¶¶ 18, 39 and fn. 79; ██████████ Witness Statement, ¶ 30; Request for Arbitration, ¶¶ 14, 30, 38.

²⁷³ **Ex. C-0010**, *Registro Especial de Comercializadores y Procesadores de Oro* (RECPO).

²⁷⁴ **Ex. C-0006**, ██████████. document package; **Ex. C-0007**, ██████████ document package; **Ex. C-0008**, ██████████ document package; **Ex. C-0009**, ██████████ document package. 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.

any event do not demonstrate that the gold was lawfully mined.²⁷⁵ Quite the opposite: they reveal multiple indicia of illegal mining and money laundering.²⁷⁶

163. Kaloti also argues that, by the time that it started operations in Peru, it had an internal manual that it characterizes in the Memorial as a “robust compliance and anti-money laundering manual” (“**AML/CFT Manual**”).²⁷⁷ However, that manual is from 2018, and cites rules issued by the US Financial Crimes Enforcement Network (FinCEN) in that year.²⁷⁸ The AML/CFT Manual thus postdates the Five Shipments by five years, and therefore could not have guided Kaloti’s actions in 2013. Kaloti further claims that its employees “constantly received talks, trainings, and seminars on the prevention of money laundering,”²⁷⁹ but as purported evidence of that it has submitted only eight handwritten training “certificates” issued by Kaloti itself on 14 February 2014 (i.e., *after* the dates on which it allegedly purchased the Five Shipments).²⁸⁰
164. Equally, the only exhibit cited by Kaloti in support of its claim that it conducted “exhaustive and diligent KYC . . . compliance investigations”²⁸¹ on the Suppliers consists of a document comprising three one-page, handwritten forms. Kaloti claims that these forms show that Kaloti conducted reviews on █████, █████ and █████ using an online tool called “World Check.”²⁸² In this regard, Kaloti notes its conclusion that since the “[W]orld [C]heck period review yielded zero results . . . [the] supplier is fully compliant.”²⁸³ But such evidence and conclusion have little or no evidentiary weight, including because (i) World Check is not a definitive KYC tool,

²⁷⁵ See Section II.B.3 above.

²⁷⁶ See Section II.B.3 above

²⁷⁷ Memorial, ¶ 21; *see also* █████ Witness Statement, ¶ 44; Witness Statement █████ (“**Witness Statement**”), ¶ 8; Witness Statement of █████ 8 February 2022 (“**Witness Statement**”), ¶ 15.

²⁷⁸ Ex. C-0025, KML AML/CFT Program Manual, p. 10.

²⁷⁹ █████ Witness Statement, ¶ 13.

²⁸⁰ Ex. C-0032, KML AML Compliance Training Program (2014).

²⁸¹ █████ Witness Statement, ¶ 30. *See also* █████ Witness Statement, ¶ 19.

²⁸² Memorial, ¶ 15; █████ Witness Statement, ¶ 19.

²⁸³ Ex. C-0033, KML compliance department periodic review of suppliers, pp. 2, 4.

and thus did not relieve or satisfy Kaloti's due diligence obligations, and (ii) Kaloti has not submitted into evidence the actual results yielded by its alleged World Check exercise. In any event, the three handwritten forms produced by Kaloti do not assist its effort to prove its purported due diligence check on the Suppliers, for two simple additional reasons: (i) because they *postdate* Kaloti's alleged purchase of the Five Shipments, and (ii) because they do not even mention one of the Suppliers ██████████.²⁸⁴

165. Even if Kaloti actually had conducted a World Check review on its Suppliers as it claims, and even if such review had been timely – neither of which appears to be the case – that would have been utterly insufficient for Kaloti to meet its due diligence obligations under Peruvian law. In fact, Kaloti's own AML/CFT Manual makes clear that a "World Check" review is only one of numerous checks that Kaloti should have conducted before buying gold worth many USD millions from the Suppliers. For example, the AML/CFT Manual states that, before transacting with a supplier, Kaloti should (i) request the entity's tax ID, trade license, certificate of incorporation, proof of address and "[p]hotos of [its] business/office";²⁸⁵ (ii) "identify each and every Ultimate Beneficial Owner";²⁸⁶ (iii) carry out "a full web search";²⁸⁷ (iv) conduct and prepare reports on "[s]ite visits";²⁸⁸ (v) "monitor and evaluate the supplier's operational activities and practices";²⁸⁹ and (vi) request "[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."²⁹⁰ In addition, the AML/CFT Manual states that, "[a]fter client's approval and onboarding, daily checks [should be] performed and reviewed to ensure accuracy."²⁹¹ The scant evidence

²⁸⁴ Ex. C-0033, KML compliance department periodic review of suppliers, showing that the forms are dated 7 February and 19 March 2014.

²⁸⁵ Ex. C-0025, KML AML/CFT Program Manual, pp. 8-9.

²⁸⁶ Ex. C-0025, KML AML/CFT Program Manual, p. 9.

²⁸⁷ Ex. C-0025, KML AML/CFT Program Manual, p. 10.

²⁸⁸ Ex. C-0025, KML AML/CFT Program Manual, p. 11.

²⁸⁹ Ex. C-0025, KML AML/CFT Program Manual, p. 11 .

²⁹⁰ Ex. C-0025, KML AML/CFT Program Manual, p. 9.

²⁹¹ Ex. C-0025, KML AML/CFT Program Manual, p. 10.

submitted by Kaloti demonstrates that it failed to implement these various due diligence mechanisms contemplated in its own compliance manual.

166. Moreover, even simply on the basis of publicly available information, Kaloti could and should have detected numerous red flags concerning the Suppliers, which are typical of companies involved in illegal mining and money laundering. For example:
- a. three out of the four Suppliers had been incorporated in 2013²⁹² (i.e., only a few months before Kaloti started dealing with them), and the other one had been transferred to new owners in December 2012.²⁹³ (Notably in this regard, even Kaloti's own AML/CFT Manual identified as a red flag the fact that a supplier "is new and/or recently established."²⁹⁴);
 - b. none of the Suppliers had significant previous experience in gold export operations.²⁹⁵ (Again, Kaloti's own AML/CFT Manual identified as a red flag the fact that a "[s]upplier displays a lack of industry/business knowledge."²⁹⁶);

²⁹² ██████████ was incorporated in April 2013; ██████████ in July 2013; and ██████████ in August 2013. See Ex. R-0181, ██████████, retrieved on 25 May 2022, p. 2; Ex. R-0083, ██████████, retrieved on 25 May 2022, p. 2; Ex. R-0182, Corporation Registration of ██████████, retrieved on 25 May 2022, p. 2.

²⁹³ See Section II.B.2 above.

²⁹⁴ Ex. C-0025, KML AML/CFT Program Manual, p. 10.

²⁹⁵ ██████████ performed only two exports in November and December 2013; ██████████ only reported two exports between 2013 and 2014; ██████████ was incorporated in December 1993, but its first reported export was in May 2013; likewise, ██████████ first export took place in August 2013. See Ex. R-0183, ██████████, 2013 Cumulative Export Activity Report, retrieved on 17 May 2022, p. 1; Ex. R-0184, ██████████, 2013 Cumulative Export Activity Report, retrieved on 17 May 2022; Ex. R-0219, ██████████, 2014 Cumulative Export Activity Report, retrieved on 17 May 2022, p. 1; Ex. R-0185, Corporation Registration of ██████████, retrieved on 25 May 2022, p. 2; Ex. R-0186, ██████████, 2013 Cumulative Export Activity Report, retrieved on 17 May 2022, p. 1; Ex. R-0187, ██████████, 2013 Cumulative Export Activity Report, retrieved on 17 May 2022, p. 1; see also 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. 3 ("However, the background of Kaloti's client companies, reviewed by Convoca.pe, suggests that the refinery's anti-money laundering department did not examine the companies' lack of export activity before accepting their gold production.").

²⁹⁶ Ex. C-0025, KML AML/CFT Program Manual, p. 10.

- c. the Suppliers were incorporated with minimal share capital, and yet between 2013 and 2014 they had recorded more than USD 175 million in gold transactions;²⁹⁷
- d. some of the Suppliers had broad corporate purposes, ranging from mining services to the sale and purchase of all types of products, real estate assets, and casinos (which is another high-risk industry).²⁹⁸

These red flags alone would have required Kaloti to conduct enhanced due diligence on its Suppliers (i.e., to take even further steps to investigate the Suppliers' *bona fides*).²⁹⁹

167. The red flags were not hard to identify, and Kaloti could have done so with minimal effort. To illustrate, a Peruvian news outlet called Convoca ran an article on illegal gold for which it had conducted due diligence of the sort that Kaloti or any reputable gold trader is expected to do, and it immediately identified red flags concerning some of the Suppliers.³⁰⁰

²⁹⁷ ██████ share capital was approximately USD 2,700 (PEN 10,000) but in 2013 reported exports for more than USD 101,000,000; ██████ share capital was approximately USD 5,600 (PEN 20,658) but in 2013 and 2014 registered two exports for an overall sum of USD 1,190,365; ██████ share capital was approximately USD 13,400 (PEN 50,000) but also registered two exports for USD 1,941,837; ██████ exports significantly increased between May and November 2013 to over USD 73,000,000. See **Ex. R-0083**, Corporation Registration of ██████, retrieved on 25 May 2022, p. 3; **Ex. R-0187**, ██████, 2013 Cumulative Export Activity Report, retrieved on 17 May 2022; **Ex. R-0181**, Corporation Registration of ██████, retrieved on 25 May 2022, p. 3; **Ex. R-0184**, ██████, 2013 Cumulative Export Activity Report, retrieved on 17 May 2022; **Ex. R-0182**, Corporation Registration of ██████, retrieved on 25 May 2022, p. 2; **Ex. R-0183**, ██████, 2013 Cumulative Export Activity Report, retrieved on 17 May 2022; **Ex. R-0219**, ██████, 2014 Cumulative Export Activity Report, retrieved on 17 May 2022; **Ex. R-0186**, ██████, 2013 Cumulative Export Activity Report, retrieved on 17 May 2022.

²⁹⁸ **Ex. R-0185**, Corporation Registration of ██████, retrieved on 25 May 2022, p. 3.

²⁹⁹ **Ex. C-0025**, KML AML/CFT Program Manual, § 7.1.i. ("Proper identification of these 'red flags' is an essential component of KYC due diligence and assessing the relative risk factors associated with a given supplier").

³⁰⁰ **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

168. Further, basic research in publicly available registries in Peru would have revealed information about the Suppliers' shareholders and representatives,³⁰¹ and exposed the fact that at least some of the Suppliers had links to well-known criminals engaged in money laundering and drug trafficking. For example, [REDACTED] was co-founded by [REDACTED], cousin of [REDACTED] (alias [REDACTED]).³⁰² Press releases from early 2014 confirmed [REDACTED] relationship with [REDACTED],³⁰³ who (i) had spent time in prison in the 1990s for laundering proceeds of drug trafficking;³⁰⁴ (ii) had been the subject of an extradition request from the United States³⁰⁵; and (iii) was suspected of being part of an organized crime group.³⁰⁶
169. Kaloti's own exhibits show that [REDACTED] cousin, [REDACTED], acted as legal representative of [REDACTED].³⁰⁷ Despite this, Kaloti alleges that Shipment 4

Respondent's translation], p. 3 ("To curb questions about the gold's origin extracted from Peru, the owner of Kaloti Metals & Logistics, [REDACTED], asserted – in 2016 – that the backgrounds of its Peruvian suppliers were duly investigated . . . However, the background of Kaloti's client companies, reviewed by Convoca.pe, suggests that the refinery's anti-money laundering department did not examine the companies' lack of export activity before accepting their gold production.").

³⁰¹ See **Ex. R-0083**, Corporation Registration of [REDACTED] retrieved on 25 May 2022; **Ex. R-0181**, Corporation Registration of [REDACTED] retrieved on 25 May 2022; **Ex. R-0182**, Corporation Registration of [REDACTED], retrieved on 25 May 2022; **Ex. R-0185**, [REDACTED], retrieved on 25 May 2022.

³⁰² **Ex. R-0182**, Corporation Registration of [REDACTED], retrieved on 25 May 2022, p. 2; **Ex. C-0051**, [News articles and books cited by Kaloti], p. 37; see also **Ex. R-0188**, "Mitad de exportadoras de oro en la mira por minería ilegal," OJO PÚBLICO, 12 February 2014.

³⁰³ **Ex. R-0188**, "Mitad de exportadoras de oro en la mira por minería ilegal," OJO PÚBLICO, 12 February 2014, p. 2.

³⁰⁴ **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.

³⁰⁵ **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.

³⁰⁶ **Ex. R-0189**, "¿Quién fue [REDACTED] el investigado por narcotráfico y minería ilegal que falleció este sábado?," RPP NOTICIAS, 26 September 2020, p. 2.

³⁰⁷ **Ex. C-0008**, [REDACTED] document package, p. 42.

was immobilized “based on a preliminary investigation by Peru against a third party (unrelated to . . . [REDACTED]), [REDACTED]”³⁰⁸ (emphasis added). Such statement suggests either (i) that Kaloti is being disingenuous and feigning ignorance, or (ii) that, even at this late date, Kaloti has not conducted proper due diligence or a background check on the Suppliers. Whatever the case may be, Kaloti’s conduct is inexcusable, and falls far short of compliance with its legal obligations under Peruvian law.

170. There were numerous other red flags that Kaloti would have identified had it been reasonably diligent. For example, in February 2014, the media reported that [REDACTED] was part of a group of companies that were involved in money laundering through offshore companies, that had registered suspicious financial transactions, and that had exported outside of Peru many tons of gold of suspicious origin.³⁰⁹ This corporate structure included other companies that had supplied gold to Kaloti, such as Darsahn International Inc S.A.C. (which in fact was Kaloti’s largest supplier in 2013), and Axbridge Gold Corp.³¹⁰ The media reported that [REDACTED] shareholder, [REDACTED], was being investigated by Peruvian authorities for money laundering.³¹¹ By early 2014, the media had already reported enough information on this individual to enable any responsible and law-abiding person or company to question the legality of his activities, or at least to recognize the need to carry out enhanced due diligence on him.³¹²

³⁰⁸ Memorial, ¶ 49.

³⁰⁹ See **Ex. R-0188**, “*Mitad de exportadoras de oro en la mira por minería ilegal*,” OJO PÚBLICO, 12 February 2014, pp. 1-2.

³¹⁰ [REDACTED] supplied gold in 2013 and [REDACTED] supplied gold in 2012 and 2013. See **Ex. C-0030**, KML transaction summary of all purchases between 2012 and 2018, pp. 3 and 6.

³¹¹ See **Ex. R-0188**, “*Mitad de exportadoras de oro en la mira por minería ilegal*,” OJO PÚBLICO, 12 February 2014, pp. 1-2.

³¹² See *i.e.*, **Ex. R-0188**, “*Mitad de exportadoras de oro en la mira por minería ilegal*,” OJO PÚBLICO, 12 February 2014, p. 3 (“A key player in this story is [REDACTED] (42), owner of [REDACTED] and [REDACTED], created in 2013. This business manager - dedicated to printing and garment manufacturing businesses and with no experience in the industry - barely registers enough assets to justify the millionaire purchase of tons of gold he made in the last year.”).

laundering and fraud techniques between 2017 and 2018, such as “**falsifying invoices for the sales of gold**, when in reality it was the receipt of a large cash deposit.”³¹⁹ (Emphasis added).

173. Kaloti’s own exhibits confirm its poor compliance practices. For example, a presentation given by an external law firm to Kaloti had noted that “[a] sample of the 51 different precious metals sale transaction files [of Kaloti] for the period of 2011-12, revealed only 12% with completed files,”³²⁰ and “only 3 of the 30 customer files reviewed had the required documentations.”³²¹
174. In conclusion, all of the foregoing demonstrates unequivocally (i) that, in violation of its obligations under Peruvian law, Kaloti failed to conduct even minimal due diligence on the Suppliers and the Five Shipments, and had it done so it would have identified documents and facts that would have given pause to any reasonable gold purchaser; and (ii) that contrary to Kaloti’s arguments, SUNAT’s immobilization proceedings were reasonable, proportionate and well-founded. As a result, Kaloti is solely responsible for any loss that it may have suffered as a result of the immobilizations of the shipments.

C. Peru conducted criminal investigations and commenced judicial proceedings against the Suppliers

175. Continuing with its unsubstantiated conspiracy theories, Kaloti argues that Peru turned the SUNAT Immobilizations “into judicial anti-money laundering investigations against third parties unrelated to KML”,³²² speculating that Peru did so “presumably to buy time until a reason to effect a permanent seizure could be

³¹⁹ **Ex. R-0193**, “*Gold Dealers Sentenced for Financial Crimes and Gun Crimes*,” U.S. DEPARTMENT OF JUSTICE, 3 December 2021, p. 2; *see* **Ex. C-0030**, KML transaction summary of all purchases between 2012 and 2018, pp. 12, 15, 17, 20 (listing GGEX and Global Exchange LLC as Kaloti’s suppliers).

³²⁰ **Ex. C-0034**, Diaz Reus Attorneys & Solicitors International Practice - KML staff AML training, p. 30.

³²¹ **Ex. C-0034**, Diaz Reus Attorneys & Solicitors International Practice - KML staff AML training, p. 30.

³²² Memorial, ¶ 55.

found.”³²³ According to Kaloti, Peru has placed “KML in legal limbo by not charging it with any crimes . . . while denying it the opportunity to challenge the . . . seizures” in the four ongoing criminal proceedings against the Suppliers³²⁴ and/or their representatives.³²⁵ As explained in this Section, Kaloti’s arguments are utterly baseless and lack any merit.

176. Contrary to Kaloti’s contentions, the Prosecutor’s Office decided to open investigations into the Suppliers³²⁶ and/or their representatives based on (i) objective indicia of money laundering offenses identified in SUNAT’s Reports concerning the inspections of Shipments 1 to 4, and (ii) the State Attorney’s requests to open such preliminary investigations. This is discussed in more detail in **Section II.C.1** below.
177. The Prosecutor’s Office then requested, and obtained, four orders from a Criminal Court for the precautionary seizure of each of Shipments 1 to 4.³²⁷ The objective of the Precautionary Seizures was not, as Kaloti speculates, “to buy time,”³²⁸ but rather to avoid the dissipation of the assets contained in Shipments 1 to 4 pending further criminal investigation, since such assets were suspected of being the proceeds of criminal activity. This is discussed in more detail in **Section II.C.2** below.
178. The Criminal Courts³²⁹ subsequently ordered the initiation of the Criminal Proceedings against the Suppliers and/or their representatives for alleged money

³²³ Memorial, ¶ 55.

³²⁴ The sole exception was [REDACTED] Criminal Proceedings, as those were initiated solely against the representatives, not against the Supplier itself (which was [REDACTED]).

³²⁵ Memorial, ¶ 2.

³²⁶ The sole exception was [REDACTED] Preliminary Investigation, as this was initiated solely against the representatives, not against the Supplier itself (which was [REDACTED]).

³²⁷ **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, April 30, 2014; **Ex. R-0136**, Precautionary Seizure against Shipment 4, 1 May 2014.

³²⁸ Memorial, ¶ 55.

³²⁹ During the course of the preliminary investigations and Criminal Proceedings several courts at different times have intervened in and conducted each of the four proceedings. Consequently, in this Counter-Memorial Peru will simply refer to the “**Criminal Courts**,” which should be understood to comprehend the competent court at the relevant time.

laundering. Based on their independent analyses of the evidence and of the applicable Peruvian law rules, the Criminal Courts also ordered that the previously granted Precautionary Seizures remain in place—not only to avoid the dissipation of the seized assets, but also (amongst other reasons) to ensure that any final judgments in the Criminal Proceedings could be enforced. This is discussed in more detail in **Section II.C.3** below.

179. In parallel, Kaloti filed multiple requests before the Prosecutor’s Office and the Criminal Courts requesting that Shipments 2 and 3 be returned to Kaloti. However, such requests were unsuccessful, because Kaloti (i) failed to abide by the procedural rules applicable to the intervention of third parties in criminal proceedings, and (ii) failed to prove that Kaloti was in fact the legal owner of those shipments. Kaloti’s argument that Peru denied it the opportunity to challenge the Precautionary Seizures is therefore misleading. This is discussed in more detail in **Section II.C.4** below.
180. The Criminal Proceedings are still ongoing, and the Criminal Courts have confirmed that, as of today and based on the evidence on the record, there are still strong indicia that the Suppliers were involved in money laundering, specifically in relation to the Five Shipments. Therefore, until the Criminal Courts render their final judgments in the Criminal Proceedings, the Precautionary Seizures must remain in place. Should the Criminal Courts eventually confirm that the Suppliers have committed a criminal offence, the asset *seizure* would become an asset *forfeiture*, in accordance with Peruvian law. This is discussed in more detail in **Section II.C.5** below.
181. Contrary to Kaloti’s arguments, this does not mean that “Peru’s seizure of KML’s assets has become *de facto* permanent without a court order making it so.”³³⁰ To the contrary, the seizure will remain temporary until such time as the relevant courts make a ruling—at which time the assets either will be liberated or will default to the State, depending upon whether the courts determine that such assets were involved in, or the product of, criminal activity. It bears noting, moreover, that there is nothing exceptional about this type of forfeiture to the State of assets involved in criminal

³³⁰ Memorial, ¶ 117.

activity, as such forfeitures occur routinely in most (if not all) jurisdictions around the globe.

182. Kaloti also misrepresents the facts regarding Shipment 5. The precautionary measure concerning that shipment was granted in a *civil* proceeding brought by ██████ against Kaloti (“**Civil Attachment**”). Kaloti elided this fact from the Memorial. The latest judgment issued by the court in such civil proceeding, dated 14 June 2022, established that Shipment 5 belongs to ██████, and that Kaloti does not have any property rights over that shipment. Kaloti is not alleging any denial of justice in the relevant civil proceeding, and Peru thus cannot be held responsible for the outcome of what amounts to a private dispute between Kaloti and ██████. This is discussed in more detail in **Section II.C.6** below.

183. Kaloti also complains that Peru mentioned it in investigations concerning alleged money laundering schemes in relation to illegal mining.³³¹ Peru did not simply mention Kaloti in those investigations, but included it as an investigated party. The reference to Kaloti in such investigations was fully justified, because Kaloti had purchased large volumes of gold from multiple suppliers who in turn were suspected of having laundered money through the sale of illegally mined gold. In other words, Kaloti’s involvement in those investigations was the result of its own questionable business choices. This is discussed in more detail in **Section II.C.7** below.

1. *The Prosecutor’s Office found sufficient evidence to open preliminary criminal investigations*

184. Between 23 January 2014 and 28 April 2014, the State Attorney’s Office requested that the Prosecutor’s Office open preliminary investigations into the Suppliers and/or their representatives. Such requests were based on (i) the evidence contained in SUNAT’s Reports (*see Section II.B* above), and (ii) additional information identified by the State Attorney’s Office, which included the following objective indicia of criminal activities:

³³¹ Memorial, ¶¶ 55, 58.

- a. [REDACTED]: [REDACTED], [REDACTED] general manager, had stated in four written submissions dated 2 December 2013, that the gold in Shipment 1 had come from a mine called “Mi Buena Suerte,” with respect to which [REDACTED] had concession rights.³³² However, official information from the concession’s registry showed that [REDACTED] in fact was *not* the concession holder of “Mi Buena Suerte.”³³³ In addition, the State Attorney’s Office identified various red flags typical of companies involved in money laundering. For example, [REDACTED] share capital only amounted to PEN 168,800 (approximately USD 45,500), but in 2013 the company had reported gold exports worth more than USD 73 million.³³⁴ Further, [REDACTED] had previously exported gold to an Italian company that itself was suspected of laundering money for criminal organizations involved in drug trafficking;³³⁵
- b. [REDACTED]: in January 2014, [REDACTED] had allegedly sold gold to Kaloti worth USD 3,605,304.30.³³⁶ However, that sale price was *below* the cost of the gold. The fact that such price was lower than the cost allegedly incurred by [REDACTED] to acquire the gold (USD 3,674,351.45),³³⁷ was a red flag of money laundering. In addition, the press had linked [REDACTED] to [REDACTED], a company under investigation for buying high volumes of illegal gold;³³⁸
- c. [REDACTED]: a customs officer had visited the site from which [REDACTED]

³³² 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.

³³³ 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.

³³⁴ 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, ¶ 10.

³³⁵ 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, ¶ 13.

³³⁶ Ex. R-0082, State Attorney’s Request for the Initiation of [REDACTED] Preliminary Investigation for the Crime of Money Laundering, 7 March 2014, p. 8, ¶¶ 11, 13; *see also* Memorial, ¶ 39.

³³⁷ Ex. R-0082, State Attorney’s Request for the Initiation of [REDACTED] Preliminary Investigation for the Crime of Money Laundering, 7 March 2014, p. 8, ¶ 13.

³³⁸ Ex. R-0082, State Attorney’s Request for the Initiation of [REDACTED] Preliminary Investigation for the Crime of Money Laundering, 7 March 2014, pp. 7-8.

claimed to have extracted the gold in Shipment 3, and found that such site was a rural, undeveloped area “where there [were] neither camps nor mines”³³⁹ In addition, ██████████ shareholders and general manager were engaged in economic activities that were wholly unrelated to gold trading or production.³⁴⁰ Further still, none of them had registered any foreign trade activity with foreign entities, which showed that they had no experience as gold exporters;³⁴¹ and

- d. ██████████: Mr. ██████████, ██████████ representative, had links with ██████████ and ██████████,³⁴² both of whom were being prosecuted for money laundering offenses connected to illegal mining.³⁴³ Both were known to have incorporated companies that, immediately after incorporation, exported large volumes of illegally mined gold³⁴⁴ – a classic red flag for money laundering. ██████████ seemed to be following the same pattern as the companies formed by ██████████ and ██████████: within a mere four months from its incorporation

³³⁹ Ex. C-0068, ██████████. [State Attorney’s] Request for Preliminary Investigation for the crime of money laundering filed by the Prosecutor’s Office Specializing in Money Laundering Crimes and Loss of Domain Proceedings before the Ninth Provincial Criminal Prosecutor’s Office of Callao, p. 4, ¶ 4.4 (“[L]ugar agreste donde no hay presencia de campamentos ni de minas . . .”).

³⁴⁰ Ex. C-0068, ██████████. [State Attorney’s] Request for Preliminary Investigation for the crime of money laundering filed by the Public Prosecutor’s Office Specializing in Money Laundering Crimes and Loss of Domain Proceedings before the Ninth Provincial Criminal Prosecutor’s Office of Callao, pp. 4-5, ¶¶ 4.5-4.8.

³⁴¹ Ex. C-0068, ██████████. [State Attorney’s] Request for Preliminary Investigation for the crime of money laundering filed by the Public Prosecutor’s Office Specializing in Money Laundering Crimes and Loss of Domain Proceedings before the Ninth Provincial Criminal Prosecutor’s Office of Callao, pp. 4-5, ¶¶ 4.5-4.8.

³⁴² On 16 October 2008, Mr. ██████████ was appointed manager of Business Investments S.A.C., whose founding shareholder, director and general manager was ██████████. In turn, the corporate address of Business Investments S.A.C. was also that of Comercializadora de Minerales Rivero S.A.C., whose founding shareholder and general manager was ██████████. See Ex. R-0084, State Attorney’s Request for the Initiation of ██████████ Preliminary Investigation for the Crime of Money Laundering, 18 March 2014, p. 5, ¶ 12.

³⁴³ Ex. R-0084, State Attorney’s Request for the Initiation of ██████████ Preliminary Investigation for the Crime of Money Laundering, 18 March 2014, p. 6, ¶¶ 16-18.

³⁴⁴ Ex. R-0084, State Attorneys’ Request for the Initiation of ██████████ Preliminary Investigation for the Crime of Money Laundering, 18 March 2014, p. 7, ¶ 20.

in September 2013, ██████ already had sold gold to Kaloti worth more than USD 4.6 million.³⁴⁵

185. After considering the objective indicia of criminal activities identified by the State Attorney's Office described above and in SUNAT's Reports, between 27 January and 21 March 2014 the Prosecutor's Office opened preliminary investigations on each of the Suppliers and/or their legal representatives, for alleged money laundering offenses connected to illegal mining ("█████ Investigation", "█████ Investigation", "█████ Investigation", and "█████ Investigation," respectively).³⁴⁶
186. Kaloti does not appear to contest the propriety of the opening of such criminal investigations against the Suppliers and/or their representatives.³⁴⁷ Instead, Kaloti complains that it was unfairly affected by the Precautionary Seizures ordered in the context of the criminal investigations against the Suppliers and/or their representatives; according to Kaloti, it had no connection with the investigations or Criminal Proceedings relating to the Suppliers.³⁴⁸ However, that argument by Kaloti is disingenuous. As shown above, the purpose of the criminal investigations was precisely to ascertain whether there were sufficient indicia that the Suppliers and/or their representatives had laundered money through the sale to Kaloti of illegally mined gold. As explained in the following Section, the same indicia that had prompted the opening of the preliminary investigations subsequently also led the

³⁴⁵ Ex. R-0084, State Attorney's Request for the Initiation of ██████ Preliminary Investigation for the Crime of Money Laundering, 18 March 2014, p. 5, ¶ 12.

³⁴⁶ Ex. R-0087, Prosecutor's Office Initiation of ██████ Preliminary Investigation, Intake No. 37-2014, 27 January 2014, pp. 22-23; Ex. R-0095, Prosecutor's Office Initiation of ██████ Preliminary Investigation, Intake No. 140-2014, 13 March 2014; Ex. R-0099, Prosecutor's Office Initiation of ██████ Preliminary Investigation, Intake No. 187-2014, 21 April 2014; Ex. R-0101, Prosecutor's Office Initiation of ██████ Preliminary Investigation, Intake No. 151-2014, 21 March 2014. In the case of ██████, the Prosecutor's Office decided to initiate a preliminary investigation even before receiving the State's Attorney's request.

³⁴⁷ Memorial, ¶ 53 ("If Peru had diligently conducted and concluded the investigations involving KML's five purchases of gold temporarily seized in 2013-14, no breach of the TPA would have occurred.").

³⁴⁸ Memorial, ¶ 116.

Prosecutor's Office to request the Precautionary Seizures. There is therefore a manifest connection between (i) the investigations into the Suppliers, (ii) the Precautionary Seizures, and (iii) Kaloti.

2. *The Criminal Courts granted the Precautionary Seizures, in accordance with Peruvian law*

187. Kaloti essentially claims that Peru acted arbitrarily by failing to return to Kaloti the gold contained in Shipments 1 to 4 once the SUNAT Immobilizations had been lifted.³⁴⁹ According to Kaloti, by ordering the Precautionary Seizures, the Criminal Courts imposed "a criminal sanction on an investor [i.e., Kaloti] which was (1) never charged; (2) tried; or (3) convicted of having committed a crime."³⁵⁰ As Peru demonstrates below, however, these claims misrepresent Peruvian law and disregard the fact that the Precautionary Seizures were entirely warranted (as explained above), as well as appropriately put in place pursuant to Peruvian law (as explained below). They also conveniently ignore Kaloti's own responsibility for failing (i) to conduct proper due diligence on the Suppliers, and (ii) to verify the lawful origin of the gold.
188. Law No. 27379 on the Procedure for the Adoption of Exceptional Measures for the Limitation of Rights in Preliminary Investigations ("**Law No. 27379**")³⁵¹ provides that, in the context of criminal investigations, the Prosecutor's Office may request that the Criminal Courts order the precautionary seizure of assets potentially related to, or derived from, crimes.³⁵² As Peru's legal expert Prof. Missiego explains, that

³⁴⁹ Memorial, § II.D.d.

³⁵⁰ Memorial, ¶ 112.

³⁵¹ See **Ex. R-0106**, Law No. 27379, 20 December 2000 [*Re-submitted version of CL-0004, with Respondent's translation*].

³⁵² **Ex. R-0106**, Law No. 27379, 20 December 2000 [*Re-submitted version of CL-0004, with Respondent's translation*], Art. 2(3) ("The Provincial Prosecutor, in cases of strict necessity and urgency, may request from the Criminal Judge the following measures limiting rights: 3. Seizure and/or confiscation of the objects of the criminal offense or the instruments with which it was executed as well as the proceeds, be they be goods, money, profits or any proceeds derived from said offense, be they in the possession of natural or juridical persons. In the case of objects and proceeds of the criminal offense or the instruments or means with which the offense has been executed, the Criminal Judge shall also proceed in accordance with the provisions of other special rules.")

precautionary seizure serves several purposes: (i) prevents the dissipation of proceeds of crime; (ii) preserves evidence that is relevant to the investigation(s); and/or (iii) ensures the enforceability of any court order for the confiscation of such assets at the end of the relevant criminal proceeding, if a crime has been found.³⁵³

189. The above-mentioned indicia of criminal activities identified by SUNAT and the State Attorney's Office suggested that Shipments 1 to 4 were part of a money laundering scheme, and/or have originated from illegal mining.³⁵⁴ As a result, such indicia led the Prosecutor's Office to request, and the Criminal Courts to order, the Precautionary Seizures.³⁵⁵
190. Pursuant to Peruvian law and jurisprudence, any precautionary measure must fulfil two requirements: (i) *fumus comissi delicti* (i.e., *prima facie* evidence of the commission of a crime), and (ii) *periculum in mora* (i.e., prejudice ("danger") in delay).³⁵⁶ As Prof. Missiego explains, establishing *fumus comissi delicti* requires proving "*sufficient indicia to infer, with a certain degree of certainty, of the existence of the crime and the link between the subjects and/or objects under investigation.*"³⁵⁷ And establishing *periculum in mora* requires showing that there is a well-founded risk that the failure to take

³⁵³ Missiego Report, ¶¶ 90, 154.

³⁵⁴ See, for example, **Ex. R-0132**, Prosecutor's Request for Precautionary Measure against Shipment 1, 20 February 2014, p. 1 ("I request your office to issue a restrictive measure of seizure of gold bars weighing 111.545 kg, . . . goods that would constitute proceeds of Money Laundering, apparently derived from Illegal Mining"); see also **Ex. R-0133**, Prosecutor's Request for Precautionary Measure against Shipment 2, 24 March 2014, p. 1; **Ex. R-0190**, Prosecutor's Request for Precautionary Seizure against Shipment 3, 21 April 2014, p. 1.

³⁵⁵ In particular, the Criminal Courts ordered a precautionary seizure of (i) Shipment 1 (██████████ Investigation) on 21 February 2014; (ii) Shipment 2 (██████████ Investigation) on 25 March 2014; (iii) Shipment 3 (██████████ Investigation) on 30 April 2014; and (iv) Shipment 4 (██████████ Investigation) on 1 May 2014. 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**, ██████████ Ruling of the Superior Court of Justice of Callao – Permanent Criminal Court, April 30, 2014; **Ex. R-0136**, Precautionary Seizure against Shipment 4, 1 May 2014.

³⁵⁶ Missiego Report, ¶ 82.

³⁵⁷ Missiego Report, ¶ 82 ("*I[ndicios suficientes que permitan inferir, con un cierto grado de certeza, la existencia del delito y la vinculación entre los sujetos y/o objetos investigados.*").

precautionary measures might frustrate the objective of the criminal proceedings and the enforcement of the final judgment.³⁵⁸

191. The Precautionary Seizures met both of the aforementioned requirements.³⁵⁹ In all four of the cases regarding the Suppliers, the Criminal Court³⁶⁰ found that the indicia of criminal activities identified by the Prosecutor's Office (as set out in **Section II.C.1** above) met the *fumus delicti comissi* requirement.³⁶¹
192. Additionally, in its order granting the precautionary seizure of Shipment 4 in the [REDACTED] Investigation, that same Criminal Court stressed that although Kaloti had submitted documents alleging that it was the owner of that shipment, it had been negligent in its due diligence:

[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

³⁵⁸ Missiego Report, ¶ 82 (“[A] risk that if the measure is not taken, the proceeding will not proceed properly, for example due to the risk that certain evidence disappears or that it will not be possible to obtain the payment of civil damages . . .”).

³⁵⁹ Missiego Report, ¶¶ 114–125.

³⁶⁰ In all four cases, the Preliminary Seizures were granted by the same Criminal Court (this is, the *Juzgado de Turno Permanene de la Corte Superior de Justicia del Callao*).

³⁶¹ **Ex. R-0134**, Precautionary Seizure against Shipment 1, 21 February 2014, p. 3 (“That according to the proceedings, contained in the present investigation, there are sufficient elements of conviction that allow . . . to suppose, making a calculation of probability, that the goods . . . would constitute proceeds of Money Laundering, derived from Illegal Mining.”); **Ex. R-0135**, Precautionary Seizure against Shipment 2, 25 March 2014, p. 2 (“The objective data detailed above would indicate plausible facts and, therefore, justify the granting of the [precautionary] measure that has been requested.”); **Ex. C-0090**, [REDACTED]. Ruling of the Superior Court of Justice of Callao – Permanent Criminal Court, April 30, 2014, p. 3 (“Pursuant to all facts contained in this investigation, we can evidence enough elements of proof allowing the Prosecutor's Office to assume, by making a probability calculus, that the assets . . . would be an outcome from a Money Laundering crime deriving from unlawful mining.”); **Ex. R-0136**, Precautionary Seizure against Shipment 4, 1 May 2014, p. 2 (“In the present case, although the preliminary investigation has just begun, it is also that the State's Attorney Office . . . and SUNAT have presented a series of reasonable facts that would indicate that the approximately **126.61 kg of gold ore that** [REDACTED] [REDACTED] intended to export abroad came from illegal mining, and therefore would make the granting of a precautionary seizure reasonable.” (emphasis in original)).

illegally and causes considerable damage to the environment.³⁶²
(Emphasis added)

193. Concerning the second requirement (*periculum in mora*), the Criminal Court found that, in all four of the Criminal Proceedings regarding the Suppliers, the requirement had likewise been met. The Criminal Court noted 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.”³⁶³ Thus, the Criminal Court concluded that, in the absence of a precautionary measure to ensure that the proceeds of crime are not dissipated, it could “result in their disposal or their transfer to other persons, which is why this [precautionary] measure is necessary.”³⁶⁴
194. The resolution issued by the Criminal Court in the [REDACTED] Investigation is particularly illustrative as to the need for, and adequacy of, the precautionary seizure over the shipments (in that case, over Shipment 2). The Criminal Court noted in that regard that the relevant precautionary seizure was “necessary for the purpose of ensuring the goods [Shipment 2] remain[ed] in safe custody in order to avoid their disposal by the defendants or another representative of the [REDACTED] company.”³⁶⁵ In that context,

³⁶² **Ex. R-0136**, Precautionary Seizure against Shipment 4, 1 May 2014, p. 3 (“[Kaloti] no ha presentado ninguna instrumental acreditado y/o sustentado haber adquirido el mineral en mención de Buena fe y tomando las precauciones del caso para evitar ser utilizado como agente lavador, mas aun si conforme es de público conocimiento en el Perú hay zonas en donde se extrae mineral en forma ilegal y causando cuantiosos daños en el medio ambiente”).

³⁶³ **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.

³⁶⁴ **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

³⁶⁵ **Ex. R-0135**, Precautionary Seizure against Shipment 2, 25 March 2014, p. 2 (“resulta necesaria para los efectos de asegurar su permanencia y ponerlos a buen recaudo y lejos de la posibilidad de disposición”).

the court highlighted that the assets whose seizure had been requested were suspected of being the proceeds of crime, and that therefore there was a risk that the assets

will be disposed of, hidden or disappeared, especially considering that the gold or goods to be seized, were [previously] subject to an immobilization in circumstances where they were going to be exported abroad (Miami - U.S.A.) pursuant to a foreign trade transaction (sale and purchase) . . .³⁶⁶
(emphasis added and in original)

195. Contrary to Kaloti's baseless assertion, the Precautionary Seizures ordered in the Criminal Proceedings do not amount to a "criminal sanction"³⁶⁷ against Kaloti. Under Peruvian law, precautionary seizures of assets are issued with respect to any and all suspected proceeds of a crime—irrespective of whether or not the legal owner (or alleged legal owner) of the seized assets is a defendant in the underlying criminal proceeding.³⁶⁸ Indeed, Article 94 of the Code of Criminal Procedure even establishes that the precautionary seizure of assets that have been obtained through crime "shall be carried out even when they are in the possession of **third parties**, whether natural or legal."³⁶⁹ (emphasis added). Naturally, the seizure of third parties' assets is essential (and common) in money laundering investigations—not just in Peru, but in most if not all jurisdictions—for the simple reason that criminals frequently transfer the proceeds of their crimes to other individuals, precisely to conceal their unlawful origin.³⁷⁰ Kaloti's legal expert, ██████████, admits that in Peru—like in other jurisdictions—"seizure for purposes of confiscation is intended to prevent. . .the

³⁶⁶ **Ex. R-0135**, Precautionary Seizure against Shipment 2, 25 March 2014, p. 2 ("*van a ser dispuestos, ocultados o desaparecidos, tanto más si se tiene en cuenta que el oro o mercancía que el oro o mercancía que se pretende incautar, fue objeto [previamente] de inmovilización, en circunstancias que si iban a ser exportados al extranjero (Miami - EE.UU.) en una operación de comercio exterior (compra venta)*") (emphasis added).

³⁶⁷ Memorial, ¶ 112.

³⁶⁸ **Ex. R-0223**, Law No. 9024, Criminal Procedure Code, 23 November 1939 [Re-submitted version of CL-0006, with Respondent's translation], Art. 94; Missiego Report, ¶ 99; see also **Ex. R-0136**, Precautionary Seizure against Shipment 4, 1 May 2014, p. 3.

³⁶⁹ Missiego Report, ¶¶ 99-102.

³⁷⁰ Missiego Report, ¶¶ 100, 142; **Ex. R-0137**, "██████████ en Panorama - Incautación de la vivienda de Ollanta Humala y Nadine Heredia," YOUTUBE, 14 May 2018.

disappearance of the illicit asset or the benefit of the asset. [Precautionary seizure] is absolutely usual in cases related to organized crime in general, and in money laundering as well.”³⁷¹

196. In sum, the Precautionary Seizures were fully justified, and they cannot in any way be considered a “criminal sanction” against Kaloti.

3. *The Criminal Courts initiated the Criminal Proceedings in accordance with Peruvian law*

197. Contrary to the arguments advanced by Kaloti and its witnesses in this case,³⁷² the decisions by the Criminal Courts to initiate the Criminal Proceedings against the Suppliers and/or their representatives, and to maintain the Precautionary Seizures, were based on ample evidence of money laundering and illegal mining.

198. Pursuant to Peruvian law, if a preliminary investigation reveals sufficient indicia of criminal activities, the Prosecutor’s Office must file a criminal complaint (*Formalización de Denuncia*) before the competent criminal court.³⁷³ If that court concludes that there are sufficient indicia of criminal activities and the applicable legal requirements have been met,³⁷⁴ it issues a decision initiating judicial criminal proceedings (*Auto de Apertura de Instrucción*). In that decision, the criminal court also must decide whether it maintains or lifts any precautionary measure that may have

³⁷¹ **Ex. R-0137**, “██████████ en Panorama – Incautación de la vivienda de Ollanta Humala y Nadine Heredia,” YOUTUBE, 14 May 2018, 1:35 and 2:30 (“La incautación con fines de decomiso, yo te quito el bien porque yo creo Fiscal que tu bien tiene origen delictivo y lo que quiero evitar es que tú lo vendas, lo transfieras, lo liquides, es decir que desaparezca ese bien ilícito o que goces del bien. [La incautación] es absolutamente usual en casos vinculados a crimen organizado en general es absolutamente usual, en lavado también.”).

³⁷² See, e.g., ██████████ Witness Statement, ¶ 49.

³⁷³ Missiego Report, ¶ 65.

³⁷⁴ Missiego Report, ¶¶ 67–68 (“(i) “the existence of sufficient indicia revealing the existence of a crime” (ii) “the identification of the alleged perpetrator of the act,” and (iii) “the verification that there is no cause for termination that would prevent the continuation of the proceeding.”; **Ex. R-0223**, Law No. 9024, Criminal Procedure Code, 23 November 1939 [Re-submitted version of CL-0006, with Respondent’s translation], Art. 77.

been previously granted, during the preliminary investigations.³⁷⁵ Precautionary seizures and other precautionary measures are interlocutory in nature and therefore may remain in force throughout the criminal proceeding.³⁷⁶

199. In this case, the Prosecutor’s Office conducted thorough investigations and found sufficient indicia of money laundering offenses in relation to the four Suppliers. Therefore, as summarized in the following chart, each of the four preliminary criminal investigations led to (i) the filing of a criminal complaint by the Prosecutor’s Office before the Criminal Courts, and (ii) the initiation of criminal proceedings against the corresponding Suppliers and/or their respective legal representatives (“**██████████ Criminal Proceeding**”, “**██████████ Criminal Proceeding**”, “**██████████ Criminal Proceeding**”, and “**██████████ Criminal Proceeding**”).

Supplier	Preliminary investigation	Criminal complaint	Initiation of criminal proceeding	Defendants	Criminal offence
██████████	27 January 2014 ³⁷⁷	19 Feb 2015 ³⁷⁸	16 March 2015 ³⁷⁹	██████████	Money laundering
██████████	13 March 2014 ³⁸¹	26 March 2015 ³⁸²	14 May 2015 ³⁸³	██████████	Money laundering

³⁷⁵ **Ex. R-0106**, Law No. 27379, 20 December 2000 [*Re-submitted version of CL-0004, with Respondent’s translation*], Art. 6.

³⁷⁶ Missiego Report, ¶¶ 94–96, 120–122.

³⁷⁷ **Ex. R-0087**, Prosecutor’s Office Initiation of ██████████ Preliminary Investigation, Intake No. 37-2014, 27 January 2014, p. 1.

³⁷⁸ **Ex. R-0138**, Criminal Complaint No. 169-2014, ██████████ Case, 19 February 2015.

³⁷⁹ **Ex. R-0139**, Resolution No. 1: Order Initiating Criminal Proceedings, ██████████ Case, 16 March 2015.

³⁸⁰ ██████████, ██████████, ██████████.

³⁸¹ **Ex. R-0095**, Prosecutor’s Office Initiation of ██████████ Preliminary Investigation, Intake No. 140-2014, 13 March 2014, p. 1.

³⁸² **Ex. R-0164**, Criminal Complaint No. 382-2014, ██████████ Case, 11 March 2015.

³⁸³ **Ex. R-0145**, Resolution No. 1: Order Initiating Criminal Proceedings, ██████████ Case, 14 May 2015.

Supplier	Preliminary investigation	Criminal complaint	Initiation of criminal proceeding	Defendants	Criminal offence
█	21 April 2014 ³⁸⁴	27 August 2014 ³⁸⁵	9 September 2014 ³⁸⁶	█	Money laundering
█	21 March 2014 ³⁸⁷	30 January 2015 ³⁸⁸	10 March 2015 ³⁸⁹	█	Money laundering

200. In each case, the Criminal Courts decided to maintain the Precautionary Seizures, which had been issued – during the preliminary investigation phase – with respect to Shipments 1 to 4.³⁹¹

201. The following paragraphs provide a small but illustrative selection of the objective and compelling evidence underlying the Criminal Courts’ decisions to (i) initiate the Criminal Proceedings, and (ii) maintain the Precautionary Seizures granted during the preliminary criminal investigations.

a. █ (Shipment 1)

202. The evidence underlying the Criminal Court’s decision to initiate the █ Criminal

³⁸⁴ Ex. R-0099, Prosecutor’s Office Initiation of █ Preliminary Investigation, Intake No. 187-2014, 21 April 2014, p. 1.

³⁸⁵ Ex. R-0148, Criminal Complaint No. 187-2014, █ Case, 27 August 2014.

³⁸⁶ Ex. R-0224, Resolution No. 1: Order Initiating Criminal Proceedings, █ Case, 9 September 2014 [*Re-submitted version of C-0087, with Respondent’s translation*].

³⁸⁷ Ex. R-0101, Prosecutor’s Office Initiation of █ Preliminary Investigation, Intake No. 151-2014, 21 March 2014.

³⁸⁸ Ex. R-0149, Criminal Complaint No. 398-2014, █ Case, 30 January 2015.

³⁸⁹ Ex. R-0150, Resolution No. 1: Order Initiating Criminal Proceedings, █ Case, 10 March 2015.

³⁹⁰ █, █, and █, Agencia de Aduana Mega Customs Logistic SAC.

³⁹¹ Ex. R-0139, Resolution No. 1: Order Initiating Criminal Proceedings, █ Case, 16 March 2015 ; Ex. R-0145, Resolution No. 1: Order Initiating Criminal Proceedings, █ Case, 14 May 2015; see Ex. R-0224, Resolution No. 1: Order Initiating Criminal Proceedings, █ Case, 9 September 2014 [*Re-submitted version of C-0087, with Respondent’s translation*]; Ex. R-0150, Resolution No. 1: Order Initiating Criminal Proceedings, █ Case, 10 March 2015.

Proceeding included:

- a. an on-site inspection report of the mine from which [REDACTED] had allegedly extracted Shipment 1 (the “Mi Buena Suerte” mine), which confirmed that: (i) “[t]here [were] no recent tailings or residues resulting from metallurgic processes that could prove any gold treatment in the area;”³⁹² (ii) “[t]he new equipment found in the area had not been installed;”³⁹³ and (iii) “the gold processing plant . . . [was] inoperative.”³⁹⁴ In other words, there were multiple indicia suggesting that there had been no recent mining activity at the “Mi Buena Suerte” mine, and that [REDACTED] was therefore lying when it claimed to have mined Shipment 1 from that site;
- b. communications from the relevant authorities that confirmed that [REDACTED] and its legal representative, [REDACTED] did not have any mining concession rights, any exploitation or assignment contract, or any links to the “Mi Buena Suerte” mining concession;³⁹⁵ and
- c. a submission from the registered holder of the “Mi Buena Suerte” mining concession which explained that such concession holder had not signed any contract that would allow [REDACTED], or any other party, to extract or commercialize gold from that mine.³⁹⁶

³⁹² **Ex. R-0139**, Resolution No. 1: Order Initiating Criminal Proceedings, [REDACTED] Case, 16 March 2015, p. 14 (“*No existen relaves/ residuos recientes de procesos metalúrgicos que prueben que se haya beneficiado minerales de oro en el área inspeccionada.*”)

³⁹³ **Ex. R-0139**, Resolution No. 1: Order Initiating Criminal Proceedings, [REDACTED] Case, 16 March 2015, p. 14 (“*Los equipos nuevos encontrados en el área instalada no están instaladas.*”)).

³⁹⁴ **Ex. R-0139**, Resolution No. 1: Order Initiating Criminal Proceedings, [REDACTED] Case, 16 March 2015, p. 14 (“*La planta de beneficio ubicada en el margen derecho del río Viseas, se encuentra en estado inoperativo . . .*”)).

³⁹⁵ **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.

³⁹⁶ **Ex. R-0139**, Resolution No. 1: Order Initiating Criminal Proceedings, [REDACTED] Case, 16 March 2015, p. 12 (“[T]he brief submitted by SOCIEDAD MINERA TRECE BARRAS, which expressly

203. Based on the above and additional evidence, on 16 March 2015 the Criminal Court ordered the precautionary seizure of Shipment 1, in order to prevent dissipation of the assets contained therein.³⁹⁷ Such precautionary seizure remains in force to date.

b. [REDACTED] (Shipment 2)

204. The evidence underlying the Criminal Court's decision to initiate the [REDACTED] Criminal Proceeding included:

- a. statements from [REDACTED] alleged suppliers confirming that they: (i) did not know any of [REDACTED] representatives or employees;³⁹⁸ (ii) had never been involved in the extraction of gold;³⁹⁹ and (iii) did not recognize as theirs the fingerprints and signatures that had been included (under their respective names) in a sworn statement that was submitted by [REDACTED] to SUNAT as purported attestation of the lawful origin of Shipment 2;⁴⁰⁰
- b. an expert opinion from the Peruvian Police that concluded that the fingerprints in that sworn statement did not match the fingerprints of the three alleged suppliers;⁴⁰¹

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.

³⁹⁷ **Ex. R-0139**, Resolution No. 1: Order Initiating Criminal Proceedings, [REDACTED] Case, 16 March 2015, p. 19.

³⁹⁸ **Ex. R-0145**, Resolution No. 1: Order Initiating Criminal Proceedings, [REDACTED] Case, 14 May 2015, pp. 9-10 (Statements of [REDACTED]).

³⁹⁹ **Ex. R-0145**, Resolution No. 1: Order Initiating Criminal Proceedings, [REDACTED] Case, 14 May 2015, pp. 9-10 (Statements of [REDACTED]).

⁴⁰⁰ **Ex. R-0145**, Resolution No. 1: Order Initiating Criminal Proceedings, [REDACTED] Case, 14 May 2015, pp. 3, 9-10 ([REDACTED]).

⁴⁰¹ **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

- c. a report issued by the Regional Office of Energy and Mining (*Dirección Regional de Energía y Minas* or “DREM”) of the Puno region that concluded that one of the other mines from which ██████ allegedly obtained the gold – the “Medalid IV” mine – was “extinct”,⁴⁰² such that no gold could have been extracted from that mine;
- d. a statement from a supplier that allegedly had extracted the gold from the Medalid IV mine admitting that, upon the request of one of his relatives, he had falsely stated that he had extracted gold from that mine, and that in reality he did not even know ██████ representatives;⁴⁰³ and
- e. a report issued by the DREM of the Ica region which concluded that the other two mines from which ██████ 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.⁴⁰⁴

IDENTIFICATION that correspond to ██████ 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.”)

⁴⁰² Ex. R-0145, Resolution No. 1: Order Initiating Criminal Proceedings, ██████, 14 May 2015, p. 13 (“The “Medalid IV” mining concession belongs to the Puno Region, but has EXPIRED in GEOCATMIN and SIDEMCAT.”); see also pp. 16-17.

⁴⁰³ Ex. R-0145, Resolution No. 1: Order Initiating Criminal Proceedings, ██████ Case, 14 May 2015, p. 11 (█████ 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 - Ituata - Carabaya - Puno, which had then been sold to the company ██████ Gold, stating that I do not know this place. The address was provided to him by his godfather ██████.”).

⁴⁰⁴ Ex. R-0145, Resolution No. 1: Order Initiating Criminal Proceedings, ██████ 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’.”).

205. The Criminal Court concluded that the above and other “strong” indicia of criminal activities required that it keep in place the precautionary seizure of Shipment 2.⁴⁰⁵ In its resolution, dated 14 May 2015, the Criminal Court explained that lifting such seizure would likely have resulted in the dissipation of the gold in Shipment 2, which in turn could frustrate the final judgment to be issued in the [REDACTED] Criminal Proceeding, in the event that in such proceeding it were determined that a crime had been committed.⁴⁰⁶ This precautionary seizure remains in place to date.

c. [REDACTED] (Shipment 3)

206. The evidence underlying the Criminal Court’s decision to initiate the [REDACTED] Criminal Proceeding included:

- a. a report from the DREM of the Ica region that 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;”⁴⁰⁷
- b. a report from the Municipality of Miraflores in Lima, which confirmed that: (i) [REDACTED] alleged registered address belonged to a lawyer who apparently was unrelated to [REDACTED] and (ii) the property at that address did not have any authorization to carry out mining activities;⁴⁰⁸ and
- c. a report from the Financial Intelligence Unit, which indicated that: (i) the proceeds of [REDACTED] sales had been withdrawn from the bank by an

⁴⁰⁵ Ex. R-0145, Resolution No. 1: Order Initiating Criminal Proceedings, [REDACTED] Case, 14 May 2015, p. 25.

⁴⁰⁶ Ex. R-0145, Resolution No. 1: Order Initiating Criminal Proceedings, [REDACTED] Case, 14 May 2015, p. 25.

⁴⁰⁷ 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*], pp. 5 (“[T]he aforementioned concession does not yet have the authorization for the exploration, exploitation and/or commercialization of minerals.”).

⁴⁰⁸ 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).”).

individual that had no relationship with ██████████; and (ii) ██████████ founders were linked to two other recently-created mining companies that 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.⁴⁰⁹

207. On 9 September 2014, the Criminal Court decided to maintain the precautionary seizure over Shipment 3 because the circumstances that had justified the granting of that seizure in the first place (*see Section II.C.2* above) had not changed.⁴¹⁰ Such precautionary seizure remains in place to date.

d. ██████████ (Shipments 4 and 5)

208. Finally, the evidence underlying the Criminal Court's decision to initiate ██████████ Criminal Proceeding included:

a. a report issued by the DREM of the Piura region⁴¹¹ which confirmed that: (i) the mine from which ██████████ allegedly obtained the gold (*viz.*, the "Alder 3" mine) produced mainly copper;⁴¹² (ii) it was not possible to extract from that mine the quantities of gold that ██████████ declared had been sources from that

⁴⁰⁹ **Ex. R-0224**, Resolution No. 1: Order Initiating Criminal Proceedings, ██████████ Case, 9 September 2014 [*Re-submitted version of C-0087, with Respondent's translation*], p. 6 ("██████████" is related to ██████████ and ██████████, "likewise the three companies mentioned above are related to fifteen other companies in the same industry and have founding partners in common. . .").

⁴¹⁰ **Ex. R-0224**, Resolution No. 1: Order Initiating Criminal Proceedings, ██████████ Case, 9 September 2014 [*Re-submitted version of C-0087, with Respondent's translation*], p. 11.

⁴¹¹ **Ex. R-0150**, Resolution No. 1: Order Initiating Criminal Proceedings, ██████████ Case, 10 March 2015, pp. 2, 11.

⁴¹² **Ex. R-0150**, Resolution No. 1: Order Initiating Criminal Proceedings, ██████████ Case, 10 March 2015, p. 2 ("[T]he predominant mineral in said location is copper.").

site;⁴¹³ (iii) in any event, that mine would have been operating illegally, since it did not have the necessary authorizations to conduct mining activities;⁴¹⁴ and

- b. the criminal background of [REDACTED] legal representative, [REDACTED], who (i) had spent time in prison for money laundering and drug trafficking,⁴¹⁵ and (ii) had been investigated for fraud, and for the supply and possession of weapons and explosives.⁴¹⁶

209. Based on the above and other compelling indicia of criminal activities, on 10 March 2015 the Criminal Court decided to maintain the precautionary seizure over Shipment 4,⁴¹⁷ which remains in place today.

210. The Criminal Court, however, rejected the Prosecutor's Office request for a precautionary seizure over Shipment 5 (also from [REDACTED]), due to jurisdictional issues. In doing so, the court noted that Shipment 5 was already subject of a separate precautionary measure, which had been granted in the context of a contractual dispute between [REDACTED] and Kaloti (*see Section II.C.6* below).⁴¹⁸

* * *

⁴¹³ **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.”).

⁴¹⁴ **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.”).

⁴¹⁵ **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: T.I.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.

⁴¹⁶ **Ex. R-0150**, Resolution No. 1: Order Initiating Criminal Proceedings, [REDACTED] Case, 10 March 2015, p. 3.

⁴¹⁷ **Ex. R-0150**, Resolution No. 1: Order Initiating Criminal Proceedings, [REDACTED] Case, 10 March 2015, p. 11.

⁴¹⁸ **Ex. R-0150**, Resolution No. 1: Order Initiating Criminal Proceedings, [REDACTED] Case, 10 March 2015, p. 12.

211. The above decisions of the Criminal Courts triggered the pre-trial phase (*etapa de instrucción*) in each of the four Criminal Proceedings. As Prof. Missiego explains, “[t]he pre-trial phase is also an investigative phase,” directed by the judge.⁴¹⁹ The Code of Criminal Procedure explains that the main objective of the pre-trial phase is “to gather evidence of the perpetration of the crime, of the circumstances in which it was perpetrated, and of its motives; to establish the different participation of the perpetrators and accomplices, either during or after committing the crime.”⁴²⁰

4. *Kaloti’s misplaced attempts to participate in the criminal investigations and proceedings*

212. Kaloti argues that when it “attempted to intervene and assert its [alleged] property rights 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,”⁴²¹ and on that basis Kaloti accuses Peru of preventing it from “secur[ing] the release of its gold.”⁴²² Kaloti bases its claims on several written submissions that it filed before the Prosecutor’s Office and the Criminal Courts. As explained in this section, Kaloti’s claims concerning its attempted intervention in the preliminary investigations and Criminal Proceedings against the Suppliers reflects either a deep misunderstanding or sheer disregard of Peruvian law. In sum, none of Kaloti’s attempted interventions complied with the legal requirements under Peruvian law.

213. Further, Kaloti’s assertion that Peru has kept it “locked in a legal black box”⁴²³ is misleading, because Kaloti did have the means to vindicate its property rights with respect to the seized gold but failed to exercise its rights in accordance with Peruvian law. As Prof. Missiego explains, “the precautionary seizure may be applied to an asset

⁴¹⁹ Missiego Report, ¶ 70 (“*La fase de instrucción es también una fase de investigación.*”).

⁴²⁰ **Ex. R-0223**, Law No. 9024, Criminal Procedure Code, 23 November 1939 [*Re-submitted version of CL-0006, with Respondent’s translation*], Art. 72 (“*reunir la prueba de la realización del delito, de las circunstancias en que se ha perpetrado, y de sus móviles; establecer la distinta participación que hayan tenido los autores y cómplices, en la ejecución o después de su realización.*”).

⁴²¹ Memorial, ¶ 4.

⁴²² Memorial, ¶ 114.

⁴²³ Memorial, ¶ 4.

that is not owned by the person being investigated,” but that “does not mean that the third party affected by such a measure cannot assert its rights.”⁴²⁴

214. 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 established in 2010, “the third party who claims to be the owner of a seized asset and who has not participated in the offense . . . may request the reexamination of the precautionary seizure, so that it may be lifted and the asset released . . .”.⁴²⁵ The *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 originally granted have changed.⁴²⁶ To pursue this remedy, the party affected by the precautionary seizure (i.e., the petitioner) must file a written submission before the court that ordered the precautionary seizure, providing evidence to attest its property rights and the new circumstances that would justify the lifting of the precautionary seizure. If the court determines that the 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 is subject to an appeal.⁴²⁷
215. *Second*, the Peruvian Supreme Court has also established that, instead of filing an re-evaluation request, a third party that claims to be affected by the issuance of a

⁴²⁴ Missiego Report, ¶ 126 (“[L]a medida cautelar de incautación puede recaer sobre un bien que no sea de propiedad del sujeto que está siendo investigado. . . esto no quiere decir que el tercero afectado por dicha medida no pueda hacer valer sus derechos.”).

⁴²⁵ **Ex. R-0152**, Plenary Agreement No. 5-2010/CJ-116, 16 November 2010, p. 6 (“[E]l tercero que alegue ser propietario de un bien incautado y que no ha intervenido en el delito. . . puede solicitar el reexamen de la medida de incautación, a fin de que se levante y se le entregue el bien de su propiedad . . .”).

⁴²⁶ **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.”).

⁴²⁷ See 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.

precautionary seizure may file an *appeal*.⁴²⁸ Unlike the re-evaluation request discussed above – wherein new facts are presented to the court in an effort to reverse the court’s decision – , the appeal is a judicial remedy that questions the legal basis on which the court granted the precautionary seizure, and asks the Court of Appeals to review that decision and either annul or revoke the seizure.⁴²⁹

216. *Third*, the third party can have recourse to the constitutional courts “through an amparo request, which is intended to protect constitutional rights (including property right).”⁴³⁰ To exercise this right, the third party that alleges a violation of its constitutional property rights needs to file an *amparo* request before the constitutional courts, asking for a judicial decision ordering the respondent in the amparo proceedings – which may include the criminal courts – to cease or refrain from taking any action that violates or may violate the petitioner’s constitutional rights.

217. As explained in the following paragraphs, Kaloti failed to make use of *any* of the three remedies discussed above, and instead submitted requests that were simply inadmissible under Peruvian law.

a. Kaloti’s unfounded submissions before the Prosecutor’s Office

218. Kaloti filed four written submissions with the Prosecutor’s Office, making a series of requests, including in relation to the precautionary seizures ordered by the Criminal Courts.⁴³¹ However, the Prosecutor’s Office was simply not empowered to grant Kaloti’s requests; only the Criminal Courts had the legal authority to grant, maintain

⁴²⁸ Ex. R-0152, Plenary Agreement No. 5-2010/CJ-116, 16 November 2010, p. 6.

⁴²⁹ 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”).

⁴³⁰ Missiego Report, ¶ 127 (“[A] través de una acción de amparo, que tiene por objeto proteger los derechos constitucionales, incluyendo el derecho a la propiedad”).

⁴³¹ Ex. C-0086, [REDACTED] KML appeal as the legitimate owner of the gold in the money laundering investigation against [REDACTED] April 16, 2014; Ex. C-0089, [REDACTED] Petition submitted by KML before the Ninth Provincial Prosecutor’s Office of Callao, April 29, 2014; Ex. C-0092, [REDACTED]. Petition submitted by KML before the Eleventh Provincial Prosecutor’s Office of Callao, August 05, 2014; Ex. C-0093, [REDACTED]. Petition submitted by KML before the Ninth Provincial Prosecutor’s Office of Callao, August 05, 2014.

or lift precautionary seizures. Further, all four requests were flawed in additional ways. The four requests are discussed in more detail below.

219. On 16 April 2014, Kaloti filed the *first* written submission, requesting (i) that the Prosecutor's Office give Kaloti "access to the record" of the [REDACTED] Investigation so that Kaloti could "read it and submit briefs and motions"; and (ii) that Kaloti "be served in all matters related to the property right . . . on the gold."⁴³² However, as Prof. Missiego explains, the Prosecutor's Office may not grant full access to criminal investigation files to third parties; as in most (if not all) jurisdictions, in Peru files in criminal investigations are highly confidential,⁴³³ and often extremely sensitive.
220. On 29 April 2014, Kaloti submitted a *second* request in the [REDACTED] Investigation.⁴³⁴ This time, Kaloti asked the Prosecutor's Office not to grant SUNAT's precautionary seizure request over Shipment 3, on the asserted basis that Kaloti was the owner of that shipment.⁴³⁵ As previously mentioned, however, the Prosecutor's Office lacks the legal authority to grant or lift precautionary seizures. Further, and in any event, SUNAT in fact had *not* requested any precautionary seizure with respect to Shipment 3 after the immobilization had been lifted and the criminal investigations had commenced.
221. Finally, on 5 August 2014, Kaloti submitted the *third* and *fourth* requests (which were practically identical): one in the [REDACTED] Investigation⁴³⁶ and one in the [REDACTED] Investigation.⁴³⁷ Kaloti attached to its requests a translation of a letter allegedly

⁴³² Ex. C-0086, [REDACTED]. KML appeal as the legitimate owner of the gold in the money laundering investigation against [REDACTED], April 16, 2014.

⁴³³ Missiego Report, ¶ 135.

⁴³⁴ Ex. C-0089, [REDACTED]. Petition submitted by KML before the Ninth Provincial Prosecutor's Office of Callao, April 29, 2014.

⁴³⁵ Ex. C-0089, [REDACTED]. Petition submitted by KML before the Ninth Provincial Prosecutor's Office of Callao, April 29, 2014, p. 8

⁴³⁶ Ex. C-0092, [REDACTED]. Petition submitted by KML before the Eleventh Provincial Prosecutor's Office of Callao, August 05, 2014.

⁴³⁷ Ex. C-0093, [REDACTED]. Petition submitted by KML before the Ninth Provincial Prosecutor's Office of Callao, August 05, 2014.

prepared by the law firm [REDACTED], which according to Kaloti provided “an analysis about the property title transfer [of Shipments 2 and 3], under the Laws of Florida.”⁴³⁸ Kaloti then asked the Prosecutor’s Office “to give the appropriate weight” to that letter.⁴³⁹ But Kaloti could not legitimately have expected the Prosecutor’s Office to give any weight at all to a letter (i) that was filed by an entity that was not even a party to the investigations; (ii) that addressed issues of Florida law; (iii) that did not change in any way the circumstances that justified ordering the precautionary seizures; and (iv) that did not attest in any way that the gold that was the subject of Shipments 2 and 3 had been lawfully procured.

222. Tellingly, Kaloti’s own Peruvian law expert has omitted any reference to the above four requests in his expert report.⁴⁴⁰ Such expert refers only to the three submissions that Kaloti filed before the Criminal Courts.⁴⁴¹ However, as explained below, those three requests likewise lacked any legal basis.

b. Kaloti’s unfounded submissions before the Criminal Courts

223. On 29 April 2015, Kaloti requested the Criminal Court in the [REDACTED] Criminal Proceeding to return Shipment 3 to Kaloti, on the asserted basis that Kaloti did not “have any criminal liability whatsoever” in [REDACTED] alleged money laundering

⁴³⁸ Ex. C-0092, [REDACTED]. Petition submitted by KML before the Eleventh Provincial Prosecutor’s Office of Callao, August 05, 2014; Ex. C-0093, [REDACTED]. Petition submitted by KML before the Ninth Provincial Prosecutor’s Office of Callao, August 05, 2014.

⁴³⁹ Ex. C-0092, [REDACTED]. Petition submitted by KML before the Eleventh Provincial Prosecutor’s Office of Callao, August 05, 2014; Ex. C-0093, [REDACTED]. Petition submitted by KML before the Ninth Provincial Prosecutor’s Office of Callao, August 05, 2014.

⁴⁴⁰ See Expert Report of [REDACTED], 10 February 2022 (“[REDACTED] Report”), pp. 3, 9 (“Between 2015 and 2016, following the issuance of the provisional seizure orders, KML filed three petitions with the courts hearing the criminal proceedings pertaining to the seizures, including the Sixth Criminal Court of Callao (Exhibit C-0013-SPA), the Eighth Criminal Court of Callao (Exhibit C-0014-SPA), and the Transitional Criminal Court of Callao (Exhibit C-0015-SPA).”).

⁴⁴¹ 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].

scheme.⁴⁴² As Prof. Missiego explains, Kaloti tried to intervene in the [REDACTED] Criminal Proceeding as if it were a party to that proceeding, but without formally filing a *re-evaluation* request or an *appeal*—two of three legal avenues available to Kaloti, as discussed above—of the precautionary seizure order.⁴⁴³

224. Additionally, whether or not Kaloti was criminally liable was irrelevant, because the precautionary seizure was based on the potentially unlawful origin of the seized gold.⁴⁴⁴ As previously explained, one of the main purposes of the precautionary seizure was to prevent the dissipation of proceeds of a crime.⁴⁴⁵
225. In addition, Kaloti’s allegations were based on the premise that it was the owner of Shipment 3, but Kaloti did not provide any evidence to substantiate its ownership claim. The Criminal Court consequently rejected Kaloti’s request,⁴⁴⁶ noting that Kaloti was “not a procedural party in th[e] [REDACTED] [C]riminal [P]roceeding and . . . [had] **failed to prove . . . being the owner of the seized gold bars**”⁴⁴⁷ (emphasis added).
226. Kaloti filed two additional submissions in the [REDACTED] Criminal Proceeding: one on 25 May 2016⁴⁴⁸ and the other on 7 June 2016.⁴⁴⁹ In both instances, it asked the Criminal Court to revoke the precautionary seizure over Shipment 3 and to return

⁴⁴² **Ex. C-0013**, Petition before the *Sexto Juzgado Penal del Callao*, p. 4.

⁴⁴³ Missiego Report, ¶¶ 141–142; **Ex. R-0152**, Plenary Agreement No. 5-2010/CJ-116, 16 November 2010.

⁴⁴⁴ **Ex. R-0223**, Law No. 9024, Criminal Procedure Code, 23 November 1939 [*Re-submitted version of CL-0006, with Respondent’s translation*], Art. 94.

⁴⁴⁵ See Section II.C.2.

⁴⁴⁶ **Ex. C-0100**, Resolution dated July 23, 2015, issued by the 6th Criminal Court of Callao, responding to KML’s petitions, p. 3.

⁴⁴⁷ **Ex. C-0100**, Resolution dated July 23, 2015, issued by the 6th Criminal Court of Callao, responding to KML’s petitions, p. 3.

⁴⁴⁸ **Ex. R-0228**, Kaloti’s Request to Lift Precautionary Seizure, 3 May 2016 [*Re-submitted version of C-0014, with Respondent’s translation*].

⁴⁴⁹ **Ex. R-0229**, Kaloti’s Request to Lift Precautionary Seizure, 25 May 2016 [*Re-submitted version of C-0015, with Respondent’s translation*].

that shipment to Kaloti.⁴⁵⁰ Even though Kaloti was aware—or should have been aware—that the Criminal Proceedings were governed exclusively by Peruvian law, it inexplicably based its requests on the Treaty and international law. Indeed, it argued that the precautionary seizure of Shipment 3 was contrary to “foreign investment protections established in the Peru-US TPA”.⁴⁵¹ Kaloti also provided to the Criminal Court a copy of its First Notice of Intent, exhorting the Criminal Court to avoid the aggravation of the international dispute by accepting Kaloti’s requests.⁴⁵² In other words, Kaloti completely disregarded the applicable law, and once again failed to pursue the appropriate judicial remedies.

227. Kaloti’s legal expert, Prof. ██████████, argues that the Criminal Courts acted arbitrarily when they rejected Kaloti’s requests on the basis that Kaloti was not a party to the Criminal Proceedings.⁴⁵³ However, far from being arbitrary, the Criminal Courts’ findings and decisions were fully in accordance with Peruvian law.⁴⁵⁴ As Prof. Missiego explains, Kaloti’s requests to the Criminal Courts failed to comply with “the formal and substantive requirements that Peruvian law establishes for a third party to be able to intervene”⁴⁵⁵ in criminal proceedings. Specifically, at no point did Kaloti request a “re-evaluation of the precautionary seizures” let alone meet the evidentiary standard for that request to succeed. Instead, as explained by Prof. Missiego, it

⁴⁵⁰ **Ex. R-0228**, Kaloti’s Request to Lift Precautionary Seizure, 3 May 2016 [*Re-submitted version of C-0014, with Respondent’s translation*], p. 1; **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.

⁴⁵¹ **Ex. R-0228**, Kaloti’s Request to Lift Precautionary Seizure, 3 May 2016 [*Re-submitted version of C-0014, with Respondent’s translation*], pp. 1, 9–10; **Ex. R-0229**, Kaloti’s Request to Lift Precautionary Seizure, 25 May 2016 [*Re-submitted version of C-0015, with Respondent’s translation*], pp. 1, 9–10. (“*las protecciones a la inversión extranjera establecidas en el TLC Perú -EEUU.*”).

⁴⁵² **Ex. R-0228**, Kaloti’s Request to Lift Precautionary Seizure, 3 May 2016 [*Re-submitted version of C-0014, with Respondent’s translation*], p. 1; **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.

⁴⁵³ See, e.g., ██████████ Report, p. 9; **Ex. C-0016**, Decision from the *Cuarta Sala Penal Reos Libre*, p. 3.

⁴⁵⁴ **Ex. R-0223**, Law No. 9024, Criminal Procedure Code, 23 November 1939 [*Re-submitted version of CL-0006, with Respondent’s translation*], Art. 73 (“The pre-trial is confidential in nature”).

⁴⁵⁵ Missiego Report, ¶ 144 (“[L]os requisitos de forma y de fondo que la legislación del Perú establece para que un tercero pueda intervenir.”).

“simply filed pleadings as if it were a party to the proceedings, making references to rules that were not applicable and submitting requests that could not be granted, as it would have implied a violation of local procedural law by the respective court.”⁴⁵⁶

228. In any event, if Kaloti truly believed that its alleged property or due process rights were being violated by the Criminal Courts as a result of the Precautionary Seizures, it could have filed an *amparo* request (the third legal recourse available to Kaloti, discussed above) before Peru’s constitutional courts.⁴⁵⁷ Kaloti was well aware that it could pursue this legal recourse if it believed that its fundamental rights were not being observed. Indeed, on 11 March 2014, Kaloti filed an *amparo* request before the Constitutional Court of Lima, requesting that court to lift SUNAT’s immobilizations of Shipments 2 and 3 (“**Amparo Request**”).⁴⁵⁸ In the Amparo Request, Kaloti argued that SUNAT’s immobilizations violated, among others, its due process rights, as well as its alleged property rights over the gold contained in those shipments.⁴⁵⁹ Kaloti, however, decided to withdraw that request on 14 May 2014, i.e., a mere two months after it had filed it.⁴⁶⁰ Therefore, Kaloti knew perfectly well that it could file an *amparo* request with respect to the Precautionary Seizures, if it truly believed that its property and due process rights had not been respected, but decided not to pursue such remedy.
229. Additionally, any bona fide purchaser in Kaloti’s position would have taken legal action against the Suppliers themselves, but Kaloti also does not appear to have done so.
230. In short, Kaloti’s attempted participation in the Criminal Proceedings against the Suppliers were simply misguided. Kaloti, either consciously or through gross

⁴⁵⁶ Missiego Report, ¶ 145 (“[S]implemente presentó escritos como si fuera parte del proceso, haciendo referencias a normas que no eran aplicables y presentando solicitudes que no podían ser concedidas, ya que habría implicado una violación de la ley procesal local por parte del tribunal correspondiente.”).

⁴⁵⁷ Missiego Report, ¶¶ 146–148.

⁴⁵⁸ Ex. R-0230, Amparo Request, Constitutional Court of Lima, 11 March 2014, pp. 1–3.

⁴⁵⁹ Ex. R-0230, Amparo Request, Constitutional Court of Lima, 11 March 2014, pp. 8–12, 17–22.

⁴⁶⁰ Ex. R-0237, Resolution No. 1, Approving Withdrawal, 2 June 2014.

negligence, failed to pursue any of the three legal avenues at its disposal under Peruvian law to challenge the Precautionary Seizures and request the release of Shipments 1 to 4.

5. *The Criminal Courts conducted the Criminal Proceedings in full accordance with Peruvian law*

231. Kaloti alleges that Peru has taken an “unreasonable length of time” to “conclude the criminal proceedings,”⁴⁶¹ without making “any formal connection of specific money laundering as to the five purchases of gold seized in 2013-14.”⁴⁶² Contrary to Kaloti’s arguments—as explained above—Peru’s authorities have discovered numerous indicia of money laundering in connection with illegal mining, which specifically relate to the Five Shipments.⁴⁶³ The Criminal Courts have confirmed that such indicia require that the Precautionary Seizures ordered during the preliminary investigations remain in place during the pendency of the Criminal Proceedings.⁴⁶⁴ And as explained in the following paragraphs, there are multiple circumstances that explain, and justify, the length of the Criminal Proceedings.

232. *First*, the investigation and prosecution of crimes concerning money laundering and illegal mining, by the very nature of such crimes, cannot be carried out on some sort of accelerated or expedited basis. The Criminal Court that granted the precautionary seizures over Shipments 1 to 4 had 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 “verification actions must be carried out”⁴⁶⁵

233. Indeed, each of the Criminal Proceedings involved the performance of numerous

⁴⁶¹ Memorial, ¶ 118; *see also* Memorial, ¶¶ 8, 68.

⁴⁶² Memorial, ¶ 63.

⁴⁶³ *See* Sections II.C.1 and II.C.3.

⁴⁶⁴ *See* Section II.C.2. and II.C.3.

⁴⁶⁵ **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, April 30, 2014, p. 4; **Ex. R-0136**, Precautionary Seizure against Shipment 4, 1 May 2014, p. 5.

investigative inquiries (*actos de investigación*) during the pre-trial phase,⁴⁶⁶ including, among other, (i) on-site inspections of the mining concessions and of the alleged addresses of the Suppliers;⁴⁶⁷ (ii) the taking of statements from the defendants, the alleged concession holders, and other relevant witnesses;⁴⁶⁸ (iii) the preparation of expert reports⁴⁶⁹; (iv) multiple information requests to Financial Intelligence Unit, SUNAT, Public Registry Office, Regional Governments, and other State agencies;⁴⁷⁰ and (v) multiple defendants, including the Suppliers and their representatives.⁴⁷¹

234. *Second*, the Covid-19 pandemic (which in Peru led to the formal declaration of a State

⁴⁶⁶ In particular, in each of these cases, the *Auto de Apertura de Instrucción* ordered the performance of (i) 33 investigative proceedings in the ██████ Criminal Proceeding; (ii) 36 investigative proceedings in the ██████ Criminal Proceeding; (iii) 16 investigative proceedings in the ██████ Criminal Proceeding; and (iv) 24 investigative proceedings in the ██████ Criminal Proceedings. See **Ex. R-0139**, Resolution No. 1: Order Initiating Criminal Proceedings, ██████ Case, 16 March 2015 ; **Ex. R-0145**, Resolution No. 1: Order Initiating Criminal Proceedings, ██████ Case, 14 May 2015; **Ex. R-0224**, Resolution No. 1: Order Initiating Criminal Proceedings, ██████ Case, 9 September 2014 [*Re-submitted version of C-0087, with Respondent's translation*]; **Ex. R-0150**, Resolution No. 1: Order Initiating Criminal Proceedings, ██████ Case, 10 March 2015.

⁴⁶⁷ See, e.g., **Ex. R-0145**, Resolution No. 1: Order Initiating Criminal Proceedings, ██████ Case, 14 May 2015, p. 24 (“31.- It is hereby ordered to, in due time, carry out verifications and/or site visits at the properties included in this complaint.”).

⁴⁶⁸ See, e.g., **Ex. R-0139**, Resolution No. 1: Order Initiating Criminal Proceedings, ██████ Case, 16 March 2015 , p. 20; **Ex. R-0145**, Resolution No. 1: Order Initiating Criminal Proceedings, ██████ Case, 14 May 2015, p. 21; **Ex. R-0224**, Resolution No. 1: Order Initiating Criminal Proceedings, ██████ 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, ██████ Case, 10 March 2015, p. 13.

⁴⁶⁹ See, e.g., **Ex. R-0224**, Resolution No. 1: Order Initiating Criminal Proceedings, ██████ Case, 9 September 2014 [*Re-submitted version of C-0087, with Respondent's translation*]. (For example, in this case an expert report on the economic situation of ██████ was requested (“*Pericia Contable*”).).

⁴⁷⁰ See, e.g., **Ex. R-0139**, Resolution No. 1: Order Initiating Criminal Proceedings, ██████ Case, 16 March 2015 ; **Ex. R-0145**, Resolution No. 1: Order Initiating Criminal Proceedings, ██████ Case, 14 May 2015; **Ex. R-0224**, Resolution No. 1: Order Initiating Criminal Proceedings, ██████ Case, 9 September 2014 [*Re-submitted version of C-0087, with Respondent's translation*]; **Ex. R-0150**, Resolution No. 1: Order Initiating Criminal Proceedings, ██████ Case, 10 March 2015.

⁴⁷¹ See Section II.C.3 (chart).

of Emergency) caused a severe backlog in the Peruvian judicial system.⁴⁷² The pandemic has been devastating in Peru, which is among the countries in the world with the highest mortality rate.⁴⁷³ For example, the pandemic forced the Executive Council of the Judiciary to stop the work of the Peruvian courts, and to suspend every procedural deadline from March 2020⁴⁷⁴ to March 2021.⁴⁷⁵ After the resumption of judicial proceedings, the accumulated workload was extremely burdensome for the Peruvian courts. It was inevitable, therefore, that such circumstances would delay the Criminal Proceedings.

235. Despite the above, the Criminal Proceedings have continued to advance, and in all four Criminal Proceedings there is now ample evidence of money laundering offenses.⁴⁷⁶
236. At the date of submission of this Counter-Memorial, the [REDACTED] Criminal Proceeding and the [REDACTED] Criminal Proceeding are at the indictment phase, which means that the trial will begin as soon as the indictment is reviewed by the Trial Court.⁴⁷⁷

⁴⁷² 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.

⁴⁷³ **Ex. R-0198**, “Perú es oficialmente el país del mundo más afectado por la COVID-19,” MÉDICOS SIN FRONTERAS, 4 June 2021.

⁴⁷⁴ **Ex. R-0166**, Administrative Resolution No. 115-2020-CE-PJ, 16 March 2020.

⁴⁷⁵ **Ex. R-0236**, Administrative Resolution No. 000025-2021-CE-PJ, 29 January 2021.

⁴⁷⁶ Missiego Report, ¶ 122.

⁴⁷⁷ The Trial Court, which has to confirm that the formal requirements of the indictment have been met. See **Ex. R-0202**, Criminal Indictment, [REDACTED] Case, 19 May 2021; **Ex. R-0203**, Criminal Indictment, [REDACTED] Case, 6 February 2019.

237. In April 2021, the pre-trial phase of the ██████████ Criminal Proceeding was declared closed, and that proceeding is therefore pending indictment.⁴⁷⁸ Kaloti, however, misleadingly claims that “[o]n April 09, 2018, Peru closed the judicial investigation [in the ██████████ Criminal Proceeding] (without indictments or convictions)”⁴⁷⁹ Kaloti seems to suggest that the closure of the “judicial investigation” on 9 April 2018 means that the ██████████ Criminal Proceeding was discontinued on that date. However, Kaloti’s own exhibit contradicts that allegation.⁴⁸⁰ The fact is that the Criminal Court declared that the pre-trial phase had concluded, causing the proceedings to move to the next stage.⁴⁸¹
238. Only the ██████████ Criminal Proceeding continues in the pre-trial phase. That proceeding has not yet progressed to the next phase because it is particularly complex, as it involves two separate shipments (Shipments 4 and 5), and there have been several appeals and even a long-running dispute regarding the court’s jurisdiction. Further, ██████████ legal representative requested that the pre-trial phase in the ██████████ Criminal proceeding be extended to allow additional time to prepare ██████████ and his own defence.⁴⁸²
239. It is therefore clear that the Criminal Proceedings are following their course, despite the complexities of the underlying investigations and the challenges that the Covid-19 pandemic posed to the Peruvian judicial system.
240. Kaloti also contends that “Peru’s seizure of KML’s assets has become de facto permanent without a court order making it so.”⁴⁸³ Contrary to Kaloti’s statements, the

⁴⁷⁸ The pre-trial phase has terminated, and the indictment phase has begun. Therefore, the Superior Prosecutor’s Office is reviewing the record to decide whether or not to present an indictment. *See* **Ex. R-0204**, Resolution Declaring the Conclusion of the Investigation of ██████████, 24 April 2021.

⁴⁷⁹ Memorial, ¶ 49.

⁴⁸⁰ **Ex. C-0096**, ██████████. Order of conclusion of preliminary investigation issued by the 1st Criminal Liquidator Court, April 09, 2018.

⁴⁸¹ Missiego Report, ¶¶ 72-73.

⁴⁸² **Ex. R-0205**, Request for an extension of the investigation period for additional proceedings, p. 2.

⁴⁸³ Memorial, ¶ 117.

Precautionary Seizures have *not* become permanent. As Prof. Missiego explains, a precautionary seizure measure “does not extinguish title nor does it transfer ownership of the seized assets to the State.”⁴⁸⁴ Rather, it is merely a “temporary limitation on the exercise of ownership.”⁴⁸⁵ Notably, such limitation is “permitted by the [Peruvian] legal system and is considered proportional to the objectives it aims to achieve.”⁴⁸⁶

241. The Precautionary Seizures granted in the Criminal Proceedings were, and continue to be, interlocutory. If upon conclusion of the preliminary investigations the Criminal Courts had decided not to initiate criminal proceedings against the Suppliers, the seized assets would have been released and returned to their rightful owners. However, as previously explained, the Criminal Courts *did* decide to initiate the Criminal Proceedings, based on compelling evidence of criminal activities by the Suppliers.
242. Pursuant to Peruvian law, the Criminal Courts would lift the Precautionary Seizures if, at the end of the Criminal Proceedings, they were to decide that (i) the defendants are not guilty; and/or (ii) the seized shipments are not the proceeds of criminal activity.⁴⁸⁷ Conversely, if the Criminal Courts were to find against the Suppliers and determine that the seized assets were indeed obtained through unlawful means or for criminal purposes, the Courts could order that those assets be permanently confiscated—even if they are owned by third parties.⁴⁸⁸ As Prof. Missiego explains,

⁴⁸⁴ Missiego Report, ¶ 92. (“[N]o produce el efecto de extinguir el dominio ni transfiere la propiedad del bien incautado hacia el Estado.”).

⁴⁸⁵ Missiego Report, ¶ 92 (“[L]imitación temporal a las facultades del dominio”).

⁴⁸⁶ Missiego Report, ¶ 92 (“Se trata, como hemos dicho, de una limitación temporal a las facultades del dominio que es permitida por el ordenamiento jurídico y considerada proporcional en relación a los fines perseguidos.”).

⁴⁸⁷ **Ex. R-0199**, Legislative Decree No. 635, Criminal Code, 3 April 1991, Art. 102 [Re-submitted version of C-0009, with Respondent’s translation].

⁴⁸⁸ Based on the legal principle that, in Peru, title of property over an asset may only be acquired through legal means, assets that are suspected to be the proceeds of unlawful activities may also be subject to a loss of domain proceeding (“*Extinción de Dominio*”). This proceeding is governed

“in the event of a final conviction, the seized assets in criminal proceedings may be confiscated and definitively transferred to the State,”⁴⁸⁹ as provided for in Article 102 of the Criminal Code. Indeed, Article 102 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 . . .** [the judge] shall also order the confiscation of the property or proceeds of the crime, whatever changes they may have undergone. **The seizure requires the transfer of such assets to the ownership of the State. . . .**⁴⁹⁰ (Emphasis added)

243. Considering the amount and weight of evidence that has been submitted thus far in each Criminal Proceeding regarding (i) the unlawful origin of the gold at issue in each case, and (ii) the Suppliers’ involvement in money laundering, it is quite possible that the Criminal Courts will eventually conclude that the Suppliers (and Kaloti) do not have – and have never had – any legal right or title over the Five Shipments, and that ownership of such gold should be transferred to the State. Even if that ends up being the case, the Criminal Courts will reach their conclusions in reasoned judgments, and through judicial procedures that guarantee the due process rights of all interested parties.

6. *Shipment 5 is subject to a precautionary attachment in the context of a civil proceeding brought by* ██████████

244. Kaloti argues (i) that SUNAT immobilized Shipment 5, and (ii) that such “immobilization was reissued by a Peruvian court . . . based on an investigation for

by Legislative Decree No. 1373, and is intended to prevent and discourage the production of goods through unlawful activities. In the event that, within the framework of such proceedings, the competent court finds that the assets were indeed obtained through unlawful activities, such assets are confiscated and their legal title is returned to the State.

⁴⁸⁹ Missiego Report, ¶ 153 (“ [E]n caso de que se emita una sentencia condenatoria y devenga firme, los bienes incautados en un proceso penal pueden ser decomisados y traspasados definitivamente al Estado.”).

⁴⁹⁰ **Ex. R-0199**, Legislative Decree No. 635, Criminal Code, 3 April 1991 [Re-submitted version of C-0009, with Respondent’s translation], Art. 102 (“[e]l juez . . . resuelve el decomiso de los instrumentos con que se hubiere ejecutado el delito, *aun cuando pertenezcan a terceros* . . . Asimismo, dispone el decomiso de los efectos o ganancias del delito, cualesquiera sean las transformaciones que estos hubieren podido experimentar. *El decomiso determina el traslado de dichos bienes a la esfera de titularidad del Estado . . .*” (emphasis added)).

alleged money laundering.”⁴⁹¹ It also complains that “[a]s of 2022, Peru has not returned this gold to KML.”⁴⁹² All of those allegations by Kaloti regarding Shipment 5 are inaccurate and misleading.

245. *First*, as explained in **Section II.B** above, SUNAT never immobilized Shipment 5. *Second*, 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 interlocutory measure was issued in a civil lawsuit filed by ██████ against Kaloti, before the Lima Civil Court (“**Civil Court**”), on 12 May 2014.⁴⁹³ In that lawsuit, ██████ alleged that Kaloti had failed to pay for Shipment 5, and sought (i) an order terminating the contract for Kaloti’s purchase of Shipment 5; and (ii) an order that the gold in question be returned to ██████.⁴⁹⁴ In the context of that proceeding, ██████ also asked the Civil Court to grant the Civil Attachment whereby Shipment 5 would be placed under the custodianship of a third party during the pendency of the proceeding.
246. The Civil Attachment requested by ██████ was granted by the Civil Court on 18 June 2014, and the Civil Court later appointed an independent third party as the custodian.⁴⁹⁵ This is the precautionary measure that is in force to date.
247. For a short period of time, the Civil Attachment coexisted with another precautionary seizure granted in the ██████ Criminal Proceeding on 20 March 2015,⁴⁹⁶ but that seizure was lifted more than seven years ago, on 1 June 2015.⁴⁹⁷
248. In the Memorial, Kaloti refers to a single ruling issued in the ██████ civil lawsuit: a decision issued by the Court of Appeals in October 2018. According to Kaloti, that

⁴⁹¹ Memorial, ¶ 49.

⁴⁹² Memorial, ¶ 49.

⁴⁹³ **Ex. R-0215**, ██████ Civil Lawsuit against Kaloti, 12 May 2014.

⁴⁹⁴ **Ex. R-0215**, ██████ Civil Lawsuit against Kaloti, 12 May 2014, pp. 1-2; *see also* ¶¶ 2.6, 3.35.

⁴⁹⁵ **Ex. R-0210**, Resolution No. 1, Precautionary Seizure against Shipment 5, 20 March 2015, p. 2.

⁴⁹⁶ **Ex. R-0210**, Resolution No. 1, Precautionary Seizure against Shipment 5, 20 March 2015.

⁴⁹⁷ The Court of Appeals upheld an appeal filed by ██████ challenging the jurisdiction of the Criminal Court that had issued the precautionary seizure. *See Ex. R-0211*, Resolution No. 417-2015, Revokes Precautionary Seizure over Shipment 5, 1 June 2015.

ruling, “acknowledged that the gold was the property of KML.”⁴⁹⁸ But Kaloti misrepresents the facts yet again. Contrary to Kaloti’s assertion, the relevant court decision did *not* in any way declare that Shipment 5 was Kaloti’s property. Rather, that ruling (i) annulled (on procedural grounds) a prior ruling issued by the Civil Court on 11 December 2015 in favor of ██████, and (ii) instructed the Civil Court to revisit the matter and issue a new decision.⁴⁹⁹

249. On 23 September 2019, the Civil Court issued a new decision⁵⁰⁰ and again ruled in favor of ██████. In that decision, the Civil Court declared the termination of the contract between ██████ and Kaloti concerning Shipment 5, because the latter had not paid for the gold contained in that shipment.⁵⁰¹ Less than a month later, on 18 October 2019, Kaloti filed an appeal against the 23 September 2019 decision of the Civil Court.⁵⁰² On 14 June 2022 the Court of Appeals confirmed the Civil Court’s decision of 23 September 2019.⁵⁰³

250. Consequently, these facts show that the Civil Court has declared the termination of the contract between ██████ and Kaloti concerning Shipment 5. The Court determined that Kaloti has no property right whatsoever over Shipment 5 and thus ordered that the gold in question be returned to ██████.⁵⁰⁴

⁴⁹⁸ Memorial, ¶ 49.

⁴⁹⁹ **Ex. C-0110**, Resolution No. 4, dated October 11, 2018, issued by the Third Civil Chamber of the Supreme Court of Peru, p. 8.

⁵⁰⁰ **Ex. R-0238**, Resolution No. 46, Judgment, 23 September 2019.

⁵⁰¹ Kaloti’s expert states that neither he nor Kaloti “have had access to the text of that decision.” This is surprising given that on 18 October 2019 Kaloti filed an appeal against the 23 September 2019 decision of the Civil Court, and the report of Kaloti’s legal expert was finalised years later, on 10 February 2022. See ██████ Report, ¶ 10.2; *see also* **Ex. R-0216**, Kaloti Appeal, Exp. No. 15883-2014, 18 October 2019.

⁵⁰² **Ex. R-0216**, Kaloti Appeal, Exp. No. 15883-2014, 18 October 2019.

⁵⁰³ **Ex. R-0212**, Resolution No. 08, Supreme Court of Lima, Court Specialized in Asset Forfeiture of Lima, 14 June 2022, pp. 14–15.

⁵⁰⁴ **Ex. R-0212**, Resolution No. 08, Supreme Court of Lima, Court Specialized in Asset Forfeiture of Lima, 14 June 2022, p. 15.

7. *Kaloti was included in criminal investigations due to its close links with companies that were the subject of criminal investigation*

251. Kaloti also alleges that Peru “arbitrarily mentioned KML”⁵⁰⁵ in “generic money laundering investigations, not specifically or directly connected to the temporarily seized gold.”⁵⁰⁶ According to Kaloti, Peru acted in a calculated and unfair manner, motivated by an alleged desire to “extend and prolong the temporary seizures of KML’s gold.”⁵⁰⁷ Kaloti refers, specifically, to investigation under file No. 42-2014 (“**Investigation No. 42-2014**”)⁵⁰⁸ and investigation under joint files No. 01-2014 and 78-2015 (“**Investigation No. 01-2014**”),⁵⁰⁹ launched by the Prosecutor’s Office and involving not only Kaloti but several other companies. Kaloti’s allegations and conspiracy theories are – once again – utterly unfounded.

252. Kaloti misrepresents the facts when it argues that it was “mentioned” in money laundering investigations. Kaloti was not simply “mentioned” but was in fact part of the aforementioned investigations, along with several other companies.⁵¹⁰ The facts show that there was nothing arbitrary about the fact that Kaloti was part of those

⁵⁰⁵ Memorial, ¶ 58.

⁵⁰⁶ Memorial, ¶ 55. *See also* ██████████ Witness Statement, ¶ 49 (“Peru also arbitrarily involved KML in unfounded investigations of money laundering unrelated to the seized gold.”)

⁵⁰⁷ Memorial, ¶ 55.

⁵⁰⁸ **Ex. C-0052**, Prosecutorial Resolution No. 1, dated September 20, 2015, issued by the 1st supra-provincial corporate prosecutor’s office specializing in money laundering and loss of domain crimes - Prosecution File No. 42-2014 Separation of allegations and further investigation, p. 1.

⁵⁰⁹ **Ex. C-0101**, Prosecutorial Order No. 19, dated January 09, 2017, issued by the 1st supra-provincial corporate prosecutor’s office specializing in money laundering and loss of domain crimes, pp. 1-3.

⁵¹⁰ **Ex. C-0052**, Prosecutorial Resolution No. 1, dated September 20, 2015, issued by the 1st supra-provincial corporate prosecutor’s office specializing in money laundering and loss of domain crimes - Prosecution File No. 42-2014 Separation of allegations and further investigation, pp. 2, 4 (“On 23 March 23 2015, this Prosecutor's Office . . . orders opening the Preliminary Investigation. . . [a]gainst the following Foreign Legal Entities. . . KALOTI METALS LOGISTICS LLC (EE.UU.)”); **Ex. C-0101**, Prosecutorial Order No. 19, dated January 09, 2017, issued by the 1st supra-provincial corporate prosecutor’s office specializing in money laundering and loss of domain crimes, pp. 2, 4 (referring to “[T]he Preliminary Investigation carried out against the natural and legal persons indicated below, for the alleged commission of the crime of MONEY LAUNDERING, originating from Illegal Mining, to the detriment of THE STATE” and mentioning, among other companies, “KALOTI METALS LOGISTICS” (emphasis in original)).

KALOTI METALS LOGISTICS LLC (USA). b. **TITANIUM GOLD ENTERPRISES SAC**, received ten transfers for USD\$ 10,054,080 sent by the company **KALOTI METALS LOGISTICS LLC (USA)**, presumably corresponding to the payment of the exported gold⁵¹⁴ (emphasis added)

254. All four companies identified above as having received transfers from Kaloti, appear to have indeed supplied gold to Kaloti.⁵¹⁵ Kaloti's Transaction History shows that it had purchased gold from those companies.⁵¹⁶ For example, Darsahn International Inc S.A.C. was Kaloti's third biggest supplier in 2013; in that year alone, Darsahn International supplied Kaloti with 1,586 kg.⁵¹⁷ Likewise, between 2012 and 2013, Axbridge Gold Corp. SAC. supplied more than 300 kg to Kaloti.⁵¹⁸ And in 2014 Titanium Gold Enterprises SAC. supplied 304.38 kg to Kaloti.⁵¹⁹
255. Likewise, Investigation No. 01-2014 arose out of the findings of the Prosecutor's Office concerning a possible criminal organization involved in illegal mining.⁵²⁰ [REDACTED] was

⁵¹⁴ Ex. C-0052, Prosecutorial Resolution No. 1, dated September 20, 2015, issued by the 1st supra-provincial corporate prosecutor's office specializing in money laundering and loss of domain crimes - Prosecution File No. 42-2014 Separation of allegations and further investigation, p. 96 ("a. [REDACTED] . . . *habría recibido once (11) transferencias por USD\$ 9,434,900 remitidas por [REDACTED] b. [REDACTED] [REDACTED], recibió diez transferencias por USD\$ 10,054,080 remitidas por la empresa [REDACTED], presuntamente correspondiente al pago del oro exportado . . .").*

⁵¹⁵ Ex. C-0030, KML transaction summary of all purchases between 2012 and 2018, pp. 7, 8, 9, 11, 14, 17 (showing that the following companies supplied gold to Kaloti: [REDACTED], [REDACTED], [REDACTED], and [REDACTED]).

⁵¹⁶ Ex. C-0030, KML transaction summary of all purchases between 2012 and 2018, pp. 7, 8, 9, 11, 14, 17. See for example purchases from [REDACTED], amounting to 305.68 kg in 2013-2014 combined; purchases from [REDACTED], amounting to 304.38 kg in 2014 alone

⁵¹⁷ Ex. C-0030, KML transaction summary of all purchases between 2012 and 2018, p.7. This takes into account only the entry for "[REDACTED]" in C-0030. If "[REDACTED]" is added, Kaloti purchased 6966.86 kg from the company which accounted for 19.98% of its gold purchases in 2013.

⁵¹⁸ Ex. C-0030, KML transaction summary of all purchases between 2012 and 2018, pp. 4, 7.

⁵¹⁹ Ex. C-0030, KML transaction summary of all purchases between 2012 and 2018, p. 11.

⁵²⁰ Ex. C-0101, Prosecutorial Order No. 19, dated January 09, 2017, issued by the 1st supra-provincial corporate prosecutor's office specializing in money laundering and loss of domain crimes, pp. 32, 42.

suspected of forming part of this organization,⁵²¹ and was being investigated precisely for facts related to Shipment 5.⁵²² Other companies involved in the suspected criminal organization sold significant volumes of gold to Kaloti and others. According to the Prosecutor,

after their incorporation, they were used to export gold ore [fine gold bars] to the United States to American companies, among them, NTR METALS MIAMI LLC, NTR METALS LLC, NTR METALS AMERICAS LLC, **KALOTI METALS LOGISTICS**, etc., and then received in exchange for the illegal export of gold, millions of dollars in foreign currency. . .⁵²³ (Emphasis added)

256. Kaloti also purchased gold from Comercializadora Minerales Rivero S.A.C., one of the companies under investigation. Once again, Kaloti's Transaction History shows that Kaloti purchased 1152.99 kg from that supplier in 2013.⁵²⁴ Kaloti had made more than 15 international transfers of money to Comercializadora Minerales Rivero S.A.C., for more than USD 10 million:

According to UIF Report No. 021-2014-DAO-UIF-SBS, the company Kaloti Metals Logistics LLC, is listed as the originator of fifteen (15) transfers for USD 10,493,223 from the United States to Comercializadora de Minerales Rivero SAC . . .⁵²⁵

⁵²¹ **Ex. C-0101**, Prosecutorial Order No. 19, dated January 09, 2017, issued by the 1st supra-provincial corporate prosecutor's office specializing in money laundering and loss of domain crimes, p. 33.

⁵²² **Ex. C-0101**, Prosecutorial Order No. 19, dated January 09, 2017, issued by the 1st supra-provincial corporate prosecutor's office specializing in money laundering and loss of domain crimes, pp. 161-162, 171-173, 230.

⁵²³ **Ex. C-0101**, Prosecutorial Order No. 19, dated January 09, 2017, issued by the 1st supra-provincial corporate prosecutor's office specializing in money laundering and loss of domain crimes, p. 33 ("*[L]uego de su constitución fueron utilizadas para realizar exportaciones de mineral aurífero [oro fino en barras] hacia Estados Unidos a unas empresas americanas, entre ellas, NTR METALS MIAMI LLC, NTR METALS LLC, NTR METALS AMERICAS LLC, **KALOTI METALS LOGISTICS**, etc., para luego recibir a cambio de la exportación ilegal de oro, millonarias sumas de dinero en moneda extranjera. . .*").

⁵²⁴ **Ex. C-0030**, KML transaction summary of all purchases between 2012 and 2018, p. 7.

⁵²⁵ **Ex. C-0101**, Prosecutorial Order No. 19, dated January 09, 2017, issued by the 1st supra-provincial corporate prosecutor's office specializing in money laundering and loss of domain

257. The evidence thus shows that there were objective reasons for including Kaloti in Investigations No. 42-2014⁵²⁶ and No. 01-2014, given that, in both cases, it had taken part in the specific transactions with other companies suspected of money laundering.⁵²⁷
258. As will be discussed in greater detail in **Section II.D**, long before any of the abovementioned facts took place, the [REDACTED] had been engaged in dishonest and possibly criminal activities. For instance, a UK court formally determined that Kaloti had been engaged in knowingly circumventing customs regulation to smuggle gold out of Morocco.⁵²⁸

* * *

259. In conclusion, the foregoing demonstrates that between 2014 and 2015, the Prosecutor's Office gathered ample evidence of the Suppliers' involvement in money laundering (and illegal mining), specifically in relation to the gold that they supplied to Kaloti. On that basis, the Criminal Courts ordered the initiation of the Criminal Proceedings against the Suppliers and in the context of such proceedings issued the Precautionary Seizures. They did so based on compelling evidence of criminal activities by the Suppliers, and in order to avoid the dissipation of the gold that comprised Shipments 1 to 4 (and briefly also Shipment 5). Kaloti failed to pursue any of the three legal avenues at its disposal under Peruvian law to challenge the

crimes, pp. 125, 128 (“*según el Reporte de la UIF N° 021-2014-DAO-UIF-SBS, la Empresa Kaloti Metals Logistics LLC, figura como ordenante de quince (15) transferencias por USD 10'493,223 dólares americanos desde Estados Unidos a favor de Comercializadora de Minerales Rivero SAC . . .*”).

⁵²⁶ **Ex. C-0052**, Prosecutorial Resolution No. 1, dated September 20, 2015, issued by the 1st supra-provincial corporate prosecutor's office specializing in money laundering and loss of domain crimes - Prosecution File No. 42-2014 Separation of allegations and further investigation.

⁵²⁷ See **Ex. C-0052**, Prosecutorial Resolution No. 1, dated September 20, 2015, issued by the 1st supra-provincial corporate prosecutor's office specializing in money laundering and loss of domain crimes - Prosecution File No. 42-2014 Separation of allegations and further investigation, pp. 26, 44, 45, 96. See also **Ex. C-0101**, Prosecutorial Order No. 19, dated January 09, 2017, issued by the 1st supra-provincial corporate prosecutor's office specializing in money laundering and loss of domain crimes, pp. 114, 125.

⁵²⁸ **Ex. R-0119**, *Rihan* (Judgment), ¶¶ 3, 333, 641.

Precautionary Seizures. The Criminal Proceedings have followed their course in accordance with Peruvian law, and remain pending. Given the close links of Kaloti with the companies suspected of money laundering, it is hardly surprising, and in fact entirely justified, that Kaloti itself was “mentioned” in the criminal investigations.

D. Kaloti is solely responsible for its global reputation

260. Kaloti alleges that its reputation around the world was tarnished by Peru. In an attempt to support such argument, Kaloti cites ten news articles and a book (collectively, “**Publications**”) that mention Kaloti in the context of reports on gold seizures in Peru.⁵²⁹ According to Kaloti, the Publications caused multiple Peruvian gold suppliers and financial institutions in the United States to stop conducting business with it,⁵³⁰ which in turn allegedly led to the demise of Kaloti’s global operations in 2018.⁵³¹ However, Kaloti’s allegations are unfounded and untrue.
261. As explained below, Kaloti, [REDACTED] and other companies of the Kaloti family are closely intertwined by virtue of corporate and familial ties. A close tie that Kaloti itself recognized and relied on in its *Amparo* request presented to the Constitutional Court of Lima in 2014.⁵³² Therefore, for the purposes of this submission, Peru will refer to the conglomerate to which Kaloti belongs as the “[REDACTED].”⁵³³ If Kaloti has a sordid reputation, it is not due to the Challenged Measures or any conduct attributable to Peru, but rather, solely to Kaloti’s – and, more broadly, the [REDACTED] – own substandard business practices, and their involvement in suspect transactions in numerous countries (as detailed in **Section II.D.1** below). Such practices have attracted the attention of regulators and the press in various jurisdictions, and are the

⁵²⁹ See **Ex. C-0051**, [News articles and books cited by Kaloti].

⁵³⁰ Memorial, ¶¶ 59–61, 65–66, 136.

⁵³¹ Memorial, ¶ 17.

⁵³² **Ex. R-0230**, Amparo Request, Constitutional Court of Lima, 11 March 2014, ¶ 1.1 (“Currently [Kaloti] is a world leader and has ties [REDACTED], a Dubai company with more than 25 years’ experience in the commercialization of metals.”)

⁵³³ [REDACTED] is used in the following: **Ex. R-0067**, *Beneath the Shine: A Tale of Two Gold Refiners*, GLOBAL WITNESS, July 2020, p. 5; **Ex. R-0108**, “*Billion dollar gold market in Dubai where not all was as it seemed*,” THE GUARDIAN, 25 February 2014, p. 1.

reason behind the Publications and the various investigative articles and materials currently in the public domain that refer to Kaloti and the [REDACTED] (Section II.D.2 below). Further, Peru is not responsible in any way for any gold suppliers' alleged refusal to conduct business with Kaloti (Section II.D.3 below), for any severed relationship between Kaloti and financial institutions (Section II.D.4 below), or for the alleged decline in Kaloti's business.

1. *Kaloti's worldwide disrepute is the result of its own business practices*

262. Kaloti would like the Tribunal to believe that, before the Publications, Kaloti enjoyed an impeccable reputation.⁵³⁴ However, this is not the case. Even cursory due diligence easily reveals that Kaloti's sister company, [REDACTED], and the broader [REDACTED], have been long beset by red flags that would give pause to any reputable, would-be business partner.

263. In the Memorial, Kaloti repeatedly refers to its business relationship with its namesake [REDACTED]. It recognizes that the latter was both its primary financier and its main customer.⁵³⁵ Thus, it asserts that its business model "relied on one principal buyer, [REDACTED],"⁵³⁶ which "often would make prepayments on the future deliveries"⁵³⁷ and had agreed to buy as much gold as Kaloti could source.⁵³⁸ Kaloti argues that this arrangement allowed it to establish "a gold price fixing strategy on all purchases"⁵³⁹. Kaloti therefore admits that [REDACTED] played a fundamental role in its gold trading business in Peru and abroad.

⁵³⁴ See, e.g., Memorial, ¶¶ 15, 18, 21, 22, 26, 30, 32.

⁵³⁵ See, e.g., Memorial, ¶¶ 14, 22, 29, 146; Expert Report of Almir Smajlovic, 4 March 2022 ("**Smajlovic Report**"), ¶ 5.11.

⁵³⁶ Memorial, ¶ 146.

⁵³⁷ Smajlovic Report, ¶ 5.11; see also [REDACTED] Witness Statement, ¶ 37; Ex. R-0062, "Miami, nuevo centro de comercio del oro," EL FINANCIERO, 3 August 2013, p. 2.

⁵³⁸ Memorial, ¶ 146; see also [REDACTED] Witness Statement, ¶ 12.

⁵³⁹ Memorial, ¶ 28.

264. While Kaloti at times suggests that it had an arm’s-length relationship with [REDACTED],⁵⁴⁰ the evidence shows that both companies are intertwined by dint of inextricable corporate and familial ties. For example, (i) [REDACTED] was founded by [REDACTED], who is the cousin of [REDACTED], Claimant’s founder;⁵⁴¹ (ii) [REDACTED] is the father of [REDACTED] and the father-in-law of [REDACTED] (the two of whom in the aggregate own a 75% shareholding in Kaloti);⁵⁴² (iii) [REDACTED] is Managing Director and Chief Executive Officer of [REDACTED], and (iv) [REDACTED] is Director of [REDACTED].⁵⁴³
265. In addition to being Kaloti’s majority shareholders and the managers of [REDACTED], (vi) [REDACTED] and [REDACTED] are either shareholders or directors of the following [REDACTED] companies: [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], and [REDACTED].⁵⁴⁴
266. Further, (vii) Kaloti is [REDACTED] Florida-based “branch,” as explicitly noted in 2014 on [REDACTED] website.⁵⁴⁵ Specifically, in reference to Kaloti, the website noted that “[REDACTED] opened . . . an associate branch in Miami”.⁵⁴⁶ [REDACTED]

⁵⁴⁰ See, e.g., [REDACTED] Witness Statement, ¶ 13 (“From publicly available information, I understand **such conglomerate** has been smeared as reportedly investigated” (emphasis added)).

⁵⁴¹ [REDACTED] Witness Statement, ¶¶ 9, 12.

⁵⁴² Ex. C-0102, KML Operating Agreement, p. 16.

⁵⁴³ Ex. R-0063, [REDACTED] Company Profile, DUN & BRADSTREET, last accessed on 8 June 2022, p. 1.

⁵⁴⁴ Ex. R-0063, [REDACTED] Company Profile, DUN & BRADSTREET, last accessed on 8 June 2022, p. 1; Ex. R-0064, [REDACTED] 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, Kaloti [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, p. 43.

⁵⁴⁵ Ex. R-0109, Kaloti Precious Metals Web Archive, 14 March 2014.

⁵⁴⁶ Ex. R-0109, Kaloti Precious Metals Web Archive, 14 March 2014.

██████████ continued to publicly list Kaloti as either an associate office or an affiliate until at least 2020.⁵⁴⁷ ██████████ website also stated that it had “full-service assaying laboratories in Sharjah, Dubai, Hong Kong, Singapore, and Miami” (emphasis added).⁵⁴⁸ Similarly, in its advertising, ██████████ ██████████ refers to Kaloti as its Miami office.⁵⁴⁹

267. For more than a decade, leading international media outlets—including the BBC,⁵⁵⁰ the Financial Times,⁵⁵¹ The Guardian,⁵⁵² and the Organized Crime and Corruption Project⁵⁵³—have reported on ██████████ involvement in, or connections with, irregular and unlawful activities worldwide, showing it to be an unscrupulous gold trader with little regard for compliance programs or for the source of the gold that it acquires.
268. The ██████████ infamous track record is based mainly on events that predate the Challenged Measures. It is therefore disingenuous for Kaloti to pin the source of its poor reputation on the Publications and to attribute those publications to Peru. But try as it may, Kaloti simply cannot elide the evidence of its questionable business practices—and more generally those of the ██████████. Such evidence includes a UK court ruling, global investigative journalism, and criminal investigations. It is thus the ██████████ own conduct that prompted its reputation.

⁵⁴⁷ Ex. R-0109, Kaloti Precious Metals Web Archive, 14 March 2014; Ex. R-0110, Kaloti Precious Metals Web Archive, 30 April 2020.

⁵⁴⁸ Ex. R-0109, Kaloti Precious Metals Web Archive, 14 March 2014; Ex. R-0110, Kaloti Precious Metals Web Archive, 30 April 2020.

⁵⁴⁹ Ex. R-0111, ██████████ HONG KONG JEWELRY MANUFACTURERS’ ASSOCIATION, last accessed on 22 July 2022.

⁵⁵⁰ 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.

⁵⁵¹ Ex. R-0115, “*EY ordered to pay \$10m to Dubai whistleblower*,” FINANCIAL TIMES, 17 April 2020.

⁵⁵² 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.

⁵⁵³ Ex. R-0117, “*US Drug Agents Say Diplomacy Trumped Money Laundering Concerns*,” OCCRP, 23 September 2020.

269. That the [REDACTED] is a dishonest gold trader was evidenced in an English High Court proceeding. In January 2014, contemporaneously with SUNAT's immobilizations, an Ernst & Young Dubai whistleblower publicly disclosed that the [REDACTED] had pressured Ernst & Young to not report certain original 2012 audit findings that suggested that the [REDACTED] was involved in money laundering on a massive scale.⁵⁵⁴ Although both Ernst & Young and [REDACTED] brazenly denied the allegations, the issue was addressed squarely in an English High Court proceeding that involved a lawsuit by the whistleblower against Ernst & Young and others.⁵⁵⁵ In its judgment in that case, the Honorable Mr. Justice Kerr fully vindicated the whistleblower's allegations. For example, he expressly noted in his conclusion that the whistleblower was "a truthful, honest and reliable witness with a high degree of knowledge and recollection of events."⁵⁵⁶ The judgment noted that the whistleblower

was relentlessly and vigorously cross-examined . . . over three full days with frequent challenges to the veracity of his evidence to the court. The longer it went on, the more apparent it was to me that his evidence was essentially true and honest.⁵⁵⁷

270. Ultimately Mr. Justice Kerr found in favour of the whistleblower, having determined that [REDACTED] and [REDACTED], owners of 75% of Kaloti's shares,⁵⁵⁸ had colluded with a gold supplier to circumvent customs regulations in Morocco and smuggle gold out of that country.⁵⁵⁹ Mr. Justice Kerr relied on evidence showing that "everyone in [REDACTED] including [REDACTED], [REDACTED], [REDACTED], [REDACTED] and the compliance officer verbally said that the gold was exported [from

⁵⁵⁴ 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. 6-15.

⁵⁵⁵ Ex. R-0119, *Rihan* (Judgment).

⁵⁵⁶ Ex. R-0119, *Rihan* (Judgment), ¶ 128 .

⁵⁵⁷ Ex. R-0119, *Rihan* (Judgment), ¶ 128.

⁵⁵⁸ Ex. C-0102, *KML Operating Agreement*, p. 16.

⁵⁵⁹ Ex. R-0119, *Rihan* (Judgment), ¶¶ 3, 641.

Morocco] as silver and declared as gold in Dubai”.⁵⁶⁰ Mr. Justice Kerr then concluded: “I am satisfied . . . that Kaloti [REDACTED] well knew . . . that its management did know about the practice and did collude with it, were relaxed about it and regarded it as not unusual or concerning”.⁵⁶¹

271. Mr. Justice Kerr also explained that Ernst & Young’s audits “gave rise to a reasonable suspicion that [REDACTED] [REDACTED] was involved in money laundering”⁵⁶², amongst other reasons because:

- a. “about 40 per cent in value of [its] transactions were in cash” and “about \$5.2 billion of business was done in cash during 2012” alone;⁵⁶³
- b. “‘High risk’ cash transactions involving gold supplied from Sudan (\$52 million) and Ghana (\$100 million) were identified by the [Ernst & Young] team”;⁵⁶⁴
- c. “About two tonnes of gold had been bought in cash from ‘call’ customers who had no account with Kaloti [REDACTED] and without any adequate documents or ‘KYC’ (‘know your client’) procedures”;⁵⁶⁵
- d. “One of the suppliers of recycled gold to Kaloti [REDACTED] for cash, Viren Jewellers, was known to deal with another entity, Yogesh Jewellers, which had been identified adversely in a UN Security Council report”;⁵⁶⁶
- e. “The supplier [of the Moroccan gold] was called Renade International which, as it later turned out, was run by two brothers subsequently the subject of an

⁵⁶⁰ Ex. R-0119, *Rihan* (Judgment), ¶ 122. See also, Ex. R-0119, *Rihan* (Judgment), ¶¶ 118–121; 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; Ex. R-0115, “EY ordered to pay \$10m to Dubai whistleblower,” FINANCIAL TIME, 17 April 2020.

⁵⁶¹ Ex. R-0119, *Rihan* (Judgment), ¶ 333.

⁵⁶² Ex. R-0119, *Rihan* (Judgment), ¶¶ 4, 302.

⁵⁶³ Ex. R-0119, *Rihan* (Judgment), ¶ 100.

⁵⁶⁴ Ex. R-0119, *Rihan* (Judgment), ¶ 100.

⁵⁶⁵ Ex. R-0119, *Rihan* (Judgment), ¶ 101.

⁵⁶⁶ Ex. R-0119, *Rihan* (Judgment), ¶ 101.

investigation by French police leading to convictions in a French court on charges related to drug trafficking and money laundering”;⁵⁶⁷ and

- f. “The [Ernst & Young] team . . . uncovered transactions involving gold from . . . the Democratic Republic of the Congo [i.e., a conflict zone], and from Iran which was subject to US and European Union (EU) trade sanctions” (emphasis in the original).⁵⁶⁸

272. Most of these findings of Ernst & Young on the [REDACTED] illegal practices have been publicly available since at least February 2014. Indeed, they were widely publicized at the time by the BBC, Global Witness, The Guardian, and other international media outlets.⁵⁶⁹ For example, in February 2014, The Guardian published a video interview of the whistleblower, in which the latter described [REDACTED] practices as “appalling, immoral, and extremely unethical”.⁵⁷⁰ The whistleblower further noted that there had been “some severe findings, some disturbing findings” in Ernst & Young’s audits of [REDACTED] and that, if “[y]ou want to hide” money laundering, the purchase of illegal gold from conflict zones and other illicit activities, “the easiest way to do it is use cash”⁵⁷¹ (which is what Kaloti had done).

⁵⁶⁷ **Ex. R-0119**, *Rihan* (Judgment), ¶ 103. The BBC also reported that, in 2012 alone, Renade International sold USD 146 million worth of gold to [REDACTED]. **Ex. R-0114**, “*Ex-EY whistleblower wins \$10.8m in damages*,” BBC NEWS, 17 April 2020; see also **Ex. R-0121**, “*Dirty Money*,” CGI, last accessed 23 July 2022.

⁵⁶⁸ **Ex. R-0119**, *Rihan* (Judgment), ¶ 116.

⁵⁶⁹ **Ex. R-0118**, *City of Gold: Why Dubai’s First Conflict Gold Audit Never Saw the Light of Day*, GLOBAL WITNESS, February 2014, p. 2; **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.

⁵⁷⁰ **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.

⁵⁷¹ **Ex. R-0123**, Video Transcript: “*Billion dollar gold market in Dubai where not all was as it seemed*,” THE GUARDIAN, 25 February 2014, 00:42-01:18.

273. In the same publication, The Guardian reported that ██████████ (director of ██████████ ██████████ and shareholder of Kaloti) had admitted in a meeting with Ernst & Young that it was normal for the ██████████ to purchase gold from suppliers that circumvented customs regulations:⁵⁷²

E&Y inspectors could hardly believe what ██████████ was telling them. According to their minutes: 'He took a scanner and showed that the gold content was more than 85% and these bars are ... from a Moroccan supplier. He said that it's normal to receive silver coated gold bars especially from Morocco due to the gold export limits imposed by the Moroccan customs.'⁵⁷³

274. Following a separate audit of various companies of the ██████████, the Dubai Multi Commodities Centre removed ██████████ refinery (i.e., Al Kaloti Jewellers Factory Ltd) from the list of companies that adhere to the Dubai Good Delivery standard of quality and responsible sourcing. This fact, which was reported by major international media outlets in April 2015,⁵⁷⁴ undoubtedly exacerbated even further the global disrepute of the ██████████ and of Kaloti's owners.⁵⁷⁵

275. There is ample further evidence of the ██████████ suspect activity. For example, Arab Reporters for Investigative Journalism, in collaboration with the Pulitzer Prize-winning International Consortium of Investigative Journalists ("ICIJ")⁵⁷⁶, reported that, in 2011, a task force led by the DEA opened an investigation into the ██████████ ██████████, which was code-named "Operation Honey Badger".⁵⁷⁷ In the course of

⁵⁷² 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.

⁵⁷³ Ex. R-0108, "Billion dollar gold market in Dubai where not all was as it seemed," THE GUARDIAN, 25 February 2014, p. 1.

⁵⁷⁴ See, e.g., Ex. R-0124, "Dubai's Kaloti Removed From Gold List as New Factory Near," BLOOMBERG, 13 April 2015.

⁵⁷⁵ Ex. R-0119, *Rihan* (Judgment), ¶ 12.

⁵⁷⁶ The ICIJ is a U.S.-based non-profit investigative journalism consortium that works with a global network of media organizations, including the New York Times, the BBC, and The Guardian. Arab Reporters for Investigative Journalism is the leading media organization in the Middle East and North Africa? (MENA) region, dedicated to promoting investigative journalism.

⁵⁷⁷ Ex. R-0125, "The Kaloti Gold Machine," ARIJ, 20 September 2020, p. 3.

investigations into international criminal networks, the DEA noticed that illicit funds originally wired to the Lebanese Canadian Bank as part of an international narcotics trafficking and money laundering network,⁵⁷⁸ suddenly began to be transferred to the [REDACTED].⁵⁷⁹ After investigating, the DEA-led task force submitted a report to the US Treasury Department detailing the reasons that led them to believe that Kaloti and other companies were money laundering threats.⁵⁸⁰ In that report, the investigators concluded that the [REDACTED] had been “providing financial services for a variety of criminal organizations based throughout the world,”⁵⁸¹ and facilitating the conversion into gold of laundered funds. The aforementioned report, referring to “Kaloti and other companies”⁵⁸², noted that

[t]ogether, they have established a significant capability to transport or otherwise transfer tremendous amounts of illicit value through the use of gold as a commodity, as well as bulk cash transfers and third party wire payments.⁵⁸³

276. As result of these and other findings (unrelated to Kaloti’s operations in Peru), in 2014 the DEA “recommended that the [US] Treasury Department designate Kaloti as a money laundering threat under the USA Patriot Act”.⁵⁸⁴ The media also reported that Kaloti – and, as a whole, the [REDACTED] – had been investigated for suspicious wire

⁵⁷⁸ The Lebanese Canadian Bank had been banned from doing business in the United States due to money laundering concerns. **Ex. R-0194**, U.S. Department of Treasury, “*Treasury Identifies Lebanese Canadian Bank Sal as a ‘Primary Money Laundering Concern,’*” 10 February 2011.

⁵⁷⁹ See **Ex. R-0125**, “*The Kaloti Gold Machine,*” ARIJ, 20 September 2020, p. 4.

⁵⁸⁰ **Ex. R-0126**, “*US Treasury Department abandoned major money laundering case against Dubai gold company,*” ICIJ, 21 September 2020, p. 9. Although the relevant investigation was ultimately discontinued, the U.S. government agencies nevertheless reached several factual conclusions relating to the [REDACTED], and such conclusions are relevant herein (in particular in connection with Claimant’s allegations of damaged reputation as a result of actions by Peru).

⁵⁸¹ **Ex. R-0126**, “*US Treasury Department abandoned major money laundering case against Dubai gold company,*” ICIJ, 21 September 2020, p. 9.

⁵⁸² **Ex. R-0126**, “*US Treasury Department abandoned major money laundering case against Dubai gold company,*” ICIJ, 21 September 2020, p.9.

⁵⁸³ **Ex. R-0126**, “*US Treasury Department abandoned major money laundering case against Dubai gold company,*” ICIJ, 21 September 2020, p.9.

⁵⁸⁴ **Ex. R-0126**, “*US Treasury Department abandoned major money laundering case against Dubai gold company,*” ICIJ, 21 September 2020, p. 1

transfers totalling USD 9.3 *billion* made between 2007 and 2015⁵⁸⁵ (i.e., starting long before Kaloti's first business activities in Peru, which did not commence until 2012.⁵⁸⁶ The Financial Crimes Enforcement Network (FinCEN) files⁵⁸⁷ published by the ICIJ and BuzzFeed News⁵⁸⁸ exposed over *two thousand* (2,000) Suspicious Activity Reports ("SARs") filed by global banks in relation to the [REDACTED] and other companies.⁵⁸⁹ Notably, [REDACTED] was the second-most flagged company in the FinCEN files.⁵⁹⁰ For example, three SARs from 2012 and 2013 – submitted by JP Morgan Chase, Standard Chartered Bank, and Deutsche Bank – specifically referenced [REDACTED] and Kaloti's irregular and dubious transfers, including transfers to shell companies.⁵⁹¹

277. Further, also in 2012 and early 2013 (i.e., *before* SUNAT's immobilizations or any of the Publications), Deutsche Bank submitted two separate SARs expressing concerns about [REDACTED] activities. Such SARs showed, *inter alia*, that [REDACTED] was withdrawing *cash* from its Emirates NDB bank account in such amounts as to require wheelbarrows to move it.⁵⁹² This unusual fact rightly raised red flags, to the point that

⁵⁸⁵ **Ex. R-0126**, "US Treasury Department abandoned major money laundering case against Dubai gold company," ICIJ, 21 September 2020, p. 2.

⁵⁸⁶ Memorial, ¶ 14.

⁵⁸⁷ These files, submitted to U.S. authorities by various financial institutions, were obtained and processed by BuzzFeed News and ICIJ.

⁵⁸⁸ BuzzFeed News is a U.S. news source that has won several awards including the Pulitzer Prize for International Reporting.

⁵⁸⁹ **Ex. R-0127**, "We Got Our Hands on Thousands of Secret Documents. Let's Break Them Down," BUZZFEED NEWS, 20 September 2020.

⁵⁹⁰ **Ex. R-0127**, "We Got Our Hands on Thousands of Secret Documents. Let's Break Them Down," BUZZFEED NEWS, 20 September 2020, p. 12.

⁵⁹¹ **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], pp. 1-8.

⁵⁹² **Ex. R-0128**, Suspicious Transaction Report, DEUTSCHE BANK ABU DHABI, 29 October 2012, p. 4; see also **Ex. R-0126**, "US Treasury Department abandoned major money laundering case against Dubai gold company," ICIJ, 21 September 2020, p. 1; **Ex. R-0129**, *Amjad Rihan v. Ernst & Young Global Ltd, et al*, Case No.QB-2017-005208, Witness Statement of Anna Waterhouse, 3 October 2019 ("Waterhouse Witness Statement"), ¶ 11.

Emirates NDB called Deutsche Bank to share its concern, and to ask for its view on relevant compliance issues.⁵⁹³

278. The Deutsche Bank SARs also detail that ██████████ would often be willing to trade on terms that are commercially unreasonable. For example, it was willing to pay non-standard or unnecessary fees, such as wider price spreads on commodity trading, which constitutes a red flag for money laundering.⁵⁹⁴ As a result, several members of the London Metals Exchange, including Goldman Sachs and BAML, by 2012 (i.e., nearly *two years prior* to any of the Challenged Measures) either had stopped trading with the ██████████ altogether, or had begun to back away from it.⁵⁹⁵
279. For its part, Deutsche Bank London in early 2013 (also before any of the Challenged Measures), considered “exit[ing] the metals trading relationship with Kaloti ██████████”.⁵⁹⁶ That same year, Deutsche Bank and two other major banks told US authorities that they had closed, or planned to close, accounts associated with the ██████████.⁵⁹⁷ However, the U.S. Department of Justice asked Deutsche Bank to keep the ██████████ accounts open, so that it could continue to monitor the ██████████ ██████████ activities relating to that bank.⁵⁹⁸
280. The evidence thus shows that, even as early as February 2014, numerous independent sources were already publicly reporting on the questionable and arguably criminal activity of the ██████████ and Kaloti’s majority owners. Further, by that date employees of the ██████████ own auditors had already publicly linked Kaloti’s

⁵⁹³ **Ex. R-0129**, *Waterhouse Witness Statement*, ¶ 12 (“[I]t is very unusual for one bank to call another to ask for its view about its clients and compliance issues”).

⁵⁹⁴ **Ex. R-0128**, Suspicious Transaction Report, DEUTSCHE BANK ABU DHABI, 29 October 2012, p. 4; see also **Ex. R-0129**, *Waterhouse Witness Statement*, ¶ 13.

⁵⁹⁵ **Ex. R-0200**, Suspicious Transaction Report, DEUTSCHE BANK TRUST CO. AMERICAS, 7 February 2013, p. 4; **Ex. R-0129**, *Waterhouse Witness Statement*, ¶ 14.

⁵⁹⁶ **Ex. R-0200**, Suspicious Transaction Report, DEUTSCHE BANK TRUST CO. AMERICAS, 7 February 2013, p. 4.

⁵⁹⁷ **Ex. R-0126**, “US Treasury Department abandoned major money laundering case against Dubai gold company,” ICIJ, 21 September 2020, p. 10.

⁵⁹⁸ **Ex. R-0129**, *Waterhouse Witness Statement*, ¶¶ 5-7; **Ex. R-0126**, “US Treasury Department abandoned major money laundering case against Dubai gold company,” ICIJ, 21 September 2020, p. 8.

owners to a multi-billion, money-laundering scheme, to illegal mining, and to other illegal activities that were unrelated to Peru or to the Challenged Measures.

281. By contrast, only one of the Publications cited by Kaloti in this case—an article published by a Peruvian newspaper—had been published by that date.⁵⁹⁹ Moreover, all that article did was to report, as a factual matter, that SUNAT had seized gold shipments (including shipments unrelated to this case) worth approximately USD 18 million. The article mentioned Kaloti only in the context of a statement that the apparent destination of part of the seized gold was Kaloti’s facilities in the United States. The remainder of the Publications were published after February 2014. As explained above, by then Kaloti’s and the [REDACTED] widespread dubious—and potentially criminal—conduct was already public knowledge, such that by that date the reputation of those entities was already severely tarnished. In fact, five of the Publications were published several years *after* the alleged termination of Kaloti’s operations in 2018.⁶⁰⁰ That means *a fortiori* that such publications could not have caused *any* impact at all on Kaloti’s business.

282. In conclusion, the Publications did not have the detrimental effect on Kaloti’s business and/or reputation that Claimant alleges. Thus, and as discussed in more detail in **Sections II.D.3** and **II.D.4** below, the Publications were *not* the cause of Kaloti’s alleged loss of suppliers, financing difficulties, or ultimate decision to cease operations in 2018. In any event, as explained in the following section, even if the Publications had in fact impacted Kaloti’s business and reputation in the manner that Claimant alleges (*quod non*), such publications and their alleged impact cannot be attributed to Peru, for which reason they cannot form the basis of a finding of responsibility by Peru under the Treaty.

⁵⁹⁹ **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].

⁶⁰⁰ See **Ex. C-0051**, [News articles and books cited by Kaloti], where 5 articles were published in 2019 or later, pp. 41–43, 44–47, 151–161, 198–202.

2. *Peru did not leak any information about Kaloti to the press*

283. In Section II.D.c of the Memorial, Kaloti tries to blame Peru for the Publications. It accuses unspecified public officials of having leaked to the press confidential information concerning money-laundering investigations that implicated Kaloti. In putative support of this allegation, Kaloti relies on two extracts of two Publications: (i) an article on gold seizures, published by *InSight Crime* on 18 December 2015;⁶⁰¹ and (ii) an article detailing illegal mining operations and their pernicious effects in Peru, published by *Earth Island Journal* on 7 January 2015.⁶⁰² Far from proving that Peru leaked confidential information to the press, the quoted extracts of these Publications actually contradict Kaloti's allegation.
284. To begin with, neither of the quoted extracts refers to any State sources of the information contained in the corresponding articles. To the contrary, the content of such extracts suggests that the authors did *not* have any access to confidential governmental information. The extract of *InSight Crime's* article simply alludes to the immobilization of certain gold shipments that belonged to six Peruvian exporters,⁶⁰³ and indeed even goes on to state that "InSight Crime was unable to discover which of the companies was exporting to Kaloti".⁶⁰⁴ The remainder of the article transcribes an interview with a legal representative of Kaloti. The questions put to that representative sought to establish: (i) *whether* the Peruvian exporters intended to export the seized gold to Kaloti;⁶⁰⁵ and (ii) *whether* Kaloti had been included in

⁶⁰¹ **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].

⁶⁰² Memorial, ¶ 58; see also **Ex. C-0051**, [News articles and books cited by Kaloti], pp. 32–34.

⁶⁰³ **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.

⁶⁰⁴ **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 ("InSight Crime no logró descubrir cuál de las empresas exportaba para Kaloti").

⁶⁰⁵ **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.

investigations conducted by Peruvian authorities.⁶⁰⁶ Had *InSight Crime* prepared the article on the basis of confidential information leaked by Peruvian officials, it would have known exactly which of the Peruvian exporters conducted business with Kaloti, and also whether Kaloti was involved in the relevant investigations. Ironically, it was Kaloti's own representative that confirmed that there were indeed ongoing investigations involving Kaloti.⁶⁰⁷

285. With respect to the extract of the *Earth Island Journal* article quoted by Claimant, such extract does not mention any investigation against Kaloti, and does not attribute any information to State authorities. Rather, it expressly states that the information contained in the story was based on "[a] 2014 study by the Swiss nonprofit Society for Threatened People",⁶⁰⁸ which had reported that "Kaloti Metals . . . as well as NTR Metals and Republic Metals Corporation . . . were accused of importing gold from exporters who sourced the metal in Madre de Dios [in southeastern Peru]".⁶⁰⁹
286. Kaloti also asserts, again without any support, that "SUNAT . . . [fed] baseless rumors to the press about KML,"⁶¹⁰ and that "[b]ecause of Peru, these reports painted KML – as well as Mr. ██████████ himself – in sensationalistic terms."⁶¹¹ However, Kaloti does not purport to identify any specific report or article to substantiate those assertions, nor does it demonstrate that the alleged press coverage was in fact "baseless" and "sensationalistic". In any event, as explained in **Section II.D.1** above, Kaloti itself is solely responsible for its deplorable reputation, and for any adverse

⁶⁰⁶ **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.

⁶⁰⁷ **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,**' ██████████ 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'").

⁶⁰⁸ **Ex. C-0051**, [News articles and books cited by Kaloti], p. 33.

⁶⁰⁹ **Ex. C-0051**, [News articles and books cited by Kaloti], p. 33.

⁶¹⁰ Memorial, ¶ 5.

⁶¹¹ Memorial, ¶ 148.

inferences that the press may have drawn from Kaloti's business transactions with the Suppliers.

287. In the absence of any evidence whatsoever that Peru fed "rumours" or leaked any information to the press concerning Kaloti, Claimant posits that, since "the alleged money-laundering investigation was strictly confidential, it stands to reason that the Peruvian Government was the source of these damaging leaks to the press".⁶¹² In other words, Kaloti's claims are admittedly based on mere speculation.
288. The reality is that none of the Publications state or even suggest that Peru leaked information about the money laundering investigations.⁶¹³ In fact, none of the Publications contains any confidential information at all – much less information that could somehow prejudice the due process rights of the entities being investigated. The statements attributed to State officials in the Publications related mainly to general issues concerning illegal mining and money laundering, which are topics of public interest.⁶¹⁴
289. The Publications are investigative pieces published by foreign and national independent media outlets, as well as by non-governmental organizations, none of which are related or have ties to SUNAT or the Prosecutor's Office. Various Publications expressly relied on their own research and investigative work, including by consulting information that is publicly available in commercial registries and other public sources.⁶¹⁵

⁶¹² Memorial, ¶ 136.

⁶¹³ Memorial, ¶ 58; *see also* Ex. C-0051, [News articles and books cited by Kaloti].

⁶¹⁴ Ex. C-0051, [News articles and books cited by Kaloti], pp. 27-30, 148-149, 178, 180.

⁶¹⁵ 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 ("InSight Crime **was unable to discover** which of the companies exported for Kaloti. But of the six, three have traded with Kaloti since 2012, according to export data obtained from trade bodies; Minerales Rivero, [REDACTED] and Giovanni Gold." (emphasis added)); 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], p. 2 ("This newspaper **investigated** the history of the six exporters and found that four of them were incorporated between 2011 and 2013 with cash capital that contrasts with the millionaire gold exports they have made since their creation." (emphasis added)).

290. Finally, Kaloti relies upon a news article published by *Gestión* on 7 March 2022 to allege that Peru has a “practice of leaking details of criminal investigations” to the media.⁶¹⁶ That article – which does not even mention Kaloti or the seizures that are the subject of the present dispute – does not show a leak of confidential information; it simply refers to a press release issued by the Prosecutor’s Office after a *public* hearing concerning a criminal proceeding. That is evident from the article itself, which indicates that “*Gestión* broadcasted the information [contained in the article] based on the official version of the Public Prosecutor’s Office published on its website and social networks.”⁶¹⁷

291. In sum, the evidence shows that Kaloti’s desperate attempt to blame Peru for its dismal reputation is unfounded, and that, to the contrary, the “sinister cloud of doubt”⁶¹⁸ that gathered over the heads of Kaloti and the [REDACTED] was entirely of their own making. The discussion above shows – fatally for Kaloti’s claims in this arbitration – that the numerous reports in the public domain concerning Kaloti, [REDACTED] and, more generally, the [REDACTED] are not attributable to Peru, and thus cannot give rise to liability for Peru under international law (including the Treaty), as expounded further in **Section IV** below.

3. *Peru was not responsible for any gold supplier’s alleged refusal to conduct business with Kaloti*

292. Kaloti argues that, as a result of the “global media scandal which Peru unfairly connected to KML, many suppliers (sellers of gold) all over the world did not want to deal with KML.”⁶¹⁹ Even assuming that any suppliers had indeed stopped selling gold to Kaloti as a result of the Publications, Peru has already demonstrated that (i) its

⁶¹⁶ Memorial, ¶ 71 (citing **Ex. C-0114**, Raul Linares dice que no está implicado en el caso cuellos blancos. Article by *Gestion* – Grupo El Comercio.).

⁶¹⁷ **Ex. C-0114**, Raul Linares dice que no está implicado en el caso cuellos blancos. Article by *Gestion* – Grupo El Comercio, p. 3 (“*Gestión* disseminated the information based on the official version of the Public Ministry, published on its website and social networks.”).

⁶¹⁸ Memorial, ¶ 5.

⁶¹⁹ [REDACTED] Witness Statement, ¶ 55.

actions regarding the Five Shipments were reasonable and well-founded,⁶²⁰ and (ii) it cannot be held responsible for media reports on Kaloti's unscrupulous and irregular practices.⁶²¹

293. The discussion and evidence adduced above suffices for the Tribunal to reject Kaloti's argument that Peru caused Kaloti's alleged supply difficulties. As demonstrated in this Section, Kaloti adduces no evidence—because none exists—that any of its suppliers stopped selling gold to Kaloti *because* of the Challenged Measures, or even *because* of the Publications. For example, Kaloti has submitted no communications from its suppliers stating or even suggesting that they decided to sever their relationships with Kaloti due to any of the Challenged Measures or any of the Publications. Instead, Kaloti's arguments rest entirely on a list of transactions ("**Transaction History**") that Kaloti prepared for the purposes of this arbitration. The Transaction History, however, does not show—or even *purport* to show—that any supplier stopped selling gold to Kaloti *as a result of* the Challenged Measures or Publications.⁶²² In fact, and to the contrary, the Transaction History belies Kaloti's arguments in multiple ways, as detailed below.
294. *First*, Kaloti suggests that Peru's actions "torpedoed" long-standing "relationships of trust that Kaloti had developed with its sellers".⁶²³ However, several companies cited by Kaloti had only supplied it gold for a single year.⁶²⁴ Any decision by these

⁶²⁰ See Sections II.B and II.C.

⁶²¹ See Sections II.D.1 and II.D.2 above.

⁶²² Submitted as **Ex. C-0030**, KML transaction summary of all purchases between 2012 and 2018; **Ex. C-0043**, KML's transaction summary of all suppliers and purchases; and **Ex. C-0050**, KML's list of transactions and suppliers from 2011 to 2018, but referred to in this Section solely as **Ex. C-0030**.

⁶²³ Memorial, ¶ 5.

⁶²⁴ For example, American Partners Services only ever supplied gold in 2016, and A&U Metales y Minerales Sur only ever in 2017. See **Ex. C-0030**, KML transaction summary of all purchases between 2012 and 2018, pp. 15, 18.

companies to stop supplying gold to Kaloti would hardly amount to the rupture of continuous or developed “relationships of trust”.⁶²⁵

295. *Second*, many of the suppliers listed in the Transaction History did not begin selling gold to Kaloti until *after* SUNAT’s immobilizations had already occurred, and also until *after* the original Publications.⁶²⁶ Not only did Kaloti source new suppliers after the Challenged Measures, but even suppliers with whom Kaloti already had commercial relationships continued to supply gold to Kaloti until at least 2018.⁶²⁷ Therefore, it is manifestly not the case that they stopped supplying gold due to the Challenged Measures or the Publications.⁶²⁸
296. *Third*, Kaloti’s allegation that the Publications made it difficult for Kaloti to purchase “large quantities of gold, severely dampening supply”⁶²⁹ is also inaccurate. The Transaction History shows that the supplies from several companies actually *increased* from 2013, including supplies from companies that Kaloti argues discontinued their business with Kaloti as a result of Peru’s actions. For example, contrary to Kaloti’s argument, Vega Granada S.A.S. not only did not stop supplying gold in 2014 – as Claimant alleges⁶³⁰ – but, to the contrary, continued providing gold to Kaloti thereafter.⁶³¹ For example, it provided approximately 932 kg of gold to Kaloti in

⁶²⁵ Memorial, ¶ 5.

⁶²⁶ For example, CI OPEXCO S.A.S, EMCOGOMTRA and KBL E.I.R.L began supplying gold in 2016 and Steadson’s Jewellery USA Inc. 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 Stedson’s Jewellery USA Inc. Dated 12 May 2017, p. 3.

⁶²⁷ For example, Alishayev Sons (supplied from 2013 - 2018); Gemesa S.R.L /S.A. (supplied from 2014 - 2018); (EDPYME) Inversiones La Cruz S.A (supplied from 2014 - 2018). *See Ex. C-0030*, KML transaction summary of all purchases between 2012 and 2018, pp. 7, 10, 12–13, 15–16, 18–19, 21–22.

⁶²⁸ Memorial, ¶149.

⁶²⁹ Memorial, ¶ 149.

⁶³⁰ Memorial, ¶¶ 59–60.

⁶³¹ *Ex. C-0030*, KML transaction summary of all purchases between 2012 and 2018, pp. 11, 17, 20. Likewise, Veta de Oro S.A.C did not stop supplying in 2014. Instead, its supply actually *increased* from 27.7 kg in 2013 to 735 kg in 2016. *See Ex. C-0030*, KML transaction summary of all purchases between 2012 and 2018, pp. 9, 11, 14, 17.

2017,⁶³² thereby making it Kaloti's third top supplier that year.⁶³³ (By comparison, the same company had supplied Kaloti only approximately 4 kg of gold in 2013.)⁶³⁴

297. The Transaction History also shows that between 2016 and 2018 (i.e., *after* the Challenged Measures), Kaloti's purchases of gold from Mohamed's Enterprise, based in Guyana, continued to represent at least 12% of the declared total gold production of Guyana.⁶³⁵ That fact demonstrates that at least until 2018 Kaloti had been able to purchase significant volumes of gold.
298. Further, as noted in **Section II.C.7** above, after Peru intensified its fight against illegal mining and money laundering, a number of Kaloti's suppliers themselves came under investigation for gold smuggling schemes or other illicit activities. While this development may have led some companies listed in the Transaction History to stop supplying gold altogether (to Kaloti and everyone else), that cannot possibly constitute a breach of Peru's obligations to Kaloti under the Treaty. Self-evidently, Peru could not ignore indicia of criminal activities of any company simply to ensure that Kaloti's gold supply remained undiminished.
299. The evidence submitted by Kaloti proves the opposite of what it asserts, as it shows that many suppliers in fact did *not* stop supplying gold to Kaloti after 2014.⁶³⁶ The suppliers that did stop supplying gold to Kaloti are likely to have done so due to issues that marred their own businesses, including investigations into their own possible money laundering and tax evasion, and/or a myriad of other reasons (unrelated to the Challenged Measures or the Publications). Conversely, there is no evidence that

⁶³² **Ex. C-0030**, KML transaction summary of all purchases between 2012 and 2018, p. 20.

⁶³³ *See Ex. C-0030*, KML transaction summary of all purchases between 2012 and 2018, pp. 18–20.

⁶³⁴ *See Ex. C-0030*, KML transaction summary of all purchases between 2012 and 2018, p. 9.

⁶³⁵ *See Ex. C-0030*, KML transaction summary of all purchases between 2012 and 2018, pp. 6, 9, 11, 14, 17, 20, *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 Mohamed's Enterprise, a Guyanese company, by the yearly production of gold in Guyana provided in **Ex. R-0130**, shows that Claimant's purchases from Mohamed's Enterprise *alone* meant that Claimant had at least a 12% market share in Guyana.

⁶³⁶ *See* Memorial, ¶¶ 59–60; [REDACTED] Witness Statement, ¶ 34.

shows or even suggests that any of the suppliers stopped selling gold to Kaloti due to the Challenged Measures or the Publications.

4. *Peru is not responsible for any severed relationship between Kaloti and financial institutions*

300. Kaloti also argues that the Publications “caused financial institutions to stop dealing with KML, beginning in April 2014”.⁶³⁷ As alleged proof of this Kaloti points to eight letters sent to Kaloti by US-based banks from 1 April 2014 to 10 August 2018 (“**Bank Letters**”) that communicated to Kaloti the closure of its accounts with those banks.⁶³⁸ Kaloti claims that this deprived it of the financing it needed to continue its “strategy . . . of paying sellers of Peruvian gold very promptly and at prices better than those paid by KML’s competitors.”⁶³⁹ As explained in this section, Kaloti’s arguments are internally contradictory, unsubstantiated, and are belied by the evidence on the record.
301. Throughout the Memorial, Kaloti repeatedly states that [REDACTED] guaranteed that Kaloti would have access to unlimited financing in order “to buy as much gold . . . as it could source”.⁶⁴⁰ For example, Kaloti argues that: (i) it had “**reliable financing** for its investments and expansion (growth) in Peru” which “came primarily from [REDACTED] (Dubai)”;⁶⁴¹ (ii) “[t]he arrangement of KML with [REDACTED] . . . **ensured** a low cost of both financing and debt” (emphasis added);⁶⁴² and (iii) “if additional cash was required for projections beyond 2018, there would have been **no uncertainties regarding the availability of financing** based on the captive demand of [REDACTED]” (emphasis added).⁶⁴³

⁶³⁷ Memorial, ¶ 65.

⁶³⁸ Ex. C-0027, Notice of closure of KML’s bank accounts.

⁶³⁹ Memorial, ¶ 67; *see also* [REDACTED] Witness Statement, ¶ 55.

⁶⁴⁰ Memorial, ¶ 145.

⁶⁴¹ Memorial, ¶ 22.

⁶⁴² Memorial, ¶ 29; *see also*, [REDACTED] Witness Statement, ¶ 21.

⁶⁴³ Memorial, ¶ 46.

302. In addition, as explained in **Section II.D.3** above, the Transaction History shows that Kaloti was able to purchase very substantial volumes of gold up until 2018, i.e., *after* most of the Bank Letters were sent.⁶⁴⁴
303. The above statements and evidence submitted by Claimant, belie Kaloti's claim that the closure of banks accounts by certain US-based banks somehow affected its ability to obtain financing for the purchase of Peruvian gold.
304. In any event, Kaloti's arguments are entirely unsubstantiated. Kaloti has not submitted any evidence to show that it depended or even relied on outside financing provided by the US-based banks that sent the Bank Letters; nor has Kaloti submitted any evidence to show that the US-based banks severed relationships with it as a result of the Challenged Measures or the Publications. In fact, the Bank Letters do not even mention Peru or the Publications.⁶⁴⁵
305. Kaloti's arguments are also contrary to the evidence on the record. Kaloti claims that the Bank Letters "contain language that is customary in account closures based on compliance reasons".⁶⁴⁶ On that basis, it speculates that "[t]he only reason for KML [i.e., Kaloti], or Mr. [REDACTED], to have been flagged in compliance reviews . . . was directly and exclusively attributable to Peru."⁶⁴⁷ That speculation by Kaloti is false and self-serving. As explained in **Section II.D.1** above, even by the time that the first Bank Letter was sent (i.e., 1 April 2014), there were ample reasons to flag Kaloti and any other company of the [REDACTED] in compliance reviews. In fact, already in 2014 (which predates the issuance of six of the eight Bank Letters) the DEA had recommended that the US Treasury Department designate the [REDACTED] as a

⁶⁴⁴ Ex. C-0027, Notice of closure of KML's bank accounts, pp. 5-9, showing that five of the eight Bank's Letters were sent before 2017.

⁶⁴⁵ Ex. C-0027, Notice of closure of KML's bank accounts.

⁶⁴⁶ Memorial, ¶ 66.

⁶⁴⁷ Memorial, ¶ 66.

money laundering threat, for reasons unrelated to Kaloti's operations in Peru.⁶⁴⁸ According to the ICIJ, the DEA "[i]nvestigators were especially interested in two Kaloti clients that they suspected were involved in laundering drug money through gold: Salor DMCC, based in Dubai, and a business in Benin called Trading Track Company".⁶⁴⁹ Among many other red flags, the DEA investigators "noticed large wire transfers, sometimes more than once a day, from Kaloti to Salor" and Trading Track.⁶⁵⁰ In addition, the "Kaloti [Group] made cash payments worth millions of dollars to suppliers".⁶⁵¹ For instance, in 2012, it "paid Salor \$414 million in cash for gold" and USD 28 million to Trading Track.⁶⁵²

306. In fact, Kaloti itself admits that it transferred substantial sums of money "very promptly,"⁶⁵³ and paid prices for gold higher than those "paid by KML's competitors",⁶⁵⁴ which is considered a red flag for money laundering.⁶⁵⁵ As previously explained, it was precisely due to these and similar types of suspicious activities that the [REDACTED] had raised concern amongst numerous financial institutions around the world, starting well before the issuance of the Publications or the adoption of any of the Challenged Measures. Indeed, [REDACTED] was the second-most flagged

⁶⁴⁸ **Ex. R-0117**, "US Drug Agents Say Diplomacy Trumped Money Laundering Concerns," OCCRP, 23 September 2020, p. 1; see also **Ex. R-0126**, "US Treasury Department abandoned major money laundering case against Dubai gold company," ICIJ, 21 September 2020, pp. 1-2.

⁶⁴⁹ **Ex. R-0117**, "US Drug Agents Say Diplomacy Trumped Money Laundering Concerns," OCCRP, 23 September 2020, p. 4; see also **Ex. R-0126**, "US Treasury Department abandoned major money laundering case against Dubai gold company," ICIJ, 21 September 2020, p. 6.

⁶⁵⁰ **Ex. R-0117**, "US Drug Agents Say Diplomacy Trumped Money Laundering Concerns," OCCRP, 23 September 2020, p. 4.; see also **Ex. R-0126**, "US Treasury Department abandoned major money laundering case against Dubai gold company," ICIJ, 21 September 2020, p. 6.

⁶⁵¹ **Ex. R-0117**, "US Drug Agents Say Diplomacy Trumped Money Laundering Concerns," OCCRP, 23 September 2020, p. 5; see also **Ex. R-0126**, "US Treasury Department abandoned major money laundering case against Dubai gold company," ICIJ, 21 September 2020, p. 6.

⁶⁵² **Ex. R-0117**, "US Drug Agents Say Diplomacy Trumped Money Laundering Concerns," OCCRP, 23 September 2020, p. 5; see also **Ex. R-0126**, "US Treasury Department abandoned major money laundering case against Dubai gold company," ICIJ, 21 September 2020, p. 6.

⁶⁵³ Memorial, ¶ 67.

⁶⁵⁴ Memorial, ¶ 67.

⁶⁵⁵ **Ex. R-0026**, Money Laundering/Terrorist Financing Risks and Vulnerabilities Associated with Gold, FATF, July 2015, pp. 22-24.

company in the FinCEN files.⁶⁵⁶ To recall, already in 2012 (i.e., close to *two years prior* to any of the Challenged Measures, Publications, and Bank Letters), several members of the London Metals Exchange had either stopped trading with the [REDACTED] or begun to back away.⁶⁵⁷ Equally, in 2013, three major banks (including Deutsche Bank) informed US authorities that they had closed or planned to close accounts associated with the [REDACTED].⁶⁵⁸

307. As the evidence discussed in the previous section shows, by February 2014 (i.e., two months *prior* to the first Bank Letter⁶⁵⁹), leading international media outlets, such as The Guardian, had already widely publicized the Ernst & Young whistleblower's disclosures on the [REDACTED] dubious and non-compliant activities.⁶⁶⁰ To recall, it was that reporting by the whistleblower and his subsequent testimony that led an English High Court to conclude that that the Ernst & Young's audits of Kaloti's sister company, [REDACTED], "gave rise to a reasonable suspicion that [REDACTED] was involved in money laundering".⁶⁶¹

308. Therefore, it is *not* true that the Bank Letters were the result of the Challenged Measures or the Publications. Rather, Kaloti and the wider [REDACTED] are solely responsible for the alleged refusal of financial institutions and suppliers to maintain a commercial relationship with Kaloti. And it hardly could have been any other way, given that the suspicious activity and business practices of Kaloti and the [REDACTED] [REDACTED] as a whole could not and did not escape the notice and scrutiny of banks, law enforcement agencies, courts, investigative journalists, and mainstream media.

⁶⁵⁶ **Ex. R-0127**, "We Got Our Hands on Thousands of Secret Documents. Let's Break Them Down," BUZZFEED NEWS, 20 September 2020, pp. 12-13.

⁶⁵⁷ **Ex. R-0200**, Suspicious Transaction Report, DEUTSCHE BANK TRUST CO. AMERICAS, 7 February 2013, p. 4; **Ex. R-0129**, *Waterhouse Witness Statement*, ¶ 14.

⁶⁵⁸ **Ex. R-0126**, "US Treasury Department abandoned major money laundering case against Dubai gold company," ICIJ, 21 September 2020, p. 10.

⁶⁵⁹ **Ex. C-0027**, Notice of closure of KML's bank accounts, p. 8.

⁶⁶⁰ See Section II.D.1 above.

⁶⁶¹ **Ex. R-0119**, *Rihan* (Judgment), ¶ 4.

309. All of the above demonstrates that Kaloti’s arguments that Peru leaked confidential information to the press, and that suppliers or financial institutions refused to have commercial relationships with Kaloti because of actions by Peru, are a transparent and desperate attempt by Kaloti to shift the blame to Peru.

E. Peru engaged in good faith negotiations with Kaloti

310. Kaloti argues that Peru refused to engage in negotiations with it after receiving Kaloti’s second notice of intent, dated 8 April 2019 (“**Second Notice of Intent**”).⁶⁶² Specifically, Kaloti alleges that “Peru made no effort whatsoever to negotiate or even communicate with KML after April 8, 2019.”⁶⁶³ Such allegation is inexplicable, given the facts described below, which show that Peru in fact *did* meet with Kaloti – twice – to engage in negotiations regarding the present dispute, and that it made good faith efforts to comprehend Kaloti’s position and to assess the possibility of a negotiated solution. In any event, as explained in **Section IV.A.5**, Peru is not bound by a legal obligation under the Treaty to meet or enter into settlement negotiations with Kaloti or any other investor.

311. Kaloti completely omits reference to the fact that Peru had met with Kaloti in connection with its First Notice of Intent, dated 3 May 2016.⁶⁶⁴ In that notice, Kaloti had stated that the dispute stemmed from the immobilization and seizure of its gold, and from the refusal from the Peruvian administrative and judicial authorities to return the gold.⁶⁶⁵ The notice referred to the same Five Shipments from the Suppliers (i.e., █████, █████, █████, and █████)⁶⁶⁶ that were then also mentioned in the Second Notice of Intent, and that are the subject of this Arbitration.⁶⁶⁷ In both the First and the Second Notices of Intent, Kaloti alleged that the immobilizations and seizures

⁶⁶² See e.g. Memorial, ¶¶ 83, 126, 136, 233.

⁶⁶³ Memorial, ¶ 233.

⁶⁶⁴ See First Notice of Intent.

⁶⁶⁵ First Notice of Intent, ¶ 5.

⁶⁶⁶ See First Notice of Intent, p. 7; see also **Ex. R-0030**, Letter from Kaloti (A. Kaloti) to Special Commission, 22 February 2017, ¶ 10.d.

⁶⁶⁷ See Second Notice of Intent, ¶ 20; see also Memorial, ¶ 38.

of its gold were arbitrary, and that Peru thereby violated Articles 10.5 and 10.7 of the Treaty.⁶⁶⁸

312. After the First Notice of Intent was filed, Peru – through the Special Commission – met with Kaloti’s representative on 16 January 2017.⁶⁶⁹ In that meeting, such representative explained the basis of Kaloti’s claims to the Special Commission.
313. After having reviewed Kaloti’s First Notice of Intent and heard Kaloti’s representative, the Special Commission, by means of Official Letter No. 019-2017-EF/CE.36 dated 1 February 2017, asked Kaloti to clarify certain aspects of its claims.⁶⁷⁰ For example, it asked Kaloti to clarify if it had paid for the Five Shipments before the export process had begun, and the type of due diligence that had been performed by Kaloti with respect to the *bona fides* of the Suppliers.⁶⁷¹ Peru also inquired whether Kaloti had initiated any legal actions against the Suppliers,⁶⁷² and what suggestions Kaloti had for resolving the dispute.⁶⁷³ Kaloti answered Peru’s clarification requests through a letter dated 22 February 2017.⁶⁷⁴
314. After reviewing the information and answers provided by Kaloti, as well as the information gathered from the relevant State entities involved in the dispute, the Special Commission concluded that Kaloti’s claims lacked any and all merit.⁶⁷⁵ It therefore informed Kaloti of that conclusion, through Official Letter No. 118-2017-

⁶⁶⁸ See First Notice of Intent, ¶ 67; Second Notice of Intent, ¶¶ 45–52.

⁶⁶⁹ See **Ex. R-0031**, Letter No. 019-2017-EF/CE.36 from Special Commission (██████████) to Kaloti (A. Kaloti), 1 February 2017, p. 1.

⁶⁷⁰ **Ex. R-0031**, Letter No. 019-2017-EF/CE.36 from Special Commission (██████████) to Kaloti (A. Kaloti), 1 February 2017, pp. 1–2.

⁶⁷¹ **Ex. R-0031**, Letter No. 019-2017-EF/CE.36 from Special Commission (██████████) to Kaloti (A. Kaloti), 1 February 2017, Questions 4 and 5.

⁶⁷² **Ex. R-0031**, Letter No. 019-2017-EF/CE.36 from Special Commission (██████████) to Kaloti (A. Kaloti), 1 February 2017, Question 7.

⁶⁷³ **Ex. R-0031**, Letter No. 019-2017-EF/CE.36 from Special Commission (██████████) to Kaloti (A. Kaloti), 1 February 2017, Question 8.

⁶⁷⁴ **Ex. R-0030**, Letter from Kaloti (A. Kaloti) to Special Commission, 22 February 2017.

⁶⁷⁵ **Ex. R-0032**, Letter No. 118-2017-EF/CE-36 from Special Commission (██████████) to Kaloti (A. Kaloti), 14 June 2017, p. 1.

EF/CE-36 dated 14 June 2017.⁶⁷⁶ In that letter, the Special Commission explained that there was a significant divergence of opinion between Kaloti and the competent State entities, as the firm conviction of such entities was that the administrative and judicial measures questioned by Kaloti had been adopted in full accordance with Peruvian law.⁶⁷⁷ In other words, after reviewing Kaloti's arguments, Peru concluded that the claims manifestly lacked merit, and that the Parties' positions were simply too far apart to reach any amicable settlement of the dispute. Nonetheless, the Special Commission added that it remained open to receiving additional information from Kaloti, and to continue its efforts to engage in consultations in the future, whether on substantive or procedural issues.⁶⁷⁸

315. On 12 April 2019, Kaloti decided to file its Second Notice of Intent, and subsequently, on 30 April 2021, it filed its Request for Arbitration. The facts underlying both the First and Second Notice of Intent were the same, and likewise were the basis for the claims adduced in the Request for Arbitration.
316. Despite the fact that the Second Notice of Intent and Request for Arbitration involved the same dispute as the First Notice of Intent, Peru—represented this time by its external counsel in this arbitration—again met (without prejudice) with Kaloti's representatives on 22 June 2021, i.e., after Kaloti had filed the Request for Arbitration but before it filed its Memorial. However, after hearing Kaloti's position and expectations, Peru maintained its conclusion that Kaloti's claims were baseless, and that a negotiated solution would not be viable.
317. The foregoing demonstrates that it is patently untrue that "Peru has refused to engage in any discussions, negotiations or consultations with KML."⁶⁷⁹

⁶⁷⁶ Ex. R-0032, Letter No. 118-2017-EF/CE-36 from Special Commission ([REDACTED]) to Kaloti (A. Kaloti), 14 June 2017, pp. 1-2.

⁶⁷⁷ Ex. R-0032, Letter No. 118-2017-EF/CE-36 from Special Commission ([REDACTED]) to Kaloti (A. Kaloti), 14 June 2017, pp. 1-2.

⁶⁷⁸ Ex. R-0032, Letter No. 118-2017-EF/CE-36 from Special Commission ([REDACTED]) to Kaloti (A. Kaloti), 14 June 2017, p. 2.

⁶⁷⁹ Memorial, ¶ 136.

III. JURISDICTION

318. “Consent of the parties is the cornerstone of the jurisdiction of the Centre”, and therefore, of the Tribunal’s jurisdiction in this case.⁶⁸⁰ Unless such consent is established, no international tribunal has jurisdiction to determine whether a respondent State has breached its international obligations.⁶⁸¹
319. As observed by the International Court of Justice, the consent pursuant to which an international court or tribunal can assume jurisdiction “must be certain.”⁶⁸² In the present case, this means (i) that the Tribunal must determine that both Peru and Kaloti have consented to the submission of the present dispute to international arbitration under both the Treaty and the ICSID Convention,⁶⁸³ and (ii) that the Parties’ consent

⁶⁸⁰ **CL-0042**, Convention on the Settlement of Investment Disputes between States and Nationals of Other States – International Centre for Settlement of Investment Disputes, Washington, 1965, Art. 23. See also **RL-0168**, *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5, Decision on Jurisdiction, 27 September 2001 (Kaufmann-Kohler, Böckstiegel, Cremades), ¶ 95; **RL-0169**, *Fábrica de Vidrios Los Andes, C.A. and Owens-Illinois de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/21, Award, 13 November 2017 (Shin, Fortier, Douglas), ¶ 277; **RL-0170**, *ST-AD GmbH v. Republic of Bulgaria*, UNCITRAL, PCA Case No. 2011-06, Award on Jurisdiction, 18 July 2013 (Stern, Klein, Thomas), ¶ 337.

⁶⁸¹ **RL-0171**, *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award, 22 August 2012 (Dupuy, Brower, Bello Janeiro) (“**Daimler (Award)**”), ¶ 174; **RL-0172**, *Status of Eastern Carelia*, PCIJ, Advisory Opinion, 23 July 1923, p. 27; **RL-0173**, *Ambatielos case*, ICJ, Judgment, 19 May 1953, pp. 10, 19; **RL-0174**, *Monetary Gold Removed from Rome in 1943*, ICJ, Preliminary Judgment, 15 June 1954, pp. 19, 32.

⁶⁸² **RL-0175**, *Certain Questions of Mutual Assistance in Criminal Matters*, ICJ, Judgment, 4 June 2008, ¶ 62. See also **RL-0176**, *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award, 8 December 2008 (Nariman, Beradini, Torres Bernárdez), ¶ 167.

⁶⁸³ See **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)**”), ¶ 43 (“[T]here are two independent parameters that must both be satisfied: what the parties have given their consent to, as the foundation for submission to arbitration; and what the Convention establishes as the framework for the competence of any tribunal set up under its provisions”). See also **CL-0049**, *Krederi Ltd. v. Ukraine*, ICSID Case No. ARB/14/17, Award, 2 July 2018, ¶ 243. **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) (“**Salini (Decision)**”), ¶ 44; **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) (“**Joy Mining (Award)**”), ¶ 50.

to arbitration cannot simply be presumed, but rather must be established with certainty on the basis of affirmative evidence.⁶⁸⁴

320. In the Memorial, Kaloti concedes that its “ability to invoke the substantive and procedural protections offered under the [Treaty]” depends on the Tribunal’s jurisdiction *ratione personae*, *ratione materiae* and *ratione temporis* under the Treaty, as well as on the existence of “jurisdiction over this dispute under Article 25 of the ICSID Convention”.⁶⁸⁵

321. In accordance with the principle *actori incumbit onus probandi*,⁶⁸⁶ the burden of proving the facts necessary to establish jurisdiction falls upon Kaloti, as the party alleging that the Tribunal has jurisdiction to adjudicate its claims.⁶⁸⁷ As affirmed by the *Blue Bank v. Venezuela* tribunal:

All facts that are dispositive for purposes of jurisdiction must be proven at the jurisdictional stage. In this regard, the Claimant bears the burden of proving the facts required to establish jurisdiction, insofar as they are contested by the Respondent.⁶⁸⁸

322. Consistent with relevant international jurisprudence, Kaloti, as the claimant in the present proceeding, must prove *inter alia* (i) that it has made an “investment” in Peru which meets the applicable requirements to qualify as such under both the Treaty and

⁶⁸⁴ **RL-0171**, *Daimler* (Award), ¶ 175.

⁶⁸⁵ Memorial, ¶ 72.

⁶⁸⁶ **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 Amento v. Ukraine*, SCC Case No. 080/2005, Final Award, 26 March 2008 (Cremades, Runeland, Söderlund), ¶ 64.

⁶⁸⁷ See **RL-0182**, *Vito G. Gallo v. Government of Canada*, UNCITRAL, PCA Case No. 55798, Award, 15 September 2011 (Fernández-Armesto, Castel, Lévy) (“**Gallo (Award)**”), ¶ 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)**”), ¶¶ 60–61.

⁶⁸⁸ **RL-0184**, *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB 12/20, Award, 26 April 2017 (Söderlund, Bermann, Malintoppi), ¶ 397; see also **RL-0002**, *ICS Inspection and Control Services Ltd. v. Argentine Republic*, PCA Case No. 2010-9, Award on Jurisdiction, 10 February 2012 (Dupuy, Torres Bernárdez, Lalonde) (“**ICS (Award on Jurisdiction)**”), ¶ 280.

the ICSID Convention (jurisdiction *ratione materiae*);⁶⁸⁹ (ii) that it actually owns the alleged investments in Peru that form the basis of its claims (jurisdiction *ratione materiae*);⁶⁹⁰ and (iii) that its claims fall within the Treaty’s three-year limitations period (jurisdiction *ratione temporis*).⁶⁹¹ Kaloti, however, has failed to meet its burden.

323. As set forth in the sections that follow, the Tribunal lacks jurisdiction *ratione materiae* (see **Section III.A**) and *ratione temporis* over Kaloti’s claims (see **Section III.B**).

A. The Tribunal lacks jurisdiction *ratione materiae* over Kaloti’s claims

324. Kaloti initiated this arbitration under the Treaty and the ICSID Convention.⁶⁹² Both instruments limit the Tribunal’s jurisdiction to disputes arising out of an “investment” made by the claimant in the territory of the respondent State.

325. Treaty Article 10.16 specifies that the only type of dispute that an investor of a State Party to the Treaty can submit to arbitration is “an **investment** dispute” (emphasis added) with the other State Party to the Treaty. Treaty Article 10.28 also establishes that the claimant must own or control the foreign investment underlying its claims, and that such investment must possess certain characteristics. In addition, Treaty Article 1.3 provides that, to qualify as a “covered investment,” the claimant must have made the investment in the territory of the respondent State.

⁶⁸⁹ See **RL-0185**, *Malaysian Historical Salvors, SDN, BHD v. Government of Malaysia*, ICSID Case No. ARB/05/10, Award on Jurisdiction, 17 May 2007 (Hwang), ¶ 43; **RL-0186**, *Marco Gavazzi and Stefano Gavazzi v. Romania*, ICSID Case No. ARB/12/25, Decision on Jurisdiction, 21 April 2015 (van Houtte, Veeder, Rubino-Sammartano), ¶ 97.

⁶⁹⁰ See **RL-0187**, *Standard Chartered Bank v. United Republic of Tanzania*, ICSID Case No. ARB/10/12, Award, 2 November 2012 (Park, Pryles, Legum), ¶¶ 264–265; **RL-0182**, *Gallo* (Award), ¶ 328.

⁶⁹¹ See **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) (“**Resolute (Decision)**”), ¶ 85; **RL-0107**, *Michael Ballantine and Lisa Ballantine v. Dominican Republic*, PCA Case No. 2016-17, Submission of the United States of America, 6 July 2018 (Ramírez-Hernández, Cheek, Vinuesa) (“**Ballantine (USA Submission)**”), ¶ 8; **RL-0151**, *Italba Corp. v. Oriental Republic of Uruguay (I)*, ICSID Case No. ARB/16/9, Submission of the United States of America, 11 September 2017 (Oreamuno, Beechy, Douglas) (“**Italba (USA Submission)**”), ¶ 9.

⁶⁹² Request for Arbitration, ¶¶ 1–2.

326. Article 25(1) of the ICSID Convention, for its part, establishes that “[t]he jurisdiction of the Centre shall extend to any legal dispute arising directly out of an **investment**, between a Contracting State . . . and a national of another Contracting State” (emphasis added).
327. In addition, it is well established that international investment law does not protect investments made in violation of the host State or international public policy, regardless of whether or not a legality requirement is expressly stated in the applicable investment treaty.⁶⁹³
328. As explained in the sections that follow, Kaloti has failed to establish that the Tribunal has jurisdiction *ratione materiae* over the present dispute for at least four reasons. *First*, Kaloti’s purported assets in Peru do not possess the characteristics required to qualify as an “investment” under either the Treaty or the ICSID Convention (see **Section III.A.1**). *Second*, Kaloti has not established that it “owns or controls” the assets at issue (see **Section III.A.2**). *Third*, Kaloti’s alleged investments in Peru were not acquired in conformity with Peruvian law or international public policy (see **Section III.A.3**). *Fourth*, even assuming that Kaloti owned or controlled investments in Peru that benefit from the protection of the Treaty and the ICSID Convention (quod non), the Tribunal nonetheless would lack jurisdiction *ratione materiae* over the alleged indirect expropriation of Kaloti as an “entire enterprise,”⁶⁹⁴ as well as Kaloti’s claims of lost profits outside of Peru resulting from the State’s alleged breach of the MST Provision, because Kaloti itself is not a “covered investment” in the territory of the other State Party to the Treaty, i.e., *in Peru* (see **Section III.A.4**).

⁶⁹³ See, e.g., **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), ¶ 332; **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) (“**SAUR International (Decision)**”), ¶ 308; **RL-0183**, *Phoenix* (Award), ¶ 101.

⁶⁹⁴ Memorial, ¶¶ 8, 130.

1. *Kaloti's alleged assets in Peru do not have the "characteristics of an investment" under Treaty Article 10.28 and the ICSID Convention*

329. The jurisprudence of investor-State tribunals unequivocally confirms,⁶⁹⁵ and Kaloti admits,⁶⁹⁶ that to benefit from the protections of the Treaty and the ICSID Convention, Kaloti must have made investments in Peru that meet the requirements of both of those instruments.

330. Treaty Article 10.28 defines "investment" as

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 the **assumption of risk**.⁶⁹⁷ (emphasis added).

331. Article 10.28 includes a list of assets to illustrate the "[f]orms that an investment may take." The plain meaning of Article 10.28 confirms that the fact that an asset is included in that list does *not* automatically mean that such asset qualifies as an "investment" under the Treaty. As the United States (the other Party to the Treaty) has explained in multiple cases acting in its capacity as non-disputing party, the examples of assets mentioned in Article 10.28 must still possess the "characteristics of an investment" in order to qualify as an "investment" under the Treaty:

The enumeration of a type of an asset in Article 10.28 is not dispositive as to whether a particular asset, owned or controlled by an investor, meets the definition of investment; it must still always possess the characteristics of an investment, including such characteristics as the commitment of capital or other

⁶⁹⁵ See for example, **RL-0178**, *Salini* (Decision), ¶ 44; **RL-0179**, *Joy Mining* (Award), ¶ 50; **RL-0177**, *Global Trading* (Award), ¶ 43.

⁶⁹⁶ Request for Arbitration, ¶ 56 (acknowledging that Kaloti's "ability to invoke the substantive and procedural protections offered under the TPA is contingent upon establishing that . . . Kaloti Metal's investments in Peru are considered an 'investment' within the definition provided in article 10.28 of the TPA [and] ICSID has jurisdiction over this dispute under Article 25 of the ICSID Convention.").

⁶⁹⁷ **RL-0001**, Treaty, Art. 10.28.

resources, the expectation of gain or profit, or the assumption of risk.⁶⁹⁸

332. Therefore, as confirmed by arbitral jurisprudence that has addressed identically-worded provisions, the Tribunal's assessment of whether Kaloti's purported investments in Peru meet the requirements of Treaty Article 10.28 should "start with the three listed characteristics"⁶⁹⁹: (i) a "commitment of capital or other resources"; (ii) an "expectation of gain or profit"; and (iii) the "assumption of risk". Nevertheless, the use in Article 10.28 of the word "including" in relation to these three "characteristics of an investment" indicates that additional characteristics may be relevant.⁷⁰⁰ Whether additional characteristics are relevant depends on the facts of each case.⁷⁰¹
333. The Tribunal must also verify the existence of an "investment" under the ICSID Convention. While the ICSID Convention does not define the term "investment", arbitral jurisprudence has confirmed that "investment" is an objective and autonomous concept.⁷⁰² Tribunals have applied several criteria to determine whether an economic operation amounts to "investment" under the ICSID Convention. These criteria include, but are not limited to, the requirements established in Article 10.28:

⁶⁹⁸ **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 (Nunes Pinto, Beechey, Kohen) ("**Amec Foster (USA Submission)**"), ¶ 30. See also **RL-0192**, *Seo Jin Hae v. Republic of Korea*, HKIAC Case No. 18117, United States Submission, 19 June 2019 (Simma, Lo, McRae), ¶ 15; **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 (Phillips, Grigera Naón, Thomas), ¶ 14. See further **RL-0191**, *Seo Jin Hae v. Republic of Korea*, HKIAC Case No. 18117, Final Award, 27 September 2019 (Simma, Lo, McRae) ("**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'").

⁶⁹⁹ **RL-0191**, *Seo Jin Hae (Final Award)*, ¶ 96.

⁷⁰⁰ **RL-0190**, *Amec Foster (USA Submission)*, ¶ 30.

⁷⁰¹ **RL-0191**, *Seo Jin Hae (Final Award)*, ¶ 96.

⁷⁰² **RL-0179**, *Joy Mining (Award)*, ¶ 50; **RL-0115**, *Vestey Group Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, 15 April 2016 (Kaufmann-Kohler, Grigera Naón, Dupuy) ("**Vestey Group (Award)**"), ¶ 187 ("A majority of ICSID tribunals hold that the term "investment" in Article 25 of the ICSID Convention has an independent meaning.").

(i) a contribution having an economic value;⁷⁰³ (ii) an expectation of return⁷⁰⁴ and (iii) the assumption of an investment risk.⁷⁰⁵ In addition, arbitral tribunals have consistently found that an “investment” requires a certain minimum duration.⁷⁰⁶

334. In the Memorial, Kaloti contends that it “directly controlled protected investments.”⁷⁰⁷ However, rather than identifying or defining such investments with specificity, it contents itself with mentioning two *categories* of investments that it claims to have made: (i) “tangible movable objects such as gold,” and (ii) “its infrastructure for testing and selling gold.”⁷⁰⁸ Nevertheless, it is apparent from the Memorial that

⁷⁰³ See for example, **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 banka (Award)**”), ¶ 361.

⁷⁰⁴ **RL-0078**, Christopher Schreuer, *et al.*, THE ICSID CONVENTION: A COMMENTARY (2009), p. 372. See for example, **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) (“**Toto (Decision)**”), ¶ 84 (“In the absence of specific criteria or definitions in the ICSID Convention, the underlying concept of investment, which is economical in nature, becomes relevant: it implies an economical operation initiated and conducted by an entrepreneur using its own financial means and at its own financial risk, with the objective of making a profit within a given period of time. It has been argued that ‘investment’ should include some duration, e.g., a minimum duration of two years, although a shorter duration also may be conceivable, or that the investment should serve the public interest.”).

⁷⁰⁵ See for example, **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**, *Standard Chartered Bank (Hong Kong) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/15/41, Award, 11 October 2019 (Boo, Unterhalter, Hossain), ¶¶ 218–220.

⁷⁰⁶ **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 (“[T]he existence of an ‘investment’ requires a commitment or allocation of resources for a duration and involving risk. For example, a one-time sale resulting in receivables would not qualify as an ‘investment,’ even if the receivables may be listed as ‘assets.’”); **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) (“**Bayindir (Decision)**”), ¶ 132 (“The element of duration is the paramount factor which distinguishes investments within the scope of the ICSID Convention and ordinary commercial transactions.”).

⁷⁰⁷ Memorial, ¶ 81.

⁷⁰⁸ Memorial, ¶ 81.

Kaloti's claims are all based on the premise that the Five Shipments qualify as an "investment" under both the Treaty and the ICSID Convention.

335. As discussed in the remainder of this section, Kaloti's alleged assets (including the Five Shipments) in fact do *not* have the "characteristics of an investment" under Treaty Article 10.28 and the ICSID Convention. Specifically, Kaloti has not demonstrated (i) that it made an economic contribution or commitment of capital or resources qualifying for the protection of the Treaty or the ICSID Convention, (ii) that it assumed an investment risk, or (iii) that its alleged investments had the requisite duration.

a. Kaloti did not make a commitment of capital or other resources qualifying for the protection of the Treaty or the ICSID Convention

336. It is well-established in jurisprudence that, "to qualify as an investment, the project in question must constitute a substantial commitment on the side of the investor".⁷⁰⁹ This requirement is expressly included in Treaty Article 10.28, which specifies that an "investment" must involve the "commitment of capital or other resources".⁷¹⁰ Tribunals have considered that "the reality of the contribution is to be assessed taking into account the totality of the circumstances and the elements of the economic goal pursued".⁷¹¹ For example, faced with a limited contribution, the tribunal in *Phoenix v. Czech Republic* required an analysis of the circumstances of the transaction to determine whether there had been "a real intent to develop economic activities"⁷¹² in the respondent State.

⁷⁰⁹ See, e.g., **RL-0196**, *Bayindir* (Decision), ¶ 131. See also **RL-0195**, *Société Civile Immobilière de Gaëta v. Republic of Guinea*, ICSID Case No. ARB/12/36, Award, 21 December 2015 (Tercier, Grigera Naón, Lévy), ¶ 231; **RL-0078**, Christopher Schreuer, *et al.*, THE ICSID CONVENTION: A COMMENTARY (2009), Art. 25, ¶¶ 158, 161.

⁷¹⁰ **RL-0001**, Treaty, Art. 10.28.

⁷¹¹ **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)*"), ¶ 126. See also **RL-0179**, *Joy Mining* (Award), ¶ 53.

⁷¹² **RL-0183**, *Phoenix* (Award), ¶ 119.

337. Equally, it is generally accepted that mere payment for the purchase of goods or services does not constitute a “contribution” or “commitment” for the purposes of proving the existence of an investment.⁷¹³ As the tribunal in *Poštová banka et al. v. Greece* explained, “[a]n investment, in the economic sense, is linked with a process of creation of value, **which distinguishes it clearly from a sale**, which is a process of exchange of values . . .”⁷¹⁴ (emphasis added). As that tribunal further clarified, “[i]n a sale there is also a contribution of goods or services by the seller and a contribution of money by the buyer, but **this is different from the contribution to an economic venture required in order to find an investment**” (emphasis added).⁷¹⁵
338. In *Global Trading v. Ukraine*, the tribunal considered that the purchase and sale contracts entered into by the claimant, who was engaged primarily in export activities, were “pure commercial transactions” as a “trading supplier,” and thus did not qualify as investments under the ICSID Convention.⁷¹⁶ Similarly, the tribunal in *Apotex v. United States* considered that the claimant had not made an investment in the United States because its activities in that country amounted to “no more than the ordinary conduct of a business for the export and sale of goods”.⁷¹⁷ That tribunal stressed that it had

no reason to doubt that Apotex **has committed significant capital in the United States towards the purchase of raw materials** and ingredients used in its sertraline and pravastatin ANDA products. But this activity was evidently undertaken for the purposes of manufacturing in Canada products intended for export to the United States (and subsequent sale by others). **These were no more than purchases from U.S. suppliers by way of a “commercial contract for the sale of goods”** which are

⁷¹³ **RL-0198**, *Romak* (Award), ¶ 222.

⁷¹⁴ **RL-0194**, *Poštová banka* (Award), ¶ 361.

⁷¹⁵ **RL-0194**, *Poštová banka* (Award), fn. 506.

⁷¹⁶ **RL-0177**, *Global Trading* (Award), ¶¶ 1, 56.

⁷¹⁷ **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.

generally excluded by NAFTA Article 1139(i).⁷¹⁸ (Emphasis added).

339. Kaloti is a gold trading company based in Miami⁷¹⁹ whose business operations consisted of the purchase of gold in a number of countries—including, but not exclusively, Peru⁷²⁰—to then import that gold into the United States and subsequently resell it to third parties.⁷²¹ The Memorial and ██████████ witness statement make clear that Kaloti’s operations in Peru consisted exclusively of the purchase of precious metals for onward export to the United States.⁷²² According to the Memorial, Kaloti intended to follow the same process with the Five Shipments.⁷²³ ██████████ own witness statement confirms that Peru was merely a “source of raw material for KML”.⁷²⁴
340. It is therefore clear that Kaloti’s purported investment in “tangible movable objects such as gold” was neither a “commitment” nor a “contribution” within the meaning that arbitral jurisprudence has assigned to those terms. In the words of the tribunal in *Poštová banka*, Kaloti’s purchase of precious metals in Peru was not “a process of creation of value”, but rather a “process of exchange of values”.⁷²⁵ Like the claimant

⁷¹⁸ **RL-0202**, *Apotex* (Award on Jurisdiction), ¶ 239.

⁷¹⁹ Memorial, ¶ 3. Moreover, Claimant’s manager (██████████) and permanent employees (including Mr. ██████████ and Ms. ██████████) were also domiciled in Miami and worked there. See ██████████ Witness Statement, ¶ 2; Memorial, ¶ 21; ██████████ Witness Statement, ¶ 2; ██████████ Witness Statement, ¶¶ 2, 7, 11, 22.

⁷²⁰ In 2013, 47 percent of Kaloti’s gold purchases came from Peru, while the remaining 53 percent of all purchases came from at least nine other countries, including the United States, Curacao, and Bolivia. Smajlovic Report, ¶ 6.31; Expert Report of Brattle, 3 August 2022 (“**Brattle Report**”), ¶ 75.

⁷²¹ Memorial, ¶ 3 (“KML began buying gold in Peru and selling it to overseas buyers at a small profit margin . . . KML established a highly lucrative business model”). ██████████ Witness Statement, ¶ 16 (“KML started its Latin American operations in 2012 by buying small quantities of gold and silver from countries like Brazil, Bolivia, Ecuador and Peru. That gold was normally bought from third parties and miners, and transported to Miami as scrap metal and dore (bars) for processing (including melting and assaying), to be later sold to other parties.”).

⁷²² Memorial, ¶ 25.

⁷²³ Memorial, ¶ 4.

⁷²⁴ ██████████ Witness Statement, ¶ 32.

⁷²⁵ **RL-0194**, *Poštová banka* (Award), ¶ 361.

in *Apotex*, Kaloti might have committed significant capital in Peru towards the purchase of raw materials (in this case, gold) but such activity amounted to “no more than the conduct of a business for the export and sale of goods”,⁷²⁶ and thus does not constitute an investment, either under the Treaty or the ICSID Convention.⁷²⁷

341. The second prong of Kaloti’s argument concerning the existence of an “investment” (viz., that it established “infrastructure [in Peru] for testing and selling gold”⁷²⁸) is equally unavailing. As Kaloti itself admits, the objective of that alleged infrastructure was merely “to weigh[] and assay gold for subsequent export to the United States.”⁷²⁹ Therefore, following the reasoning of the *Apotex* tribunal, Kaloti’s alleged infrastructure was “simply the mechanism by which the export and sale is conducted”,⁷³⁰ such that the infrastructure cannot be considered an investment under the Treaty or the ICSID Convention. There are several additional circumstances that confirm this conclusion.

342. For example, the “office” that Kaloti allegedly “opened and equipped” in Lima⁷³¹ was in fact a facility that the courier company ██████ leased to Kaloti as part of a broader service agreement⁷³² for ██████’ “transportation and storage [of] KML’s precious metals”⁷³³ prior to their export to the United States. Moreover, Kaloti’s service agreement with ██████ was for only one year, to be finalized in July 2014.⁷³⁴ In *Apotex*, the claimant argued that it had made an investment in the United States, among other reasons, because it had appointed its US affiliate to act as the distributor

⁷²⁶ **RL-0202**, *Apotex* (Award on Jurisdiction), ¶ 235.

⁷²⁷ **RL-0202**, *Apotex* (Award on Jurisdiction), ¶ 239.

⁷²⁸ Memorial, ¶ 80.

⁷²⁹ Memorial, ¶ 19.

⁷³⁰ **RL-0202**, *Apotex* (Award on Jurisdiction), ¶ 237.

⁷³¹ Memorial, ¶ 19.

⁷³² **Ex. R-0208**, Lease agreement between ██████ and Kaloti, 8 July 2013 [*Re-submitted version of C-0028, with Respondent’s translation*], second Clause (“whose main objective is to provide services for the Transfer of Securities and Documents”).

⁷³³ Memorial, ¶ 25.

⁷³⁴ **Ex. C-0035**, KML lease agreement, payment vouchers and picture of apartment in Lima, Peru, p. 2, Clause 2.

of Apotex's products in that country. But the tribunal rejected Apotex's argument, explaining that such appointment did "not transform Apotex's activity from one of export to one of investment."⁷³⁵ Similarly, Kaloti's service agreement with ██████ did not transform Kaloti's export activity from one of export to one of investment.

343. Kaloti also refers to an apartment in Lima that it allegedly rented to "house expatriate and travelling personnel".⁷³⁶ Yet, the lease submitted by Kaloti to support that allegation (i) states that the apartment was actually the private residence of Mr. ██████ ██████ (Kaloti's operational manager in Peru); (ii) expressly prohibited any sublease or other use of the apartment;⁷³⁷ and (iii) had a duration of only one year, from July 2013 to July 2014.⁷³⁸

344. Kaloti also argues that it "hired local employees in Peru,"⁷³⁹ but the contracts that it has submitted to support this statement are not employment agreements.⁷⁴⁰ Instead, they are three service contracts for the performance of specific tasks regarding the testing of minerals before their export and eventual acquisition by Kaloti.⁷⁴¹ These contracts do not prove any employment relationship or substantial commitment by Kaloti. In fact, the contracts could be terminated at any time, with only a 30-day notice.⁷⁴²

⁷³⁵ **RL-0202**, *Apotex* (Award on Jurisdiction), ¶ 237.

⁷³⁶ Memorial, ¶ 20.

⁷³⁷ **Ex. C-0035**, KML lease agreement, payment vouchers and picture of apartment in Lima, Peru, p. 3, Clause 3.

⁷³⁸ **Ex. C-0035**, KML lease agreement, payment vouchers and picture of apartment in Lima, Peru, p. 2, Clause 2.

⁷³⁹ Memorial, ¶¶ 21, 24; **Ex. C-0037**, [Alleged] Employment agreements between KML and ██████

⁷⁴⁰ **Ex. C-0037**, [Alleged] Employment agreements between KML and ██████ ██████, pp. 4, 8, 12.

⁷⁴¹ According to Peruvian law, a service contract, as opposed to an employment contract, is a civil contract where the service provider remains autonomous in the execution of the requested services. **RL-0220**, Peruvian Civil Code, 25 July 1984, Art. 1764 ("In a service lease, the lessor is obliged, **without being subordinate to the principal**, to render his services for a certain period of time or for a specific job, in exchange for a remuneration." (emphasis added)).

⁷⁴² **Ex. C-0037**, Employment agreements between KML and ██████ ██████, pp. 3, 7, 11.

345. In sum, Kaloti’s alleged infrastructure in Peru was almost non-existent, and involved no substantial commitment or economic contribution. As ██████ himself admits, Kaloti’s “strategy in Peru” was one of “**extremely low** cost of financing of operations, and **low** overhead” (emphasis added).⁷⁴³
346. For the foregoing reasons, Kaloti has failed to establish that it made the type of substantial “commitment of capital or resources” required by Treaty Article 10.28 and the ICSID Convention for qualification as an “investment”. Kaloti neither developed nor intended to develop any economic activities in Peru beyond the mere purchase of gold and of minimal services required to export that mineral from the country. Rather, its activities consisted purely of commercial, export-related transactions and arrangements. As the jurisprudence has consistently confirmed, those types of business operations do not constitute an “investment.”

b. Kaloti did not assume any investment risk

347. An investment risk entails operational risk i.e., uncertainty, and therefore risk, with respect to expenditures and returns. The tribunal in *Nova Scotia v. Venezuela (II)* clarified in this regard that “any transaction involves a risk, but what is required for an investment is a risk that is distinguishable from the type of risk that arises in an ordinary commercial transaction.”⁷⁴⁴
348. In that same vein, the tribunal in *Seo v. Korea* explained that merely commercial or sovereign/country risks, such as (i) “the risk of an asset declining in value”, (ii) “the risk of [an asset] being expropriated”, or (iii) “the risk of being subject to [the] laws” of the host State are not, without more, considered an “investment risk”.⁷⁴⁵ The tribunal explained that these types of risks are “inherent in the purchase of *any* asset” (emphasis in original).⁷⁴⁶ The treaty applicable in that case provided—just like the Treaty in this case—that an asset only qualifies as an investment if it has certain

⁷⁴³ ██████ Witness Statement, ¶ 36.

⁷⁴⁴ **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.

⁷⁴⁵ **RL-0191**, *Seo Jin Hae* (Final Award), ¶¶ 130–133.

⁷⁴⁶ **RL-0191**, *Seo Jin Hae* (Final Award), ¶ 130.

characteristics, such as “the assumption of risk”.⁷⁴⁷ The tribunal explained that “[t]hose characteristics, including the assumption of risk, must go beyond the features that any asset automatically has. Otherwise, the requirement of the asset showing the characteristics of an investment would be rendered meaningless”.⁷⁴⁸

349. Similarly, the tribunal in *Joy Mining v. Egypt* found that the risk arising from a contract for the supply of mining equipment did not satisfy the investment risk requirement under the ICSID Convention, because it was “not different from that involved in any commercial contract”.⁷⁴⁹

350. Accordingly, arbitral jurisprudence has made clear that “an investment risk [is] an operational risk and not a commercial risk or a sovereign risk.”⁷⁵⁰ An investment risk involves uncertainty as to both the amount that the investor will have to invest in its project in the host State and the return that the investment will yield. As explained by the tribunal in *Romak v. Uzbekistan*, an “investment risk” 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. Where there is ‘risk’ of this sort, the investor simply cannot predict the outcome of the transaction.⁷⁵¹

351. In this case, Kaloti did not assume any investment risk at all. Kaloti’s business operations in Peru consisted merely of the purchase of gold from local suppliers to then export that gold to the United States and sell it to other entities in third countries. Therefore, Kaloti was not subject to any operational or investment risk beyond the

⁷⁴⁷ **RL-0191**, *Seo Jin Hae* (Final Award), ¶ 88; **RL-0003**, South Korea-United States Free Trade Agreement, 1 January 2019, Art. 11.28 (“[I]nvestment means 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 the assumption of risk.”).

⁷⁴⁸ **RL-0191**, *Seo Jin Hae* (Final Award), ¶ 130.

⁷⁴⁹ **RL-0179**, *Joy Mining* (Award), ¶ 57.

⁷⁵⁰ **RL-0194**, *Poštová banka* (Award), ¶ 369.

⁷⁵¹ **RL-0198**, *Romak* (Award), ¶ 230. See also **RL-0201**, *Doutremepuich* (Award), ¶ 145.

risks that are “inherent in the purchase of *any* asset” (emphasis in original).⁷⁵² To the contrary, Kaloti,⁷⁵³ its witnesses,⁷⁵⁴ and its quantum expert⁷⁵⁵ all readily concede that Kaloti’s operations in Peru “exposed the company to minimal risk,”⁷⁵⁶ because, even before acquiring the gold, Kaloti knew with certainty the price at which it would subsequently resell the gold to its affiliate, ██████████.⁷⁵⁷

352. Given the foregoing, it is clear that Kaloti has failed to prove that it assumed the type of investment risk required to establish that it made an “investment” under the Treaty and the ICSID Convention.

c. Kaloti’s alleged investment lacked the requisite duration

353. In addition to the foregoing, to benefit from the protection of the Treaty and the ICSID Convention, the investment made by the foreign investor in the host State must have a certain duration.

354. The tribunal in *Bayindir v. Pakistan* explained that “[t]he element of duration is the paramount factor which distinguishes investments within the scope of the ICSID Convention and ordinary commercial transactions.”⁷⁵⁸ That tribunal found that the duration requirement was fulfilled in the case of a “long-term contract”⁷⁵⁹ (spanning

⁷⁵² **RL-0191**, *Seo Jin Hae* (Final Award), ¶ 130.

⁷⁵³ See Memorial, ¶ 31 (“The only business risk to KML was its access to the Peruvian gold, and access to financial institutions (i.e., banks). This risk was limited Further, KML’s risk associated with its trading operation was non-existent due to the high demand for its product, coupled with a single customer demanding 45,000 kilograms of gold per year from Peru”).

⁷⁵⁴ See, e.g., ██████████ First Statement, ¶ 20 (“In addition, KML could always be certain to resell the gold very quickly to ██████████, a conglomerate based in Dubai (United Arab Emirates), which always pressured KML to increase the supply of Peruvian gold. In fact, I, as a head trader, when negotiating a price with gold sellers in Peru, in the vast majority of cases I was already certain of the price at which KML was going to resell that same gold to ██████████ (Dubai).”).

⁷⁵⁵ See, e.g., Smajlovic Report, ¶ 5.11 (“[M]ost of the final products were sold to the related entity ██████████ located in Dubai, United Arab Emirates. I understand that ██████████ would make prepayments on the future delivered.”).

⁷⁵⁶ Memorial, ¶ 25.

⁷⁵⁷ Memorial, ¶ 28; ██████████ Witness Statement, ¶ 37.

⁷⁵⁸ **RL-0196**, *Bayindir* (Decision), ¶ 132.

⁷⁵⁹ **RL-0196**, *Bayindir* (Decision), ¶ 136.

over several years) that governed a project to build a six-lane motorway.⁷⁶⁰ It also noted that, in contrast, the duration requirement would not be satisfied in the case of “an ordinary sales contract”.⁷⁶¹

355. Kaloti has not submitted *any* kind of agreement proving that it made a long-term investment in Peru. On the contrary, its arguments show that its alleged investment amounted to no more than the acquisition gold in Peru, based on ordinary sales contracts:

As part of its strategy, KML executed purchases of gold from Peruvian suppliers, who delivered the gold to KML’s facilities in Lima. After receiving the metals, KMLs’ 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 ██████████ (Dubai).⁷⁶²

356. In fact, Kaloti expresses pride in the alleged fact that it resold the gold with particular celerity: “KML 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 KML sales.”⁷⁶³
357. The Five Shipments – which make up the alleged investment underlying Kaloti’s claims in this case – were no exception. Kaloti claims to have bought those shipments on the following dates: 27 November 2013 (Shipment 1), between 7 and 8 January 2014 (Shipments 2 to 4) and 8 January 2014 (Shipment 5).⁷⁶⁴ According to Kaloti, such shipments “were being prepared for export to foreign purchasers at the time of the

⁷⁶⁰ **RL-0196**, *Bayindir* (Decision), ¶¶ 132–133.

⁷⁶¹ **RL-0196**, *Bayindir* (Decision), ¶ 132. *See also* **RL-0179**, *Joy Mining* (Award), ¶¶ 56–57 (“The terms of the Contract are entirely normal commercial terms . . . The duration of the commitment is not particularly significant, as evidenced by the fact that the price was paid in its totality at an early stage.”). *See also* **RL-0204**, *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award, 8 November 2010 (Robinson, Alexandrov, Turbowicz), ¶ 318.

⁷⁶² Memorial, ¶ 25.

⁷⁶³ Memorial, ¶ 26.

⁷⁶⁴ Memorial, ¶ 39.

seizures”,⁷⁶⁵ which took place only a few days after Kaloti’s alleged purchase of the shipments.⁷⁶⁶

358. Likewise, as explained above, the evidence submitted by Kaloti regarding its alleged “infrastructure” in Peru is comprised of ordinary, short-term contracts for the purchase of services and the rental of a private residence. Because of their very nature, these contracts fail to meet the duration requirement. In addition to relating merely to ordinary commercial transactions, these contracts had a short duration. Specifically, as previously noted, Kaloti’s service agreement with [REDACTED] and the apartment lease had a one-year duration,⁷⁶⁷ and Kaloti could terminate the service contracts with its alleged “employees” at any time.⁷⁶⁸

359. For the foregoing reasons, Kaloti also has failed to establish that its business activities in Peru had the duration required to be considered an “investment” under the Treaty and the ICSID Convention.

* * *

360. In sum, Kaloti’s alleged investments in Peru do not have the “characteristics of an investment” under Treaty Article 10.28 or the ICSID Convention, because (i) they involved the purchase and sale of goods (in this case, gold), and thus related purely to commercial transactions rather than to investments; (ii) they did not involve the assumption of the type of risk that is characteristic of an investment; and (iii) they did not have the requisite duration to qualify as an investment. As a result, the Tribunal lacks jurisdiction *ratione materiae* over Kaloti’s claims concerning those alleged investments.

⁷⁶⁵ Memorial, ¶ 4.

⁷⁶⁶ Memorial, ¶ 49.

⁷⁶⁷ Ex. R-0208, Lease agreement between [REDACTED] and Kaloti, 8 July 2013 [*Re-submitted version of C-0028, with Respondent’s translation*], second Clause; Ex. C-0035, KML lease agreement, payment vouchers and picture of apartment in Lima, Peru, p. 2, Clause 2.

⁷⁶⁸ Ex. C-0037, Employment agreements between KML and [REDACTED], pp. 3, 7, 11.

2. *Kaloti has failed to establish that it owns or controls the alleged investments underlying its claims*

361. Pursuant to the definition of “investment” in Treaty Article 10.28, in addition to demonstrating that the assets underlying its claims have the “characteristics of an investment”, Kaloti must establish that it “owns or controls” those assets. Such ownership or control constitutes an obvious threshold requirement, since one cannot assert an investment treaty claim with respect to the assets of a third party. In the present case, however, Kaloti has failed to demonstrate that it owns or controls the Five Shipments, and thus such shipments do not qualify as an “investment” under Treaty Article 10.28. Other evidentiary factors discussed in this section are consistent with the thesis that Kaloti does *not* own the Five Shipments. Therefore, even assuming that Kaloti’s purported investments in Peru did have the “characteristics of an investment” (quod non), the Tribunal would still lack jurisdiction *ratione materiae* over Kaloti’s claims.

362. As discussed in **Section II.A.1** above, the State is the exclusive owner of all mineral resources located in Peruvian territory.⁷⁶⁹ The State may grant concessions to private parties for the extraction of mineral resources from public lands,⁷⁷⁰ in exchange for payment by the concessionaire of fees, mining royalties and income taxes to the State.⁷⁷¹ The General Mining Law, Illegal Mining Controls and Inspection Decree, and other Peruvian laws require purchasers of mineral resources to verify and be able to demonstrate the lawful origin of such minerals (e.g., pursuant to a valid mining

⁷⁶⁹ **CL-0002**, Official English translation of the Political Constitution of Peru, 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.”).

⁷⁷⁰ **Ex. R-0013**, General Mining Law, Art. 7 (“The activities of exploration, exploitation, benefit, general labor and mining transportation are executed by national or foreign natural and legal persons, through the concession system.”).

⁷⁷¹ **Ex. R-0011**, Mining Annual Report 2020, MINEM, May 2020, pp. 116–123.

concession) and their compliance with other legal requirements.⁷⁷² The General Mining Law also expressly provides that unlawfully mined minerals must be returned to the State:

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].⁷⁷³

363. Equally, in the context of asset forfeiture proceedings, Peruvian courts have confirmed that a purchaser of mineral resources bears the burden of establishing their lawful origin:

[T]he defendants should be in better conditions and circumstances to assume the burden of proof in order to demonstrate and prove the lawful origin or destination of the asset subject of the forfeiture proceeding, for which reason, it falls on the technical defense of [the defendants] to prove the lawful origin and destination of the asset sub litis [i.e., gold bars] . . .⁷⁷⁴

364. Peruvian courts also have confirmed that a property right is void ab initio if the origin of the property or asset is unlawful (e.g., theft); in those cases (e.g., purchase of a stolen good), the property or asset is forfeited (*extinción de dominio*):

Asset forfeiture is a procedural mechanism . . . allowing the State to pursue assets of illicit origin or destination or of unjustified possession through a judicial process whose purpose it is to declare the forfeiture of the property or any other asset-related right. These rights are exercised only in appearance, **since illicit**

⁷⁷² **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.

⁷⁷³ **Ex. R-0013**, General Mining Law, Art. 52 (“La persona que extraiga sustancias minerales sin derecho alguno, devolverá al Estado los minerales indebidamente extraídos, o sus valores, sin deducir costo alguno y sin perjuicio de la acción judicial a que hubiere lugar.”).

⁷⁷⁴ **Ex. R-0214**, Resolution No. 10, Hearing Judgment, Transitory Appeals Chamber Specialized in Asset Forfeiture of Lima, 14 October 2022, p. 178.

or unjustified possession renders any legal effects that could favor the owner or exerciser void ab initio.⁷⁷⁵ (Emphasis added)

365. Importantly, if a supplier of mineral resources fails to establish their lawful origin, such resources can be presumed unlawful. This is precisely what Peruvian courts concluded in a forfeiture proceeding concerning a gold supplier of the company Aram. In the context of its FET claim under the MST Provision, Kaloti refers to Aram as a “similarly-situated investor[.]”⁷⁷⁶ As explained in further detail in **Section IV.A.4** below, the gold of Aram’s supplier, Mining & Energy Solutions SAC (“**Mining & Energy Solutions**”), has been permanently confiscated. In the decision declaring the forfeiture (*extinción de dominio*) of the gold, the court acknowledged that Aram had complied with its obligation to verify that Mining & Energy Solutions was duly registered with RECPO, but considered that Mining & Energy Solutions had failed to comply with its obligations—under Article 11 of Illegal Mining Controls and Inspection Decree and other Peruvian law rules referred to in **Section II.A.4** above—to verify the lawful origin of the gold:

ARAM ASSET MANAGEMENT N.V. did comply with the requirements of Article 4 of Supreme Decree No. 027-2012-EM; in that it verified that MINING & ENERGY SOLUTIONS S.A.C. was registered in the RECPO . . . However, MINING & ENERGY SOLUTIONS S.A.C. 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 . . . ⁷⁷⁷

⁷⁷⁵ **Ex. R-0232**, Resolution No. 16, Judgment, Appeals Chamber Specialized in Asset Forfeiture of Lima, 21 January 2021, ¶ 15 (“*La extinción de dominio es un mecanismo procesal . . . mediante el cual el Estado puede perseguir los bienes de origen o destinación ilícita o posesión injustificada, a través de un proceso judicial debido y autónomo que tiene como finalidad declarar la extinción de la propiedad o cualquier otro derecho real sobre patrimonios, que se ejercitan en apariencia, ya que la ilicitud o injustificada posesión, produce la nulidad ab initio de cualquier efecto en el derecho que pudiera favorecer a su dómimo o ejercitante.*”).

⁷⁷⁶ Memorial, § IV.B.c.

⁷⁷⁷ **Ex. R-0233**, Resolution No. 83, Judgment, Specialized Court in Asset Forfeiture of Lima, 26 January 2022, p. 55.

366. Given that Aram’s supplier failed to verify, and was unable to establish in the judicial proceeding, the lawful origin of the gold, the court concluded that the gold was of unlawful origin and, therefore, ordered its confiscation:

In sum, it has been proven that MINING & ENERGY SOLUTIONS S.A.C. did not comply with the requirements of Article 11 of Legislative Decree No. 1107, nor of Supreme Decree No. 027-2012-EM. Since there is no evidence in the file that proves the legal origin of the gold, nor any proof of payment that proves the purchase of gold of legal origin by said company from any of its suppliers, **we must consider that the unlawful origin of the gold pieces under examination, linked to Illegal Mining and Laundering of Proceeds from Illegal Mining, is proven.**⁷⁷⁸ (Emphasis added).

367. For the foregoing reasons, Kaloti could only validly claim ownership of the gold contained in the Five Shipments if it can establish that such gold had a lawful origin. However, as explained in **Section II.B.6** above, Kaloti has failed to establish such lawful origin (i.e., it failed to establish that the gold was not illegally mined).

368. Even assuming that the gold comprising the Five Shipments had a lawful origin, Kaloti has failed to demonstrate that it ever acquired ownership or control over such shipments. Specifically, Kaloti has not provided the sale and purchase agreements between Kaloti and the Suppliers, or any other document establishing the conditions under which Kaloti was to acquire ownership over the Five Shipments (e.g., upon payment or physical delivery of the shipments). On this basis, too, the Five Shipments fail to qualify as investments under the Treaty.

369. Not only has Kaloti failed to meet its burden of proof, but, as explained in the remainder of this section, the evidence on the record of this arbitration either demonstrates outright, or at least strongly suggests, that Kaloti never acquired ownership or control over three of the Five Shipments. For example, Kaloti alleges that it paid USD 4,100,000 to ██████ for the purchase of Shipment 1, through six fund

⁷⁷⁸ **Ex. R-0233**, Resolution No. 83, Judgment, Specialized Court in Asset Forfeiture of Lima, 26 January 2022, p. 55.

transfers.⁷⁷⁹ However, Kaloti only has submitted evidence regarding *three* of those transfers, totaling USD 2,275,000.⁷⁸⁰ Kaloti has not demonstrated that it made any of the other three transfers, which account for almost half of the alleged value of Shipment 1.

370. In addition, Kaloti has expressly and repeatedly admitted that it did not make any payment whatsoever for Shipments 3 and 5.⁷⁸¹ In relation to Shipment 3, Kaloti alleged in the Second Notice of Intent that “[REDACTED] agreed to allow Kaloti Metals to maintain possession of the gold, but not pay for it until it reached the United States.”⁷⁸² However, Kaloti has not submitted that alleged agreement, such that there is no evidence on the record that such agreement exists. In relation to Shipment 5, the Peruvian courts have already concluded that Kaloti’s failure to pay for that shipment means that: (i) Kaloti breached its contractual obligations toward [REDACTED] (viz., the Supplier of Shipment 5); and (ii) Kaloti does *not* have any right whatsoever over the shipment (*see Section II.C.6 above*).

371. All the foregoing demonstrates that Kaloti has failed to prove that the Five Shipments qualify as an “investment” under Treaty Article 10.28. Since those shipments form the basis of each and every one of the claims advanced by Kaloti in this proceeding, the Tribunal lacks jurisdiction *ratione materiae* over the totality of Kaloti’s claims.

3. *Kaloti’s alleged investments were not acquired in accordance with Peruvian law and international public policy*

372. 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

⁷⁷⁹ Second Notice of Intent, ¶ 23.

⁷⁸⁰ Ex. C-0041, Payment vouchers of shipments of gold from Peru to Miami, pp. 14–19.

⁷⁸¹ First Notice of Intent, 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).” (“*Cabe precisar que, en vista a las acciones de inmovilización e incautación que para ese momento ya se habían producido, Kaloti acordó que el pago de las compras Nro. 3 y 5 se efectuaría a su arribo al lugar de destino de la exportación (Florida)*”). C-0022, KML April 8, 2019, Notice of Intent, ¶¶ 33, 38, 42.

⁷⁸² Second Notice of Intent, ¶ 33.

protected by investment treaties or the ICSID Convention.⁷⁸³ As explained by the tribunal in *Phoenix Action*, “States cannot be deemed to offer access to the ICSID dispute settlement mechanism to investments made in violation of their laws.”⁷⁸⁴ Similarly, the tribunal in *Krederi v. Ukraine* explained that violating “core values protected by international law” or the “international or transnational *ordre public*” would “lead to the loss of investment protection” under the applicable investment treaty.⁷⁸⁵

373. The tribunal in *Álvarez y Marín v. Panama* affirmed that this legality requirement is inherent to the State’s consent to arbitration.⁷⁸⁶ Similarly, numerous tribunals have recognized that the legality requirement is implicit in all investment treaties, and thus applies even in the absence of an express provision to that effect in a given treaty.⁷⁸⁷
374. The evidentiary standard for proving the existence of illegality in the context of investment arbitration is much less demanding than that which applies in a criminal proceeding under municipal law. It is not, for example, the evidentiary standard requiring the absence of reasonable doubt. Rather, the applicable standard is the less demanding one of “balance of probabilities,” according to which a tribunal can

⁷⁸³ See for example, **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 (Decision)*, ¶ 46.

⁷⁸⁴ **RL-0183**, *Phoenix (Award)*, ¶ 101.

⁷⁸⁵ **CL-0049**, *Krederi Ltd. v. Ukraine*, ICSID Case No. ARB/14/17, Award, 2 July 2018, ¶ 386. See also **RL-0004**, *World Duty Free Co. v. Republic of Kenya*, ICSID Case No. Arb/00/7, Award, 4 October 2006 (Guillaume, Rogers, Veeder), ¶ 157.

⁷⁸⁶ **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), ¶ 135 (“In a system such as the one described, it is reasonable to assume that States have only consented to this curtailment of their sovereignty, provided that the protective mechanism is limited to investments made in compliance with their own legal system - but that it does not cover non-compliant investments.”).

⁷⁸⁷ See, e.g., **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; see also **RL-0189**, *SAUR International (Decision)*, ¶ 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; **RL-0183**, *Phoenix (Award)*, ¶ 101.

conclude that an allegation is sufficiently proven if there is a preponderance of evidence that makes the allegation more likely than not to be true. Numerous tribunals have used this standard to determine the illegality of an investment.⁷⁸⁸

375. Applying the appropriate standard of balance of probabilities, in the present case there is a preponderance of evidence for the Tribunal to conclude that the Five Shipments were part of a money laundering scheme related to illegal mining, and thus that they have an illegal origin. Indeed, as Peru explained in **Section II.B.6**, Kaloti has failed to submit any evidence showing that it complied with its obligation under Peruvian law to verify and document the lawful origin of the Five Shipments.⁷⁸⁹ In addition, as explained in **Section II.C.1**, there are strong *indicia* that the Five Shipments were part of a money-laundering scheme.
376. Money laundering is a crime under Peruvian law.⁷⁹⁰ This is consistent with international public policy, which also proscribes money laundering. For example, Article 14 of the United Nations Convention against Corruption requires member States to adopt measures designed to deter, detect, and criminalize money laundering.⁷⁹¹ Also, in setting aside the award issued in *Belokon v. Kyrgyzstan*, the Paris Court of Appeals confirmed the existence of an international public policy against

⁷⁸⁸ **RL-0212**, *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Award, 26 July 2007 (Mustill, Bernardini, Price), ¶ 124; **RL-0024**, *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, 6 May 2013 (Berman, Donovan, Lalonde) (“**Rompetrol (Award)**”), ¶¶ 182–183; **RL-0211**, *Libananco Holdings Co. Ltd. v. Republic of Turkey*, ICSID Case No. ARB/06/8, Award, 2 September 2011 (Hwang, Alvarez, Berman), ¶ 125; **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.

⁷⁸⁹ See **Ex. R-0013**, General Mining Law, 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.

⁷⁹⁰ **Ex. R-0218**, Money Laundering Decree, Arts. 3 and 4; see also **RL-0208**, *Kyrgyz Republic v. Valeri Belokon*, Judgment of the Paris Court of Appeal, 21 February 2017 (Paulsson, Hobér, Schiersing) (“**Kyrgyz Republic (Decision)**”), pp. 5–6.

⁷⁹¹ **RL-0209**, United Nations Office on Drugs and Crime, Convention Against Corruption, 2004, Art. 14.

money laundering.⁷⁹²

377. Peru has not consented to arbitrate disputes related to investments that were procured or established in violation of Peruvian law or international public policy. Consequently, Kaloti's alleged investments do not deserve protection under the Treaty, and Kaloti's claims must be dismissed for lack of jurisdiction *ratione materiae*.

4. *In any event, the Tribunal lacks jurisdiction ratione materiae over the alleged expropriation of Kaloti as an enterprise, as well as over Kaloti's claims of lost profits outside of Peru*

378. Kaloti itself is not a "covered investment" in the territory of the other State Party to the Treaty i.e., *in Peru*. Therefore, even assuming that Kaloti owned or controlled investments in Peru that benefit from the protection of the Treaty and the ICSID Convention (*quod non*), the Tribunal nonetheless would lack jurisdiction *ratione materiae* over: (i) the alleged indirect expropriation of Kaloti as an "entire enterprise,"⁷⁹³ and (ii) Kaloti's claims of lost profits outside of Peru resulting from the State's alleged breach of the MST Provision. The remainder of this section addresses each of these two points in turn.

379. *First*, the Expropriation Provision only applies to the unlawful expropriation of "covered investments", and Kaloti does not qualify as a "covered investment" under the Treaty because that company is not located in the territory of Peru.

380. Treaty Article 1.3 establishes that, in order to qualify as a "covered investment", a claimant's asset not only must meet the requirements set out in Treaty Article 10.28, but must also be located in the territory of the respondent State:

[C]overed investment means, with respect to a Party, an investment, as defined in Article 10.28 (Definitions), in its territory of an investor of another Party; (Emphasis added)

381. As the tribunal in *Hope Services v. Cameroon* recently confirmed, the requirement that a claimant's investment must be located in the territory of the respondent State also

⁷⁹² **RL-0208**, *Kyrgyz Republic* (Decision), p. 8.

⁷⁹³ Memorial, ¶¶ 8, 130.

arises from the ICSID Convention.⁷⁹⁴ Indeed, a territorial link or nexus between the investment and the respondent State is inherent in Article 25 of the ICSID Convention, as one of the principal goals of the Convention was to encourage the flow of private investment from developed States to developing States.⁷⁹⁵

382. Therefore, to establish the Tribunal's jurisdiction *ratione materiae* over the alleged expropriation of the Kaloti enterprise, as a going concern, Kaloti would need to demonstrate that the enterprise is an investment located *in the territory of Peru*. However, Kaloti can do no such thing, because it is a company that is both incorporated and physically located in the United States. By Kaloti's own admission, (i) 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.⁷⁹⁶ Accordingly, the Kaloti company does not qualify as a "covered investment" under the Treaty or the ICISD Convention. The Tribunal therefore lacks jurisdiction *ratione materiae* over Peru's alleged expropriation of that company.
383. *Second*, the jurisprudence has confirmed that, when a claimant has made investments both within and outside the territory of respondent State, the tribunal's jurisdiction is limited to damages concerning the investments made by that claimant *within* the respondent State. For example, the tribunal in *Archer Daniels v. Mexico* noted that "Chapter Eleven of the NAFTA applies to measures adopted or maintained by a Party relating to, inter alia 'investments of investors of another Party in the territory of the Party', and pursuant to Article 1101 (1)(b) only measures relating to investments that

⁷⁹⁴ **RL-0207**, *Hope Services LLC v. Republic of Cameroon*, ICSID Case No. ARB/20/2, Award, 23 December 2021 (Scherer, Ziadé, Garel) ("**Hope Services (Award)**"), ¶ 215.

⁷⁹⁵ ICSID Convention, Art. 25 and p. 35. See also **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 ("**Abaclat (Dissenting Opinion of Professor Georges Abi-Saab)**"), ¶ 74.

⁷⁹⁶ Memorial, ¶¶ 11, 76, 219.

are within the scope of Chapter Eleven should be covered.”⁷⁹⁷ On that basis, the tribunal concluded that it only had jurisdiction to award compensation for the injury caused to the investments of the claimant that were located in the respondent State:

The Tribunal has jurisdiction only to award compensation for the injury caused to Claimants in their investment made in Mexico (through ALMEX). Therefore, the Claimants are not entitled to recover the lost profits on HFCS [high fructose corn syrup] they would have produced in the United States and exported to Mexico “but for” the Tax [i.e., Mexico’s breach of NAFTA], as these losses were not suffered in their capacity as investors in Mexico.⁷⁹⁸

384. Therefore, to the extent that Kaloti were entitled to any damages at all (*quod non*), it could only recover damages for harm caused to its investment specifically *in Peru*. Kaloti, however, seeks compensation that far exceeds the scope of any harm that its purported investments allegedly suffered in Peru. Indeed, under its “third main head of damages,”⁷⁹⁹ Kaloti seeks compensation for “the indirect expropriation of its entire enterprise as a going concern business.”⁸⁰⁰
385. Mr. Smajlovic, Kaloti’s damages expert, calculated the “fair market value of the [Kaloti] enterprise using a discounted cash flow (DCF) analysis,” for which he (i) “assumed that KML would remain in Peru **and other markets** for another thirty years until the current Peruvian proven reserves were depleted” (emphasis added);⁸⁰¹ and (ii) considered Kaloti’s cash flows in general, without distinguishing between the damage incurred by Kaloti’s alleged investments in Peru and those located outside of

⁷⁹⁷ **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) (“**Archer (Award)**”), ¶ 273.

⁷⁹⁸ **RL-0105**, *Archer (Award)*, ¶¶ 273–274. This solution has been commended by commentators. See **RL-0205**, Christopher R. Zheng, “*The Territoriality Requirement in Investment Treaties: A Constraint on Jurisdictional Expansionism*,” SINGAPORE LAW REVIEW (2016), p. 167.

⁷⁹⁹ Memorial, ¶ 207.

⁸⁰⁰ Memorial, ¶¶ 8, 175.

⁸⁰¹ Smajlovic Report, ¶ 3.16.

Peru.⁸⁰² A substantial proportion of the fair market value calculated by Mr. Smajlovic is attributable to alleged lost revenues outside Peru. According to Mr. Smajlovic, revenues outside Peru accounted for 53% of Kaloti's overall revenues prior to the Challenged Measures.⁸⁰³ Mr. Smajlovic assumes, for the purposes of his damages model, that this percentage would stay the same throughout the 30-year period covered by the expropriation claim (i.e., 2018-2048).⁸⁰⁴

386. The same damages model underpins Kaloti's claims for compensation in relation to its FET and national treatment claims, which comprise alleged lost profits from January 2014 to November 2018. Thus, Mr. Smajlovic assumes that 53% of Kaloti's counter-factual revenues during this period would derive from business operations *outside* of Peru.⁸⁰⁵

387. As a result of Mr. Smajlovic's assumptions regarding counterfactual revenues, a substantial proportion of the damages claimed by Kaloti, under all heads of claim, relate to the alleged damage to Kaloti's business outside Peru. As Brattle confirms, "approximately 62% of the lost profit and expropriation damages arise from Mr. Smajlovic's assumed lost volumes sourced outside of Peru."⁸⁰⁶

388. As previously explained, however, pursuant to Treaty Article 1.3 and the ICSID Convention, the Tribunal does not have jurisdiction to award compensation for any losses or damages incurred by Kaloti for any investment or operation outside of Peruvian territory.

B. The Tribunal lacks jurisdiction *ratione temporis* over most of Kaloti's claims because they are barred by the limitations clause in Treaty Article 10.18.1

389. The Tribunal also lacks jurisdiction *ratione temporis* over (i) two of Kaloti's FET claims; (ii) Kaloti's expropriation claims; and (ii) Kaloti's national treatment claim. Kaloti

⁸⁰² Memorial, ¶ 209; Smajlovic Report, ¶ 6.5.

⁸⁰³ Smajlovic Report, ¶ 6.31.

⁸⁰⁴ Smajlovic Report, ¶ 6.34.

⁸⁰⁵ Smajlovic Report, ¶ 6.34.

⁸⁰⁶ Brattle Report, ¶ 75.

submitted all of those claims to arbitration more than three years after it first acquired knowledge (i) of Peru's alleged breaches, and (ii) of the alleged fact that it had incurred loss or damage as a result of those breaches. Therefore, such claims are outside of the Tribunal's jurisdiction by virtue of Treaty Article 10.18.1, which states:

No 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 under Article 10.16.1 and knowledge that the claimant . . . has incurred loss or damage.⁸⁰⁷

390. As the United States explained in its non-disputing party submission in *Gramercy v. Peru*, Treaty Article 10.18.1 "imposes a *ratione temporis* jurisdictional limitation on the authority of a tribunal to act on the merits of the dispute."⁸⁰⁸ Accordingly, "a tribunal must find that a claim satisfies the requirements of . . . Treaty Article 10.18.1 in order to establish a Party's consent to (and therefore the tribunal's jurisdiction over) a claim."⁸⁰⁹ Consistent with what previous tribunals have explained in relation to nearly identical provisions, the limitation period contained in Treaty Article 10.18.1 "is 'clear and rigid' and not subject to any 'suspension,' 'prolongation,' or 'other qualification'."⁸¹⁰

391. Statute of limitation clauses like Treaty Article 10.18.1 seek to prevent the prosecution of late or historic claims. As the tribunal in *Spence v. Costa Rica* underscored, "[statute

⁸⁰⁷ **RL-0001**, Treaty, Art. 10.18.1.

⁸⁰⁸ **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 (Fernández-Armesto, Drymer, Stern) ("**Gramercy (USA Submission)**"), ¶ 5.

⁸⁰⁹ **RL-0103**, *Gramercy (USA Submission)*, ¶ 5.

⁸¹⁰ **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)**"), ¶ 192; In the context of NAFTA, arbitral tribunals have described the nearly identical Chapter Eleven limitations period in these same terms. See **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 (Nairman, 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) ("**Resolute (Decision)**"), ¶ 153. See also, **RL-0103**, *Gramercy (USA Submission)*, ¶ 6.

of limitation] clauses are a legitimate legal mechanism to limit the proliferation of historic claims, with all the attendant legal and policy challenges and uncertainties that they bring”.⁸¹¹ In that same vein, in its non-disputing party submission in *Corona Materials v. Dominican Republic*, the United States stressed that effective limitation periods are necessary “to promote the goals of ensuring the availability of sufficient and reliable evidence, as well as providing legal stability and predictability for potential respondents and third parties.”⁸¹²

392. Treaty Article 10.18.1 encompasses two forms of knowledge: *actual* knowledge (“[the] date on which the claimant first **acquired** . . . knowledge”) and *constructive* knowledge (“[the] date on which the claimant . . . **should have first acquired** . . . knowledge” (emphasis added)).⁸¹³ The tribunal in *Spence* addressed the meaning of “constructive knowledge,” concluding that “[t]he ‘should have first acquired knowledge’ test . . . is an objective standard; what a prudent claimant should have known or must reasonably be deemed to have known”.⁸¹⁴ Accordingly, in instances in which a reasonably diligent foreign investor *should have* been aware of the alleged breach or loss, a claimant cannot invoke lack of knowledge to circumvent the application of the time limit set forth in Treaty Article 10.18.1.
393. Treaty Article 10.16.4 establishes that, in ICSID arbitrations (specifically), “[a] claim shall be deemed submitted to arbitration . . . when the claimant’s . . . request for arbitration . . . referred to in paragraph 1 of Article 36 of the ICSID Convention is

⁸¹¹ **RL-0138**, *Spence v. Costa Rica* (Corrected Award), ¶ 208. See also **RL-0139**, *Daniel W. Kappes, et al., v. Republic of Guatemala*, ICSID Case No. ARB/18/43, Submission of the United States of America, 19 February 2021 (Kalicki, Townsend, Douglas) (“**Kappes (USA Submission)**”), ¶ 5; **RL-0140**, *Merrill & Ring v. Government of Canada*, ICSID Case No. UNCT/07/1, U.S. Submission Made Pursuant to Article 1128 to the NAFTA, 14 July 2008 (Vicuña) (“**Merrill & Ring (USA Submission)**”), ¶ 16, fn. 21.

⁸¹² **RL-0141**, *Corona Materials v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Submission of the United States of America, 11 March 2016 (Dupuy, Thomas, Mantilla-Serrano), ¶ 5. See also **RL-0140**, *Merrill & Ring (USA Submission)*, ¶ 16; **RL-0139**, *Kappes (USA Submission)*, ¶ 5.

⁸¹³ See **RL-0135**, *Corona (Award)*, ¶ 193.

⁸¹⁴ **RL-0138**, *Spence v. Costa Rica* (Corrected Award), ¶ 209. See also **RL-0136**, *Grand River (Decision)*, ¶ 59 (“Constructive knowledge¹ of a fact is imputed to a person if by exercise of reasonable care or diligence, the person would have known of that fact.”).

received by the Secretary-General” of ICSID.⁸¹⁵ On that basis, the jurisprudence has unanimously concluded, with respect to three-year limitations clauses such as that in Article 10.18.1, that “the relevant date for triggering the time bar is three years before Claimant filed its Request for Arbitration.”⁸¹⁶

394. Further, the language of Treaty Article 10.18.1 makes plain that the three-year time limit begins to run on the day that the claimant *first* acquired, or should have *first* acquired, knowledge of the alleged breach and of the alleged fact that it suffered loss or damage as a result of that breach.⁸¹⁷ Thus, as recognized by the tribunal in *Renco v. Peru (II)*, “the knowledge that triggers the limitation period can only occur on a single date, when the breach first occurs.”⁸¹⁸

1. *The relevant cut-off date here for purposes of the three-year limitations clause is 30 April 2018*

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

⁸¹⁵ **RL-0001**, Treaty, Art. 10.16.4. *See also* ICSID Convention, Article 36(1) (“Any Contracting State or any national of a Contracting State wishing to institute arbitration proceedings shall address a request to that effect in writing to the Secretary-General who shall send a copy of the request to the other party.”)

⁸¹⁶ **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) (“**Rusoro Mining (Award)**”), ¶ 192. *See also* **RL-0135**, *Corona (Award)*, ¶ 199; **RL-0142**, *Astrida Benita Carrizosa v. Republic of Colombia*, ICSID Case No. ARB/18/5, Award, 19 April 2021 (Kaufmann-Kohler, Fernández Arroyo, Söderlund), ¶ 186; **RL-0143**, *Infinito Gold Ltd. v. Costa Rica*, ICSID Case No. ARB/14/5, Decision on Jurisdiction, 4 December 2017 (Kaufmann-Kohler, Hanotiau, Stern), ¶ 301; **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) (“**Ansung Housing (Award)**”), ¶ 122.

⁸¹⁷ *See* **RL-0138**, *Spence v. Costa Rica (Corrected Award)*, ¶¶ 207–208.

⁸¹⁸ **RL-0145**, *The Renco Group, Inc. v. Republic of Peru [III]*, PCA Case No. 2019-46, Decision on Expedited Preliminary Objections, 30 June 2020 (Simma, Grigera Naón, Thomas) (“**Renco (Decision)**”), ¶ 86.

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

396. Aware that this means that its claims fall outside of the jurisdiction of the Tribunal by virtue of Treaty Article 10.18.1, Kaloti tries to circumvent that provision in multiple ways, but fails for the reasons explained in the following section.

2. *None of Kaloti's arguments enable it to circumvent the three-year limitations bar*

397. *First*, Kaloti claims that it was not until 30 November 2018 (i.e., seven months after the Cut-off Date of 30 April 2018) that it acquired knowledge of the full extent of the “actual damage” that it allegedly suffered as result of Peru’s alleged breaches.⁸¹⁹ Kaloti thus argues that Treaty Article 10.18.1 requires knowledge of a breach of the Treaty, as well as knowledge of the *actual* loss. However, this argument is entirely inconsistent with both the text and spirit of Treaty Article 10.18.1.

398. The jurisprudence that has analyzed the meaning of the terms “incurred loss or damage” has unanimously confirmed that what is required for the limitation period to begin to run is simple knowledge that some type of loss or damage was suffered – even if the extent and quantification of the harm is still unclear.⁸²⁰ In that same vein,

⁸¹⁹ Memorial, ¶¶ 8, 90; Request for Arbitration, ¶ 78(c).

⁸²⁰ **RL-0038**, *Rusoro Mining (Award)*, ¶ 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-0138**, *Spence v. Costa Rica (Corrected Award)*, ¶ 213 (“[T]he 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.”); **RL-0146**, *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002 (Stephen, Crawford, Schwebel) (“**Mondev (Award)**”), ¶ 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-0147**, *Michael Ballantine and Lisa Ballantine v. Dominican Republic*, PCA Case No. 2016-17, Final Award, 3 September 2019 (Ramírez-Hernández, Cheek, Vinuesa), ¶ 265 (“Regarding the incurred “loss or damage” under Article 10.18.1, an investor may have knowledge of it even if the financial impact of that loss or damage is not immediate”); **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 (“in 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

the United States has explained that “an investor may ‘incur’ loss or damage even if the financial impact (whether in the form of disbursement of funds, reduction in profits, or otherwise) of that loss or damage is not immediate”.⁸²¹ Likewise, based on a limitation provision that is very similar to the one *sub judice*,⁸²² the tribunal in *Ansung Housing v. China* 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”⁸²³ (emphasis in original).

399. *Second*, Kaloti claims that “the facts in this case prove . . . the composite nature of Peru’s breaches of the TPA, which impl[ies] that the totality of acts by Peru must be considered as a unity that climaxed on November 30, 2018.”⁸²⁴ However, as explained in **Section IV.A.2** below, the acts and omissions alleged by Kaloti are not sufficiently connected to constitute a “composite act” under international law.

400. The concept of a “composite act” is defined in Article 15(1) of the International Law Commission Articles on State Responsibility (“**ILC Articles**”), in the following terms:

The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the

they can be subsequently elaborated with more specificity); nor must the amount of loss or damage suffered be precisely determined.”); **RL-0148**, *Bilcon of Delaware, et al., v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015 (Simma, Schwartz, McRae), ¶ 275 (“The plain language of Article 1116(2) [of NAFTA] does not require full or precise knowledge of loss or damage.”).

⁸²¹ **RL-0103**, *Gramercy* (USA Submission), ¶ 8. See also **RL-0145**, *Renco* (Decision), ¶ 87 (“The United States confirmed that interpretation in its non-disputing party submission in *Renco v. Peru (II)*, wherein it defined the phrase “knowledge of incurred loss or damage” as “knowledge of the existence of such loss or damage, *even if it cannot be quantified until a later date.*”) (emphasis added).

⁸²² **RL-0149**, Agreement on the Promotion and Protection of Investments Between the Government of the People’s Republic of China and the Government of the Republic of Korea, 5 February 2010, Art. 9(7) (“[A]n investor may not make a claim pursuant to paragraph 3 of this Article if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge that the investor had incurred loss or damage.”).

⁸²³ **RL-0144**, *Ansung Housing* (Award), ¶ 110.

⁸²⁴ Memorial, ¶ 48.

other actions or omissions, is sufficient to constitute the wrongful act.⁸²⁵

401. As explained by the late Professor James Crawford, “a composite act is more than a simple series of repeated actions”⁸²⁶ Indeed, the International Law Commission Commentary on the ILC Articles (“**ILC Commentary**”) explains that, to be deemed a composite act, the 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.”⁸²⁷ Tribunals in investor-State arbitrations have recognized and applied this legal standard, requiring evidence of a scheme or “coordinated pattern adopted by the State” in the implementation of the measures.⁸²⁸
402. However, as discussed in **Section IV.A.2** below, the Challenged Measures do not involve any underlying pattern or purpose, or any interconnectedness between the various alleged acts and omissions of which such measures were comprised. To the contrary, the Challenged Measures concern discrete actions performed by different State entities, each of which was acting independently, objectively, and in accordance with its competencies and powers.⁸²⁹ Moreover, most of the Challenged Measures were not even directed at Kaloti itself, but rather related to administrative and criminal proceedings against the Suppliers. Accordingly, the various measures cannot reasonably be viewed as configuring a coordinated scheme or pattern (of any sort, let alone one specifically designed to harm Kaloti). Each of the Challenged Measures must therefore be assessed as a stand-alone alleged breach, rather than as a component of a composite act.

⁸²⁵ **CL-0040**, ILC Articles, Art. 15(1).

⁸²⁶ **RL-0150**, James Crawford, *STATE RESPONSIBILITY: THE GENERAL PART* (2014), p. 266.

⁸²⁷ **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).

⁸²⁸ **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) (“*RosInvestCo (Award)*”), ¶ 621.

⁸²⁹ *See Sections II.B and II.B.* above.

403. In respect of a stand-alone alleged breach, ILC Article 14 recognizes that any such breach may arise from a completed act that “occurs ‘at the moment when the act is performed’ even though its effects or consequences may continue” later in time.⁸³⁰ In other words, the relevant timing is that of the alleged act or omission that triggered the alleged breach and loss, even if there were other acts or omissions that were natural effects or consequences of the triggering act or omission.
404. In sum, the “composite act” doctrine does not assist Kaloti for at least two reasons. *First*, the measures of which Kaloti complains were not inter-connected in any way, or part of a pattern, such that they do not constitute a “composite act”. *Second*, as explained below, *all* of the key alleged State actions and omissions underlying the alleged breaches took place *before* the Cut-off Date. Therefore, according to Kaloti’s own account of the facts, the specific “action or omission” of Peru that “taken with the other actions or omissions, is sufficient to constitute the wrongful act” must have occurred before the Cut-off Date. Pursuant to ILC Article 15, this means that, even assuming *arguendo* that Peru’s actions did indeed amount to a composite act (quod non), any resulting breach still would have occurred *before* the Cut-off Date (and thus would have transcended the three-year limitations period).
405. The upshot of the foregoing discussion overall is that, to determine whether Kaloti’s claims are time-barred under Article 10.18.1, the Tribunal must (i) assess when Kaloti first acquired (or should have acquired) knowledge of the State act or omission that generated the alleged breach and loss, and (ii) determine if such date was prior to the Cut-off Date, i.e., before 30 April 2018.
3. *Kaloti already had actual or constructive knowledge, before the Cut-off Date, of most of the alleged breaches and of the alleged resulting loss or damage*
406. Kaloti alleges that Peru breached its obligations: (i) to provide FET under the MST Provision; (iii) not to expropriate Kaloti’s investment in contravention of the Expropriation Provision; and (ii) to comply with the National Treatment Provision.

⁸³⁰ **RL-0022**, ILC Commentary, Art. 14, Commentary 2.

407. As demonstrated in this Section, prior to the Cut-off Date, Kaloti had already acquired knowledge (i) of two of the FET breaches that it alleges; (ii) of the alleged fact that Kaloti incurred loss or damage as a result of the foregoing alleged breaches; and (iii) of *all* of the national treatment and expropriation-related breaches that it alleges.
- a. Two of Kaloti’s FET claims are time-barred under Treaty Article 10.18.1
408. Kaloti alleges that Peru breached the FET standard contained in Treaty Article 10.18.1 by adopting the following four measures: (i) depriving Kaloti of its property without due process of law;⁸³¹ (ii) failing to return the gold to Kaloti within a reasonable amount of time;⁸³² (iii) “treating similarly-situated investors differently in judicial proceedings”;⁸³³ and (iv) refusing to engage in discussions with Kaloti following receipt of Kaloti’s notice of dispute.⁸³⁴
409. As explained below, the Tribunal lacks jurisdiction *ratione temporis* over the first two of the alleged FET breaches mentioned above, because Kaloti first acquired knowledge of those alleged breaches (and of at least part of their associated damages) prior to the Cut-off Date.
410. *First*, Kaloti claims, on three asserted grounds, that Peru deprived it of the Five Shipments without due process of law. Those three grounds (and Peru’s response to each) are the following:
- a. **Kaloti argument:** “[A]t no point in time did Peru afford KML the opportunity to present a bona fide purchaser defense and thereby secure the release of its gold”.⁸³⁵ **Peru’s response:** Kaloti bases this argument on two interim judicial

⁸³¹ Memorial, § IV.B.a.

⁸³² Memorial, § IV.B.b.

⁸³³ Memorial, § IV.B.c.

⁸³⁴ Memorial, § IV.B.e.

⁸³⁵ See Memorial, ¶ 114.

decisions, both of which were rendered *before* the Cut-off Date—on 23 July 2015⁸³⁶ and 3 February 2016, respectively;⁸³⁷

- b. **Kaloti argument:** “Multiple requests made by, or on behalf or for the benefit of KML, were simply *de facto* ignored by Peru”.⁸³⁸ **Peru’s response:** All of the requests cited by Kaloti were filed between 27 December 2013 and 7 June 2016⁸³⁹ (i.e., several years before the Cut-off Date of 30 April 2018); and
- c. **Kaloti argument:** SUNAT’s original immobilization of “KML’s gold . . . bears no rational connection to”⁸⁴⁰ the seizures of the Five Shipments ordered by the Criminal Courts in the context of the preliminary investigations pursued by the Prosecutor’s Office in relation to the Suppliers. **Peru’s response:** As explained in Sections II.B and II.C above, (i) SUNAT ordered the immobilizations between November 2013 and January 2014 (before the Cut-off Date); and (ii) the orders of the Criminal Courts mandating provisional seizure of each of the Five Shipments were issued between 21 February 2014 and 20 March 2015 (also several years before the Cut-off Date).⁸⁴¹ Accordingly, both sets of measures lie outside the three-year limitations period.

411. *Second*, Kaloti argues that “the unreasonable length of time that Peru has taken to conclude the criminal proceedings and other investigations, and return KML’s gold assets constitutes a violation of the TPA’s fair and equitable treatment provision.”⁸⁴² Specifically, Kaloti contends that, under Peruvian law, the Five Shipments could not remain seized for more than 180 days.⁸⁴³ As previously explained, however, the

⁸³⁶ **Ex. C-0100**, Resolution dated July 23, 2015, issued by the 6th Criminal Court of Callao, responding to KML’s petitions.

⁸³⁷ **Ex. C-0016**, Decision from the *Cuarta Sala Penal Reos Libre*.

⁸³⁸ See Memorial, ¶ 115.

⁸³⁹ See Memorial, ¶ 115.

⁸⁴⁰ Memorial, ¶ 116.

⁸⁴¹ **Ex. R-0134**, Precautionary Seizure against Shipment 1, 21 February 2014; **Ex. R-0210**, Resolution No. 1, Precautionary Seizure against Shipment 5, 20 March 2015.

⁸⁴² Memorial, ¶ 118.

⁸⁴³ Memorial, ¶ 119.

Criminal Courts ordered the last seizure of the Five Shipments on 20 March 2015. That means that, pursuant to Kaloti's own argument, (i) Peru would have begun to commit the alleged breach no later than 180 days after 20 March 2015 (i.e., approximately on 20 September 2015); and (ii) Kaloti would have first acquired knowledge of the alleged breach on that same date in September 2015 (i.e., over two years before the Cut-Off Date).

412. Further, Kaloti's own pleadings in this case confirm that, well before the Cut-off Date, Kaloti had already acquired knowledge of the alleged fact that it had incurred loss or damage from the above-mentioned alleged breaches. For example, for its FET claims, Kaloti seeks compensation consisting in lost profits allegedly suffered by Kaloti starting from 2013.⁸⁴⁴
413. Aware that the above claims are time-barred under Treaty Article 10.18.1, Kaloti attempts to argue that Peru's alleged FET breaches only "became actionable (*i.e.*, cognizable in arbitration) on 30 November 2018."⁸⁴⁵ The latter date was the one on which, according to Kaloti, it became insolvent.⁸⁴⁶ However, Kaloti's argument that the alleged FET breach only became "cognizable" upon Kaloti's insolvency lacks any basis under international law. Whether or not Peru breached its obligation to treat Kaloti's alleged investments fairly and equitably does not depend on the materialization or extent of the financial consequences allegedly suffered by Kaloti as a result of that breach. Indeed, Kaloti has failed to cite any authority to support its untenable legal argument.
414. Importantly, Kaloti's self-serving position is contradicted by multiple arguments that it itself advanced before initiating the present arbitration. For instance, as early as in the First Notice of Intent – which was dated 6 May 2016, nearly two years before the Cut-off Date – Kaloti (i) had already invoked the alleged FET breaches mentioned

⁸⁴⁴ See Memorial, ¶ 188.

⁸⁴⁵ Memorial, ¶ 188.

⁸⁴⁶ See, e.g., Memorial, ¶ 70. See also Memorial, ¶ 17.

above, and (ii) had already argued that such breaches had caused economic damage to it. The First Notice of Intent stated the following:

- a. “Peru [had] immobilized and seized protected assets owned by Kaloti arguing, at first, through SUNAT, that the export documents were not sufficient and, later, that the legality of their origin was under judicial investigation”;⁸⁴⁷
- b. “In none of the customs or judicial proceedings ha[d] Kaloti been allowed to appear and be notified of the proceedings, despite having proven that it is the owner of the seized gold”;⁸⁴⁸
- c. “[T]he Prosecutor’s Office and the Judiciary [still] maintain[ed] four seizure measures . . . despite the fact that the seized property [had been] acquired by Kaloti in good faith and for valuable consideration”;⁸⁴⁹ and
- d. The seizures of the Five Shipments had been in place for an unreasonable amount of time.⁸⁵⁰

415. In part on the basis of the above arguments, Kaloti asserted in the First Notice of Intent that “Peru . . . ha[d] breached its obligations under Article 10.5 of the Treaty to accord Kaloti’s investment fair and equitable treatment.”⁸⁵¹

416. The allegations quoted in points (a) to (d) of the previous paragraph are either identical or very similar to the ones Kaloti made in the Memorial to support the two FET claims addressed in this section (i.e., that Peru (i) deprived Kaloti of its property

⁸⁴⁷ First Notice of Intent, ¶ 62 (“*el Perú [ha] inmovilizado e incautado activos protegidos propiedad de Kaloti arguyendo, en un primer momento, a través de SUNAT, que los documentos para la exportación no eran suficientes y, después, que la legalidad de su procedencia se encuentra en investigación judicial.*”).

⁸⁴⁸ First Notice of Intent, ¶ 62 (“*[e]n ninguno de los procedimientos aduaneros, ni en los judiciales, se ha permitido a Kaloti apersonarse y ser notificado de las actuaciones, a pesar de haber acreditado ser el propietario del oro incautado*”).

⁸⁴⁹ First Notice of Intent, ¶ 65(b) (“*el Ministerio Público y el Poder Judicial mantienen cuatro medidas de Incautación . . . a pesar de que la propiedad incautada fue adquirida por Kaloti de buena fe y a título oneroso*”).

⁸⁵⁰ First Notice of Intent, ¶¶ 27, 35–36, 42, 48, 61, 65.

⁸⁵¹ First Notice of Intent, ¶ 67 (“*el Perú . . . ha violado la obligación del Artículo 10.5 del Tratado de conferir a la inversión de Kaloti trato justo y equitativo.*”).

without due process of law,⁸⁵² and (ii) failed to return the gold to Kaloti within a reasonable amount of time⁸⁵³). That means that Kaloti already knew of the alleged breaches underlying those claims on the date of the First Notice of Intent (6 May 2016), which long predated the Cut-off Date of 30 April 2018. Therefore, the FET claims that are predicated on such alleged breaches (and the State measures to which they relate) transcend the three-year statute of limitations, and are beyond the Tribunal's jurisdiction *ratione temporis*.

417. A similar analysis applies to the “alleged loss or damage” prong of Article 10.18.1. In the First Notice of Intent, Kaloti had already specified that the above-referenced alleged breaches of the MST Provision had caused it economic damage. Among other alleged damages, Kaloti claimed in the First Notice of Intent:

- a. that “[a]s a result of the actions taken by Peru . . . this investor ha[d] been forced to breach a series of agreements with third parties, ha[d] been affected by the fluctuation of the international price of gold since it was immobilized, ha[d] incurred extraordinary costs, and its commercial reputation ha[d] been seriously affected”;⁸⁵⁴ and
- b. that “**Kaloti ha[d] suffered serious economic loss consisting of more than USD 17 million** of immobilized and seized gold, as well as default interest of more than USD 2,498,577.00, loss in the fluctuation of the price of gold of more than USD 1,200,000.00 and legal defense costs and vault rental extension of more than USD 565,593.00”.⁸⁵⁵ (Emphasis added).

⁸⁵² Memorial, § IV.B.a.

⁸⁵³ Memorial, § IV.B.b.

⁸⁵⁴ First Notice of Intent, ¶ 54 (“[c]omo resultado de las acciones que ha llevado a cabo el Perú . . . este inversionista se ha visto obligado a incumplir una serie de acuerdos con terceros, se ha visto afectado por la fluctuación del precio internacional del oro desde que fuera inmovilizado, ha incurrido en costos extraordinarios y su reputación comercial ha sido seriamente afectada.”).

⁸⁵⁵ First Notice of Intent, ¶ 68 (“Kaloti ha sufrido un grave perjuicio económico conformado por los más de USD 17 millones de oro inmovilizados e incautados, así como por intereses moratorios por más de USD 2,498,577.00, por la pérdida en la fluctuación del precio del oro por más de USD 1,200,000.00 y por gastos de defensa legal y extensión de alquiler de bóveda por más de USD 565,593.00”).

418. The incontrovertible implication of the foregoing is that, as of the date of the First Notice of Intent (viz., 6 May 2016) Kaloti already knew of the alleged loss or damage that the relevant alleged FET violations had caused it. The fact itself that in May 2016 Kaloti had (i) delineated with some precision its FET claims, and (ii) expressed its view that those claims were ripe for arbitration, directly contradicts Kaloti's claim in the present proceeding that the relevant FET claims did not become "actionable" or "cognizable" until 30 November 2018. Accordingly, Kaloti's First Notice of Intent further confirms that the referenced FET claims lie outside the Tribunal's *ratione temporis* jurisdiction.
419. Yet another compelling element of proof corroborates the conclusion above. On 25 May 2016 and 7 June 2016 (i.e., almost two years before the Cut-off Date), Kaloti filed two submissions before Peruvian courts, expressly claiming that Peru had breached its FET obligation under Treaty Article 10.5.⁸⁵⁶ Just like in the present proceeding, Kaloti based its claims before the Peruvian courts on (i) "the immobilization and seizure of the minerals owned by them";⁸⁵⁷ (ii) the alleged "refusal of the judicial authority to hear them and to return the assets";⁸⁵⁸ and (iii) the alleged excessive length of the gold seizures.⁸⁵⁹ The foregoing are the same factual predicates of the two FET claims addressed in this section (i.e., that Peru (i) deprived Kaloti of its property without due process of law,⁸⁶⁰ and (ii) failed to return the gold

⁸⁵⁶ **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).

⁸⁵⁷ **Ex. R-0228**, Kaloti's Request to Lift Precautionary Seizure, 3 May 2016 [*Re-submitted version of C-0014, with Respondent's translation*], ¶ 12; **Ex. R-0229**, Kaloti's Request to Lift Precautionary Seizure, 25 May 2016 [*Re-submitted version of C-0015, with Respondent's translation*], ¶ 12 ("*la inmovilización e incautación del mineral de su propiedad*").

⁸⁵⁸ **Ex. R-0228**, Kaloti's Request to Lift Precautionary Seizure, 3 May 2016 [*Re-submitted version of C-0014, with Respondent's translation*], ¶ 12; **Ex. R-0229**, Kaloti's Request to Lift Precautionary Seizure, 25 May 2016 [*Re-submitted version of C-0015, with Respondent's translation*], ¶ 12 ("*[la] negativa de la autoridad judicial a escucharlo y restituir dicho activo*").

⁸⁵⁹ First Notice of Intent, ¶¶ 35, 42, 48 (where Kaloti complains that the immobilizations have been in place for more than 26 months).

⁸⁶⁰ Memorial, § IV.B.a.

to Kaloti within a reasonable amount of time⁸⁶¹), and the Peruvian court submissions in which Claimants articulated such predicates were submitted approximately two years before the Cut-off Date.

420. In sum, the arguments submitted by Kaloti in this arbitration, in the First Notice of Intent, and in local judicial proceedings unequivocally demonstrate that, well before the Cut-off Date, Kaloti had already acquired knowledge of two of the FET breaches that it has invoked in this case, and of the alleged fact that it had incurred loss or damage as a result of such breaches. Accordingly, such claims lie beyond the limitations period under Article 10.18.1, and should be dismissed for lack of jurisdiction *ratione temporis*.

b. Kaloti's Expropriation claims are also time-barred under Treaty Article 10.18.1

421. Kaloti further argues that, in breach of the Expropriation Provision, "Peru's actions and omissions resulted in two . . . 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."⁸⁶² (Emphasis in original)

422. In a clear attempt to circumvent the statute of limitations contained in Article 10.18.1, Kaloti argues that both of the alleged indirect expropriations that it invokes "materialized when KML was forced to terminate operations on November 30, 2018."⁸⁶³ However, as explained in this section, by the time of the Cut-Off Date, Kaloti had already acquired knowledge (i) of such alleged expropriations, and (ii) of the alleged fact that it had incurred loss or damage as a result thereof. Therefore, as with the two FET claims and the national treatment claims discussed above, the Tribunal lacks jurisdiction *ratione temporis* over Kaloti's expropriation claims. The temporal aspects of each of the two alleged expropriations are discussed in greater detail below.

⁸⁶¹ Memorial, § IV.B.b.

⁸⁶² Memorial, ¶ 130.

⁸⁶³ Memorial, ¶ 131.

(i) *Alleged indirect expropriation of the Five Shipments*

423. The alleged termination of Kaloti’s operations on 30 November 2018 is entirely irrelevant to its claim that Peru expropriated the Five Shipments. In the words of the *Spence* tribunal, that alleged termination of operations is not “a distinct and legally significant event that is capable of founding [that expropriation] claim in its own right”.⁸⁶⁴ The timing of the company’s operations (including the termination thereof) is simply not one of the factors to consider in determining whether Peru unlawfully deprived Kaloti of the gold contained in those shipments. Kaloti’s attempt to link those two concepts, which are entirely divorced, is a thinly-veiled attempt to circumvent the time bar imposed by Article 10.18.1.
424. As explained below in **Section IV.B.4**, to constitute an expropriation, a taking must be permanent (or quasi-permanent), and irreversible. Kaloti itself states in the Memorial—which was filed several years *after* the alleged termination of Kaloti’s operation—that it “is not opposed to receiving back its entire inventory of gold seized” as partial restitution.⁸⁶⁵ Such assertion *a fortiori* means that, even in Kaloti’s own estimation, the alleged termination of its operations on 30 November 2018 did not render permanent or irreversible the seizure of the Five Shipments.
425. In fact, the arguments submitted by Kaloti before Peruvian courts prove that Kaloti’s alleged termination of operations on 30 November 2018 is neither a pre-requisite nor relevant to Kaloti’s claim that Peru has expropriated the Five Shipments. Indeed, in the Amparo Request it filed before the Constitutional Court of Lima on 11 March 2014 (*see Section II.C.4* above), Kaloti already claimed that SUNAT’s immobilizations of Shipments 2 and 3 amounted to an indirect expropriation under Treaty Article 10.7. In that Amparo Request, Kaloti requested the Constitutional Court of Lima to declare that:

the Precautionary Seizure Immobilization Orders No. 316-0300-2014-000110 dated 10/01/2014 lifted against the company

⁸⁶⁴ **RL-0138**, *Spence v. Costa Rica* (Corrected Award), ¶ 163.

⁸⁶⁵ Memorial, ¶ 161.

██████████ on products exclusively owned by the appellants [i.e., Kaloti]; and, Precautionary Seizure Immobilization Orders No. 316-0300-2014-000002 dated 10/01/2014 lifted against the company ██████████. ██████████. on products exclusively owned by the appellants [i.e., Kaloti]; . . . **constitute a manifest violation . . . of the Free Trade Agreement (FTA) . . in its Chapter X, Article 10.7, referring to the application of Indirect Expropriation, as well as the provisions of Annex 10-B, Expropriation of the FTA**⁸⁶⁶ (Emphasis added)

426. Kaloti submitted this expropriation claim on the alleged basis that SUNAT had issued the immobilization orders concerning Shipments 2 and 3 for actions attributable to ██████████ and ██████████ despite the fact that: (i) these shipments belonged to Kaloti;⁸⁶⁷ and (ii) Kaloti had already established the lawful origin of such shipments.⁸⁶⁸ As previously explained, SUNAT's immobilizations of the Five Shipments took place between November 2013 and January 2014. Therefore, under Kaloti's own theory, by 11 March 2014 (when Kaloti filed the Amparo) Kaloti knew of the alleged breach of the Expropriation Provision—not only in respect of Shipment 2 and 3, but also in respect of Shipment 1 and 4.⁸⁶⁹ In fact, in this arbitration Kaloti has raised the same argument of alleged expropriation in relation to the Five Shipments than the argument it raised in March 2014 in the Amparo Request. For example, in the Memorial, Kaloti bases its expropriation claim, *inter alia*, on the alleged fact that:

SUNAT seized five shipments of gold belonging to KML on the pretext that it needed to verify the origin for the gold. This was

⁸⁶⁶ **Ex. R-0230**, Amparo Request, Constitutional Court of Lima, 11 March 2014, pp. 2–3 (“*las Actas de Inmovilización - Incautación Nro. 316-0300-2014-000110 de fecha 10/01/2014 levantada a la empresa ██████████ sobre productos de propiedad exclusiva de los recurrentes [i.e., Kaloti]; y, Actas de Inmovilización - Incautación Nro. 316-0300-2014-000002 de fecha 10/01/2014 levantada a la empresa ██████████ sobre productos de propiedad exclusiva de los recurrentes [i.e., Kaloti]; . . . constituyen una vulneración manifiesta . . . del Tratado de Libre Comercio (TLC) . . . en su Capítulo X, artículo 10.7, referida a la aplicación de la Expropiación Indirecta, así como por lo previsto en el Anexo 10-B, Expropiación del Tratado*”).

⁸⁶⁷ **Ex. R-0230**, Amparo Request, Constitutional Court of Lima, 11 March 2014, ¶¶ 2.6, 2.8, 2.9.

⁸⁶⁸ **Ex. R-0230**, Amparo Request, Constitutional Court of Lima, 11 March 2014, ¶¶ 2.6, 2.10.

⁸⁶⁹ Shipment 5 was not the subject of immobilization by SUNAT.

a baseless reason for the seizure because KML had already presented origin verification documents to SUNAT⁸⁷⁰

427. Therefore, as early as 11 March 2014 (i.e., the date on which Kaloti filed its Amparo Request), Kaloti already had acquired knowledge of Peru’s alleged expropriation.
428. Equally, Kaloti cannot credibly argue that it was not until 30 November 2018 that it realized that it had incurred loss or damage as a result of the alleged expropriation of the Five Shipments. In fact, already in the First Notice of Intent – which as noted was filed nearly two years prior to the Cut-off Date – Kaloti had claimed that Peru’s alleged Treaty breaches required Peru to compensate Kaloti for the total value of the Five Shipments.⁸⁷¹ Such total value is precisely the same compensation that Kaloti seeks in the present arbitration for the alleged expropriation of the Five Shipments.⁸⁷² Accordingly, Kaloti already knew in 2016 of the loss or damage that it alleges it suffered as a result of the alleged expropriation of the Five Shipments.
429. Further, Kaloti implicitly admits in the Memorial that the alleged termination of its operations on 30 November 2018 is irrelevant for purposes of determining the point in time at which it first acquired knowledge of Peru’s alleged expropriation of the Five Shipments. That is so because, in paragraph 136 of the Memorial, Kaloti lists the 16 alleged actions and omissions by Peru that, in Kaloti’s view, demonstrate that Peru unlawfully expropriated the Five Shipments. Importantly, however, Kaloti’s alleged termination of its operations in 2018 is *not* included in that list.
430. Moreover, the items that *do* appear on that list in and of themselves demonstrate that, well before the Cut-off Date, Kaloti had already acquired knowledge of the key facts underlying its claim of expropriation of the Five Shipments. Thus, of the 16 alleged “actions and omissions” that supposedly “compel the conclusion that Peru will not return the seized gold to KML”,⁸⁷³ 12 occurred or started before the Cut-off Date. For

⁸⁷⁰ Memorial, ¶ 136.

⁸⁷¹ See **Section III.B.3.a** above; First Notice of Intent, ¶ 68.

⁸⁷² Memorial, ¶ 205.

⁸⁷³ Memorial, ¶ 136.

example, Kaloti bases its expropriation claim concerning the Five Shipments on the following alleged facts and alleged measures—*all of which predated the 2018 Cut-off Date*:

- a. SUNAT’s immobilizations of Shipments 1 to 4 (which took place between November 2013 and January 2014);⁸⁷⁴
- b. SUNAT’s alleged change of justification for the immobilizations, “when it sought a court order for the gold shipments *on a different ground*”⁸⁷⁵ (which allegedly occurred no later than 1 May 2014, given that the Precautionary Seizures of Shipments 1 to 4 were ordered between 21 February 2014 and 1 May 2014⁸⁷⁶);
- c. SUNAT’s alleged failure to inform “KML when, or under what circumstances, the five immobilized gold shipments would be returned to Claimant”⁸⁷⁷ (an omission that would necessarily have started with SUNAT’s immobilizations themselves, i.e., between November 2013 and January 2014);
- d. Peru’s mention of Kaloti “in supervening anti-money laundering investigations” on 20 September 2015 and 9 January 2017;⁸⁷⁸

⁸⁷⁴ See **Section II.B.2** above.

⁸⁷⁵ Memorial, ¶ 136, second bullet point.

⁸⁷⁶ Contrary to Kaloti’s statements, SUNAT did not seek a court order on a different ground. It was the Prosecutor’s Office who requested the Criminal Court to order the Precautionary Seizures of Shipments 1 to 4. The four orders issued by the Criminal Court clearly evidence that it was the Prosecutor’s Office who requested the Precautionary Seizures. See **Ex. R-0134**, Precautionary Seizure against Shipment 1, 21 February 2014, p. 1; **Ex. R-0135**, Precautionary Seizure against Shipment 2, 25 March 2014, p. 1; **Ex. C-0090**, [REDACTED]. Ruling of the Superior Court of Justice of Callao – Permanent Criminal Court, April 30, 2014, p. 1; **Ex. R-0136**, Precautionary Seizure against Shipment 4, 1 May 2014, p. 1.

⁸⁷⁷ Memorial, ¶ 136, tenth bullet point.

⁸⁷⁸ Memorial, ¶ 136, third bullet point (*citing Ex. C-0052*, Prosecutorial Resolution No. 1, dated September 20, 2015, issued by the 1st supra-provincial corporate prosecutor’s office specializing in money laundering and loss of domain crimes - Prosecution File No. 42-2014 Separation of allegations and further investigation; **Ex. C-0101**, Prosecutorial Order No. 19, dated January 09, 2017, issued by the 1st supra-provincial corporate prosecutor's office specializing in money laundering and loss of domain crimes).

- e. Peru’s alleged leak to the press of confidential information regarding these investigations, which Kaloti claims occurred starting in 2014;⁸⁷⁹
 - f. Peru’s alleged failure to set out the “specific facts explaining why KML was mentioned in supervening general investigations **starting in 2015**” (emphasis added);⁸⁸⁰
 - g. Peru’s alleged failure to interview, question, arrest, or indict Kaloti or ██████████ ██████████ in relation to the money-laundering investigations (which Kaloti claims started in 2015);⁸⁸¹
 - h. the alleged fact that “[i]n 2016, KML warned Peru that Peru’s actions could potentially become a future expropriation under the TPA”;⁸⁸² and
 - i. the alleged fact that “[w]hen KML tried to intervene in criminal proceedings against certain gold suppliers [i.e., in July 2015⁸⁸³], the court [allegedly] shut Claimant out, declaring that KML could not assert its rights because it was ‘not a party’ to the criminal proceedings”⁸⁸⁴.
431. In the same paragraph 136 of the Memorial, and ostensibly to circumvent the time limitation in Treaty Article 10.18.1, Kaloti invokes four alleged facts that occurred *after* the Cut-off Date. However, as explained below, none of those facts assists Kaloti’s argument, because they do not alter the moment in time at which Kaloti “first” acquired knowledge of the alleged expropriation of the Five Shipments. Each of the four post-Cut-off Date facts invoked by Kaloti is discussed briefly below.

⁸⁷⁹ Memorial, ¶ 136, fourth bullet point.

⁸⁸⁰ Memorial, ¶ 136, fifth bullet point.

⁸⁸¹ Memorial, ¶ 136, sixth, seventh, eighth and ninth bullet points.

⁸⁸² Memorial, ¶ 136, eleventh bullet point.

⁸⁸³ **Ex. C-0100**, Resolution dated July 23, 2015, issued by the 6th Criminal Court of Callao, responding to KML’s petitions.

⁸⁸⁴ Memorial, ¶ 136, twelfth bullet point.

432. *First*, Kaloti argues that “[w]hen KML sent a notice of dispute to the Peruvian Government in 2019, it received no response”.⁸⁸⁵ However, such notice of intent asserted that the expropriation of the Five Shipments had already materialized⁸⁸⁶. It follows logically that any failure by Peru to respond to the 2019 notice of dispute (i) could not have been a constituent element of Kaloti’s expropriation claim, and (ii) thus did not alter in any way the date on which, by its own account, Kaloti *first* apprehended the alleged expropriation of the Five Shipments and associated alleged loss or damage.
433. *Second*, Kaloti argues that “[a] Peruvian court recognized KML’s ownership of at least part of the gold on October 11, 2018”.⁸⁸⁷ Kaloti appears to be invoking such judicial decision simply because it was issued after the Cut-off Date. But such decision does not serve to negate the factors identified above, which show that the alleged expropriation claim had already crystallized—in Kaloti’s own perception—well before the Cut-off Date. Moreover, the decision itself was not expropriatory in any way, since it was a ruling *in Kaloti’s favor*: it upheld Kaloti’s appeal against the first instance ruling that had been issued in the civil proceedings commenced by ██████ against Kaloti in relation to Shipment 5. Kaloti therefore cannot rely on the appellate decision to claim that, until such ruling was issued, it had not yet acquired knowledge of the alleged expropriation of the Five Shipments.
434. *Third*, Kaloti claims that the “unreasonable nature of the measures taken by SUNAT has been recognized by Peruvian court decisions in cases similar to KML’s”.⁸⁸⁸ The relevant court decisions were rendered on 25 October 2020 and 27 January 2021, respectively, and were therefore post-Cut-off Date measures (which is presumably why they were invoked by Kaloti). The argument is fatally flawed on its face, however, insofar as Kaloti does not purport to be claiming that those two decisions

⁸⁸⁵ Memorial, ¶ 136, thirteenth bullet point.

⁸⁸⁶ Second Notice of Intent, ¶¶ 9, 44–45.

⁸⁸⁷ Memorial, ¶ 136, fourteenth bullet point.

⁸⁸⁸ Memorial, ¶ 136, fifteenth bullet point.

were themselves expropriatory; rather, it contends that such decisions *recognized* as expropriatory certain measures that had already been adopted earlier by the executive branch. Such being the case, it is wholly unclear on what basis Kaloti believes that such decisions – in and of themselves – substantiate its argument that it was only after the Cut-off Date that Kaloti first acquired knowledge of the alleged expropriation of the Five Shipments.

435. In any event, the argument also fails for the same reasons articulated immediately above in connection with Kaloti’s first and second arguments; namely, (i) because Kaloti itself is claiming in this arbitration that the expropriation did not materialize until 30 November 2018, and (ii) because Kaloti’s 2019 notice of intent – which predated the two court decisions mentioned above – already had articulated Kaloti’s expropriation claim concerning the Five Shipments.
436. *Fourth*, and finally, Kaloti claims that, “[w]hen KML submitted its Request for Arbitration in **April 2021**, it received no response from the Peruvian Government in connection with its request for consultations”⁸⁸⁹ (emphasis added). This argument fails for the same reasons delineated in response to Kaloti’s first and third arguments above. Long before its Request for Arbitration, Kaloti had already clearly articulated its expropriation claim concerning the Five Shipments (e.g., in its 2019 notice of intent). That means *a fortiori* (i) that Kaloti had already first acquired knowledge of the alleged breach (and alleged resulting harm) well before the Request for Arbitration was filed, and (ii) that therefore whether Peru did or did not respond to a consultations request made by Kaloti in 2021 would be irrelevant for purposes of the limitations issue at hand (since any fact or occurrence in 2021 would not have altered the fact that Kaloti already had gained knowledge of the alleged breach/associated loss years before). In the words of the tribunal in *Mobil Investments v. Canada*, “an

⁸⁸⁹ Memorial, ¶ 136, sixteenth bullet point.

investor cannot *first* acquire knowledge of the same matter on more than one occasion.”⁸⁹⁰

437. In sum, Kaloti’s own arguments prove that it first acquired knowledge both of the alleged expropriation of the Five Shipments, and of the damages associated therewith, well before the Cut-off Date of 30 April 2018. The Tribunal therefore lacks jurisdiction *ratione temporis* over Kaloti’s claim of expropriation of the Five Shipments.

(ii) *Peru’s alleged expropriation of Kaloti*

438. Claimant also alleges that Peru expropriated the Kaloti company as a whole, and it wants this Tribunal to believe that it first acquired knowledge of such expropriation on 30 November 2018, again because “such date corresponds to KML’s insolvency and the end of its operations”.⁸⁹¹ However, as explained in this Section, Kaloti theory is wholly untenable on its face. Kaloti’s own pleadings, as well as the report of its quantum expert Mr. Smajlovic, demonstrate that, prior to the Cut-off Date, Kaloti had already acquired (or should have acquired) knowledge of the alleged expropriation of the company and of the alleged loss or damage resulting therefrom. Indeed, the following paragraphs show that, by the Cut-off Date, Kaloti had already acquired knowledge of each and every constituent element of the alleged expropriation of the company.

439. *First*, Claimant argues that Peru’s actions led to the expropriation of Kaloti because they “*occasioned a sharp decline in KML’s supply of gold*”⁸⁹² (emphasis in original). Kaloti attributes such alleged decline to the fact that “Peru’s series of gold seizures . . . were reported in both the domestic and international press”.⁸⁹³ However, Kaloti and its own quantum expert themselves argue that the alleged decline in Kaloti’s gold supply took place immediately after SUNAT’s immobilizations in late 2013 and early

⁸⁹⁰ **RL-0007**, *Mobil Investments v. Government of Canada (II)*, ICSID Case No. ARB/15/6, Decision on Jurisdiction and Admissibility, 13 July 2018 (Greenwood, Rowley, Griffith) (“*Mobil Investments (Decision)*”), ¶ 147.

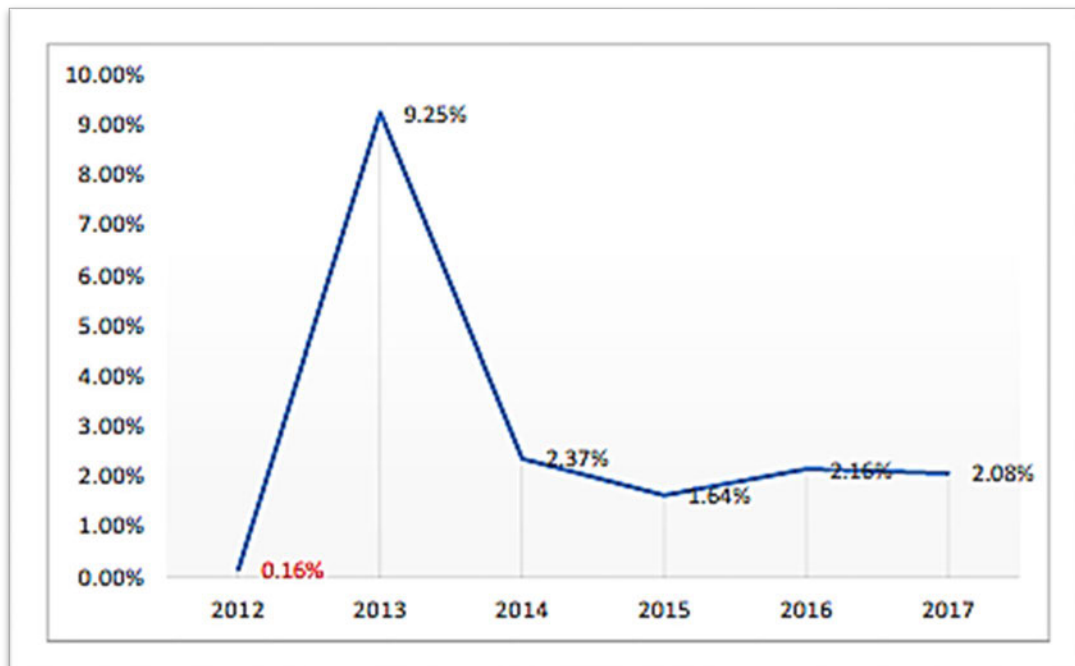
⁸⁹¹ Memorial, ¶ 36.

⁸⁹² Memorial, ¶ 148.

⁸⁹³ Memorial, ¶ 149.

2014 (i.e., years before the Cut-off Date). Indeed, in the Memorial Kaloti claims that “[a]s Mr. Smajlovic has showed, the volume of KML’s gold purchased in Peru declined **precipitously** after the five seizures by SUNAT” (emphasis added). Similarly, as reflected below, Figure 3 of Mr. Smajlovic’s quantum report (on which Kaloti’s argument is based⁸⁹⁴) shows that the alleged decline would have taken place between 2013 and 2015:

Figure 8: KML’s Actual Market Share IN Peru 2012–2017⁸⁹⁵



440. Therefore, this first constituent element of Peru’s alleged expropriation of Kaloti (i.e., the decline in Kaloti’s gold supply allegedly caused by SUNAT’s immobilizations and the Publications) has been known by Kaloti since 2015 at the latest. Moreover, the above chart purports to identify the *magnitude* of the decline in Kaloti’s market share. That means that, already in 2015, Kaloti knew or should have known of the *loss or damage* that it allegedly suffered as a result of Peru’s actions.

⁸⁹⁴ Memorial, ¶ 150.

⁸⁹⁵ Smajlovic Report, p. 16, Figure 3.

441. *Second*, Kaloti argues that “SUNAT’s widely publicized seizures of KML’s gold also began to affect KML’s ability to maintain and use bank accounts, further handicapping KML’s ability to do business”.⁸⁹⁶ As explained in **Section II.D.4** above, however, this argument is entirely based on the Bank Letters, and Kaloti itself admits, in paragraph 65 of the Memorial, that 7 of 8 of the Bank Letters (including the first one) were sent on dates before the Cut-off Date. Specifically, two were sent in 2014,⁸⁹⁷ three in 2016,⁸⁹⁸ two in 2017⁸⁹⁹, and one only after the Cut-off Date (in August 2018).⁹⁰⁰ That means that, by the Cut-off Date of 30 April 2018, Kaloti would already have suffered most of the damage that it alleges was caused by the closure of its bank accounts.
442. As previously explained, the jurisprudence that has analyzed provisions like Article 10.18.1 has confirmed 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”⁹⁰¹ (emphasis in original). Therefore, for the purposes of Article 10.18.1, it must be deemed that by the Cut-off Date Claimant had already *first* acquired knowledge of this second constituent element of Peru’s alleged expropriation of Kaloti and of the alleged resulting loss or damage.
443. *Third*, Kaloti claims that “*Peru’s actions created an overwhelming debt burden for KML*” (emphasis in original).⁹⁰² According to Kaloti, in order to purchase the Five Shipments in late 2013 and early 2014, it borrowed USD 11.9 million from [REDACTED], and that “since KML could not sell the seized gold, it could not repay the

⁸⁹⁶ Memorial, ¶ 151.

⁸⁹⁷ Ex. C-0027, Notice of closure of bank accounts of KML’s, pp. 8-9.

⁸⁹⁸ Ex. C-0027, Notice of closure of bank accounts of KML’s, pp. 5-7.

⁸⁹⁹ Ex. C-0027, Notice of closure of bank accounts of KML’s, pp. 3-4.

⁹⁰⁰ Ex. C-0027, Notice of closure of bank accounts of KML’s, p. 2.

⁹⁰¹ RL-0144, *Ansung Housing* (Award), ¶ 110.

⁹⁰² Memorial, ¶ 152.

loan”.⁹⁰³ Kaloti further argues that on 30 November 2018, when (according to Kaloti) the seizures of the Five Shipments became permanent, it had to write off the value of those shipments from its gold inventory, and that as a result by 30 November 2018 it became impossible for Kaloti to repay its loan to [REDACTED]. In that same vein, Mr. Smajlovic states that, up to 30 November 2018, “neither KML’s management nor auditors considered the temporary seizure of the Company’s gold inventory as a ‘triggering event’ requiring a permanent impairment or write-down of temporarily seized inventory.”⁹⁰⁴ Kaloti and its quantum expert further claim that, as result of the alleged write-off of the value of the Five Shipments, “KML’s equity turned to negative US\$ 13,649,821 on that date [30 November 2018], and KML became *de facto* bankrupt”.⁹⁰⁵ On that basis, Kaloti argues that 30 November 2018 was the date on which Peru’s expropriation of Kaloti “became permanent and fully irreversible”.⁹⁰⁶

444. However, Kaloti’s selection of 30 November 2018 as the alleged expropriation date is unfounded, arbitrary, and contrary to the evidence in the record. There is no basis whatsoever to conclude that (i) the seizures of the Five Shipments became permanent on 30 November 2018, or (ii) that on that date it had become impossible for Kaloti to replay its loan to [REDACTED]. In the previous section, Peru demonstrated that Kaloti first acquired knowledge of the alleged expropriation of the Five Shipment years before the Cut-off Date. In fact, in its Amparo Request dated 11 March 2014, Kaloti already argued that Peru had expropriated Shipments 2 and 3.⁹⁰⁷ That means that, based on Kaloti’s own account of the facts: (i) it should have written off the value of the Five Shipments from its inventory long before the Cut-off Date; (ii) it had already become impossible for Kaloti repay its loan to [REDACTED] well before the Cut-off Date; and (iii) the alleged expropriation of Kaloti itself (not just of the Five Shipments) also had materialized before the Cut-off Date.

⁹⁰³ Memorial, ¶ 152.

⁹⁰⁴ Smajlovic Report, ¶6.13.

⁹⁰⁵ Memorial, ¶ 163.

⁹⁰⁶ Memorial, ¶ 163.

⁹⁰⁷ Ex. R-0230, Amparo Request, Constitutional Court of Lima, 11 March 2014, p. 2.

445. Peru's quantum experts from Brattle confirm in their report that Kaloti's arguments are also untenable from an accounting perspective:

[I]t appears that the decision to write off the value of inventories on this date is arbitrary. We are not aware of any events that occurred on or around 30 November 2018 that would have materially affected the status or expectations about the seized inventories as of this date, and therefore justified a write-off as of that date.⁹⁰⁸

446. Kaloti points to no measure at all by Peru that took place on 30 November 2018. In fact, as reflected in the **Figure 9** below, there were no challenged measures that occurred between 30 April 2018 (Cut-off Date) and 30 November 2018 (alleged materialization of the expropriation) that could have caused Kaloti's alleged insolvency. The only measures attributable to Peru within that timeframe are two judicial decisions that self-evidently could not have had any adverse impact on Kaloti's business:

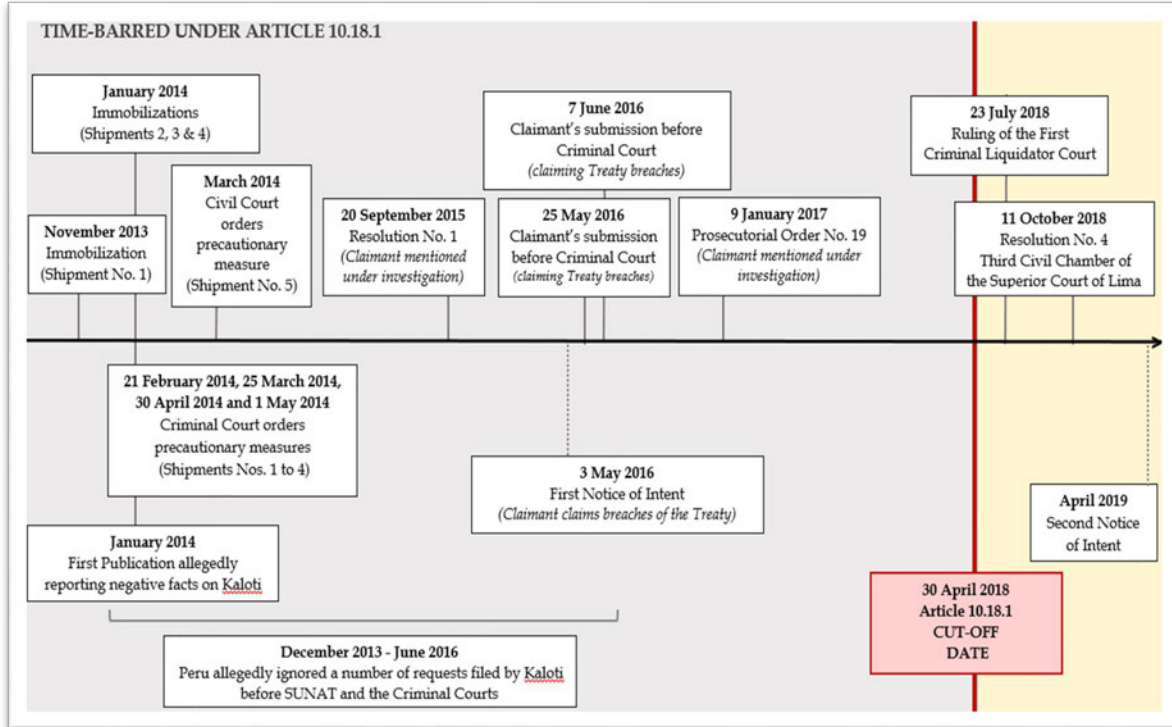
- a. A Ruling of the First Criminal Liquidator Court issued on 23 July 2018, which declared closed the pre-trial stage of the ██████████ Criminal Proceedings, and ordered that such proceedings continue to the next stage;⁹⁰⁹ and
- b. A resolution issued by the Third Civil Chamber of the Superior Court of Justice of Lima on 11 October 2018, which ruled in Kaloti's favor by upholding its appeal against the first instance ruling issued in civil proceedings against ██████████.⁹¹⁰

⁹⁰⁸ Brattle Report, ¶ 237.

⁹⁰⁹ Ex. C-0097, ██████████ Ruling of the 1st Criminal Liquidator Court, July 23, 2018.

⁹¹⁰ Ex. C-0110, Resolution No. 4, dated October 11, 2018, issued by the Third Civil Chamber of the Supreme Court of Peru.

Figure 9: Kaloti's Claims Are Time-Barred under Treaty Article 10.18.1



447. **Absence of Proximate Cause.** As explained in **Section IV.B.5** and **Section V.A** below, Kaloti has failed to establish a proximate causal link between *any* of the Challenged Measures, on the one hand, and the alleged expropriation of Kaloti's business on 30 November 2018, on the other. Rather, numerous supervening events— unrelated to the Challenged Measures—could have caused the failure of Kaloti's business, including (i) the widespread, serious, and reputationally damaging allegations against the ██████████, described in **Section II.D** above; (ii) the downturn in the artisanal gold market from 2013-2014; and (iii) the decision of Kaloti's shareholders to shut down Kaloti's business and transfer its operations to a new enterprise.⁹¹¹

448. However, even assuming that Peru had indeed caused the failure of Kaloti's business (quod non), Kaloti acquired, or should have acquired, knowledge of that fact well before the Cut-off Date. As Brattle explains in its report, "each of the three factors which Mr. Smajlovic highlights as relevant to assessing KML's ability to remain a

⁹¹¹ See **Section V.A.2.d** below.

going concern were present long before 30 November 2018.”⁹¹² For example Brattle explains that Kaloti’s financial status in 2014 and 2015 already posed concerns about its ability to continue as a going concern.⁹¹³ These were many of the same concerns Mr Smajlovi used to highlight doubts about Kaloti’s ability to continue as a going concern on 30 November 2018. Mr. Smajlovic’s own data shows that in 2014 and 2015 Kaloti faced *negative financial trends*, generating losses in those years that largely related to the company’s very thin equity layer.⁹¹⁴ Given these ongoing losses, already by that time there would have been substantial concern about a possible default by Kaloti on its loans, or about other financial difficulties.⁹¹⁵

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

⁹¹² Brattle Report, ¶ 240.

⁹¹³ Brattle Report, ¶ 240.

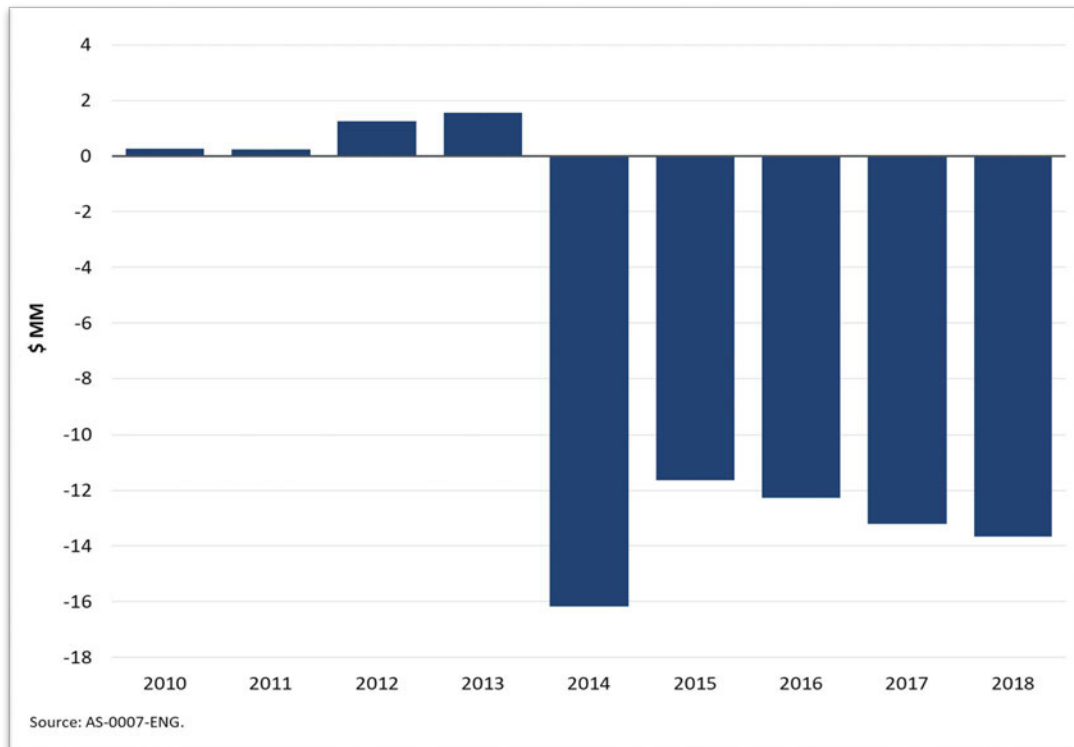
⁹¹⁴ **Ex. AS-0007**, Appendix 3 - Discounted Cash Flow Model and Accompanying Support, Tabs 3.4, 3.5.3. At the end of 2014, KML’s equity was only \$185,763.

⁹¹⁵ **Ex. AS-0007**, Appendix 3 - Discounted Cash Flow Model and Accompanying Support, Tab 3.5.3.

⁹¹⁶ Brattle Report, ¶ 240.

⁹¹⁷ Brattle Report, ¶ 240.

Figure 10: Projected KML net equity from 2014 onward, had it written off the value of the Five Shipments



450. Further, although Kaloti argues that it was “forced” to write off the value of the Five Shipments from its inventory, and to terminate its operations on 30 November 2018, it fails to provide any evidence or explanation of why it was compelled to do so *on that particular date*. As explained by Brattle, the reality is that “the legal uncertainty about whether KML would eventually recover the inventories would have raised serious concerns about its solvency”⁹¹⁸ not only well before 30 November 2018, but also well before the Cut-off Date. That is so because, as noted by Brattle, “[f]rom a valuation and economic perspective, even a relatively small chance that the inventories would not be returned was more than sufficient to make KML effectively insolvent.”⁹¹⁹

⁹¹⁸ Brattle Report, ¶ 240.

⁹¹⁹ Brattle Report, ¶ 240.

451. Had Kaloti acted as a prudent and diligent investor, it would have identified such “small chance”, and accordingly written off the value of the Five Shipments from its inventory on one or more of the following dates: (i) in 2014, when the Peruvian Courts precautionarily seized Shipments 1 to 4, based on serious indicia of illegal mining and money-laundering;⁹²⁰ and/or (ii) between April 2015 and June 2016, when Kaloti filed several (ultimately unsuccessful) requests to lift the seizures.⁹²¹ That Kaloti should have considered these circumstances in its financial statements is undeniable, considering that Kaloti clearly had failed to comply with its obligation to verify the lawful origin of the Five Shipments, or to conduct adequate due diligence on the Suppliers (**Section II.B.6**). Indeed, Kaloti should have known that, pursuant to Peruvian law, if the Five Shipments were eventually found to have been unlawfully mined, the gold inventory contained in such shipments would *not* be returned (either to the Suppliers or to Kaloti) (**Section II.A.4**).
452. Further, and as discussed above, the jurisprudence of investor-State tribunals has expressly rejected the proposition that the statute of limitations in clauses like Article 10.18.1 begin to run only when the alleged damage suffered by the investor has fully crystallized. For example, in *Ansung v. China*, the claimant had argued that it incurred loss or damage “only after its expectation and plan . . . was completely frustrated . . . when it sold its shares in the joint venture on December 17, 2011”.⁹²² However, the tribunal rejected such argument:

Ansung ignores the plain meaning of the words “first” and “loss or damage” []. The 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. Ansung’s actual sale of its shares on December 17, 2011 marked the date on which it could *finalize* or

⁹²⁰ See **Section II.C.1** above.

⁹²¹ See **Sections II.B.4, II.C.4** above.

⁹²² **RL-0144**, *Ansung Housing* (Award), ¶ 109.

liquidate its damage, not the *first* date on which it had to know it was incurring damage.⁹²³

453. Like in the *Ansung* case, the date on which Kaloti allegedly became insolvent at best would reflect the date on which Kaloti itself “*finalize[d]* or *liquidate[d]* its damage, not the *first* date on which it knew it ha[d] incurred damage”.
454. Finally, Claimant’s argument that the expropriation of Kaloti as a company materialized only on 30 November 2018 also lacks merit because, contrary to what Claimant argues, the company did not in fact become insolvent as of that date. As Brattle explains, “the alleged insolvency is not supported by any evidence.”⁹²⁴ Kaloti has failed to provide any evidence proving the “actual bankruptcy filing” they invoke,⁹²⁵ or any “contemporaneous documentation of efforts to restructure KML’s debt”.⁹²⁶ Further, “according to the company’s 2018 balance sheet, KML did not take any write-down of the seized inventories” that year.⁹²⁷
455. For the foregoing reasons, Claimant’s claim that Kaloti (*qua* company) was expropriated also fails to survive the limitations filter, and must be dismissed.

c. Kaloti’s national treatment claim is likewise time-barred under Treaty Article 18.10.1

456. The Tribunal also lacks jurisdiction *ratione temporis* over Kaloti’s national treatment claim under Treaty Article 10.3.⁹²⁸ According to Kaloti, Peru breached that provision because “SUNAT only pursued asset seizures against the foreign purchasers, while none of the domestic purchasers had any of their gold seized”.⁹²⁹

⁹²³ **RL-0144**, *Ansung Housing* (Award), ¶ 110.

⁹²⁴ Brattle Report, ¶ 238.

⁹²⁵ Brattle Report, ¶ 238.

⁹²⁶ Brattle Report, ¶ 238.

⁹²⁷ Brattle Report, ¶ 238.

⁹²⁸ Memorial, ¶ 124.

⁹²⁹ Memorial, ¶ 124.

457. Kaloti bears the burden of proving all facts required to establish that its claims meet the requirements of Treaty Article 10.18.1.⁹³⁰ As the United States has explained in multiple submissions acting as a non-disputing party:

because the claimant bears the burden of proof with respect to the factual elements necessary to establish jurisdiction under Chapter Ten, including with respect to Article 10.18.1, a claimant must prove the necessary and relevant facts to establish that each of its claims falls within the three-year limitations period.⁹³¹

458. In that same vein, the tribunal in *Spence* explained that “[i]f the Claimants [in that case could not] establish, to an objective standard, that they [had] first acquired knowledge of the breaches and losses that they allege[d] in the period after 10 June 2010 [i.e., “the critical limitation date”], they [would] fall at the first hurdle”.⁹³²

459. Yet, Kaloti’s national treatment claim is based solely on the following assertion by ██████ in his witness statement: “I believe that the Peruvian government made sure that the gold was paid by KML [i.e., Kaloti] first, as it preferred to affect, and accuse, foreign companies like KML, rather than Peruvian parties with local connections.”⁹³³ ██████ does not purport to identify (i) specific Peruvian exporters that allegedly received a more favorable treatment from Peru, or (ii) when it was that such exporters allegedly received that treatment. ██████ statement therefore clearly fails to prove that Kaloti first acquired knowledge of Peru’s alleged breach of the National Treatment Provision, or of the resulting losses, less than three years prior to the submission of Kaloti’s Request for Arbitration.

460. On the contrary, ██████ statement suggests that, in his perception, the alleged breach (and associated loss or damage) materialized at the time that—allegedly for discriminatory reasons—SUNAT immobilized Shipments 1 to 4 (all of which occurred in 2013 and 2014). The fact that Kaloti and ██████ first acquired knowledge of the

⁹³⁰ See Introduction to **Section III** above. See also **RL-0137**, *Resolute* (Decision), ¶ 85.

⁹³¹ **RL-0107**, *Ballantine* (USA Submission), ¶ 8; **RL-0151**, *Italba* (USA Submission), ¶ 9.

⁹³² **RL-0138**, *Spence v. Costa Rica* (Corrected Award), ¶ 163.

⁹³³ ██████ Witness Statement, ¶ 48.

alleged breach at that time is confirmed by Kaloti's own quantum claims, according to which—due to Peru's alleged breach of the National Treatment Provision—Kaloti started losing profits in 2013.⁹³⁴ That compensation claim necessarily implies that, in Kaloti's understanding, the relevant breach had already materialized by 2013—a full five years before the Cut-Off Date.

461. In addition, and as similarly discussed above in connection with the time-barred alleged FET violations, as early as in its First Notice of Intent dated 6 May 2016, Kaloti was already claiming that SUNAT's immobilizations in 2013 and 2014 had caused substantial economic damage to Kaloti.⁹³⁵ The foregoing means that, for the same reasons articulated above in the FET context, Kaloti's national treatment claim, too, is barred *ratione temporis*.

* * *

462. In sum, the Tribunal lacks jurisdiction *ratione temporis* over Kaloti's claims concerning (i) the two FET breaches addressed in this Section; (ii) Peru's alleged violation of the National Treatment Provision; and (iii) Peru's alleged expropriations of the Five Shipments and of Kaloti as a company, because all such 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. Those claims are thus barred under Article 10.18.1 of the Treaty.

IV. PERU HAS COMPLIED WITH ITS OBLIGATIONS UNDER THE TREATY

A. Kaloti's FET claims under the MST Provision lack merit

463. Kaloti alleges that Peru breached its obligation under Article 10.5 of the Treaty (the "**MST Provision**") to accord to covered investments "treatment in accordance with customary international law", including FET. The MST Provision provides the following:

⁹³⁴ Memorial, ¶¶ 187-188.

⁹³⁵ See **Section III.B.3** above.

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.

2. For greater certainty, **paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment** to be afforded to covered investments. The concepts of “fair and equitable treatment” and “full protection and security” **do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights**. The obligation in paragraph 1 to provide:

(a) “fair and equitable treatment” includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world. . .

3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.⁹³⁶ (Emphasis added)

464. Kaloti claims that Peru violated the MST Provision in three separate ways, by allegedly: (i) denying Kaloti *due process and access to justice*, (ii) engaging in *discriminatory conduct* against Kaloti, and (iii) refusing to engage in *negotiations* with Kaloti after receiving notice of Kaloti’s intention to submit a claim to arbitration.⁹³⁷ Each of these three claims is without merit and should be dismissed.

465. As Peru will explain in the sections that follow: (i) Peru’s obligations under the MST Provision are limited to the minimum standard of treatment (**MST**) in accordance with *customary international law* (**Section IV.A.1**); (ii) Kaloti has failed to demonstrate that the events underlying its claims constitute a composite act **Section IV.A.2**; (iii) Peru has not denied justice or due process to Kaloti or its investments (**Section IV.A.3**); (iv) Peru has not discriminated against Kaloti or its investments (**Section**

⁹³⁶ **RL-0001**, Treaty, Art. 10.5.

⁹³⁷ Memorial, ¶¶ 105–119, 120–123, 126–129.

IV.A.4); and (v) Kaloti's claim regarding the Parties' negotiations must be dismissed for lack of legal merit and factual support (**Section II.A.5**).

1. *The MST Provision requires Peru to treat Kaloti's investment in accordance with the "minimum standard of treatment of aliens" under customary international law*

466. The MST Provision expressly limits the obligation to accord FET under the Treaty to what is required by customary international law. Specifically, it requires that each Party accord "to covered investments treatment in accordance with customary international law." The MST Provision also clarifies, "[f]or greater certainty," that the concept of "fair and equitable treatment" under the MST Provision does *not* require treatment "in addition to or beyond that which is required by that standard [viz., MST under customary international law]" and "do[es] not create additional substantive rights."⁹³⁸

467. Footnote 3 of Treaty Chapter 10 states that the MST Provision "shall be interpreted in accordance with Annex 10-A." Annex 10-A, in turn, elaborates on the scope of the MST Provision:

The Parties confirm their shared understanding that "customary 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.** Regarding 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.**⁹³⁹ (Emphasis added)

468. The MST provision was intended to be narrow in scope, and to be interpreted as such by arbitral tribunals. Such intent is confirmed by the legislative report issued by the US Congress when it ratified the Treaty, which states:

The investment rules in the Peru FTA are significantly changed from those originally included in NAFTA's Chapter 11 **in response to concerns about overly broad interpretations by**

⁹³⁸ RL-0001, Treaty, Art. 10.5.

⁹³⁹ RL-0001, Treaty, Annex 10-A.

some arbitration panels and creative claims brought by some private companies against the governments of Mexico, the United States and Canada.⁹⁴⁰ (Emphasis added)

469. Kaloti acknowledges that FET under the Treaty is limited to MST, and that it therefore does not impose an autonomous treaty standard.⁹⁴¹

470. It is well-established that the FET standard as defined by reference to MST imposes a high threshold for the finding of a violation by a host State. Such stringency was reflected in the articulation of that standard by the tribunal in *Waste Management II*, which is an authority cited by Kaloti itself.⁹⁴² After analyzing prior case law, that tribunal concluded that

the 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.⁹⁴³ (Emphasis added)

⁹⁴⁰ **RL-0052**, US Congress, House Report 110-421 on the United States-Peru Trade Promotion Agreement Implementation Act, 5 November 2007, p. 6. This statement also reflects the US's broader treaty practice following the issuance of the NAFTA Free Trade Commission's binding note of interpretation of 31 July 2001, by which the NAFTA Parties rejected overly expansive interpretations of the MST provisions in Article 1105 NAFTA. In its binding note of interpretation, the Free Trade Commission memorialized the NAFTA parties' understanding that (i) the minimum standard of treatment to be accorded to investments of investors of another party was the customary international law MST and that (ii) FET and full protection and security under NAFTA do not require treatment "in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens." See **RL-0053**, Patrick Dumberry, *THE FAIR AND EQUITABLE TREATMENT STANDARD: A GUIDE TO NAFTA CASE LAW ON ARTICLE 1105* (2013), pp. 66–73. See also **RL-0054**, Kenneth Vandeveld, "A Comparison of the 2004 and 1994 US Model BITs," YIILP (2009).

⁹⁴¹ Memorial, ¶¶ 101–104.

⁹⁴² Memorial, ¶¶ 103–104.

⁹⁴³ **RL-00152**, *Waste Management, Inc. v. United Mexican States (II)*, ICSID Case No. ARB (AF)/00/3, Award, 30 April 2004 (Crawford, Civiletti, Gómez) ("**Waste Management (Award)**"), ¶ 98. Kaloti has produced the Spanish version of the award in *Waste Management II* (Exhibit CL-0045). For ease of reference, Peru submits the English version of that award.

471. Based on the findings in *Waste Management II*, the tribunal in *Gami Investments v. Mexico* identified certain principles that a tribunal should consider when examining a claim for breach of MST:

Four implications of *Waste Management II* are salient even at the level of generality reflected in the passages quoted above. (1) The failure to fulfil the objectives of administrative regulations without more does not necessarily rise to a breach of international law. (2) A failure to satisfy requirements of national law does not necessarily violate international law. (3) Proof of a good faith effort by the Government to achieve the objectives of its laws and regulations may counter-balance instances of disregard of legal or regulatory requirements. (4) The record as a whole - not isolated events – determines whether there has been a breach of international law.⁹⁴⁴

472. Similarly, the tribunal in *Cargill v. Mexico* explained that in determining whether a State has failed to accord fair and equitable treatment as an “aspect” of the minimum standard of treatment under customary international law,

a tribunal must carefully examine whether the complained of measures were **grossly unfair, unjust or idiosyncratic; arbitrary beyond a merely inconsistent or questionable** application of administrative or legal policy or procedure so as **to constitute an unexpected and shocking repudiation of a policy’s very purpose and goals, or to otherwise grossly subvert a domestic law or policy for an ulterior motive; or involve an utter lack of due process so as to offend judicial propriety.**⁹⁴⁵ (Emphasis added)

473. When analyzing a claim for breach of MST, significant deference must be given to a State’s sovereignty, particularly in light of a State’s duty to protect the public interest. The requirement for such deference has been acknowledged by various tribunals. For example, the tribunal in *S.D. Myers v. Canada* explained that a tribunal’s determination “must be made in the light of the **high measure of deference** that international law

⁹⁴⁴ **RL-0055**, *Gami Investments Inc. v. United Mexican States*, UNCITRAL, Final Award, 15 November 2004 (Paulsson, Lacarte-Muró, Reisman), ¶ 97.

⁹⁴⁵ **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.

generally extends to the right of domestic authorities to regulate matters within their own borders” (emphasis added).⁹⁴⁶

474. In sum, in order to establish a breach of the MST Provision, Kaloti would have to demonstrate that the Challenged Measures led to a denial of due process and access to justice that “offends judicial propriety – as might be the case with a manifest failure of natural justice,”⁹⁴⁷ or that such measures involved “an utter lack of due process so as to offend judicial propriety.”⁹⁴⁸ The Challenged Measures, however, do not even come close to meeting that threshold.

2. *Kaloti has failed to establish that the events underlying its claims for breach of the MST Provision constitute a composite act*

475. Kaloti appears to recognize in its Memorial that none of the Challenged Measures, individually, rises to the level of a violation of the MST Provision.⁹⁴⁹ Kaloti is also aware that, in any event, many of the Challenged Measures pre-date the applicable Cut-off Date and are thus outside of the Tribunal’s jurisdiction *ratione temporis*, given the three-year limitation period imposed by Article 10.18 of the Treaty.⁹⁵⁰

476. In an attempt to overcome these fatal flaws in its case, Kaloti argues that the alleged breach of the MST Provision is the result of a “composite act[.]”⁹⁵¹ However, Kaloti has made no attempt to identify, much less apply, the legal standard for a composite breach under public international law. When such standard is applied to the facts of

⁹⁴⁶ **CL-0035**, *S.D. Myers, Inc. v. Government of Canada*, NAFTA/UNCITRAL, First Partial Award, 13 November 2000 (Hunter, Schwartz, Rae), ¶ 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.

⁹⁴⁷ **RL-0152**, *Waste Management, Inc. v. United Mexican States (II)*, ICSID Case No. ARB (AF)/00/3, Award, 30 April 2004 (Crawford, Civiletti, Gómez) (“**Waste Management (Award)**”) [*Re-submitted version of CL-0045, with English version of the award*], ¶ 98.

⁹⁴⁸ **RL-0006**, *Cargill (Award)*, ¶ 296.

⁹⁴⁹ See Memorial, ¶ 111 (“Peru’s measures—in the aggregate—combined to deny KML due and process and access to justice.” (emphasis in original)).

⁹⁵⁰ Memorial, ¶ 91. See also **Section III.B**.

⁹⁵¹ Memorial, ¶ 111.

the present case, it becomes evident that Kaloti's composite act theory is unfounded and must be rejected.

477. As Article 15 of the ILC Articles confirms, in order to establish a composite breach of a treaty, a claimant must show that the events alleged to compose the relevant breach are "sufficiently numerous and **inter-connected** to amount **not merely to isolated incidents or exceptions but to a pattern or system**" (emphasis added).⁹⁵² Investment treaty tribunals have adopted the above test, holding that a composite breach may only be demonstrated based on "steps under a common denominator"⁹⁵³ that reveal "some link of underlying pattern or purpose between them."⁹⁵⁴
478. In this case, Kaloti has not even attempted to identify a pattern seeking a common purpose, a common denominator, or a link of underlying pattern or purpose between the challenged measures. This failure is in and of itself sufficient to dismiss Kaloti's claim for composite breach. As the tribunal in *Infinito v. Costa Rica* recognized, mere assertions or references to the composite effect of certain measures are insufficient to substantiate a composite breach argument.⁹⁵⁵
479. In any event, Kaloti's composite breach argument fails for the simple reason that it is belied by the evidence. The acts and omissions challenged by Kaloti were performed by several independent State entities, including SUNAT,⁹⁵⁶ the *Fiscal de la Décimo*

⁹⁵² **RL-0022**, ILC Commentary, Art. 15, Commentary 5 (quoting *Ireland v. United Kingdom*, ECHR, p. 64, ¶ 159).

⁹⁵³ **RL-0057**, *RosInvestCo* (Award), ¶ 621.

⁹⁵⁴ **RL-0024**, *Romp petrol* (Award), ¶ 271; see also **RL-0058**, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016 (Lévy, Gotanda, Boisson de Chazournes) ("**Crystallex (Award)**"), ¶ 545("[T]he Tribunal will endeavor to establish whether an overall pattern of conduct has emerged from these instances and whether that overall pattern of conduct does indeed breach the standard.>").

⁹⁵⁵ **CL-0053**, *Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Award, 03 June 2021, ¶¶ 229-230.

⁹⁵⁶ **Ex. C-0082**, [REDACTED]. Notarized petition submitted by [REDACTED] requesting the lift of immobilization order No. 316-0300-2014-000110, January 20, 2014; **Ex. C-0083**, [REDACTED]. Petition submitted by [REDACTED] requesting the lift of immobilization order No. 316-0300-2014-000002, January 21, 2014; **Ex. C-0084**, [REDACTED]. Informe N° 303-2014-SUNAT-3X3200, April 09, 2014

Primera Fiscalía Provincial del Callao,⁹⁵⁷ the *Fiscal de la Novena Fiscalía Provincial del Callao*,⁹⁵⁸ the *Sexto Juzgado Penal del Callao*,⁹⁵⁹ the *Octavo Juzgado Penal del Callao*,⁹⁶⁰ and the *Juzgado Penal Transitorio del Callao*.⁹⁶¹ There is no evidence that these separate entities were acting under a common purpose, system or pattern to damage Kaloti or its investments. To the contrary, as Peru has shown, SUNAT, the Prosecutor's Office and the criminal courts each acted independently, in accordance with their respective competencies and powers and on the basis of the objective evidence before each of them.⁹⁶² The SUNAT Immobilizations and the Precautionary Seizures all took place in separate proceedings with respect to different Suppliers and were therefore not "inter-connected" at all.⁹⁶³

480. Moreover, as discussed in further detail below, the relevant acts were carried out in order to address legitimate public welfare objectives, such as the prevention of money-laundering and illegal mining.⁹⁶⁴ Thus, to the extent that there was any common denominator behind Peru's actions, it was to uphold Peru's legal framework in the interests of its citizenry, not to harm Kaloti or its investment.

⁹⁵⁷ **Ex. C-0086**, [REDACTED]. KML appeal as the legitimate owner of the gold in the money laundering investigation against [REDACTED] April 16, 2014; **Ex. C-0092**, [REDACTED]. Petition submitted by KML before the Eleventh Provincial Prosecutor's Office of Callao, August 05, 2014.

⁹⁵⁸ **Ex. C-0089**, [REDACTED]. Petition submitted by KML before the Ninth Provincial Prosecutor's Office of Callao, April 29, 2014; **Ex. C-0093**, [REDACTED]. Petition submitted by KML before the Ninth Provincial Prosecutor's Office of Callao, August 05, 2014.

⁹⁵⁹ **Ex. C-0013**, Petition before the *Sexto Juzgado Penal del Callao*.

⁹⁶⁰ **Ex. R-0228**, Kaloti's Request to Lift Precautionary Seizure, 3 May 2016 [*Re-submitted version of C-0014, with Respondent's translation*].

⁹⁶¹ **Ex. R-0229**, Kaloti's Request to Lift Precautionary Seizure, 25 May 2016 [*Re-submitted version of C-0015, with Respondent's translation*].

⁹⁶² See **Sections II.B and II.C** above.

⁹⁶³ **RL-0022**, ILC Commentary, Art. 15, Commentary 5 (*quoting Ireland v. United Kingdom*, ECHR, p. 64, ¶ 159).

⁹⁶⁴ See **Sections IV.A.3 and IV.B.5** below.

3. *Kaloti's denial of justice claims also lack merit*

481. Kaloti argues that Peru “breached its commitment to treat KML fairly and equitably when it denied justice to KML.”⁹⁶⁵ Kaloti argues that the following two sets of alleged actions by Peru “in the aggregate”⁹⁶⁶ denied Kaloti justice:

- *First*, it argues that Peru “depriv[ed] KML of its property without due process of law.”⁹⁶⁷ In this regard, Kaloti refers to the SUNAT Immobilizations, claiming that they “*effectively* became permanent on November 20, [2018].”⁹⁶⁸
- *Second*, it argues that “the Peruvian investigative and prosecutorial authorities neither charged, nor exonerated, KML with criminal wrongdoing, thereby exposing Claimant to undue delay, and keeping it in a legal black hole in which it could not assert its rights.”⁹⁶⁹

482. As will be demonstrated below, (i) there is a high threshold for a finding of denial of justice under international law; and (ii) Kaloti fails to meet that high threshold with respect to the Challenged Measures.

a. The stringent standard for denial of justice claims under MST

483. Paragraph 2 of the MST Provision in the Treaty expressly confirms that FET under MST encompasses an obligation not to deny justice:

The obligation in paragraph 1 [of the MST Provision] to provide: ‘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.⁹⁷⁰

⁹⁶⁵ Memorial, p. 56, § IV.B.a.

⁹⁶⁶ Memorial, ¶ 111.

⁹⁶⁷ Memorial, ¶ 111.

⁹⁶⁸ Memorial, ¶ 111.

⁹⁶⁹ Memorial, ¶ 111.

⁹⁷⁰ **RL-0001**, Treaty, Art. 10.5.

484. Denial of justice constitutes the sole exception to the rule that judgments of national courts interpreting domestic law cannot be challenged as violations of customary international law. As noted by Prof. Zachary Douglas,

acts or omissions attributable to the State within the context of a domestic adjudicative procedure can only supply the predicate conduct for a denial of justice and not for any other form of delictual responsibility towards foreign nationals.

...

Denial of justice is the sole form of international delictual responsibility towards foreign nationals for acts or omissions within an adjudicative procedure for which the State is responsible.⁹⁷¹

485. Accordingly, judicial actions will only breach MST if they can be deemed to amount to a denial of justice. This principle has been confirmed by numerous arbitral tribunals. By way of example, the tribunals in *Azinian*, *Mondev*, and *International Thunderbird* all concluded that only judicial conduct rising to the level of a denial of justice would breach MST.⁹⁷²

486. The fact that judicial actions will only breach MST if they rise to the level of a denial of justice stems from recognition of the independence of the judiciary, and the wide

⁹⁷¹ **RL-0154**, Zachary Douglas, “*International Responsibility for Domestic Adjudication: Denial of Justice Deconstructed*,” *INTERNATIONAL AND COMPARATIVE LAW QUARTERLY* (2014), pp. 29, 34.

⁹⁷² **RL-0100**, *Robert Azinian, et al., v. United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award, 1 November 1999 (Paulsson, Civiletti, von Wobeser) (“**Azinian (Award)**”), ¶ 99 (“[What] must be shown [to hold a State internationally liable for judicial decisions] is that the court decision itself constitutes a violation of the treaty . . . the Claimants must show either a denial of justice, or a pretence of form to achieve an internationally unlawful end.”); **RL-0146**, *Mondev (Award)*, ¶ 126 (“[It] is one thing to deal with unremedied acts of the local constabulary and another to second-guess the reasoned decisions of the highest courts of a State. Under NAFTA, parties have the option to seek local remedies. If they do so and lose on the merits, it is not the function of NAFTA tribunals to act as courts of appeal. . . .”); **RL-0021**, *International Thunderbird Gaming Corp. v. United Mexican States*, UNCITRAL, Arbitral Award, 26 January 2006 (van den Berg, Wälde, Portal) (“**Thunderbird (Award)**”), ¶ 194 (“For the purposes of the present case, the Tribunal views acts that would give rise to a breach of the minimum standard of treatment prescribed by the NAFTA and customary international law as those that, weighed against the given factual context, amount to a gross denial of justice or manifest arbitrariness falling below acceptable international standards.”).

measure of deference that should be afforded to domestic courts in adjudicating and interpreting a State's domestic law.⁹⁷³

487. The starting point in analyzing any denial of justice claim is that decisions taken by domestic courts and adjudicatory entities with respect to domestic law are presumptively valid.⁹⁷⁴ The foregoing was expressly recognized by the tribunal in *Flughafen Zürich v. Venezuela*:

[T]o avoid that the denial of justice turns into an appellate instance that petitioners would abuse to review decisions they simply do not agree with . . . **the starting point must be the principle that all State acts benefit from a presumption of legality**, and the person alleging a denial of justice bears the burden of proving it.⁹⁷⁵

488. Precisely due to the presumption of legality of judicial decisions, the threshold for establishing a denial of justice is a high one.⁹⁷⁶ Kaloti itself acknowledges this fact,

⁹⁷³ **RL-0154**, Zachary Douglas, "International Responsibility for Domestic Adjudication: Denial of Justice Deconstructed," *INTERNATIONAL AND COMPARATIVE LAW QUARTERLY* (2014), p. 11 ("International law is deferential to the particular virtues of adjudication by respecting the integrity of the process and the outcomes it produces. This deference is manifest in the finality rule and the idea that denial of justice focuses upon the procedural aspects of the adjudication rather than the substantive reasons for the decision.").

⁹⁷⁴ See **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)**"), ¶ 8.41 (citing D.P. O'Connell, *INTERNATIONAL LAW* (1970), p. 948 ("[T]here is a presumption in favour of the judicial process.")).

⁹⁷⁵ **RL-0156**, *Flughafen Zürich A.G. and Gestión e Ingeniería 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)**"), ¶ 637. See also **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)**"), ¶ 564. See also **RL-0155**, *Chevron (Second Award)*, ¶ 8.41 ("A claimant's legal burden of proof is therefore not lightly discharged, given that a national legal system will benefit from the general evidential principle known by the Latin maxim as *omnia praesumuntur rite et solemniter esse acta donec probetur in contrarium*. It presumes (subject to rebuttal) that the court or courts have acted properly.").

⁹⁷⁶ Memorial, ¶ 114. See **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 ("The question is not whether the host State legal system is performing as efficiently as it ideally could: it is whether it is performing so badly as to violate treaty obligations

recognizing in its Memorial that the denial of justice standard imposes a “high bar.”⁹⁷⁷ The relevant jurisprudence establishes that only egregious failings of a State’s judicial system will lead to a finding that such a “high bar” has been met. As the *Waste Management II* tribunal explained, a denial of justice will only be found to have occurred if the outcome of the domestic proceedings “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.”⁹⁷⁸

489. In a similar vein, the tribunal in *Kredeni v. Ukraine* – a decision also cited by Kaloti itself⁹⁷⁹ – emphasized that “only a serious deficiency and failure to accord due process” could lead to a finding of denial of justice:

While it is thus generally accepted that, as a matter of principle, a denial of justice may amount to a violation of the fair and equitable treatment standard, **it is equally accepted that only a serious deficiency and failure to accord due process will reach the threshold of such a fair and equitable treatment violation**, as exemplified by the NAFTA tribunal in *Waste Management v. Mexico* which required national court decisions to be “[. . .] either ex facie or on closer examination, evidently arbitrary, unjust or idiosyncratic” in order to amount to a violation of the fair and equitable treatment standard.⁹⁸⁰ (Emphasis added)

490. Further, as Prof. Paulsson emphasized in his award in *Pantechniki v. Kazakhstan*, proof of denial of justice “requires an extreme test: the error must be of a kind which no

to accord fair and equitable treatment and full protection and security.”). See also **RL-0158**, *EBO Invest AS, Rox Holding AS and Staur Eiendom AS v. Republic of Latvia*, ICSID Case No. ARB/16/38, Award, 28 February 2020 (Schwartz, Hobér, Landau), ¶ 472 (“[A] very high threshold is required to be met in order for an investor to prevail on a claim for denial of justice, whether in respect of an alleged failure to provide administrative or judicial due process.”).

⁹⁷⁷ Memorial, ¶ 114.

⁹⁷⁸ **RL-0152**, *Waste Management* (Award), ¶ 98. See also **RL-0157**, *Vannessa Ventures* (Award), ¶ 227 (“The question is not whether the host State legal system is performing as efficiently as it ideally could: it is whether it is performing so badly as to violate treaty obligations to accord fair and equitable treatment and full protection and security”).

⁹⁷⁹ Memorial, ¶ 108.

⁹⁸⁰ **CL-0049**, *Krederi Ltd. v. Ukraine*, ICSID Case No. ARB/14/17, Award, 2 July 2018, ¶ 442.

‘competent judge could reasonably have made.’ Such a finding would mean that the state had not provided even a minimally adequate justice system.”⁹⁸¹

491. In order to satisfy the “extreme test” for establishing a denial of justice, a claimant must demonstrate a *systemic* failure of the State’s judicial system. That is so because, as numerous international tribunals have recognized, only a deficiency in the State’s judicial system *as a whole* can engage international liability for a denial of justice.⁹⁸² The tribunal in *Chevron v. Ecuador* explained that mere “shocks and surprises” in judicial decision-making will not constitute a denial of justice, and noted that “without much more, amounting to discreditable improprieties and the **failure of the whole national system** . . . judgments do not amount to a denial of justice” (emphasis added).⁹⁸³
492. Investment tribunals have recognized that denial of justice claims should not allow claimants to re-litigate substantive issues that have already been addressed by domestic adjudicatory instances, as arbitral tribunals should not act as courts of

⁹⁸¹ **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. 98 (“Denial of justice is always procedural. There may be extreme cases where the proof of the failed process is that the substance of a decision is so egregiously wrong that no honest or competent court could possibly have given it. Such cases would sanction the state’s failure to provide a decent system of justice. They do not constitute an international appellate review of national law.”).

⁹⁸² See **RL-0160**, *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Excerpts of Award, 22 June 2010 (Böckstiegel, Hobér, Crawford), ¶ 279; **RL-0161**, *Republic of Italy v. Republic of Cuba*, Award, 15 January 2008 (Derains, Cobo Roura, Tanz), ¶ 164; **RL-0057**, *RosInvestCo* (Award), ¶ 279; **RL-0218**, *Grand River Enterprises Six Nations Ltd., et al. v. United States of America*, NAFTA/UNCITRAL, Award, 12 January 2011 (Nairman, Anaya, Crook), ¶ 223; **RL-0135**, *Corona* (Award), ¶ 254; **RL-0162**, *Jan Oostergetel and Theodora Laurentius v. Slovak Republic*, UNCITRAL, Final Award, 23 April 2012 (Kaufmann-Kohler, Wladimiroff, Trapl) (“**Oostergetel and Laurentius (Award)**”), ¶ 225. See also **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) (“**Glencore (Award)**”), ¶ 1309.

⁹⁸³ **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), ¶ 640.

appeal or as “bodies charged with improving the judicial architecture of the State.”⁹⁸⁴ Kaloti itself accepts that “[d]enial of justice is generally procedural in nature,”⁹⁸⁵ and in any event does not appear to be arguing that Peru has denied it justice in a substantive sense.

493. Even in the procedural context, however, the denial of justice standard is an extremely stringent one. For example, mere errors or procedural irregularities are insufficient to constitute a denial of justice.⁹⁸⁶ This was confirmed, for example, by the tribunal in *Al-Bahloul v. Tajikistan*, a case that is cited by Kaloti as well.⁹⁸⁷ In that case, the claimant’s claim was based on an allegation that a domestic court had incorrectly interpreted a domestic law requirement for the payment of shareholders’ capital contributions. In rejecting the claim, the tribunal stressed that “it is not the role of this Tribunal to sit as an appellate court on questions of Tajik law,”⁹⁸⁸ and that the domestic court’s application of domestic law had not been “malicious or clearly wrong.”⁹⁸⁹
494. Similarly, the tribunal in *Unglaube v. Costa Rica*—another case to which Kaloti adverts—confirmed that it is not sufficient for claimants to show that “a particular court or administrative tribunal arrived at the wrong result” as a matter of domestic

⁹⁸⁴ See **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)**”), ¶ 528.

⁹⁸⁵ Memorial, ¶ 106.

⁹⁸⁶ For example, the tribunal in *Kredeni v. Ukraine* considered that no denial of justice could result from (i) proceedings being brought before the wrong domestic forum, or (ii) proceedings being instituted after the limitation period had passed on the basis of an extension. **CL-0049**, *Krederi Ltd. v. Ukraine*, ICSID Case No. ARB/14/17, Award, 2 July 2018, ¶¶ 508, 528, 559. See also **RL-0165**, *Philip Morris (Award)*, ¶ 500.

⁹⁸⁷ Memorial, ¶ 106.

⁹⁸⁸ **CL-0046**, *Mohammad Ammar Al-Bahloul v. Republic of Tajikistan*, SCC Case No. V064/2008, Partial Award on Jurisdiction and Liability, 2 September 2009, ¶ 237.

⁹⁸⁹ **CL-0046**, *Mohammad Ammar Al-Bahloul v. Republic of Tajikistan*, SCC Case No. V064/2008, Partial Award on Jurisdiction and Liability, 2 September 2009, ¶ 237.

law.⁹⁹⁰ Rather, as noted above, claimants must demonstrate a systemic failure of the State's judicial system *as a whole*.⁹⁹¹

495. An additional factor to be considered when assessing a denial of justice claim is the nature of the particular forum in which the investor asserts that it has been denied justice. The MST Provision itself recognizes that the denial of justice standard may be applied in the context of a wide range of fora, as it expressly refers to “criminal, civil, or administrative adjudicatory proceedings” when describing that standard. The precise contours of the denial of justice standard will vary depending on the particular forum to which a claimant's claim relates. In particular, a less stringent standard applies in administrative proceedings than in judicial proceedings. For example, in *Thunderbird v. Mexico*, the tribunal explained that the administrative proceedings challenged by the claimant “should be tested against the standards of due process and procedural fairness applicable to administrative officials.”⁹⁹² The tribunal then clarified that “[t]he administrative due process requirement is lower than that of a judicial process.”⁹⁹³ Similarly, the tribunal in *Glencore v. Colombia* explained that (i) the assessment of whether a party's due process rights have been violated will vary depending on the nature of the relevant proceedings;⁹⁹⁴ and (ii) due process requirements in judicial proceedings do not necessarily apply in the context of administrative adjudicatory proceedings.⁹⁹⁵

⁹⁹⁰ **CL-0047**, *Reinhard Hans Unglaube v. Republic of Costa Rica*, ICSID Case No. ARB/09/20, Award, 16 May 2012, ¶ 272.

⁹⁹¹ **CL-0047**, *Reinhard Hans Unglaube v. Republic of Costa Rica*, ICSID Case No. ARB/09/20, Award, 16 May 2012, ¶ 272.

⁹⁹² **RL-0021**, *Thunderbird* (Award), ¶ 200. See also **RL-0165**, *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) (“**Investissements (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.

⁹⁹³ **RL-0021**, *Thunderbird* (Award), ¶ 200. See also **RL-0165**, *Philip Morris* (Award), ¶ 569; **RL-0026**, *Investissements* (Award), ¶ 655; **RL-0081**, *Convial Callao* (Award), fn. 427.

⁹⁹⁴ **RL-0163**, *Glencore* (Award), ¶¶ 1319–1320.

⁹⁹⁵ **RL-0163**, *Glencore* (Award), ¶¶ 1319–1320.

496. Tribunals examining denial of justice claims under provisions identical to the MST Provision in this case have reached similar conclusions to those outlined above; for example:

- in *Bridgestone v. Panama*, the tribunal considered that, in order to establish a denial of justice by a court, the question was whether the claimant’s allegations of breach “support the case that, taken as a whole, **the decision reached by the Court was one that no honest and competent court could have reached**” (emphasis added);⁹⁹⁶ and
- in *TECO v. Guatemala*, the tribunal found that a claim for lack of due process in administrative proceedings could not prosper “if State officials can demonstrate that the decision was actually made in an objective and rational (i.e., reasoned) manner.”⁹⁹⁷

497. A corollary of the requirement for claimants to establish that there was a systemic failure of the judicial system is that an investor must exhaust domestic remedies before pursuing a denial of justice claim.⁹⁹⁸ This is so because 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. As explained in *Apotex v. United States*:

[Denial of justice] claims depend upon the demonstration of a systemic failure in the judicial system. Hence, **a claimant cannot raise a claim that a judicial act constitutes a breach of international law, without first proceeding through the judicial system that it purports to challenge**, and thereby allowing the system an opportunity to correct itself. In the words of Jan Paulsson, Denial of Justice in International Law 108 (2005):

‘For a foreigner’s international grievance to proceed as a claim of denial of justice, the national system must have been tested. **Its perceived failings cannot constitute an international wrong**

⁹⁹⁶ **RL-0164**, *Bridgestone* (Award), ¶ 409.

⁹⁹⁷ **CL-0051**, *TECO Guatemala Holdings, LLC v. The Republic of Guatemala*, ICSID Case No. ARB/10/23, Award, 19 December 2013. ¶ 587.

⁹⁹⁸ **RL-0101**, *Manolium* (Award), ¶ 535; **RL-0165**, *Philip Morris* (Award), ¶ 503.

unless it has been given a chance to correct itself.⁹⁹⁹ (Emphasis added)

498. Prof. Jan Paulsson elaborated on the requirement for exhaustion of local remedies as follows:

[I]nternational law does not impose a duty on states to treat foreigners fairly at every step of the legal process. The duty is to create and maintain a system of justice which ensures that unfairness to foreigners either does not happen, or is corrected .

...

Exhaustion of local remedies in the context of denial of justice is therefore not a matter of procedure or admissibility, but an inherent material element of the delict. . . . [A] claim of denial of justice would fail substantively in the absence of proof that the national system was given a reasonably full chance to correct the unfairness in question.¹⁰⁰⁰

499. On the basis of the above settled principle, tribunals regularly have rejected denial of justice claims when the claimant has failed to exhaust local remedies. For example, in *OI European Group v. Venezuela*, the claimant decided not to appeal a provisional order issued by a domestic court. The tribunal considered that it could not declare that such provisional order amounted to a violation of the FET standard given that “Claimant voluntarily chose not to appeal the contested court decision and not to participate in the proceedings before Venezuelan courts.”¹⁰⁰¹
500. 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. Thus for example, not granting an investor the opportunity to participate in a local proceeding in which it lacks standing will not, without more, constitute a denial of justice. This issue was addressed in some detail

⁹⁹⁹ **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) (“*Loewen (Award)*”), ¶ 156

¹⁰⁰⁰ **RL-0219**, Jan Paulsson, *DENIAL OF JUSTICE IN INTERNATIONAL LAW* (2005), pp. 7–8.

¹⁰⁰¹ **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.

by the tribunal in *Krederi v. Ukraine*. In that case, the claimant had advanced a claim of denial of justice on the asserted basis that it had been deprived of the right to participate, as an affected third party, in a proceeding regarding annulment of the sale of a plot of land that was part of the claimant's alleged real estate investment in Ukraine.¹⁰⁰² In rejecting the claim, the tribunal emphasized that States do not have the obligation to enable investors to join any local proceeding they may wish, but rather only to provide them with an adequate legal remedy to protect their rights:

It clearly follows from the rule of law demands on domestic law that a national legal system must offer individuals and legal persons an opportunity to challenge measures that affect their rights or to obtain redress that is capable of remedying the negative implications of national measures. **Such a right to challenge does not necessarily have to be a right to be joined as a party to pending proceedings. Any legal remedy would suffice**, in particular, if an entity like [Company D] had the opportunity to seek redress for the loss of its property by either directly challenging the court decision invalidating the sales transaction or by being able to seek damages from those that were responsible for its loss.¹⁰⁰³ (Emphasis added)

501. Accordingly, the nature of the proceeding, as well as the procedural rules concerning standing and the opportunity to be heard, are relevant factors that must be considered when determining whether justice has been denied under municipal and international law.

b. Peru has not denied justice to Kaloti under either Peruvian or international law

502. Kaloti's denial of justice claims target the actions of several State organs, namely (i) SUNAT, the administrative authority that ordered the SUNAT Immobilizations; (ii) the prosecutorial authorities, who conducted and participated in certain criminal investigations in relation to the Suppliers; and (iii) the Criminal Courts, which administered the Criminal Proceedings and ordered the Precautionary Seizures

¹⁰⁰² CL-0049, *Krederi Ltd. v. Ukraine*, ICSID Case No. ARB/14/17, Award, 2 July 2018, ¶¶ 559, 564–565.

¹⁰⁰³ CL-0049, *Krederi Ltd. v. Ukraine*, ICSID Case No. ARB/14/17, Award, 2 July 2018, ¶ 566.

against Shipments 1 to 4. As discussed herein, Kaloti has failed to establish that any of the above actions constituted a denial of justice.

503. Even at a threshold level, there are at least two reasons why Kaloti’s denial of justice claims should be dismissed. *First*, such claims are premised on the notion that Kaloti had in fact acquired “property” and “rights” in Peru. Specifically, Kaloti asserts that it was “depriv[ed] . . . of its **property** without due process of law” (emphasis added), and that it was kept in a “legal black hole in which it could not assert its **rights**” (emphasis added).¹⁰⁰⁴ However, as Peru has explained in **Section III.A.2** above, Kaloti could only validly claim ownership of the Five Shipments if such gold had lawful origins, but it has failed to establish that. Even assuming that such gold had lawful origins, Kaloti has failed to prove that it acquired ownership or control over the Five Shipments. On the contrary, the evidence discussed by Peru in **Section III.A.2** demonstrates, or at least strongly suggests, that Kaloti never acquired ownership or control over at least three of the Five Shipments. Therefore, Kaloti has failed to show that it had any “property” or “rights” for the purposes of its denial of justice claim.
504. *Second*, as discussed in **Section IV.A.2** above, Kaloti has failed to substantiate its allegation that the Challenged Measures should be considered a “composite act”. To recall, in order to prove that allegation, Kaloti must demonstrate that the actions or omissions which allegedly configured a composite breach of the obligation not to deny justice are “sufficiently numerous and inter-connected to amount not merely to isolated incidents or exceptions but to a pattern or system.”¹⁰⁰⁵ However, in this case Kaloti has manifestly failed to establish that the challenged actions are part of any system or pattern, as required under the relevant legal standard.¹⁰⁰⁶ This failing, coupled with Kaloti’s own admission that none of the individual actions that it alleges

¹⁰⁰⁴ Memorial, ¶ 111.

¹⁰⁰⁵ **RL-0022**, ILC Commentary, Art. 15, ¶ 5 (quoting *Ireland v. United Kingdom*, ECHR, p. 64, ¶ 159). See **Section IV.A.2**.

¹⁰⁰⁶ See **Section IV.A.2** above.

constitutes a Treaty breach in its own right,¹⁰⁰⁷ means that Kaloti's denial of justice claims must be dismissed.

505. In any event, Kaloti's denial of justice claims must be dismissed because: (i) SUNAT's actions were reasonable, proportionate, and fully compliant with Peruvian law; (ii) Peru's prosecutorial and judicial authorities did not commit any procedural irregularity (let alone the type of gross due process violation that would amount to a denial of justice under the MST Provision); (iii) Kaloti's various attempts to intervene in the Criminal Proceedings were ill-founded and did not comply with Peruvian law; and (iv) the Challenged Measures were taken in pursuance of legitimate public interest objectives.

506. Each of the above points will be addressed *seriatim* in the sub-sections that follow. As that discussion demonstrates, each of the Challenged Measures was entirely justified in the circumstances, including the broader context of Peru's legal framework to combat money-laundering and illegal mining. Given the legitimate and lawful nature of each of the individual measures that Kaloti challenges, it cannot be said that, by a process of aggregation, such measures somehow collectively amounted to a denial of justice.

(i) *The actions of SUNAT did not amount to a denial of justice*

507. Contrary to Kaloti's assertion, SUNAT's actions were *not* arbitrary or unfair, let alone so manifestly arbitrary or unfair as to constitute a denial of justice, or otherwise violate the minimum standard of treatment.¹⁰⁰⁸

508. As noted above, when examining denial of justice claims in the context of administrative proceedings—which would encompass the SUNAT Immobilizations—tribunals have confirmed that the threshold for finding a breach is

¹⁰⁰⁷ Memorial, ¶ 111 (“Peru’s measures—in the aggregate—combined to deny KML due process and access to justice” (emphasis in original)).

¹⁰⁰⁸ RL-0021, *Thunderbird* (Award), ¶ 197.

particularly high.¹⁰⁰⁹ In order to demonstrate that such high threshold is met, Kaloti would have to demonstrate the existence of “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.”¹⁰¹⁰ Kaloti cannot satisfy that high threshold. Kaloti concedes that “in and of themselves, these initial immobilizations [i.e., the SUNAT Immobilizations] did not raise [sic] to the level of a breach of the TPA by Peru.”¹⁰¹¹ And, as noted above, Kaloti has failed to demonstrate that the SUNAT Immobilizations were sufficiently inter-connected with the other measures – which according to Kaloti “in the aggregate”¹⁰¹² denied it justice – to form a “system or pattern” within the meaning of ILC Article 15.¹⁰¹³

509. In any event, Kaloti’s criticism of the SUNAT Immobilizations is baseless. Kaloti asserts that the SUNAT Immobilizations were unreasonably extended through time and remain in force as of today.¹⁰¹⁴ That assertion, however, is misleading. As explained in **Section II.B.5** above, and as recognized by Kaloti’s expert, the SUNAT Immobilizations ended – and SUNAT’s involvement ceased – when the competent judicial authorities ordered the Precautionary Seizures in relation to Shipments 1 to 4.¹⁰¹⁵ The SUNAT Immobilizations were in place for only a few months and, by May 2014, none of them remained in place.¹⁰¹⁶ Therefore, Kaloti’s claims that SUNAT indefinitely extended the SUNAT Immobilizations, and “has never informed KML

¹⁰⁰⁹ **RL-0021**, *Thunderbird* (Award), ¶ 200. See also **RL-0165**, *Philip Morris* (Award), ¶ 569; **RL-0026**, *Investissements* (Award), ¶ 655; **RL-0081**, *Convial Callao* (Award), fn. 427.

¹⁰¹⁰ **RL-0021**, *Thunderbird* (Award), ¶ 200.

¹⁰¹¹ Memorial, ¶ 49.

¹⁰¹² Memorial, ¶ 111.

¹⁰¹³ **RL-0022**, ILC Commentary, Art. 15, Commentary 5.

¹⁰¹⁴ Memorial, ¶ 4 (“[F]or close to eight years, SUNAT consistently refused to return Claimant’s gold, citing criminal investigations and proceedings against certain gold suppliers in Peru as the reason for its continued holding of Claimant’s property.”)

¹⁰¹⁵ [REDACTED] Report, ¶ 1.1 (“[T]wo classes of measures were imposed successively on KML’s proprietary mineral. One, of an administrative nature, imposed by SUNAT; and another, of criminal nature, judicially imposed at the request of the Public Prosecutor’s Office . . . Of these measures, only the criminal one remains in force today”); See also **Section II.B.5**.

¹⁰¹⁶ See **Section II.B.5**.

when, or under what circumstances, the five immobilized gold shipments would be returned to Claimant,”¹⁰¹⁷ elides and thus misrepresents the facts. Indeed, Kaloti is fully aware that the SUNAT Immobilizations were lifted. As noted above, Kaloti issued an *amparo* request in relation to the SUNAT Immobilizations asserting that its constitutional rights were being infringed, but then withdrew that request shortly after the immobilizations were lifted.¹⁰¹⁸

510. Moreover, Kaloti’s reference in the above statement to the “five immobilized gold shipments” is erroneous. As discussed in **Section II.B.2** above, only Shipments 1 to 4 were encompassed by SUNAT’s immobilizations. Shipment 5 was never immobilized by SUNAT. Rather, it was subject to the Civil Attachment in the context of [REDACTED] civil claim against Kaloti for Kaloti’s failure to pay for Shipment 5.¹⁰¹⁹
511. Similarly, Kaloti’s allegations that SUNAT was “arbitrary, overzealous and capricious”¹⁰²⁰ or acted based on improper motivations¹⁰²¹ are unsupported. In fact, Kaloti’s allegation is undercut by its own admission that the SUNAT Immobilizations did not “in and of themselves” breach the Treaty.¹⁰²² In any event, Kaloti’s allegation of arbitrary, overzealous and capricious conduct is contradicted by the facts. As Peru explained in **Section II.B**, SUNAT’s actions were taken in the context of Peru’s efforts to tackle the serious and socially damaging crimes of illegal mining and money laundering through the introduction and enforcement of a new legal regime. In accordance with that new legal regime, SUNAT initially inspected Shipments 1 to 4 based on a number of objective risk indicators concerning the Suppliers, relating to potential money-laundering and illegal mining.¹⁰²³ SUNAT then acted proportionally,

¹⁰¹⁷ Memorial, ¶ 136.

¹⁰¹⁸ See **Section II.B.4**.

¹⁰¹⁹ See **Section II.C.6** above.

¹⁰²⁰ Memorial, ¶ 71.

¹⁰²¹ Memorial, ¶ 6.

¹⁰²² Memorial, ¶ 49.

¹⁰²³ **Ex. R-0079**, Resolution of the National Deputy Superintendency of Customs No. 208-2013-SUNAT-300000, 27 August 2013, §VII.(A).1. See **Section II.B.2**.

reasonably, and within the scope of its authority and competences when it decided to immobilize Shipments 1 to 4 based on the Suppliers' failure to establish the lawful origin of the gold.¹⁰²⁴ SUNAT subsequently requested and examined additional information in an effort to determine if the gold in question had lawful origins.¹⁰²⁵ After identifying further indicia of money laundering and related criminal offenses based on the evidence before it,¹⁰²⁶ SUNAT diligently notified its findings to the competent Peruvian authorities.¹⁰²⁷ Such actions were taken on a reasoned basis and in full compliance with the relevant legal framework.¹⁰²⁸ They therefore cannot form the foundation of a claim for denial of justice, either individually, or in the aggregate with the other measures that form the basis of Kaloti's claim.

¹⁰²⁴ See **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 █████ 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 █████ Criminal Proceedings); **Ex. R-0162**, SUNAT Inspection Order No. 316-0300-2014-000038, 10 January 2014 (included in █████ 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 █████ Criminal Proceedings) [*Re-submitted legible version of C-0070*]; **Ex. R-0088**, SUNAT Inspection Order No. 316-0300-2014-000024, 9 January 2014 (included in █████ Criminal Proceedings); **Ex. R-0089**, SUNAT Inspection Order No. 316-0300-2014-000025, 9 January 2014 (included in █████ Criminal Proceedings); **Ex. R-0090**, SUNAT Inspection Order No. 316-0300-2014-000026, 9 January 2014 (included in █████ Criminal Proceedings).

¹⁰²⁵ See **Section II.B.3**.

¹⁰²⁶ **Ex. R-0140**, SUNAT Report No. 026-2014-SUNAT-3X3200, 15 January 2014 (included in █████ Criminal Proceedings), ¶ 3.1; **Ex. R-0141**, SUNAT Report No. 217-2014-SUNAT-3X3200, 5 March 2014 (included in █████ Criminal Proceedings), § III; **Ex. C-0084**, █████ Inform N° 303-2014-SUNAT-3X3200, April 09, 2014, § III; **Ex. R-0142**, SUNAT Report No. 239-2014-SUNAT-3X3200, 11 March 2014 (included in █████ Criminal Proceedings), ¶ 3.1.

¹⁰²⁷ See **Section II.B.5** above. See **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 █████ 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 █████ 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 █████ 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 █████ Criminal Proceedings).

¹⁰²⁸ See **Section II.B.5** above.

512. In addition, to the extent that Kaloti claims that the SUNAT Immobilizations constituted—or significantly contributed to—a violation of the Treaty, that claim would fall outside the Tribunal’s jurisdiction for multiple reasons.
513. *First*, the Tribunal lacks jurisdiction *ratione materiae* over the SUNAT Immobilizations because: (i) the shipments that were subject to the SUNAT Immobilizations (namely, Shipments 1 to 4) do not have the characteristics of an “investment” under Treaty Article 10.28 or the ICSID Convention (*see Section III.A.1*); (ii) Kaloti has failed to prove that it “owns or controls” such shipments, and it has therefore also failed to establish that the shipments qualify as a “covered investment” under Treaty Article 1.3 (*see Section III.A.2*); and (iii) the shipments were not acquired in accordance with Peruvian law or international public policy (*see Section III.A.3*).
514. *Second*, the Tribunal also lacks jurisdiction *ratione temporis* over the SUNAT Immobilizations. As explained in **Section III.B** above, pursuant to Treaty Article 10.18.1 Peru has not consented to submit to arbitration any claims concerning an alleged Treaty breach if, *before* the Cut-off Date (i.e., 30 April 2018), Kaloti already had knowledge—or should have had knowledge—of that breach, and of the alleged fact that it had suffered loss or damage as a result of the breach. Yet, Kaloti’s own pleadings in this case confirm that, well *before* the Cut-off Date, Kaloti had already acquired knowledge of the SUNAT Immobilizations and of the alleged fact that it had incurred loss or damage as a result of those immobilizations (*see Section III.B.3.(a)*).
515. *Third*, pursuant to the “fork in the road” in Annex 10-G of the Treaty,¹⁰²⁹ once an investor of the United States has alleged a breach of an obligation contained in Treaty Chapter 10.A before a Peruvian court, the U.S. investor may no longer submit a claim

¹⁰²⁹ **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 . . .)”).

regarding that breach to an arbitral tribunal established under Treaty Chapter 10.B.¹⁰³⁰ In the Amparo Request that Kaloti filed before the Constitutional Court of Lima on 11 March 2014, Kaloti alleged that SUNAT's immobilizations of Shipments 2 and 3 amounted to an unlawful indirect expropriation under Treaty Article 10.7 (*see Section III.B.3.c.(i)* above).¹⁰³¹ Therefore, any claim by Kaloti in this arbitration to the effect that SUNAT's immobilizations of those shipments breached –or significantly contributed to a breach of– Treaty Article 10.7 would be inadmissible under Annex 10-G.

(ii) *The actions of the Peruvian prosecutorial and judicial authorities did not deny justice to Kaloti's investments*

516. Like the SUNAT Immobilizations, the alleged actions and inactions of the Peruvian prosecutorial and judicial authorities did not amount to a denial of justice under the MST Provision, either individually or as part of an aggregate or composite act.
517. It bears emphasizing at the outset that Kaloti faces a heavy burden to establish that measures taken by a sovereign State, particularly in the criminal justice sphere, were illegitimate or in bad faith to such an extent that they rise to the level of a violation of MST. As the tribunal in *Quiborax* highlighted, “[a State] has the sovereign prerogative

¹⁰³⁰ **RL-0001**, Treaty, Annex 10-G (“1. An investor of the United States may not submit to arbitration under Section B 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. 2. For greater certainty, if an investor of the United States elects to submit a claim of the type described in paragraph 1 to a court or administrative tribunal of a Party other than the United States, that election shall be definitive, and the investor may not thereafter submit the claim to arbitration under Section B.”).

¹⁰³¹ **Ex. R-0230**, Amparo Request, Constitutional Court of Lima, 11 March 2014, pp. 2-3 (“the Precautionary Seizure Immobilization Orders No. 316-0300-2014-000110 dated 10/01/2014 lifted against the company [REDACTED] . on products exclusively owned by the appellants [i.e., Kaloti]; and, Precautionary Seizure Immobilization Orders No. 316-0300-2014-000002 dated 10/01/2014 lifted against the company [REDACTED] . on products exclusively owned by the appellants [i.e., Kaloti]; . . . constitute a manifest violation . . . of the Free Trade Agreement (FTA) . . in its Chapter X, Article 10.7, referring to the application of Indirect Expropriation, as well as the provisions of Annex 10-B, Expropriation of the FTA”).

to prosecute crimes on its territory, and such prerogative is not barred by the BIT or ICSID Convention.”¹⁰³²

518. The legitimacy of precautionary measures with respect to criminal proceedings in relation to suspected money laundering has also been acknowledged in international investment law jurisprudence. For example, 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.”¹⁰³³ The tribunal in that case also emphasized that “[i]t scarcely needs to be said that investment protection is not intended to benefit criminals or investments based on or pursued by criminal activities,”¹⁰³⁴ and therefore “[a]ny adjudicator encountering allegations of money laundering must examine the evidence with punctiliousness.”¹⁰³⁵
519. The above principles are particularly apposite to the instant case. The Precautionary Seizures in relation to Shipments 1 to 4 were amply justified by the significant evidence of potential criminal activity relating to or involving the Suppliers and such shipments. As noted in **Section II.C.6** above, Shipment 5 was subject to the Civil Attachment, which was requested by ██████ in the context of civil proceedings against Kaloti for failure to pay for that shipment. Kaloti does not impugn or challenge that Civil Attachment in this arbitration.
520. Moreover, if any of the Five Shipments may ultimately be found to have been illegally sourced and/or part of a money-laundering scheme, Kaloti should not be allowed to benefit in the interim from the protections of the Treaty for alleged harm to such shipments. Nor should Kaloti be compensated by Peru for any losses it may have

¹⁰³² **RL-0024**, *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, 6 May 2013 (Berman, Donovan, Lalonde) (“**Rompetrol (Award)**”), ¶ 238 (“[I]t is not for an investment tribunal to set itself up as a court of final review over the criminal justice systems of host States.”).

¹⁰³³ **RL-0047**, *Valeri Belokon v. Kyrgyz Republic*, PCA Case No. AA518, Award, 24 October 2014 (Paulsson, Hobér, Schiersing) (“**Belokon (Award)**”), ¶ 161.

¹⁰³⁴ **RL-0047**, *Belokon (Award)*, ¶ 158.

¹⁰³⁵ **RL-0047**, *Belokon (Award)*, ¶ 159.

incurred as a result of its decision to transact with the Suppliers, having been negligent in conducting a due diligence exercise. Such an effort would have easily revealed the many warning signs and red flags regarding potential illegal mining and money-laundering that the Suppliers presented.¹⁰³⁶ Moreover, if Kaloti believes it has been a hapless victim of the Suppliers' unscrupulous or negligent actions, it should have brought civil or criminal actions against the Suppliers, rather than an investment arbitration against Peru.

521. Turning to Kaloti's arguments regarding the specific actions of the Peruvian prosecutorial and judicial authorities, the paragraphs that follow demonstrate that such arguments are manifestly incorrect.
522. The first argument that Kaloti raises with respect to Peru's prosecutorial and judicial authorities is that "Peru's measures deprived KML of the use and enjoyment of certain of its gold assets,"¹⁰³⁷ and that "[t]hese 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."¹⁰³⁸ In a similar vein, Kaloti also contends that "the seizure of KML's gold bears no rational connection to an investigation against suppliers or other third parties."¹⁰³⁹ Such arguments are misconceived and meritless, for the following reasons.
523. *First*, Kaloti is incorrect that the Precautionary Seizures were a "criminal sanction" against Kaloti. Under Peruvian law, a precautionary seizure is not a "sanction".¹⁰⁴⁰ Nor can the Precautionary Seizures themselves be characterized as sanctions *against Kaloti*; rather, precautionary seizures are *in rem* actions that affect only the *assets* over which they are directed (in this case, the Shipments 1 to 4). In this regard, Prof. Missiego explains that Article 2(3) of Law 27379 and Article 94 of the Code of Criminal

¹⁰³⁶ See **Section II.B.6**.

¹⁰³⁷ Memorial, ¶ 112.

¹⁰³⁸ Memorial, ¶ 112.

¹⁰³⁹ Memorial, ¶ 116.

¹⁰⁴⁰ Missiego Report, ¶ 84.

Procedure permit the issuance of precautionary seizures with respect to assets that are suspected to have been acquired directly or indirectly through crime.¹⁰⁴¹ In such instances, the purposes of the seizure are (i) to ensure the availability of the necessary evidence during the preliminary investigation of the suspected crime; (ii) to avoid the dissipation of potential proceeds of a crime; and (iii) to ensure that any confiscation order at the conclusion of the criminal proceedings can be enforced.¹⁰⁴² As Prof. Missiego also explains, precautionary seizures of assets are often imposed in aid of complex criminal investigations and proceedings in relation to suspected money laundering offenses—as was the case here.¹⁰⁴³ Kaloti’s own Peruvian law expert, [REDACTED], acknowledges this fact, stating that “seizure for purposes of confiscation is intended to prevent. . . the disappearance of the illicit asset or the benefit of the asset. [Precautionary seizure] is absolutely usual in cases related to organized crime in general, and in money laundering as well.”¹⁰⁴⁴

524. *Second*, Article 94 of the Code of Criminal Procedure establishes that the Peruvian criminal courts may grant precautionary seizures over the suspected proceeds of a crime irrespective of whether or not the alleged legal owner is a defendant in those criminal proceedings.¹⁰⁴⁵ In other words, under Peruvian law, a precautionary seizure of property (such as goods or funds) that is suspected to be connected with money laundering, can be ordered whether or not the owner of such property (i) is him or herself under criminal investigation; (ii) is ultimately charged with a crime, or (iii) is

¹⁰⁴¹ Missiego 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.

¹⁰⁴² Missiego Report, ¶¶ 80, 90, 154.

¹⁰⁴³ Missiego Report, ¶ 92.

¹⁰⁴⁴ **Ex. R-0137**, “[REDACTED] en Panorama – Incautación de la vivienda de Ollanta Humala y Nadine Heredia,” YOUTUBE, 14 May 2018, 1:35 and 2:30 (“La incautación con fines de decomiso, yo te quito el bien porque yo creo Fiscal que tu bien tiene origen delictivo y lo que quiero evitar es que tú lo vendas, lo transfieras, lo liquides, es decir que desaparezca ese bien ilícito o que goces del bien . . . [La incautación] es absolutamente usual en casos vinculados a crimen organizado en general es absolutamente usual, en lavado también.”).

¹⁰⁴⁵ Missiego Report, ¶¶ 99–100.

subsequently convicted of criminal wrongdoing.¹⁰⁴⁶ Kaloti’s argument that it was somehow not “rational” for any of the Five Shipments to be seized in the context of criminal investigations against the Suppliers is therefore incorrect—assets that are suspected of being tied to, or the proceeds of, a crime can be seized pursuant to Peruvian law—regardless of who owns such assets.

525. *Third*, the Precautionary Seizures were entirely “rational” insofar as (i) they were issued on the basis of legitimate concerns and evidence with respect to potential money laundering and illegal mining; and (ii) they fulfilled the relevant procedural and substantive requirements under Peruvian law. Such circumstances are relevant in assessing the merit (or lack thereof) of Kaloti’s denial of justice claim. As noted by the tribunal in *Bosh v. Ukraine*,

in order to determine whether the Respondent is in breach of the fair and equitable treatment standard, the Tribunal is required to assess, inter alia, whether the law applicable to the proceedings before the Ukrainian courts [. . .] was properly and fairly applied.¹⁰⁴⁷

526. In this case, the Peruvian prosecutorial authorities sought and obtained the Precautionary Seizures in full compliance with the applicable legal requirements.¹⁰⁴⁸ As noted above, there are two relevant requirements for the issuance of precautionary seizures under Peruvian law: (i) *fumus delicti comissi* (*prima facie* evidence of the commission of a crime); and (ii) *periculum in mora* (peril in delay).¹⁰⁴⁹ Both of these requirements were satisfied in the case of the Precautionary Seizures. With respect to the first one, the measures were taken based on significant indicia not only that the gold in the Shipments 1 to 4 had not been lawfully originated, but also that such gold

¹⁰⁴⁶ Missiego Report, ¶¶ 99-102.

¹⁰⁴⁷ **RL-0048**, *Bosh International, Inc., et al., v. Ukraine*, ICSID Case No. ARB/08/11, Award, 25 October 2021 (Griffith, Sands, McRae), ¶ 280.

¹⁰⁴⁸ See **Section II.C** above.

¹⁰⁴⁹ Missiego Report, ¶¶ 84.

was potentially connected to money laundering offenses.¹⁰⁵⁰ Thus, the first requirement, that of *fumus delicti comissi*, was fulfilled.

527. Regarding the second requirement (*periculum in mora*), as noted above the Precautionary Seizures were designed amongst other purposes to avoid the dissipation of the potential proceeds of crime while the relevant criminal proceedings were ongoing.¹⁰⁵¹ In issuing such seizures, the Criminal Courts took into account the nature and complexity of the underlying investigations, which would inevitably extend the length of the proceedings. Based on the evidence, and in particular the risk of dissipation of Shipments 1 to 4 while the proceedings were ongoing, the Criminal Courts concluded that the *periculum in mora* requirement under Peruvian law for the issuance of a precautionary seizure was also fulfilled.¹⁰⁵²

528. In a further attempt to hoist up its claim, Kaloti alleges that “[a]t no point in time did Peru afford KML the opportunity to present a bona fide purchaser defense and thereby secure the release of its gold.”¹⁰⁵³ Kaloti’s argument is flawed, for several reasons.

529. First, Kaloti’s reference to the concept of a “*bona fide* purchaser defense” is based on 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.¹⁰⁵⁴ However, such a presumption is inapplicable to the instant case due to the principle of *lex specialis*. In this case, the relevant *lex specialis* was the provisions of the General Mining Law and Illegal Mining Controls and Inspection Decree in relation to the purchase of gold. Such laws (i) establish that the purchaser has the obligation to

¹⁰⁵⁰ See **Section II.C.3** above.

¹⁰⁵¹ See **Section II.C** above.

¹⁰⁵² **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, April 30, 2014; **Ex. R-0136**, Precautionary Seizure against Shipment 4, 1 May 2014.

¹⁰⁵³ Memorial, ¶ 114.

¹⁰⁵⁴ Memorial, ¶ 113. See also **Ex. R-0222**, Decreto Legislativo No. 295, Civil Code, 24 July 1984 [*Re-submitted version of CL-0044, with Respondent’s translation*].

verify the origin of mineral resources,¹⁰⁵⁵ and (ii) provide that the purchase of illegally mined products does not give rise to property rights over such products.¹⁰⁵⁶ Given this *lex specialis*, the general Peruvian Civil Code principle relied on by Kaloti does not apply. In other words, Kaloti cannot validly allege that Peru denied it the opportunity to present a defense under Peruvian law if that defense was not even available in the first place. The misconceived nature of this argument once again confirms Kaloti's disregard of Peruvian law.

530. *Second*, and in any event, Kaloti was not a *bona fide* purchaser, as it had failed to comply with its due diligence obligations with respect to the purchases of the Five Shipments. As explained in **Section II.B.6**, Peruvian law requires gold purchasers to (i) verify the lawful origin of the gold, (ii) conduct due diligence on their suppliers, and (iii) keep updated records proving that they complied with these obligations.¹⁰⁵⁷ Kaloti did not comply with any of the above requirements: it failed to verify the origin of the Five Shipments; it ignored numerous red flags with respect to its Suppliers (but proceeded with the relevant transactions with the Suppliers anyway); and it did not keep adequate records.¹⁰⁵⁸ Thus, the "*bona fide* purchaser" defense would not have been available to Kaloti.¹⁰⁵⁹
531. *Third*, contrary to Kaloti's allegation that there was a "lack of remedy" in this case, Peruvian law encompasses several remedies for a third party to assert property rights over seized assets. As explained below, such remedies include re-evaluation requests and *amparo* petitions.

¹⁰⁵⁵ **Ex. R-0013**, General Mining Law, Art. 4; **Ex. R-0049**, Illegal Mining Controls and Inspection Decree, Art. 11.

¹⁰⁵⁶ **Ex. R-0013**, General Mining Law, 3 June 1992, Art. 52.

¹⁰⁵⁷ See **Ex. R-0013**, General Mining Law, 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.

¹⁰⁵⁸ See **Section II.B.6** above.

¹⁰⁵⁹ See **Section II.C.4** above.

532. As Prof. Missiego explains in his expert report, and as discussed above in **Section II.C.4**, Peruvian law provides that a third party affected by a precautionary seizure over its assets may file (i) a re-evaluation request (*reexamen*), or (ii) an appeal.¹⁰⁶⁰ If either such request is granted, the Criminal Court will annul the precautionary seizure, and return the gold to its owner.¹⁰⁶¹
533. In addition, it is open to a party affected by a seizure order with respect to its assets to file an *amparo* request before the Peruvian constitutional courts,¹⁰⁶² in order to assert its constitutionally protected property and due process rights.¹⁰⁶³
534. Despite the availability of the above-described remedies, Kaloti did not avail itself of either one of them to challenge the Precautionary Seizures. It is therefore incorrect that Peru has denied Kaloti “a fair opportunity to plead its case.”¹⁰⁶⁴ The availability of judicial remedies, coupled with Kaloti’s failure to pursue such remedies, is fatal to Kaloti’s claims. As discussed above, in order to demonstrate a denial of justice, Kaloti must show that it exhausted local remedies. However, Kaloti has failed to do so. Instead, Kaloti has built its case on interim decisions issued by the Peruvian lower courts, which cannot possibly constitute a representation of the performance of the Peruvian legal system as a whole.
535. Kaloti’s failure to file an *amparo* request with respect to the Precautionary Seizures is all the more remarkable given that, in 2014, it had in fact filed an *amparo* request in relation to the SUNAT Immobilizations (but then withdrew that request once such immobilizations were lifted and replaced by the Precautionary Seizures). The foregoing demonstrates that Kaloti was fully aware of the *amparo* remedy, and knew

¹⁰⁶⁰ Missiego Report, ¶¶ 127-131; **Ex. R-0152**, Plenary Agreement No. 5-2010/CJ-116, 16 November 2010, p. 6 (“A third party who claims to be the owner of a seized asset and has not participated in the crime, according to Article 319°.2 [New Criminal Procedure Code], may request the reexamination of the precautionary seizure, in order to have it lifted and the asset release.”).

¹⁰⁶¹ Missiego Report, ¶ 130.

¹⁰⁶² Missiego Report, ¶ 147.

¹⁰⁶³ Missiego Report, ¶ 148.

¹⁰⁶⁴ Memorial, ¶ 114.

that it could exercise that remedy with respect to the Precautionary Seizures, just like it had in response to the SUNAT Immobilizations. However, it chose not to do so. Furthermore, the scope of an *amparo* petition to the constitutional courts would have been made broad enough to include requests for the protection of Kaloti's rights to property and due process, *i.e.*, the exact same rights that form the basis of Kaloti's denial of justice claim here.¹⁰⁶⁵ Having elected not to pursue such remedy to assert its rights under Peruvian law, Kaloti failed to exhaust its remedies, and thus cannot now argue that Peru denied it justice.

536. Kaloti also advances various arguments based on the duration of the Precautionary Seizures, contending for example that the Precautionary Seizures "ha[ve] become de facto permanent without a court order making it so."¹⁰⁶⁶ Again, such arguments are misconceived and inaccurate. The discussion below first addresses jointly the precautionary seizures relating to Shipments 1 to 4, and then centers on the relevant events with respect to Shipment 5.
537. Turning to the former, Kaloti is correct that the Precautionary Seizures issued by the Criminal Courts with respect to Shipments 1 to 4 remain in place. However, contrary to Kaloti's arguments, this does not mean that such seizures have become "de facto permanent." As Prof. Missiego explains, a precautionary seizure is an interlocutory measure that may remain in force only during the pendency of preliminary investigations or criminal proceedings.¹⁰⁶⁷ Such measures are therefore, by their very nature, temporary, and is the case with the Precautionary Seizures. The latter remain in place, but would be lifted if the Criminal Courts ultimately determine that the suspected money laundering offenses that form the subject of the relevant criminal proceedings were not committed, and/or that the relevant shipments are not the

¹⁰⁶⁵ Memorial, ¶ 111.

¹⁰⁶⁶ Memorial, ¶ 117.

¹⁰⁶⁷ Missiego Report, ¶¶ 85–87.

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

538. Kaloti's allegations that the precautionary seizures became "permanent" is particularly misleading with respect to Shipment 5. As noted above, such shipment was first subject to a freezing order issued by a civil court in the context of a private lawsuit in which Kaloti is the defendant, followed by a precautionary seizure ordered by the Criminal Courts in the context of the █████ Criminal Proceedings. In the present arbitration, Kaloti is only asserting claims with respect to the second of those seizure measures, but not the first.¹⁰⁶⁹ With respect to Kaloti's denial of justice claim relating to the precautionary seizure of Shipment 5 ordered by the Criminal Courts, such measure was lifted on jurisdictional grounds only three months after it was instituted, following a challenge by █████, the claimant who brought the aforementioned private lawsuit.¹⁰⁷⁰ Thus, Kaloti's allegation that this seizure became "permanent" is manifestly incorrect, and its denial of justice claim fails.

539. Although the second seizure is not being challenged herein, Peru notes simply that such measure was the Civil Attachment already explained in **Section II.C.6** above. Such attachment had been requested by █████ and issued by the Lima Civil Court in the context of a private civil lawsuit brought by █████ against Kaloti, due to Kaloti's failure to pay for Shipment 5.¹⁰⁷¹ Kaloti does not even *mention* the Civil Attachment in its denial of justice claim, let alone allege that it constituted a breach of the Treaty. Nor could Kaloti credibly do so, given that the Civil Attachment resulted from Kaloti's own refusal to pay its Supplier.

540. Kaloti also suggests that the Precautionary Seizures were subject to a time limit of 90 days under Peruvian law.¹⁰⁷² This is incorrect. The 90-day limitation period to which

¹⁰⁶⁸ Missiego Report, ¶ 92.

¹⁰⁶⁹ Memorial, ¶ 117, Appendix A, p. xxv.

¹⁰⁷⁰ **Ex. R-0212**, Resolution No. 08, Supreme Court of Lima, Court Specialized in Asset Forfeiture of Lima, 14 June 2022, p. 15; *see also* **Section II.C.6**.

¹⁰⁷¹ *See* **Section II.C.6**.

¹⁰⁷² Memorial, ¶ 119.

Kaloti refers is only applicable to precautionary measures that are granted in the context of the preliminary investigation phase, which is the phase that precedes the initiation of criminal proceedings.¹⁰⁷³ Once that phase has ended and judicial criminal proceedings have been initiated, under Peruvian law, precautionary measures such as seizures may remain in place until the end of the criminal proceedings, provided that such measures continue to be necessary to (i) ensure the effective conduct of the criminal proceedings; and (ii) avoid the dissipation of the assets obtained or acquired as a result of a criminal offense.¹⁰⁷⁴

541. In this case, as explained in **Section II.C.3**, while Shipments 1 to 4 were indeed the subject of preliminary seizures in the investigative phase, the investigations phase concerning the Suppliers then progressed to the pre-trial phase (i.e., the initial phase of criminal proceedings). It was in that context that the Criminal Courts found that the Precautionary Seizures of Shipments 1 to 4 continued to be necessary.¹⁰⁷⁵ Since that occurred at the pre-trial phase, the Precautionary Seizures were not subject to the 90-day period referenced by Kaloti. Accordingly, such measures were not subject – at any time – to any legal time limit, and they may remain in force for the duration of the Criminal Proceedings.
542. Kaloti further alleges that “[t]he unreasonable length of time that Peru has taken to conclude the criminal proceedings and other investigations, and return KML’s gold assets constitutes a violation of the TPA’s fair and equitable treatment provision”¹⁰⁷⁶ and likens the ongoing criminal proceedings to a “sword of Damocles” hanging over Kaloti.¹⁰⁷⁷ However, Kaloti’s emphasis on the time that has passed since the SUNAT

¹⁰⁷³ Missiego Report, ¶ 94.

¹⁰⁷⁴ Missiego Report, ¶¶ 94, 120, 122.

¹⁰⁷⁵ See **Ex. R-0139**, Resolution No. 1: Order Initiating Criminal Proceedings, ██████████ Case, 16 March 2015; **Ex. R-0145**, Resolution No. 1: Order Initiating Criminal Proceedings, ██████████ Case, 14 May 2015; **Ex. R-0224**, Resolution No. 1: Order Initiating Criminal Proceedings, ██████████ Case, 9 September 2014 [*Re-submitted version of C-0087, with Respondent’s translation*]; **Ex. R-0150**, Resolution No. 1: Order Initiating Criminal Proceedings, ██████████ Case, 10 March 2015.

¹⁰⁷⁶ Memorial, ¶ 118.

¹⁰⁷⁷ Memorial, ¶ 119.

Immobilizations and Precautionary Seizures is insufficient to demonstrate a denial of justice—either individually or when aggregated with the other measures encompassed within Kaloti’s denial of justice claim. Tribunals have accepted that international law establishes no clear or fixed time limits to assess whether court delays constitute a denial of justice.¹⁰⁷⁸ As a result, the question of whether “justice is rendered within a reasonable delay [i.e., timeframe] depends on the circumstances and the context of the case.”¹⁰⁷⁹ In order to determine whether delays in judicial proceedings are so manifestly unjustified as to amount to a denial of justice, tribunals have considered the complexity of the case, the behavior of the litigants involved, the significance of the interests at stake, and the behavior of the courts themselves.¹⁰⁸⁰

543. In this case, the duration of Peru’s investigations and criminal proceedings must be assessed within the context of the complexity of the suspected crimes to which those investigations and proceedings related. In this regard, as discussed in **Section II.A.4** above, money laundering offenses are particularly complex when compared to other crimes. That tends to be so because, by its very nature, the objective of money laundering is to conceal or disguise the illicit origin of funds or other assets. Money

¹⁰⁷⁸ **RL-0162**, *Oostergetel and Laurentius* (Award), ¶ 290; **RL-0062**, *White Industries Australia Ltd. v. Republic of India*, UNCITRAL, Final Award, 30 November 2011 (Rowley, Brower, Lau), ¶ 10.4.10.

¹⁰⁷⁹ **RL-0197**, *Toto* (Decision on Jurisdiction), ¶¶ 155, 163. See also **RL-0064**, *H&H Enterprises Investments, Inc. v. Arab Republic of Egypt*, ICSID Case No. ARB 09/15, Award, 6 May 2014 (Cremades, Heiskanen, Gharavi), ¶ 405.

¹⁰⁸⁰ **RL-0065**, *Chevron Corp. (USA) and Texaco Petroleum Corp. (USA) v. Republic of Ecuador I*, PCA Case No. 2007-02/AA277, Partial Award on the Merits, 30 March 2010 (Böckstiegel, Brower, van den Berg), ¶ 250 (“The Ecuadorian legal system must thus, according to Article II(7), provide foreign investors with means of enforcing legitimate rights within a reasonable amount of time. The limit of reasonableness is dependent on the circumstances of the case. As with denial of justice under customary international law, some of the factors that may be considered are the complexity of the case, the behavior of the litigants involved, the significance of the interests at stake in the case, and the behavior of the courts themselves. The Tribunal must thus come to a conclusion about if and when the delay exceeded the allowable threshold under Article II(7) in light of all such circumstances.”). See also **RL-0197**, *Toto* (Decision on Jurisdiction); **RL-0162**, *Oostergetel and Laurentius* (Award), ¶ 290; **CL-0048**, *Lion Mexico Consolidated L.P. v. United Mexican States*, ICSID Case No. ARB(AF)/15/2, Award, 9 September 2021, ¶¶ 242–244.

laundering schemes are therefore inherently time-consuming and difficult to investigate and uncover.

544. The complexity of criminal investigations and proceedings regarding money laundering, and the fact that such complexity often yields extended investigations and proceedings, has been acknowledged in the relevant jurisprudence. For example, in the set-aside procedure with respect to the *Belokon v. Kyrgyz Republic* award, the Paris Court of Appeal dismissed as irrelevant the fact that criminal investigations initiated by the State into suspected money laundering had not yet, by the time of the award, resulted in a criminal trial.¹⁰⁸¹ According to the Court, the length of the proceedings was not manifestly disproportionate because “money laundering gives rise, by its own nature, to opaque and complex schemes involving multiple offshore companies.”¹⁰⁸² The Court further concluded that there was “reliable, accurate and consistent evidence,” sufficient to justify the annulment of the award, as the recognition and enforcement of the arbitral award would contradict international public policy by hindering State actions to combat money laundering.¹⁰⁸³ The Court’s decision was upheld in a recent decision of the French Supreme Court, and is thus final and definitive.¹⁰⁸⁴
545. In the instant case, the relevant proceedings were highly complex, and therefore the duration of the proceedings was entirely justified. For example, given the numerous factual issues requiring investigation, the pre-trial proceedings in relation to each of the Criminal Proceedings have required numerous investigative procedures to be carried out.¹⁰⁸⁵ These investigative procedures include, among others, conducting several on-site inspections of the mines from which the gold was allegedly sourced, taking statements from numerous witnesses, and preparing complex and voluminous

¹⁰⁸¹ **RL-0208**, *Kyrgyz Republic* (Decision), pp. 4, 9.

¹⁰⁸² **RL-0208**, *Kyrgyz Republic* (Decision), p. 9.

¹⁰⁸³ **RL-0208**, *Kyrgyz Republic* (Decision), p. 9.

¹⁰⁸⁴ **RL-0166**, *Kyrgyz Republic v. Valeri Belokon*, Judgment No. 17-17.981 of the Paris Court of Cassation, 23 March 2022.

¹⁰⁸⁵ See Section II.C above.

expert evidence.¹⁰⁸⁶ The prosecutorial authorities and courts have also had to issue multiple requests for information from various public institutions.¹⁰⁸⁷ For example, the [REDACTED] Criminal Proceeding alone has required 36 such investigative procedures.¹⁰⁸⁸

546. To compound the above complexities, the Criminal Proceedings were adversely affected by the Covid-19 pandemic. As explained in **Section II.C.5** above, this exceptional event required the Executive Council of the Judiciary to suspend deadlines in all cases before the Peruvian courts for an entire year, from March 2020 to March 2021.¹⁰⁸⁹ This circumstance naturally delayed the progress of the Criminal Proceedings.

547. Despite all of the complexities and difficulties described above, the evidence shows that the Peruvian courts diligently advanced the Criminal Proceedings. The legal standard to move to each of the various stages in the criminal process has been met in all Criminal Proceedings.¹⁰⁹⁰ Additionally, Prof. Missiego confirms in his report that the duration of the Criminal Proceedings and the Precautionary Seizures in the Criminal Proceedings is not unusual in Peru, particularly in cases involving complex crimes and a large number of defendants.¹⁰⁹¹

(iii) *Kaloti's intervention requests were unjustified and not in accordance with Peruvian law*

548. Kaloti also argues that “[m]ultiple requests made by, or on behalf or for the benefit of KML, were simply *de facto* ignored by Peru.”¹⁰⁹² To support that statement, Kaloti lists 11 requests that it made to various authorities (identified below) either to lift the

¹⁰⁸⁶ See Section II.C above.

¹⁰⁸⁷ See Section II.C above.

¹⁰⁸⁸ See **Ex. R-0145**, Resolution No. 1: Order Initiating Criminal Proceedings, [REDACTED] Case, 14 May 2015, pp. 21–24.

¹⁰⁸⁹ Missiego Report, ¶123.

¹⁰⁹⁰ See **Section II.C** above.

¹⁰⁹¹ Missiego Report, ¶ 124.

¹⁰⁹² Memorial, ¶ 115.

SUNAT Immobilizations or the Precautionary Seizures, or to allow access to investigation files in relation to the criminal investigations against the Suppliers (“Kaloti’s Intervention Requests”).¹⁰⁹³

549. As Peru demonstrated in **Sections II.B.4 and II.C.4** above, each and every one of Kaloti’s Intervention Requests was unsupported and failed to comply with Peruvian law. To recall, four of the requests listed by Kaloti were allegedly made to SUNAT,¹⁰⁹⁴ four to the Prosecutor’s Office,¹⁰⁹⁵ and the remaining three to the Criminal Courts.¹⁰⁹⁶ In the paragraphs that follow, Peru will address each set of requests in turn.
550. *First*, regarding the requests allegedly issued to SUNAT, one of them can be immediately disregarded because it was not, in fact, made to SUNAT, or indeed to any Peruvian State agency. Rather, it was made to a private party, namely ██████ which was the company that managed the storage facilities where Shipments 1 to 4 were stored during the SUNAT Immobilizations.¹⁰⁹⁷ With respect to the remaining three requests, which sought to persuade SUNAT to lift the SUNAT Immobilizations, there was no basis to grant such requests. SUNAT would only have been authorized under Peruvian law to lift the SUNAT Immobilizations if it had been determined that

¹⁰⁹³ Memorial, ¶ 115.

¹⁰⁹⁴ **Ex. C-0065**, ██████. Proprietary Excluding Intervention submitted by ██████ in favor of KML, December 27, 2013; **Ex. C-0082**, ██████. Notarized petition submitted by ██████ Gold Corporation requesting the lift of immobilization order No. 316-0300-2014-000110, January 20, 2014; **Ex. C-0083**, ██████. Petition submitted by ██████ requesting the lift of immobilization order No. 316-0300-2014-000002, January 21, 2014; **Ex. C-0084**, ██████. Inform N° 303-2014-SUNAT-3X3200, April 09, 2014.

¹⁰⁹⁵ **Ex. C-0086**, ██████. KML appeal as the legitimate owner of the gold in the money laundering investigation against ██████ April 16, 2014; **Ex. C-0089**, ██████. Petition submitted by KML before the Ninth Provincial Prosecutor’s Office of Callao, April 29, 2014; **Ex. C-0092**, ██████. Petition submitted by KML before the Eleventh Provincial Prosecutor’s Office of Callao, August 05, 2014; **Ex. C-0093**, ██████. Petition submitted by KML before the Ninth Provincial Prosecutor’s Office of Callao, August 05, 2014.

¹⁰⁹⁶ **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*].

¹⁰⁹⁷ **Ex. C-0065**, ██████. Proprietary Excluding Intervention submitted by ██████ in favor of KML, December 27, 2013.

the origin of the gold was lawful. However, as discussed in **Section II.B.6** above, not only was no such determination made, but to the contrary, it was decided rather that a criminal proceeding was warranted. For that reason, SUNAT lacked the power to lift the SUNAT Immobilizations. SUNAT could not have been expected to disregard Peruvian law. Its decision not to lift the SUNAT Immobilizations – which was made in full compliance with Peruvian law – does not constitute a denial of justice.

551. *Second*, as discussed in **Section II.C.4** above, Kaloti’s four requests filed with the Prosecutor’s Office – which sought the lifting of the Precautionary Seizures with respect to Shipments 1 to 4 and access to the investigation files with respect to the Suppliers – were not made in accordance with Peruvian law. This was because, *inter alia*: (i) the Prosecutor’s Office lacks the legal authority to grant or lift a precautionary seizure that has been imposed by a criminal court;¹⁰⁹⁸ (ii) Peruvian law establishes that only investigated parties may have access to investigation files, and Kaloti was not a party to any of the relevant investigations;¹⁰⁹⁹ and (iii) Kaloti asked the Prosecutor to rely on evidence submitted to it with respect to its alleged ownership of one of the seized shipments, despite the fact that ownership of the gold was irrelevant to the issue of whether such gold was suspected to be connected with criminal activity, and whether a seizure order was justified.¹¹⁰⁰ Thus, as was the case with respect to the requests to SUNAT, there was no basis for the Prosecutor’s Office to grant Kaloti’s requests.

552. *Third*, Kaloti’s requests to the Peruvian Criminal Courts were similarly unfounded. Such requests disregarded Peruvian law insofar as they ignored the specific judicial remedies that are available under Peruvian law to third parties to intervene in criminal proceedings or to assert property rights over seized assets. In other words, Kaloti

¹⁰⁹⁸ Missiego Report, ¶139.

¹⁰⁹⁹ Missiego Report ¶, 135.

¹¹⁰⁰ See **Section II.C** above. See also **Ex. C-0092**, [REDACTED]. Petition submitted by KML before the Eleventh Provincial Prosecutor’s Office of Callao, August 05, 2014; **Ex. C-0093**, [REDACTED]. Petition submitted by KML before the Ninth Provincial Prosecutor’s Office of Callao, August 05, 2014; Missiego Report, ¶ 102; **Ex. R-0223**, Law No. 9024, Criminal Procedure Code, 23 November 1939 [Re-submitted version of CL-0006, with Respondent’s translations], Art. 94.

invented its own legal remedy, by simply sending letters to the Criminal Courts asking that such courts lift the Precautionary Seizures.

553. As explained in **Section II.C.4**, the Supreme Court expressly established in 2010 that “a third party who claims to be the owner of a seized asset and has not participated in the crime, . . . may request the reexamination of the precautionary seizure, in order to have it lifted and the asset released. . . [or] may directly seek an appeal.”¹¹⁰¹ Kaloti, however, did not pursue any of these alternatives under Peruvian law. In fact, two of the three requests did not even invoke Peruvian law, but rather referred solely to protections under the Treaty and international law.¹¹⁰² In any event, Kaloti’s requests and allegations were unsubstantiated. For example, Kaloti justified one request based on the fact that Kaloti had not been included in the Prosecutor’s Office criminal complaint. However, this argument ignored the fact that, as mentioned, the type of precautionary measures at issue are *in rem* measures adopted with respect to gold that was suspected of having been illegally mined or being involved in a money laundering scheme. The involvement of the owner(s) of the gold in the relevant criminal investigation or proceeding is irrelevant. Thus it did not matter at all that Kaloti was not a defendant in the underlying criminal proceedings.¹¹⁰³ Additionally, Kaloti argued that it was the owner of the gold, but did not provide any evidence to the Criminal Courts regarding its alleged property rights over such gold.¹¹⁰⁴

¹¹⁰¹ **Ex. R-0152**, Plenary Agreement No. 5-2010/CJ-116, 16 November 2010, p. 6 (“*el tercero que alegue ser propietario de un bien incautado y que no ha intervenido en el delito. . . puede solicitar el reexamen de la medida de incautación, a fin de que se levante y se le entregue el bien de su propiedad . . . [o] intentar derechamente la apelación.*”).

¹¹⁰² See **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].

¹¹⁰³ See **Section II.C**; see also **Ex. C-0013**, Petition before the *Sexto Juzgado Penal del Callao*.

¹¹⁰⁴ **Exs. 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].

(iv) The Challenged Measures were taken in pursuance of legitimate public policy objectives

554. As noted above,¹¹⁰⁵ in analyzing an alleged breach of MST, tribunals must consider the legitimacy of the objectives that are being pursued by States when enacting measures that might affect a foreign investment. Tribunals must also pay due deference to the State's discretion to determine appropriate measures to address such objectives.¹¹⁰⁶
555. In this case, the SUNAT Immobilizations and the Precautionary Seizures were issued in the context of Peru's efforts to eradicate the scourge of illegal mining and associated criminal activities, including money laundering. These actions were taken in accordance with the regulatory framework that Peru had established – before Kaloti invested in Peru, and before the Challenged Measures were adopted – to tackle such crimes, and to safeguard public interests such as public health, personal safety, tax collection, environment, and the development of sustainable economic activities.¹¹⁰⁷
556. As the evidence discussed earlier in this section shows, Peru's actions were designed and applied to pursue the above-mentioned objectives. For example, SUNAT temporarily immobilized Shipments 1 to 4 in order to verify that the origin of the relevant gold was lawful, and the shipments' compliance with tax and customs requirements.¹¹⁰⁸ The Prosecutor's Office, in turn, conducted thorough investigations in order to gather evidence regarding the Supplier's potential commission of money laundering offenses in connection with illegal mining. These are crimes which, as discussed in **Section II.A** above, have had—and continue to have—a deeply pernicious impact on the Peruvian citizenry. Finally, the reason that the Criminal Courts granted the Precautionary Seizures was the legitimate one of avoiding the

¹¹⁰⁵ See **Section IV.A.1**.

¹¹⁰⁶ See **Section IV.A.1**.

¹¹⁰⁷ See **Section IV.A**.

¹¹⁰⁸ See **Section II.B**.

dissipation of evidence and assets that were suspected of being proceeds of crime, and thereby to protect the integrity of the Criminal Proceedings.¹¹⁰⁹

* * *

557. In conclusion, Peru has demonstrated in this Section that SUNAT, as well as the Peruvian prosecutorial and judicial authorities involved in the Precautionary Seizures acted reasonably, proportionally, and in accordance with their respective competencies under Peruvian law. Kaloti has not demonstrated any systemic failure of Peru's judicial system. Nor has Kaloti established that any of the measures, whether considered individually or in the aggregate, amount to a denial of justice. Indeed, Kaloti's invocation of the concept of a composite act is a mere expedient designed to salvage its unmeritorious claim. Peru's reasonable and justified measures do not somehow configure a denial of justice merely through aggregation. In any event, as explained in **Section IV.A.2** above, Kaloti has failed to show that the Challenged Measures had any common denominator, or a part of an underlying pattern or purpose, such that they should be considered to be a composite act for the purposes of international law. For all of these reasons, Kaloti's claims fail to meet the high threshold applied by arbitral tribunals to find a denial of justice in breach of the MST Provision.

4. *Kaloti's FET claim regarding discrimination courts fails as a matter both of law and of fact*

558. Kaloti alleges that Peru discriminated against it, in breach of the MST Provision. According to Kaloti, Peru "denied KML fair and equitable treatment by treating similarly-situated investors differently in judicial proceedings."¹¹¹⁰ In particular, Kaloti alleges that Peru treated Curaçaoan company Aram differently than Kaloti. Specifically, it claims that "[t]he Peruvian courts allowed Aram to assert its rights" with respect to certain gold shipments that it had purchased ("**Aram Shipments**"),

¹¹⁰⁹ See **Section II.C.2**.

¹¹¹⁰ Memorial, § IV.B.c.

and “ordered SUNAT to return the gold that SUNAT had seized from Aram.”¹¹¹¹ Kaloti asserts that, by contrast, “KML was never even allowed to participate in the legal proceedings in which its gold was at stake.”¹¹¹² Kaloti’s claim therefore appears to be based on the assertion that Aram was able to assert rights before the Peruvian courts and obtain a judicial order for the return of its gold, whereas none of Kaloti’s Intervention Requests – which were discussed in the previous Section – were upheld.

559. Kaloti’s claim is both legally and factually flawed. In the discussion below, Peru (a) addresses the legal standard that applies to FET-based discrimination claims, (b) describes the factual background to Kaloti’s claim, and (c) explains why Peru has not breached the applicable legal standard.

a. The legal standard for FET-based discrimination

560. As an initial matter, Peru notes that Kaloti has styled its claim of discrimination as a breach of the FET requirement under the MST Provision. With respect to FET-based discrimination claims, tribunals have consistently used a three-part test, as follows. *First*, the investor must identify a similarly-situated comparator; i.e., an entity that was in “like circumstances” at the time of the relevant treatment.¹¹¹³ As explained by the tribunal in *Invesmart v. Czech Republic*, the requirement cannot be limited to singling out isolated points of resemblance. In addressing the question of whether certain banks that had requested State aid were similarly situated, the tribunal explained the following:

The question . . . 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. The comparators must be similarly placed in**

¹¹¹¹ Memorial, ¶ 122.

¹¹¹² Memorial, ¶ 123.

¹¹¹³ **RL-0058**, *Crystallex (Award)*, ¶ 616. See also **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)*”), ¶ 8.54.

the market and the circumstances of the request for state aid **must be similar.**¹¹¹⁴ (Emphasis added)

561. The investor must therefore conduct a fact-specific analysis of the exact circumstances surrounding the treatment of the investment in the context of the measure that the investor is challenging. As explained by the tribunal in *Total v. Argentina*, “[t]he elements that are at the basis of likeness vary depending on the legal context in which the notion has to be applied and the specific circumstances of any individual case.”¹¹¹⁵ As a result, the mere fact that two entities are engaged in the same business sector has been deemed insufficient to satisfy the requirement of like circumstances.¹¹¹⁶
562. *Second*, the investor must show that its covered investment was treated less favorably than the comparable investment¹¹¹⁷ and that such differential treatment had adverse effects on the investor’s investment.¹¹¹⁸
563. *Third*, even if the investor manages to identify an appropriate comparator and shows less favorable treatment by the State, the State’s measures will not constitute discrimination unless the investor can establish that the difference in treatment lacked

¹¹¹⁴ **RL-0092**, *Invesmart, B.V. v. Czech Republic*, UNCITRAL, Award, 26 June 2009 (Pryles, Thomas, Bernardini) (“**Invesmart (Award)**”), ¶ 415.

¹¹¹⁵ **RL-0015**, *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability, 27 December 2010 (Sacerdoti, Alvarez, Marcano) (“**Total (Decision on Liability)**”), ¶ 210. *See also* **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, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009 (Pryles, Caron, McRae) (“**Cargill (Award)**”), ¶¶ 203, 206.

¹¹¹⁶ **RL-0038**, *Rusoro Mining (Award)*, ¶ 563. *See also* **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) (“**Bayindir (Award)**”), ¶ 402.

¹¹¹⁷ **RL-0006**, *Cargill (Award)*, ¶ 228.

¹¹¹⁸ **RL-0091**, *Apotex (Award)*, ¶ 8.21 (“[T]he Tribunal considers that the treatment complained of must have some not-insignificant practical negative impact in order to lead to a breach of NAFTA Articles 1102 or 1103.”); **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), ¶ 80 (“To the extent that a practical impact must be shown, the Tribunal notes that the Investor has identified the adverse effects it believes arise from the treatment received, and thus also meets this particular test, subject, of course, to proving the actual extent of those effects and the adverse consequences that ensue, if any.”).

“reasonable justification.”¹¹¹⁹ As explained by the tribunal in *Quiborax v. Bolivia*, “there are situations that may justify differentiated treatment, a matter to be assessed under the specific circumstances of each case.”¹¹²⁰ For example, the tribunal in *Enron v. Argentina* rejected a discrimination claim after failing to identify “any capricious, irrational or absurd differentiation in the treatment accorded to the Claimants as compared to other entities or sectors.”¹¹²¹

564. An investor alleging discrimination has the burden of proof to establish that each of the above elements is satisfied.¹¹²² However, as the remainder of this section will show, Kaloti has not satisfied any of the above elements.

b. The factual background to Kaloti’s discrimination claim

565. In support of its assertion that it was treated less favorably than Aram, Kaloti relies on two Peruvian court judgments. Those judgments related to an interim measure that had been imposed by SUNAT over the Aram Shipments. Such shipments were in the process of being supplied to Aram by a company called Mining & Energy Solutions SAC (“**Mining & Energy Solutions**”).¹¹²³ Aram attempted to invoke its property rights over the Aram Shipments, by filing before SUNAT an objection of *intervención excluyente de propiedad* (“exclusive property intervention”), pursuant to Article 120 of the Peruvian Tax Code.¹¹²⁴ SUNAT rejected Aram’s objections, Aram appealed

¹¹¹⁹ **CL-0025**, *Saluka Investments BV v. Czech Republic*, Partial Award (17 March 2006), PCA—UNCITRAL, IIC 210 (2006), ¶ 313.

¹¹²⁰ **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) (“**Quiborax (Award)**”), ¶ 247.

¹¹²¹ **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) (“**Enron (Award)**”), ¶ 282. See also **RL-0097**, *Plama* (Award), ¶ 184.

¹¹²² **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.

¹¹²³ Memorial, ¶ 122.

¹¹²⁴ **Ex. R-0206**, Supreme Decree No. 133-2013-EF, Tax Code, 22 June 2013, Art. 120 (“The third party who is the owner of the seized property may file an property excluding intervention with the Coercive Executor at any time before the auction of the assets begins” (“*El tercero que sea propietario de bienes embargados, podrá interponer Intervención Excluyente de Propiedad ante el Ejecutor Coactivo en cualquier momento antes que se inicie el remate del bien.*”)).

SUNAT's decisions before the Tax Tribunal, and the Tax Tribunal found in Aram's favor.¹¹²⁵

566. The two decisions relied on by Kaloti to support its discrimination claim relate to the two judgments that resulted from SUNAT's appeal against the decision of the Tax Tribunal in favor of Aram. Specifically, such judgments were: (i) Resolution No. 14 of the *Vigésimo Juzgado Especializado contencioso administrativo de Lima*, dated 15 October 2020 ("**Resolution No. 14**") (which rejected SUNAT's appeal against the above-mentioned decision of the Tax Tribunal);¹¹²⁶ and (ii) Resolution No. 21 of the 6th Contentious Administrative chamber of the Lima Superior Court ("**Resolution No. 21**") (which confirmed Resolution No. 14).¹¹²⁷ The Tax Tribunal and the courts that rendered Resolutions No. 14 and No. 21 all found that they were bound by a decision issued by the *Cuarta Sala Penal* of the Superior Court of Justice of Callao on 31 May 2018 ("**31 May 2018 Decision**"), which had determined that Aram was the owner of the Aram Shipments, and had ordered that such shipments be returned to Aram.¹¹²⁸
567. As discussed in the sections that follow, Kaloti's discrimination argument based on Resolution No. 14 and Resolution No. 21 fails to satisfy the above-mentioned three-limb test for discrimination in breach of FET.

¹¹²⁵ **Ex. C-0111**, Resolution N° 14 of the 20th Specialized Contentious-Administrative Court of Lima (Sub-specialty in tax and customs matters) of the Superior Court of Justice of Lima, file N° 08717-2019-0-1801-JR-CA-20, ¶¶ 3.3-3.7, 8.

¹¹²⁶ **Ex.C-0111**, Resolution N° 14 of the 20th Specialized Contentious-Administrative Court of Lima (Sub-specialty in tax and customs matters) of the Superior Court of Justice of Lima, file N° 08717-2019-0-1801-JR-CA-20.

¹¹²⁷ **Ex. C-0112**, Resolution N° 21 of the 6th Specialized Court in Administrative Litigation of Lima (Sub-specialty in tax and customs matters) of the Superior Court of Justice of Lima, file No. 8717-2019.

¹¹²⁸ **Ex. C-0111**, Resolution N° 14 of the 20th Specialized Contentious-Administrative Court of Lima (Sub-specialty in tax and customs matters) of the Superior Court of Justice of Lima, file N° 08717-2019-0-1801-JR-CA-20, ¶¶ 5.22-5.24.

c. Kaloti has not identified a similarly situated comparator

568. With respect to the first limb of the test (viz., the requirement to identify a similarly situated comparator), Kaloti contents itself with the assertion that Aram was a gold purchaser “[l]ike KML”,¹¹²⁹ and that both companies had “gold seized under temporary immobilization orders” in connection with criminal investigations.¹¹³⁰ However, such assertions fall well short of the requisite standard, which requires that the investor demonstrate that there is “a broad coincidence of similarities covering a range of factors,” that the comparators are “similarly placed in the market”, and that the “circumstances” of the relevant treatment are “similar.”¹¹³¹ In other words, it does not suffice for Kaloti simply to note that both companies had their gold seized in the context of criminal investigations.
569. Kaloti glosses over crucial differences that make it clear that Aram was in fact *not* similarly situated to Kaloti at the time of the relevant treatment by the Peruvian courts. Such differences include those discussed below.
570. *First:* While the Aram Shipments and the Shipments 1 to 4 had both been subject to measures by SUNAT, the circumstances surrounding the respective measures were different. The Aram Shipments were seized due to suspected false information on the tax returns of Mining & Energy Solutions.¹¹³² By contrast, Shipments 1 to 4 were immobilized by SUNAT on account of concerns regarding potential money-laundering and illegal mining, as well as the Suppliers’ failure to verify the origin of the relevant shipments.
571. *Second:* SUNAT’s seizures of the Aram Shipments were carried out in accordance with SUNAT’s powers with respect to taxation under Article 56 of the Peruvian Tax Code (*medidas cautelares previas al procedimiento de cobranza coactiva*). SUNAT’s immobilizations of Shipments 1 to 4, on the other hand, were carried out in

¹¹²⁹ Memorial, ¶ 121.

¹¹³⁰ Memorial, ¶ 123.

¹¹³¹ **RL-0092**, *Invesmart* (Award), ¶ 415.

¹¹³² **Ex. R-0234**, SUNAT Coercive Enforcement Resolution No. 0230072627598, 27 February 2014.

accordance with a different set of powers, namely SUNAT's customs powers under Article 165 of the General Customs Law.

572. *Third:* With respect to Shipment 5, the seizure of that shipment did not even involve SUNAT, but rather was ordered by the Lima Civil Court, in the context of a private contractual dispute between Kaloti and ██████.¹¹³³ It is thus indisputable that the procedure governing the immobilization of the Aram Shipments, on the one hand, and the Five Shipments, on the other hand, were materially and markedly different.
573. *Fourth:* the applicable legal regime with respect to Kaloti and Shipments 1 to 4 on the one hand, and Aram and the Aram Shipments on the other, was entirely different. The pursuit by Aram of its rights with respect to the Aram Shipments was subject to the Tax Tribunal's powers under the Tax Code, whereas the consideration of Kaloti's attempts to intervene in the Criminal Proceedings took place in the context of (i) SUNAT's powers with respect to customs administration; and (ii) the Peruvian Prosecutor's and Peruvian criminal courts' competencies with respect to criminal investigations and procedures.
574. *Fifth:* As a consequence of the different circumstances described above, the legal rights of Aram and Kaloti were also different. Aram's objection to the relevant seizures by SUNAT was raised and filed pursuant to Article 120 of the Tax Code. That provision allows third parties to intervene in coercive tax debt collection procedures (*procedimiento de cobranza coactiva*) to present a motion to suspend the auctioning of the assets (*intervención excluyente de propiedad*).¹¹³⁴ By contrast, such procedure was not available to Kaloti with regard to Shipments 1 to 4, for the following reason. As explained in **Section II.B**, SUNAT had immobilized Shipments 1 to 4 pursuant to the

¹¹³³ See **Section II.C.6**.

¹¹³⁴ **Ex. R-0206**, Supreme Decree No. 133-2013-EF, Tax Code, 22 June 2013, Art. 120 ("The third party who is the owner of the seized property may file an property excluding intervention with the Coercive Executor at any time before the auction of the assets begins" ("*El tercero que sea propietario de bienes embargados, podrá interponer Intervención Excluyente de Propiedad ante el Ejecutor Coactivo en cualquier momento antes que se inicie el remate del bien.*")).

General Customs Law,¹¹³⁵ and ultimately concluded that the Suppliers had failed to establish the lawful origin of Shipments 1 to 4.¹¹³⁶ Because the SUNAT Immobilizations were unrelated to tax debt collection procedures, the type of motion used by Aram (under Article 120 of the Tax Code) was not applicable. Similarly, the Article 120 procedure was not available to Kaloti with regard to the precautionary measure over Shipment 5, as that measure was granted by a civil court in the context of a contractual dispute between █████ and Kaloti;¹¹³⁷ it was therefore entirely unrelated to SUNAT's function as tax authority. In short, due to the differing circumstances of the seizures of the Aram Shipments, on the one hand, and the Five Shipments, on the other, the procedure used by Aram under Article 120 of the Tax Code was not available to Kaloti.

575. In sum, neither Aram nor the Aram Shipments were “similarly situated” to Kaloti or the Five Shipments, respectively, at the time of the alleged discriminatory treatment. Aram is therefore not a valid comparator, and Kaloti's discrimination claim falls at the first hurdle.

¹¹³⁵ **Ex. R-0091**, SUNAT Immobilization Order No. 316-0300-2013-001497, 29 November 2013 (included in █████ 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 █████ 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 █████ Criminal Proceedings) [*Re-submitted legible version of C-0040*]; **Ex. R-0094**, SUNAT Immobilization Lifting Order No. 316-0300-2014-000111, 10 January 2014 (included in █████ 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 █████ Shipment); **Ex. R-0096**, SUNAT Immobilization Order No. 316-0300-2014-000020, 9 January 2014 (included in █████ 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 █████ Criminal Proceedings) [*Re-submitted legible version of C-0040*]; **Ex. R-0098**, SUNAT Immobilization Record No. 316-0300-2014-000022, 9 January 2014 (included in █████ Criminal Proceedings) [*Re-submitted legible version of C-0040*].

¹¹³⁶ See **Section II.B.3**.

¹¹³⁷ **Ex. R-0201**, Criminal Complaint, █████ Case, 13 July 2015; see also **Section II.C.6**.

d. In any event, Kaloti was not treated less favorably than Aram

576. Regarding the second limb of the test for discrimination under FET (i.e., less favorable treatment), the evidence contradicts Kaloti's allegation that it was treated less favorably by Peru than Aram. In the Memorial, Kaloti gives only a partial and selective account of the facts concerning Aram. Importantly, Kaloti fails to mention either of the following key facts: (i) that the Aram Shipments, like Shipments 1 to 4, were subject to criminal proceedings and precautionary seizures issued by the Criminal Courts; and (ii) that in the end the Aram Shipments were in fact *not* returned to Aram, and such shipments have been permanently confiscated.
577. The complete relevant chronology – which Kaloti elided from the Memorial – is the following: In December 2013, the Aram Shipments were subject to immobilization by SUNAT, to verify the origin of the goods.¹¹³⁸ In 2014 and 2015, the Prosecutor's Office initiated criminal proceedings against Mining & Energy Solutions, and the Criminal Courts ordered the seizure of the Aram Shipments.¹¹³⁹ On 1 September 2020, the Prosecutor's Office requested the forfeiture (*proceso de extinción de dominio*) of Mining & Energy Solutions's gold assets, including the Aram Shipments, on the basis that such assets were the product of illegal mining and/or money laundering.¹¹⁴⁰ Such forfeiture request was granted by the *Juzgado Especializado en Extinción de Dominio* (a court specializing in forfeiture proceedings).¹¹⁴¹ Aram raised a *res judicata* objection, relying on the above-mentioned 31 May 2018 Decision (which had ordered the return of the gold assets to Aram).¹¹⁴² However, Aram's objection failed, and the appellate

¹¹³⁸ **Ex. R-0207**, Resolution No. 83, Judgment, Court Specialized in Asset Forfeiture of Lima, 26 January 2022, p. 2.

¹¹³⁹ **Ex. R-0207**, Resolution No. 83, Judgment, Court Specialized in Asset Forfeiture of Lima, 26 January 2022, p. 2.

¹¹⁴⁰ **Ex. R-0207**, Resolution No. 83, Judgment, Court Specialized in Asset Forfeiture of Lima, 26 January 2022, pp. 3-4.

¹¹⁴¹ **Ex. R-0207**, Resolution No. 83, Judgment, Court Specialized in Asset Forfeiture of Lima, 26 January 2022, p. 64.

¹¹⁴² **Ex R-0209**, Resolution No. 95, Hearing Judgment, Transitory Appeals Chamber Specialized in Asset Forfeiture of Lima, 26 April 2022, p. 16.

court noted that the 31 May 2018 Decision had been procured through corruption.¹¹⁴³ As a result, the appellate court *confirmed the forfeiture* (i.e., the permanent confiscation) of the Aram Shipments on 26 April 2022.¹¹⁴⁴ In short, Aram in the end did not have its shipments returned to it.

578. The foregoing demonstrates that Peru's treatment has *not* placed Kaloti in a less favorable position than Aram. In fact, the opposite is true: Aram is in a *less* favorable position than Kaloti, insofar as the gold to which it laid claim has been permanently confiscated which is not the case with Kaloti's gold, as explained in Section II.C above.

579. A further reason why Kaloti's allegation that it was treated less favorably than Aram is untenable is that, as noted above, there are significant differences between the two companies, which rendered them dissimilarly situated. As a result, while Kaloti's treatment may have been different in some respects, that is attributable only to the fact that different legal regimes and circumstances applied to Kaloti and Aram, respectively. Moreover, as discussed below, it was precisely due to the nature of those differences that any differential treatment was fully justified. And in any event, any such differences in treatment were narrow in scope; none of them alters the key fact mentioned above; that when all of the legal processes had concluded, Aram ended up in a worse situation than Kaloti; arguably, therefore, if anyone received more favorable treatment here, it was Kaloti itself. Kaloti's discrimination claim therefore fails, and must be dismissed.

e. Any differential treatment was objectively justified

580. To the extent Aram and Kaloti were treated differently, such differential treatment was objectively justified. *First*, as noted above, Aram's and Kaloti's gold shipments were subject to measures that were taken by SUNAT under different legal regimes and pursuant to different powers. Aram and Kaloti accordingly possessed different

¹¹⁴³ Ex R-0209, Resolution No. 95, Hearing Judgment, Hearing Judgment, Transitory Appeals Chamber Specialized in Asset Forfeiture of Lima, 26 April 2022, pp. 35-36, 38.

¹¹⁴⁴ Ex R-0209, Resolution No. 95, Hearing Judgment, Hearing Judgment, Transitory Appeals Chamber Specialized in Asset Forfeiture of Lima, 26 April 2022, pp. 46-47.

procedural rights for challenges to SUNAT's measures. As noted above, this meant that Aram had the right to pursue an action under Article 120 of the Peruvian Tax Code, whereas Kaloti did not. The fact that Kaloti did not possess the same rights as Aram to challenge SUNAT's measures did not represent a "capricious, irrational or absurd differentiation";¹¹⁴⁵ rather, it was merely the consequence of the differences between the respective legal regimes that were applicable to the Aram Shipments and the Five Shipments, respectively.

581. *Second*, while Aram pursued its available rights under the correct procedure under Peruvian law, Kaloti's Intervention Requests lacked substantiation, and were not made in accordance with Peruvian law.¹¹⁴⁶ Thus, Peru was objectively justified in not upholding Kaloti's Intervention Requests. Kaloti's discrimination claim therefore fails to satisfy the third limb of the applicable legal test, and for that reason, too, should be dismissed.

5. *Kaloti's FET claim regarding the Parties' negotiations fails as a matter of law and fact*

582. Kaloti argues that "[u]nder the TPA, the State has an affirmative obligation to engage in substantive discussion with a claimant in relation to a potential dispute."¹¹⁴⁷ It further claims that Peru "refus[ed] to engage in discussions with KML following the receipt of the notice of dispute [of 8 April 2019]," and that such alleged refusal "represents a denial of fair and equitable treatment."¹¹⁴⁸

583. Kaloti's arguments fail for two main reasons: (i) contrary to what Kaloti contends, neither the Treaty nor the MST imposed on Peru any "affirmative obligation to engage in substantive discussion" in the dispute *sub judice*; and (ii) in any event, and also contrary to Claimant's allegations, Peru *did* in fact "engage in discussions with KML

¹¹⁴⁵ **RL-0096**, *Enron* (Award), ¶ 280.

¹¹⁴⁶ See Sections II.B, II.C, IV.A.3 above.

¹¹⁴⁷ Memorial, ¶ 127.

¹¹⁴⁸ Memorial, § IV.B.c.e.

following receipt of the notice of dispute.”¹¹⁴⁹ Peru will address below in turn each of these two grounds for rejecting Kaloti’s claim.

a. Peru was under no obligation to enter into negotiations with Kaloti

584. As a threshold matter, Kaloti’s allegation fails as a matter of law because the obligation that it invokes simply does not exist under the Treaty. It is therefore unsurprising that Kaloti does not invoke any particular Treaty provision in support of its arguments, and does not otherwise attempt to specify the source of the alleged “affirmative obligation to engage in substantive discussions”¹¹⁵⁰
585. Kaloti initiated this arbitration under Treaty Article 10.16,¹¹⁵¹ which—unlike many investment treaties — contains no obligation to engage in consultations or negotiations prior to arbitration. Rather, Article 10.16 authorizes commencement of an arbitration “[i]n the event that a disputing party *considers* that an investment dispute cannot be settled.” (Emphasis added). Peru was thus under no obligation to undertake negotiations with Kaloti (but it nevertheless did so, as explained below and in **Section II.E**).
586. Since it is unable to invoke any Treaty provision as a source of the alleged obligation to engage in negotiations, Kaloti argues that such obligation derives from Peru’s “commitment of transparency and good faith.”¹¹⁵² But numerous tribunals have pointed out that there is no duty of transparency under MST.¹¹⁵³ For example, the award in *Metalclad v. Mexico* was set aside because “[n]o authority was cited or

¹¹⁴⁹ Memorial, § IV.B.c.e.

¹¹⁵⁰ Memorial, ¶ 127.

¹¹⁵¹ Request for Arbitration, ¶ 2.

¹¹⁵² Memorial, ¶ 128.

¹¹⁵³ **RL-0006**, *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009 (Pryles, Caron, McRae), ¶ 294. See also **RL-0007**, *Mobil Investments* (Decision), ¶ 168; **RL-0008**, *Vigotop Limited v. Republic of Hungary*, ICSID Case No. ARB/11/22, Award, 1 October 2014 (Sachs, Bishop, Heiskanen) (“*Vigotop (Award)*”), ¶ 585; **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 (van den Berg, Tawil, Vinuesa) (“*Mamacocha (USA Submission)*”), ¶ 28.

evidence introduced to establish that transparency has become part of customary international law.”¹¹⁵⁴ The annulment panel concluded that the tribunal had therefore “misstated the applicable law to include transparency obligations.”¹¹⁵⁵

587. Similarly, it is well established, including by the ICJ, that good faith “is not in itself a source of obligation where none would otherwise exist.”¹¹⁵⁶ Therefore, absent a specific obligation, a party “may not justifiably rely upon the principle of good faith in support of its submissions”.¹¹⁵⁷

588. Given all of the above, it is unsurprising that previous tribunals have rejected claims similar to the one raised by Kaloti here. For example, in *Roussalis v. Romania*, the claimant had asserted such a claim on the basis of a treaty provision that stated that disputes “shall, if possible, be settled by the disputing parties in an amicable way.”¹¹⁵⁸ The tribunal rejected the claim, noting that “[t]he Treaty neither imposes a legal duty on the state nor creates a legal right for the investor to negotiate a settlement.”¹¹⁵⁹

b. Kaloti’s claim is contradicted by the facts

589. In any event, even assuming *arguendo* that the Treaty and/or the MST did require that the respondent State enter into negotiations with the claimant (quod non), Kaloti’s claim would need to be rejected outright for the simple reason that Peru did in fact engage in good faith negotiations with Kaloti, as recalled below.

¹¹⁵⁴ **RL-0010**, *United Mexican States v. Metalclad Corp.*, BCSC Case No. L0022904, Reasons for Judgment of the Honourable Mr. Justice Tysoe, 2 May 2001 (Tysoe) (“**Mexico (Reason for Judgment)**”), ¶¶ 68, 70.

¹¹⁵⁵ **RL-0010**, *Mexico (Reason for Judgment)*, ¶¶ 68, 70.

¹¹⁵⁶ **RL-0011**, *Case Concerning Border and Transborder Armed Actions (Nicaragua v. Honduras)*, ICJ, Judgment, 20 December 1988, ¶ 94. See also **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 (Kaufmann-Kohler, Brower, Landau), ¶ 7.

¹¹⁵⁷ **RL-0013**, *Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, ICJ, Judgment, 11 June 1998, ¶ 39.

¹¹⁵⁸ **RL-0014**, *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award, 7 December 2011 (Hanotiau, Giardina, Reisman) (“**Roussalis (Award)**”), ¶ 43.

¹¹⁵⁹ **RL-0014**, *Roussalis (Award)*, ¶ 254.

590. Kaloti alleges that it “received no response from Peru” to its Second Notice of Intent,¹¹⁶⁰ and that, following such notice, Kaloti “tried to engage in good faith negotiations with Peru” but “Peru ignored KML’s approach.”¹¹⁶¹ However, neither of the two documents on which Kaloti relies (namely, Kaloti’s Second Notice of Intent and an email from KML to Peru dated 1 December 2020) demonstrate any refusal by Peru to engage in negotiations.¹¹⁶²
591. Contrary to Kaloti’s assertion that Peru “refus[ed] to engage in discussions with KML following the receipt of the notice of dispute [of 8 April 2019],”¹¹⁶³ by that date Peru had already made good faith efforts to resolve the dispute amicably, following receipt of the *First* Notice of Intent dated 6 May 2016. Specifically, as contemporaneous communications from the Special Commission to Kaloti demonstrate, Peru engaged in a process to “evaluate the possibility of a negotiation” and to “put an end to the dispute.”¹¹⁶⁴ As part of this process, (i) Peru met with Kaloti in January 2017,¹¹⁶⁵ (ii) considered Kaloti’s additional clarifications about, *inter alia*, the factual background of the claim and its suggestions for resolving the dispute, submitted in response to Peru’s queries, in February 2017,¹¹⁶⁶ and (iii) consulted internally with State entities that had been involved in the dispute or that were otherwise relevant.¹¹⁶⁷
592. Following such meetings and consultations, it became clear to Peru that Kaloti’s position manifestly lacked merit, and that insurmountable differences existed

¹¹⁶⁰ Memorial, ¶ 126.

¹¹⁶¹ Memorial, ¶ 83.

¹¹⁶² **Ex. C-0022**, KML April 8 2019, Notice of Intent; **Ex. C-0020**, Email between KML and Peru regarding negotiations.

¹¹⁶³ Memorial, § IV.B.e.

¹¹⁶⁴ **Ex. R-0032**, Letter No. 118-2017-EF/CE-36 from Special Commission (██████████) to Kaloti (A. Kaloti), 14 June 2017, p. 1.

¹¹⁶⁵ **Ex. R-0031**, Letter No. 19-2017-EF/CE.36 from Special Commission (██████████) to Kaloti (A. Kaloti), 1 February 2017, p. 1.

¹¹⁶⁶ **Ex. R-0030**, Letter from Kaloti (A. Kaloti) to Special Commission, 22 February 2017, pp. 1–5. *See Section II.E.*

¹¹⁶⁷ **Ex. R-0032**, Letter No. 118-2017-EF/CE-36 from Special Commission (██████████) to Kaloti (A. Kaloti), 14 June 2017, p. 1.

between the Parties' respective positions. Peru informed Kaloti of such conclusions in a letter dated 14 June 2017, adding that it remained open to receiving additional information or clarifications to restart the negotiation process, should that seem warranted.¹¹⁶⁸ However, Peru did not receive any response to its 14 June 2017 letter; instead, Kaloti proceeded directly to submit its Second Notice of Intent.

593. As explained in **Section II.E**, that Second Notice of Intent was based on the same factual allegations as the first one, and the legal arguments articulated in both were substantively the same. Accordingly, nothing had changed that would have rendered it sensible for Peru to reopen negotiations. In other words, absent new information or a change in position by Kaloti, the Parties' positions remained too far apart to reach an amicable resolution of the dispute, even after submission of the Second Notice of Intent.
594. Peru's exchanges with Kaloti prior to submission of the latter's Request for Arbitration confirm not only that Peru had in fact engaged in negotiations with Kaloti in response to the latter's initial notification of the dispute, but that indeed it had invested significant time and effort in doing so. During the period between January and June 2017, Kaloti was offered the opportunity to explain its position, both in person¹¹⁶⁹ and in writing.¹¹⁷⁰ In coordination with other entities, Peru's Special Commission duly considered Kaloti's position, and provided Kaloti with detailed reasons for its conclusions.¹¹⁷¹
595. In sum, the claim of alleged failure by Peru to comply with an alleged obligation to engage in negotiations fails because: (i) the claim is devoid of legal foundation, since, contrary to Claimant's position, neither the Treaty nor customary international law

¹¹⁶⁸ **Ex. R-0032**, Letter No. 118-2017-EF/CE-36 from Special Commission (██████████) to Kaloti (A. Kaloti), 14 June 2017, p. 2.

¹¹⁶⁹ **Ex. R-0031**, Letter No. 19-2017-EF/CE.36 from Special Commission (██████████) to Kaloti (A. Kaloti), 1 February 2017, p. 1; **Ex. R-0032**, Letter No. 118-2017-EF/CE-36 from Special Commission (██████████) to Kaloti (A. Kaloti), 14 June 2017, p. 1.

¹¹⁷⁰ **Ex. R-0030**, Letter from Kaloti (A. Kaloti) to Special Commission, 22 February 2017, pp. 1-5.

¹¹⁷¹ **Ex. R-0032**, Letter No. 118-2017-EF/CE-36 from Special Commission (██████████) to Kaloti (A. Kaloti), 14 June 2017, p. 1.

imposed any affirmative requirement to engage in negotiations in this particular dispute; and (ii) the claim is fatally flawed from a factual standpoint, insofar as Peru did in fact engage in good faith negotiations with Kaloti prior to submission of the Request for Arbitration.

B. Peru did not expropriate any investment by Kaloti

596. Kaloti argues that “Peru’s actions and omissions resulted in two distinct—but related—indirect expropriations,”¹¹⁷² and that Peru therefore breached the prohibition on unlawful expropriation contained in Article 10.7 of the Treaty. Specifically, Kaloti argues that (i) “Peru’s seizure of the five gold shipments constitutes an indirect expropriation of certain of KML’ [sic] **assets**” (emphasis added) and, (ii) that the seizure of the Five Shipments “constitute[d] an indirect expropriation of KML’s **business going concern.**”¹¹⁷³ (emphasis added) It argues that the latter alleged expropriation occurred because, Kaloti contends, “the gold seizures triggered a downward spiral in KML’s Peruvian business operations . . . from which the company never recovered.”¹¹⁷⁴
597. In particularizing these claims, Kaloti refers to a list of 16 alleged “actions and omissions” that, according to Kaloti, indirectly expropriated Kaloti’s “gold assets,”¹¹⁷⁵ and “brought about an indirect expropriation of the entirety of KML’s business operations.”¹¹⁷⁶ Such list includes, amongst others, the following four alleged acts: (i) the SUNAT Immobilizations, (ii) the Prosecutor’s Office’s mention of Kaloti in two documents relating to money laundering investigations, (iii) the Peruvian government’s alleged leak to the public of information about money-laundering

¹¹⁷² Memorial, ¶ 130.

¹¹⁷³ Memorial, ¶ 130.

¹¹⁷⁴ Memorial, ¶ 130.

¹¹⁷⁵ Memorial, ¶ 136.

¹¹⁷⁶ Memorial, ¶ 142.

investigations, and (iv) the decision of a Peruvian Criminal Court to allegedly “shut Claimant out” of criminal proceedings involving Kaloti’s Suppliers.¹¹⁷⁷

598. Kaloti’s list also includes the following three alleged omissions by Peru: (i) Peru’s failure to question, arrest or indict ██████████ in connection with money-laundering investigations (which Kaloti appears to suggest was somehow inconsistent with the inclusion of Kaloti within the scope of certain criminal investigations); (ii) Peru’s alleged failure to keep Kaloti informed with regard to the gold seizures, and (iii) Peru’s alleged failure to enter into negotiations with Kaloti following its Second Notice of Intent and Request for Arbitration.¹¹⁷⁸

599. Kaloti’s expropriation claims raise two preliminary issues. *First*, as is the case with Kaloti’s claims under the MST Provision, Kaloti appears to recognize that, taken alone, none of the above-mentioned alleged actions and omissions individually amounts to an indirect expropriation.¹¹⁷⁹ Nevertheless, Kaloti argues that such actions and omissions configured a “progressive and creeping expropriation,”¹¹⁸⁰ which it claims “materialized when KML was forced to terminate operations on November 30, 2018.”¹¹⁸¹ However, Kaloti fails to demonstrate that the acts and conduct attributable to Peru constitute a “creeping expropriation” i.e., a composite breach of the Expropriation Provision.

600. In order to establish a case of creeping expropriation, Kaloti must show that the measures on which its claim is premised constitute a composite act under public international law.¹¹⁸² Peru has summarized the customary international law principles

¹¹⁷⁷ Memorial, ¶ 136.

¹¹⁷⁸ Memorial, ¶ 136.

¹¹⁷⁹ Memorial, ¶ 137.

¹¹⁸⁰ Memorial, ¶¶ 85, 137.

¹¹⁸¹ Memorial, ¶ 131.

¹¹⁸² **CL-0018**, *Siemens A.G. v. Argentina*, ICSID Case No. ARB/02/8, Award (6 February 2007), ¶¶ 263–264 (“By definition, creeping expropriation refers to a process, to steps that eventually have the effect of an expropriation. . . . We are dealing here with a composite act in the terminology of the [ILC Commentary].”); **RL-0099**, Andrew Newcombe, *et al.*, LAW AND PRACTICE

regarding composite acts in **Section IV.A.2** above, in the context of Peru’s rebuttal of Kaloti’s FET claim.¹¹⁸³ Such principles on composite acts are equally applicable to Kaloti’s creeping expropriation claim. To recall, Kaloti must demonstrate that the actions or omissions which allegedly form the composite act are “sufficiently numerous and inter-connected to amount not merely to isolated incidents or exceptions but to a pattern or system.”¹¹⁸⁴ However, in this case Kaloti has manifestly failed to establish that the challenged actions are part of any system or pattern.¹¹⁸⁵ In fact, the only “pattern or system” in Peru’s conduct in this case was its overall effort to uphold its laws and safeguard its population against the adverse impacts of illegal mining and money-laundering. Consequently, both of Kaloti’s creeping expropriation claims—of its supposed assets and its business as a going concern— should be dismissed, because the relevant standard for a “composite act”—which is a prerequisite for a finding of creeping expropriation— has not been met.

601. *Second*, Kaloti’s expropriation claims merely rehash the same arguments that Kaloti had already made in the Memorial in purported support of its denial of justice claims under the MST Provision. As explained in **Section IV.A.3**, judicial decisions can only be challenged under international law on the basis that they constitute a denial of justice. As a result, judicial decisions cannot give rise to an expropriation claim as such under investment treaties. To recall, past international investment arbitration tribunals that have adjudicated simultaneous expropriation and denial of justice claims based on the same judicial measures have rejected the expropriation claims and have analyzed the investors’ claims solely under the standard applicable to denial of justice claims.¹¹⁸⁶ For example, in *Gramercy v. Peru*, which involved the very same

OF INVESTMENT TREATIES: STANDARDS OF TREATMENT (2009), § 7.15 (“State responsibility for creeping expropriation is reflected in the concept of a composite act, defined in Article 15(1) of the [ILC Commentary].”).

¹¹⁸³ See **Section IV.A.**

¹¹⁸⁴ **RL-0022**, ILC Commentary, Art. 15, ¶ 5 (quoting *Ireland v. United Kingdom*, ECHR, p. 64, ¶ 159). See **Section IV.A.2** above.

¹¹⁸⁵ See **Section IV.A.2** above.

¹¹⁸⁶ See **RL-0101**, *Manolium* (Award), ¶ 156.

Treaty at issue in the instant case, the United States – one of the two Parties to the Treaty – emphasized that “[j]udicial measures applying domestic law may give rise to a claim for denial of justice under Article 10.5 of the Agreement [the MST provision]”, but “[d]ecisions of domestic courts acting in the role of neutral and independent arbiters of the legal rights of litigants **do not, however, give rise to a claim for expropriation** under Article 10.7” (emphasis added).¹¹⁸⁷

602. In this case, as demonstrated in **Section IV.A.3** above, Kaloti has manifestly failed to meet the burden of establishing a denial of justice. Kaloti cannot purport to contest the same measures on the basis of a standard that is less stringent with respect to judicial measures (such as the expropriation standard) simply by styling its claim as one for expropriation. Accordingly, Kaloti’s expropriation claims must be dismissed.
603. As will be shown in the remainder of this section, Kaloti has in any event failed to meet the requirements applicable to indirect expropriations under the Treaty.

1. *The relevant requirements under the Expropriation Provision and Treaty Annex 10-B*

604. The first paragraph of the Expropriation Provision provides as follows:

No Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization (“expropriation”), except:

- (a) for a public purpose;
- (b) in a non-discriminatory manner;
- (c) on payment of prompt, adequate, and effective compensation; and
- (d) in accordance with due process of law and Article 10.5.

605. Pursuant to footnote 4 of Treaty Chapter 10, the Expropriation Provision “shall be interpreted in accordance with Annex 10-B.” Annex 10-B in turn distinguishes

¹¹⁸⁷ **RL-0103**, *Gramercy* (USA Submission), ¶ 28.

between direct and indirect expropriation, and articulates the following guidance for a tribunal to assess whether or not an *indirect* expropriation has taken place¹¹⁸⁸:

The Parties confirm their shared understanding that:

[. . .]

3. The second situation addressed by Article 10.7.1 is indirect expropriation, where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.

(a) The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors:

(i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;

(ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and

(iii) the character of the government action.

606. Paragraph 3 of Annex 10-B further specifies that non-discriminatory regulatory actions of a Treaty Party which are designed and applied to protect legitimate public welfare objectives do not constitute indirect expropriation:

Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect

¹¹⁸⁸ As explained by the United States regarding an identically-worded indirect expropriation provision in CAFTA, “[t]his paragraph is not an exception, but rather is intended to provide tribunals with additional guidance in determining whether an indirect expropriation has occurred.” **RL-0104**, Aaron C. Berkowitz, et al., (formerly Spence International Investments and others) v. Republic of Costa Rica, ICSID Case No. UNCT/13/2, Submission of the United States of America, 17 April 2015 (Bethlehem, Kantor, Vinuesa), ¶ 31. See also **RL-0009**, Mamacocha (USA Submission), ¶ 37; **RL-0106**, David R. Aven, et al., v. Republic of Costa Rica, ICSID Case No. UNCT/15/3, Submission of the United States of America, 2 December 2016 (Siqueiros, Baker, Nikken), ¶ 3.

legitimate public welfare objectives, such as public health, safety, and the environment, **do not constitute indirect expropriations**.¹¹⁸⁹ (Emphasis added)

607. Kaloti bears the burden of proving that its claim meets all the requirements of an indirect expropriation under the Expropriation Provision and under Treaty Annex 10-B.¹¹⁹⁰ Specifically, Kaloti would have to establish:

- *First*, that the rights that it claims were expropriated were “covered investment[s]”¹¹⁹¹ under the Treaty, and were vested in Kaloti under Peruvian law at the time of the alleged actions and omissions by Peru.
- *Second*, that a fact-based inquiry conducted in accordance with the requirements set out in the above-cited paragraph 3(a) of Treaty Annex 10-B leads to the preliminary conclusion that the contested measures indeed constitute an indirect expropriation. This fact-based inquiry must consider (i) the economic impact of the measures, (ii) the interference of the measures with “distinct, reasonable investment-backed expectations,” and (iii) the character of the measures.
- *Third*, that the measures adopted by Peru cannot be reasonably regarded as non-discriminatory regulatory actions that were designed and applied to protect legitimate public welfare objectives, such as the protection of the environment and public safety.¹¹⁹²

608. Kaloti has failed to show any of these factors with respect to any act or omission by Peru. As demonstrated below, Kaloti’s expropriation claim must be rejected because Kaloti has *not* demonstrated that:

¹¹⁸⁹ **RL-0001**, Treaty, Annex 10-B, ¶ 3(b).

¹¹⁹⁰ **RL-0008**, *Vigotop* (Award), ¶ 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.

¹¹⁹¹ **RL-0001**, Treaty, Art. 10.7.

¹¹⁹² **RL-0001**, Treaty, Annex 10-B, ¶ 3(b).

- a. It owned, in accordance with Peruvian law, the investments that it claims were expropriated (**Section IV.C.2**);
 - b. Peru's actions interfered with any "distinct, reasonable investment-backed expectations" held by Kaloti (**Section IV.C.3**);
 - c. Peru's acts or omissions permanently deprived Kaloti of its alleged investment (**Section IV.C.4**); and
 - d. The regulatory actions adopted by Peru that Kaloti contests cannot be reasonably regarded as non-discriminatory regulatory actions designed and applied to protect legitimate public welfare objectives (**Section IV.C.5**).
609. Finally, even if Kaloti had established that an expropriation had taken place (quod non), such expropriation in any event was lawful and did not give rise to any obligation to pay compensation (**Section IV.C.6**).
2. *Kaloti has failed to prove that its expropriation claims concern a "covered investment" which it legally owns (or owned) under Peruvian law*
610. Pursuant to the Expropriation Provision, an investor may only make an expropriation claim with respect to a "covered investment."¹¹⁹³ Paragraph 1 of Annex 10-B further specifies that only measures that "interfere[] with a **tangible or intangible property interest** in an investment" (emphasis added) can constitute an expropriation. Thus, as a threshold matter, Kaloti must show that it had a property right in accordance with Peruvian law over the alleged investment.
611. This requirement under the Expropriation Provision and Annex 10-B reflects the well-established principle under international law that States cannot be held liable for the expropriation of alleged rights that did not exist under the relevant State's laws. In the words of the tribunal in *Generation Ukraine v. Ukraine*, "there cannot be an

¹¹⁹³ **RL-0001**, Treaty, Art. 10.7.1.

expropriation unless the complainant demonstrates the existence of proprietary rights in the first place.”¹¹⁹⁴

612. International courts and tribunals have repeatedly confirmed that the question of whether or not a proprietary right exists and has vested in a claimant must be determined in light of the host State’s domestic law.¹¹⁹⁵ As highlighted by the tribunal in *Emmis v. Hungary*,

[i]n order to determine whether an investor/claimant holds property or assets capable of constituting an investment it is necessary in the first place to refer to host State law. Public international law does not create property rights. Rather, it accords certain protections to property rights created according to municipal law.¹¹⁹⁶

613. Prof. Zachary Douglas explains the relevance and applicability of the host State’s property laws in the following terms:

Investment disputes are about investments, investments are about property, and property is about specific rights over tangibles and intangibles cognisable by the municipal law of the host state. [. . .] Whenever there is a dispute about the scope of the property rights comprising the investment, or to whom such rights belong, there must be a reference to a municipal law of property.¹¹⁹⁷

614. Thus, for Kaloti’s expropriation claim to succeed, it must first satisfy the threshold requirement that it held a vested property right under Peruvian law. Kaloti’s claim

¹¹⁹⁴ **RL-0111**, *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2003 (Paulsson, Salpius, Voss), ¶ 8.8. See also **RL-0112**, *EnCana Corp. v. Republic of Ecuador*, LCIA, Award, 3 February 2006 (Crawford, Naón, Thomas) (“*EnCana (Award)*”), ¶ 184; **RL-0113**, *Accession Mezzanine Capital L.P. and Danubius Kereskedőház Vagyonkezelő Zrt v. Hungary*, ICSID Case No. ARB/12/3, Award, 17 April 2015 (Rovine, Lalonde, Douglas), ¶ 75.

¹¹⁹⁵ See **RL-0112**, *EnCana (Award)*, ¶ 184; **RL-0114**, *Frank Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013 (Cremades, Hanotiau, Knieper), ¶¶ 417, 420; **RL-0115**, *Vestey Group (Award)*, ¶ 257.

¹¹⁹⁶ **RL-0116**, *Emmis International Holding, B.V., et al., v. Hungary*, ICSID Case No. ARB/12/2, Award, 16 April 2014 (McLachlan, Lalonde, Thomas), ¶¶ 161–162.

¹¹⁹⁷ **RL-0117**, Zachary Douglas, *THE INTERNATIONAL LAW OF INVESTMENT CLAIMS* (2009), ¶¶ 101–102.

fails at this first hurdle, as it has not demonstrated that it held any vested property right or interest over the Five Shipments allegedly expropriated. Moreover, Kaloti’s second expropriation claim—concerning its alleged “business operations”¹¹⁹⁸—also fails to satisfy this threshold requirement. Each of these points is elaborated in more detail in the sections that follow.

a. Kaloti has not demonstrated that it has (or had) a vested property right in the gold shipments under Peruvian law

615. Kaloti argues in its first expropriation claim that the Five Shipments were its “assets,” and that such assets were unlawfully expropriated as a result of the SUNAT Immobilizations and the Precautionary Seizures.¹¹⁹⁹ Kaloti’s first expropriation claim is therefore premised on the assertion that Kaloti had valid property rights over the Five Shipments. However, Kaloti has failed to demonstrate any such rights.
616. Peruvian law requires purchasers of mineral resources to verify the origin of the minerals that they acquire.¹²⁰⁰ It further provides that the purchase of illegally mined products does *not* vest any legal rights over such products. If products have been mined illegally, they must be returned to the State (*see Section II.A.4* above).¹²⁰¹
617. However, as Peru explained in **Section II.B.6** above, Kaloti failed to conduct appropriate due diligence on the legal origin of the Five Shipments. It has therefore not demonstrated, either in the context of the Peruvian legal proceedings relating to the seizure of the Five Shipments or in this arbitration, that it had valid legal ownership of any of the Five Shipments.
618. While Kaloti asserts that it “conducted independent compliance due diligence reviews about [the Suppliers]”, such reviews were manifestly inadequate and legally insufficient, in at least the following three ways. *First*, Kaloti alleges that it relied on

¹¹⁹⁸ Memorial, ¶¶ 130, 142.

¹¹⁹⁹ Memorial, ¶ 130.

¹²⁰⁰ **Ex. R-0013**, General Mining Law, Art. 4; **Ex. R-0049**, Illegal Mining Controls and Inspection Decree, Art. 11.

¹²⁰¹ **Ex. R-0013**, General Mining Law, Art. 52.

the Suppliers' registration with the *Registro Especial de Comercializadores y Procesadores de Oro* ("RECPO") to confirm that the Suppliers were "in good standing with the Peruvian government" ¹²⁰² However, registration with RECPO did not provide any guarantee that the Suppliers were in good standing, nor did it prove that gold traded by registered entities had a lawful origin. ¹²⁰³

619. *Second*, Kaloti has not demonstrated that it verified that the origin of the Five Shipments was legal. Kaloti's only evidence of its efforts to verify such lawfulness consists of the same documents that the Suppliers submitted to SUNAT *after* the seizures took place. ¹²⁰⁴ Nothing in these exhibits demonstrates that Kaloti reviewed the documents *prior* to the alleged purchases, or even prior to the seizures themselves. Even if Kaloti had reviewed these documents, the information included therein proved to be insufficient and too fraught with inconsistencies to establish the legality of the gold sourced. As Peru explained in **Sections II.B.1 and II.C**, it was precisely that failure to demonstrate the gold's lawful origin that triggered the commencement of preliminary investigations and subsequent criminal proceedings against the Suppliers, for alleged offenses of money laundering in connection with illegal mining.
620. *Third*, Kaloti has failed to demonstrate that it conducted appropriate "know your customer" due diligence on the Suppliers. ¹²⁰⁵ As Peru showed in **Section II.B.6**, had Kaloti conducted reasonable research on the Suppliers, even publicly available information would have raised a number of serious red flags with respect to these companies. Such red flags would have included the fact that three out of the four Suppliers had been incorporated only a few months before Kaloti started dealing with them, and the other had been transferred to new owners in December 2012, and yet

¹²⁰² Memorial, ¶ 15. *See also* Memorial, ¶¶ 39, 57, fn. 79; ██████████ Witness Statement, ¶ 30; Request for Arbitration, ¶¶ 14, 30, 38.

¹²⁰³ *See* **Sections II.A.4 and II.B.6**.

¹²⁰⁴ Ex. C-0006, ██████████ document package; Ex. C-0007, ██████████ ██████████. document package; Ex. C-0008, ██████████ document package; Ex. C-0009, ██████████ document package.

¹²⁰⁵ *See* **Section II.B.6**.

between 2013 and 2014 such supplier had recorded more than USD 175 million in gold transactions. The foregoing is public information,¹²⁰⁶ and such a fact pattern—i.e., high sales volumes immediately following incorporation or transfer to new ownership—is common in companies engaged in illegal gold trading, money laundering and tax evasion.¹²⁰⁷

621. Even if Kaloti had demonstrated the lawful origin of the gold, its claim would flounder because it not proved that it had any property rights over the Five Shipments.¹²⁰⁸ Kaloti’s own statements and exhibits prove that it did not pay for Shipments 3 and 5. Concerning Shipment 3, Kaloti explicitly recognized in its Notice of Intent that had not paid for such shipment: “██████████ agreed to allow Kaloti Metals to maintain possession of the gold, but **not pay for it** until it reached the United States. . .”) (emphasis added).¹²⁰⁹ As for Shipment 5, the Supreme Court of Lima recently confirmed that “[Kaloti] failed to make payment for said cargo despite its demands for payment,”¹²¹⁰ and therefore ordered Kaloti to return Shipment 5 to its legal owner, ██████████. ¹²¹¹ Kaloti’s first expropriation claim thus fails at the first requirement, because it has failed to prove that it has a property interest under Peruvian law in *any* of the Five Shipments.
622. With respect to the other three shipments (No. 1, 2, and 4), as noted in **Section III.A.2**, Kaloti has neither submitted the sale and purchase agreements, nor any other document that proves that it acquired ownership of these shipments..

¹²⁰⁶ See **Section II.B.6**.

¹²⁰⁷ See **Section II.B.2. Ex. R-0026**, Money Laundering/Terrorist Financing Risks and Vulnerabilities Associated with Gold, FATF, July 2015, pp. 22–25.

¹²⁰⁸ See **Section II.A.2**.

¹²⁰⁹ See Notice of Intent, 8 April 2019, ¶ 33.

¹²¹⁰ **Ex. R-0212**, Resolution No. 08, Supreme Court of Lima, 14 June 2022, p. 5.; *see also* **Ex. R-0213**, Resolution No. 46, Supreme Court of Lima, 23 September 2019, p. 2, ¶ 4.

¹²¹¹ **Ex. R-0212**, Resolution No. 08, Supreme Court of Lima, 14 June 2022, pp. 14–15.

b. Kaloti's "business operations" do not constitute a covered investment or a vested legal right under Peruvian law

623. Kaloti's second expropriation claim also fails to satisfy the requirement of the first paragraph of Treaty Annex 10-B, and international law more generally—that an expropriation claim may only be made with respect to assets with respect to which the claimant has property rights under the laws of the host State.

624. To recall, Kaloti second expropriation claim is that Peru's measures "brought about an indirect expropriation *of the entirety of KML's business operations.*"¹²¹² (emphasis added). In other words, such second claim refers to Kaloti's business itself, overall (rather than any particular asset). With respect to that claim, Kaloti seeks compensation "equal to the fair market value of the **KML enterprise** before the expropriation measure became irreversible" (emphasis added).¹²¹³

625. As noted above, the Expropriation Provision protects only "covered investments," and Treaty Annex 10-B clarifies that expropriation requires interference with "property right[s] . . . in an investment." However, as explained in **Section III.A.4**, "KML's enterprise" is not a covered investment under the Treaty, and Kaloti's enterprise does *not* constitute a "tangible or intangible property right or property interest in an investment" under Peruvian law. Consequently, Kaloti's second expropriation claim must be rejected because Kaloti's enterprise falls outside the scope of the Expropriation Provision.

3. *Peru's actions did not interfere "with distinct, reasonable investment-backed expectations"*

626. Pursuant to paragraph 3(a)(ii) of Annex 10-B of the Treaty, the inquiry to determine whether an action or series of actions constitutes an indirect expropriation must also consider "the extent to which the government action interferes with distinct, reasonable investment-backed expectations." Kaloti, however, has failed to prove that

¹²¹² Memorial, ¶ 142.

¹²¹³ Memorial, ¶ 169.

Peru's actions interfered with any such expectations, with respect to either of its expropriation claims.

627. In its award of early 2021, the tribunal in the *Ríos v. Chile* ICSID arbitration interpreted a provision in the Chile - Colombia BIT that is equivalent to paragraph 3(a)(ii) of Annex 10-B of the Treaty.¹²¹⁴ In that regard, it articulated various edifying considerations and conclusions.
628. *First*, it explained that the relevant expectation must be “unequivocal” (in the original Spanish, “*inequívoca*”), which is conceptually equivalent to the term “distinct” in the Treaty at issue in the present case. Accordingly, there can only be expropriation if a State violates an investor's expectations that arise from obligations, commitments, or declarations by the State to the investor which leave no room for doubt or error (“*que no admitan duda o equivocación*”).¹²¹⁵ The *Ríos* tribunal added that an implication of the foregoing is that “the obligation, undertaking or declaration must be expressed or, if it is implicit, that no doubt may exist over its existence or scope”¹²¹⁶
629. *Second*, an investor's expectation under paragraph 3(a)(ii) of Annex 10-B.3 must be “reasonable.”¹²¹⁷ As noted by commentators, this criterion requires the claimant to

¹²¹⁴ See **RL-0118**, Chile - Colombia BIT (2000), Annex 9-C, ¶ 3(a)(ii) (“the degree to which the government action interferes with distinct, reasonable investment-backed expectations.”); **RL-0001**, Treaty, Annex 10-B, ¶ 3(a)(ii) (“the extent to which the government action interferes with distinct, reasonable investment-backed expectations” (“*la medida en la cual la acción del gobierno interfiere con expectativas inequívocas y razonables de la inversión*”).

¹²¹⁵ **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 (“In the Tribunal's opinion, an expectation is unequivocal when its grounds are unequivocal. In other words, only if the State violates expectations arising from obligations, undertakings or declarations that do not allow any doubt or misunderstanding can expropriation exist under the Treaty. That implies that the obligation, undertaking or declaration must be expressed or, if it is implicit, that no doubt may exist over its existence or scope and, in both cases, it must refer to specific parameters related to the investment.”).

¹²¹⁶ **RL-0108**, *Ríos (Award)*, ¶ 254.

¹²¹⁷ **RL-0001**, Treaty, Annex 10-B.3(a)(ii).

prove that the claim must be “objectively reasonable and not [be] based entirely upon the investor’s subjective expectations.”¹²¹⁸

630. Similarly, the *Ríos* tribunal similarly observed that, in order to be taken into account under the equivalent provision to paragraph 3(a)(ii) of Annex 10-B, the relevant expectation must be objectively reasonable, and that merely subjective expectations of an investor will not be considered.¹²¹⁹ That tribunal further concluded that the reasonableness of an expectation is a question of fact that must be determined on a case-by-case basis, as a function of the host State’s underlying obligation, commitment, or declaration that generated the expectation, along with all relevant facts.¹²²⁰
631. *Third and finally*, an expectation must be “investment-backed.”¹²²¹ That means that the expectation must have served as a basis for the investment; i.e., the investment must have been made *in reliance upon* the State representation or commitment, such that the investment would not have been made in the absence of the expectation.¹²²² Such a requirement is not simply an investment treaty requirement, but rather, as the tribunal in *Methanex v. United States* characterized it, “a matter of general international law”:

[A]s a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable **unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation.**¹²²³ (Emphasis added)

¹²¹⁸ **RL-0119**, OECD, “‘Indirect Expropriation’ and the ‘Right to Regulate’ in International Investment Law,” OECD WORKING PAPERS ON INTERNATIONAL INVESTMENT (2004), p. 19.

¹²¹⁹ **RL-0108**, *Ríos* (Award), ¶ 255.

¹²²⁰ **RL-0108**, *Ríos* (Award), ¶ 255.

¹²²¹ **RL-0001**, Treaty, Annex 10-B.3(a)(ii).

¹²²² **RL-0108**, *Ríos* (Award), ¶ 256.

¹²²³ **RL-0120**, *Methanex Corp. v. United States of America*, UNCITRAL, Final Award on Jurisdiction and Merits, 3 August 2005 (Veeder, Rowley, Reisman), Part IV, Chapter D, ¶ 7.

632. Kaloti has failed to prove that Peru’s actions interfered with any distinct, reasonable and investment-backed expectations with respect to either of its expropriation claims.
633. With respect to its first expropriation claim – which relates to the Five Shipments –, Kaloti merely asserts that (i) it believed that “it would encounter no problems with buying, and later selling the gold” because it had completed “hundreds of previous transactions with the same suppliers” before; and (ii) it relied on Peru’s alleged “vett[ing]” of gold suppliers in the “supplier database maintained by the Peruvian Government.”¹²²⁴ But the first component of this alleged expectation does not relate to any representation or commitment *by the State* to Kaloti. Kaloti has failed to identify any obligations, commitments, or declarations by Peru that can reasonably be characterized as an assurance by the State that Kaloti’s future purchases of gold would not be subject to Peruvian law and law enforcement measures. Such measures included immobilization and/or seizure in the event that legitimate concerns were to exist regarding the origin of any gold that Kaloti were to purchase, or if insufficient documentation was provided to the authorities to establish the lawful origin of such gold.
634. Kaloti appears to suggest that its expectations arose out of the absence of any regulatory action by Peru in the context of its earlier transactions. But that is clearly insufficient to establish distinct expectations. For example, in *Feldman v. Mexico*, the tribunal dismissed an indirect expropriation claim because it considered that the “assurances allegedly relied on by the Claimant [. . .] were at best ambiguous and largely informal.”¹²²⁵ Here, Kaloti has not even alleged, let alone demonstrate, that Peru made any specific assurances at all that any future transactions by Kaloti or its suppliers would be exempt from regulatory control and law-enforcement measures. In any event, such an expectation would not have been reasonable. Kaloti could not have reasonably expected that its transactions would be immune from potential

¹²²⁴ Memorial, ¶ 139.

¹²²⁵ **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), ¶ 149.

criminal investigation and prosecution in instances in which illegal mining and/or money-laundering concerns were identified.

635. Moreover, as noted above, prior to its alleged acquisition of the Five Shipments, Kaloti failed to comply with its legal obligation to verify the lawful origin of those five shipments.¹²²⁶ Subsequently, during the export process, the Suppliers for their part failed to demonstrate the lawful origin of Shipments 1 to 4.¹²²⁷ In addition, the information that the Suppliers had submitted in connection with Shipments 1 to 4 had generated reasonable grounds to suspect that a money laundering offence had been committed.¹²²⁸ In such circumstances, Kaloti could not have had any reasonable expectations that the relevant shipments would be insulated from potential immobilization or seizure.
636. With respect to Shipment 5, as noted above, such shipment was attached in the context of a civil proceeding (i.e., a private lawsuit) brought against Kaloti by its supplier, ██████, as a result of Kaloti's failure to pay for the relevant shipment. Such attachment was carried out in accordance with Peruvian law and civil procedure. Kaloti could not reasonably have expected that it would be insulated from such private right of action, and any related civil procedures (such as attachment), in the event that it were to fail to pay one of its suppliers.
637. Kaloti's second argument concerning the first expropriation claim – that it “purchased the gold from suppliers who were previously vetted by the State”¹²²⁹ – is simply false. The quote appears to be a reference to Kaloti's assertion that the Suppliers were registered with RECPO, which according to Kaloti proved that such Suppliers were in good standing. However, as Peru explained in **Section II.A.4**, RECPO was established as part of the process to promote the formalization of the business of artisanal mining, and to provide the State with a database to identify agents involved

¹²²⁶ See **Section II.B.6**.

¹²²⁷ See **Section II.B.4**.

¹²²⁸ See **Section II.B.3**.

¹²²⁹ Memorial, ¶ 139.

in the sale, purchase and refinement of gold, pending a more formal certification procedure for the environmental quality and origin of gold.¹²³⁰ Moreover, registrants with RECPO were merely required to fill out a form containing basic information concerning their identity and the type of commercial activity that they conducted. Nothing in Peruvian laws or regulations provided, or even suggested, that registration with RECPO was a guarantee or attestation by MINEM (or by any other Peruvian authority) that the registrants were in good standing, and that transactions with registrants were, or could be deemed, lawful.

638. Thus, it would not have been reasonable for Kaloti to assume that gold supplied by a supplier registered with RECPO could be deemed “vetted” or somehow otherwise approved or ratified by the State, simply by virtue of such registration. And in any event, it would have been wholly unreasonable for Kaloti to assume that the mere fact that a supplier had registered with RECPO would somehow exempt or inoculate such suppliers’ gold shipments from law enforcement measures—including immobilization, seizure or criminal investigation in the event that the competent authorities were to determine that there was reason to doubt the lawful origin of the gold that was being exported.
639. Further still, Kaloti has not even attempted to argue, let alone demonstrate, that the aforementioned expectations served as a basis for its investment.¹²³¹ It therefore cannot assert that any expectation it may have held in that regard was “investment-backed.”¹²³²
640. Finally, with regard to the second expropriation claim (i.e., of its “business operations”), Kaloti has not even *alleged* the violation of any purported expectation.¹²³³

¹²³⁰ **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.

¹²³¹ **RL-0001**, Treaty, Annex 10-B.3(a)(ii).

¹²³² **RL-0001**, Treaty, Annex 10-B.3(a)(ii).

¹²³³ See Memorial, ¶¶ 142–155.

641. In sum, neither alleged expectation meets the standard set out in paragraph 3(a)(ii) of Treaty Annex 10-B.

4. *Peru's actions neither permanently deprived Kaloti of the gold shipments nor caused Kaloti's alleged bankruptcy*

642. Pursuant to paragraph 3(a)(i) of Treaty Annex 10-B, the “fact-based inquiry” to determine whether a measure constitutes an indirect expropriation also requires the Tribunal to consider “the economic impact of the government action.” As discussed in further detail below, in order to show that an expropriation has taken place, one of the elements that Kaloti must show is that it has suffered a complete or nearly complete deprivation of the value of its investment, and that such deprivation was an “automatic consequence, i.e., the only and unavoidable consequence, of the measures.”¹²³⁴ If acts or omissions by Kaloti itself and/or by third parties were causes of the complete or nearly complete deprivation of value of the investment, such deprivation cannot be deemed to have been proximately caused by actions or omissions by Peru, and thus would not amount to an expropriation.¹²³⁵

643. In the paragraphs that follow, Peru will first articulate the legal standard that Kaloti must meet to show that actions attributable to the State have proximately caused a substantial deprivation under international law. Peru will then demonstrate that its actions have *not* proximately caused such substantial deprivation in respect of Kaloti’s alleged investment or “business operations”.

a. Kaloti must show that Peru’s measures have caused a substantial deprivation of the value of its investment

644. Kaloti recognizes that it must show that Peru’s measures “have the effect of substantially depriving the covered investments of their economic value.”¹²³⁶ Peru

¹²³⁴ **CL-0063**, *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, ¶¶ 270, 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).

¹²³⁵ **RL-0123**, *Case Concerning Elettronica Sicula S.p A. (ELSI) (United States v. Italy)*, ICJ, Judgment, 20 July 1989, ¶ 101.

¹²³⁶ Memorial, ¶ 135.

agrees. Tribunals have consistently emphasized that 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.¹²³⁷ The tribunal in *Electrabel v. Hungary* held that to establish an indirect expropriation an investor must establish

the substantial, radical, severe, devastating or fundamental deprivation of its rights or the virtual annihilation, effective neutralisation or factual destruction of its investment, its value or enjoyment.¹²³⁸

645. Further, paragraph 3(a)(i) of Treaty Annex 10-B expressly cautions that mere adverse impact on the investment by the measures does not arise to the level of expropriation:

[T]he 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.¹²³⁹

646. Therefore, although a negative effect on the economic value of an investment is necessary to establish an indirect expropriation, the impact must be severe or substantial. As one tribunal noted, “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.”¹²⁴⁰ In that regard, the tribunal in *El Paso v. Argentina* concluded that a necessary condition to prove expropriation is “the neutralisation of

¹²³⁷ **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) (“**Electrabel (Decision)**”), ¶ 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) (“**InfraRed (Award)**”), ¶ 505; **RL-0125**, *Silver Ridge Power BV v. Italian Republic*, ICSID Case No. ARB/15/37, Award, 26 February 2021 (Simma, Thomas, Cremades), ¶ 608.

¹²³⁸ **RL-0124**, *Electrabel (Decision)*, ¶ 6.62.

¹²³⁹ **RL-0001**, Treaty, Annex 10-B, ¶3(a)(i).

¹²⁴⁰ **RL-0105**, *Archer (Award)*, ¶ 240 (“Judicial practice indicates 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.”).

the use of the investment.”¹²⁴¹ The same tribunal explained that this means “that at least one of the essential components of the property rights must have disappeared.”¹²⁴² Thus, “a mere loss in value of the investment, even an important one, is not an indirect expropriation.”¹²⁴³

647. In addition, the deprivation of value of the investment must have been permanent and irreversible.¹²⁴⁴ In *Infinito Gold v. Costa Rica*, the tribunal (like many others)¹²⁴⁵ noted that “[f]or an expropriation to occur, the taking or substantial deprivation must be *permanent*, or at least not ephemeral in nature.”¹²⁴⁶ That tribunal went on to explain that, in the case of judicial expropriation (i.e., a court ruling that has expropriatory effect), this means that “expropriation cannot occur through a decision by a first instance court [. . .] because it lacks finality and enforceability.”¹²⁴⁷
648. To prove that a measure or series of measures has deprived an investment of virtually all value, or has effectively neutralized the investment, an investor is subject to

¹²⁴¹ **CL-0063**, *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, ¶ 233.

¹²⁴² **CL-0063**, *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, ¶ 233.

¹²⁴³ **CL-0063**, *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, ¶ 233.

¹²⁴⁴ **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), ¶ 530. See also **CL-0022**, *Técnicas Medioambientales Tecmed SA v. Mexico*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003 (Grigera Naón, Fernández, Bernal), ¶ 116. **RL-0126**, *Tippetts, et al., v. TAMS-AFFA Consulting Engineers of Iran*, IUSCT Case No. 7, Award, 29 June 1984 (Riphagen, Aldrich, Shafeiei), ¶ 22.

¹²⁴⁵ **CL-0022**, *Técnicas Medioambientales Tecmed SA v. Mexico*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003 (Grigera Naón, Fernández, Bernal), ¶¶ 116–117; **RL-0095**, *Quiborax* (Award), ¶¶ 200, 233–234, 239; **RL-0134**, *Anglia Auto Accessories Ltd. v. Czech Republic*, Final Award, 10 March 2017 (Banifatemi, Reinisch, Sands), ¶¶ 292–294, 303; **RL-0127**, *Ivan Peter Busta and James Peter Busta v. Czech Republic*, Final Award, 10 March 2017 (Banifatemi, Reinisch, Sands), ¶¶ 389, 437; **RL-0128**, *BG Group Plc. v. Argentine Republic*, Final Award, 24 December 2007 (Aguilar Alvarez, van den Berg, Garro), ¶¶ 268–270; **RL-0019**, *Bayindir* (Award), ¶¶ 443, 459, 462.

¹²⁴⁶ **CL-0053**, *Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Award, 03 June 2021 (Kaufmann-Kohler, Hanotiau, Stern), ¶ 239 (emphasis in original).

¹²⁴⁷ **CL-0053**, *Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Award, 03 June 2021 (Kaufmann-Kohler, Hanotiau, Stern), ¶ 239.

another essential requirement: establishing a *causal nexus* between the State measure(s) invoked and the adverse economic effect alleged. Merely invoking a State measure and establishing that there has been a virtual total loss to an investment are, on their own, insufficient to establish any expropriation, absent proof that the State measure was in fact what *caused* the loss of value of the investment.

649. In the specific context of an indirect expropriation claim, in which a measure or series of measures must “ha[ve] an effect equivalent to direct expropriation,” the tribunal in *El Paso v. Argentina* specified that establishing causation requires determining whether an alleged loss “was or was not the **automatic consequence**, i.e., the **only and unavoidable consequence**, of the measures” (emphasis added).¹²⁴⁸ On the facts of the case, the *El Paso* tribunal concluded that although the investor had experienced a “quasi-total loss of [its] investment,” such loss had not been “an **unavoidable and direct consequence** of [the State’s] measures and [could] not be the basis of a claim for expropriation” (emphasis added).¹²⁴⁹
650. In *El Paso*, the claimant had argued that it had been forced to sell its shares of a company in Argentina due to measures adopted by Argentina. However, in rejecting this argument, the tribunal took into account the claimant’s overall global position and activities, including the fact that it had been selling assets worldwide contemporaneously. The tribunal concluded that

[i]t is not reasonable to assume that, with such an overall picture of divestment, the decision to sell in Argentina was unrelated to the situation of El Paso in the rest of the world and was solely due to the measures taken by Argentina. In the Tribunal’s view, the global situation of El Paso worldwide as well as that of the

¹²⁴⁸ **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).

¹²⁴⁹ **CL-0063**, *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, ¶ 279.

Argentine economy and the measures taken by Argentina are elements to be taken into account to explain the sale.¹²⁵⁰

b. Peru's acts did not cause any substantial or permanent deprivation of the value of Kaloti's alleged investment

651. Regarding Kaloti's first expropriation claim (concerning its "assets" i.e., the Five Shipments), there is no proximate causal link between any acts and omissions by Peru, on the one hand, and Kaloti's alleged loss of such shipments. Furthermore, there has been no permanent or irreversible deprivation of the value of such shipments.

- *First*, Kaloti has itself admitted that the Five Shipments are more valuable now than when they were seized.¹²⁵¹
- *Second*, as explained in **Sections II.C and IV.A.3**, the precautionary seizures ordered by the Peruvian courts are merely temporary. If the courts end up determining that no crime has been committed in connection with the seized gold, such gold shall be returned to its lawful owner(s).
- *Third*, as discussed above, Kaloti has failed to establish that it owned all Five Shipments. If Kaloti did not own one or more of the relevant shipments in the first place, then it naturally cannot claim that it has suffered from a substantial deprivation of the value of such shipments.
- *Fourth*, Kaloti's attempt to append, as a further component of its first expropriation claim, the allegation that Peru "refused to engage in any discussions, negotiations or consultations with KML," is unavailing.¹²⁵² First of all, Kaloti's Second Notice of Dispute was issued in April 2019, i.e., *after* the date on which Kaloti alleges that the expropriation took place (30 November 2018).¹²⁵³ Thus, any alleged failure by Peru to negotiate could not possibly have

¹²⁵⁰ **CL-0063**, *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, ¶ 277.

¹²⁵¹ *See, e.g.*, Memorial, ¶¶ 35, 70.

¹²⁵² Memorial, ¶ 136.

¹²⁵³ **Ex. C-0022**, KML April 8, 2019, Notice of Intent.

caused the substantial deprivation that Kaloti alleges. Moreover, as discussed in **Section IV.A.5** above, Claimant's allegations that Peru failed to negotiate following the Second Notice of Arbitration are legally and factually flawed. Finally, while Claimant alleges that Peru failed to negotiate with it after the Request for Arbitration was issued, as Peru explained in **Section II.E** above, that assertion is false. As Kaloti is well aware, Peru and Kaloti did in fact engage in negotiations and exchanged correspondence, on a without prejudice basis, following Peru's receipt of the RFA.¹²⁵⁴

652. Concerning its second expropriation claim, Kaloti has failed to prove that Peru's actions caused any substantial deprivation of the alleged value of its "business operations".¹²⁵⁵ Kaloti alleges in this regard that "Peru's wrongful protracted measures have permanently deprived KML of the value of its investments."¹²⁵⁶ In particular, Kaloti argues that Peru's seizure of its gold assets "torpedoed Claimant's commercial strategy in Peru, leading eventually to the company's collapse in 2018."¹²⁵⁷ Specifically, Kaloti blames the collapse of its company on: (i) gold suppliers' reticence to sell to Kaloti once the gold seizures became publicly known,¹²⁵⁸ (ii) the negative impact of public reporting regarding the seizures on Kaloti's ability to "maintain and use bank accounts",¹²⁵⁹ (iii) Kaloti's inability to pay off loans that it had taken to finance some of its gold purchases, as a result of its inability to resell such gold,¹²⁶⁰ and (iv) alleged adverse effects suffered with respect to Kaloti's working capital and costs.¹²⁶¹ Kaloti's allegation that the abovementioned economic factors can be attributed exclusively to Peru's measures is clearly contradicted by the facts.

¹²⁵⁴ See **Section II.E** above.

¹²⁵⁵ Memorial, ¶¶ 130, 142.

¹²⁵⁶ Memorial, ¶ 160.

¹²⁵⁷ Memorial, ¶ 147.

¹²⁵⁸ Memorial, ¶¶ 149-150.

¹²⁵⁹ Memorial, ¶ 151.

¹²⁶⁰ Memorial, ¶¶ 152-153.

¹²⁶¹ Memorial, ¶ 154.

653. Kaloti's failure to establish a proximate causal link between actions or omissions attributable to Peru and the loss it alleges to have suffered is addressed in more detail in **Section V** below, which rebuts Kaloti's damages claims. As discussed in more detail in that section:

- There is no evidence that Kaloti's suppliers ceased and refused to conduct business with it *as a result of* the SUNAT Immobilizations, the Precautionary Seizures, or any alleged public statements by Peru's authorities regarding investigations involving Kaloti. In fact, several of the suppliers that Kaloti alleges ceased trading with it following the seizures actually *increased* the volume of their gold supplies to Kaloti following the above actions.¹²⁶²
- There is likewise no evidence that any financial institutions ceased their relations with Kaloti *as a result of* any actions or omissions by Peru. It seems far more likely and logical that the reason for the closure of Kaloti's accounts by various banks was the broader scandals in which the [REDACTED] was enveloped (as discussed in detail in **Section II.D** above).
- Kaloti has not demonstrated that the Challenged Measures had any effect on its global business, which accounted for the majority of its purchase volumes.
- There were numerous supervening causes of the failure of Kaloti's business, including (i) the widespread and serious allegations in relation to the [REDACTED] [REDACTED], including investigations into suspected smuggling, money-laundering and conflict minerals; (ii) the downturn in the artisanal gold market from 2013-2014; and (iii) the decision of Kaloti's shareholder to shutter Kaloti's business and transfer its operations to a new enterprise.

654. For the above reasons, Kaloti has failed to show that it suffered any substantial deprivation of its business as a result of any measure(s) by Peru. Accordingly, its

¹²⁶² See **Section II.D.3** above.

second expropriation claim (concerning Kaloti's "business operations") must also be dismissed.

5. *Peru's measures were non-discriminatory regulatory actions that pursued legitimate public welfare objectives, and fell within Peru's police powers*

655. Even if Kaloti's expropriation claims did not suffer from the above fatal flaws, such claims would nonetheless fail because the measures at issue in this case were non-discriminatory regulatory actions designed and applied to protect legitimate public welfare objectives. Such measures therefore thus constituted a legitimate exercise of police powers by the Peruvian State which cannot give rise to compensation.

- a. The Treaty and general principles of customary international law exclude liability for non-discriminatory regulatory actions designed to protect public welfare objectives

656. The "police powers exception" constitutes a principle of customary international law.¹²⁶³ As the tribunal in *Saluka v. Czech Republic* noted,

the principle that a State does not commit an expropriation and is thus not liable to pay compensation to a dispossessed alien investor when it adopts general regulations that are 'commonly accepted as within the police power of States' forms part of customary international law today.¹²⁶⁴

¹²⁶³ **RL-0153**, Chester Brown, *"United States,"* COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES (2013), p. 791 ("In addition, legislation or regulation in question must be 'designed and applied' to protect legitimate public welfare objectives to be covered by the presumption of non-expropriation. Notably, paragraph 4(b) is distinct from the 'police power' exception to expropriation, which the United States has long recognized under customary international law.").

¹²⁶⁴ **CL-0025** *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006 (Watts, Fortier, Behrens), ¶ 262. See also, *Methanex Corporation v. United States of America*, UNCITRAL, Award, 3 August 2005 (Veeder, Reisman, Rowley), Part IV, ¶ 7 (. . . as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation."); **RL-0119**, OECD, *"Indirect Expropriation' and the 'Right to Regulate' in International Investment Law,"* OECD WORKING PAPERS ON INTERNATIONAL INVESTMENT (2004), p. 17 ("The existence of generally recognised considerations of the public health, safety, morals or welfare will normally lead to a conclusion that there has been no 'taking'").

657. The police powers principle is reflected in paragraph 3 of Treaty Annex 10-B, which states as follows:

Except in rare circumstances, non-discriminatory regulatory actions by a Party that are **designed and applied to protect legitimate public welfare objectives**, such as public health, safety, and the environment, **do not constitute indirect expropriations**. (Emphasis added)

658. The tribunal's award in *Rios v. Chile* is also instructive in this regard. Commenting on paragraph 3(b) of Annex 9-C of the Chile-Colombia BIT – which is similar to the (equally authentic¹²⁶⁵) Spanish version of paragraph 3(b) of Treaty Annex 10-B¹²⁶⁶ – the tribunal in that case highlighted that it suffices if the regulatory actions in question are designed and applied to achieve legitimate public welfare objectives; the measures need not actually have *achieved* such objectives:

In the case of regulatory acts, the Tribunal cannot not qualify them as expropriatory if they are non-discriminatory and if they are designed or applied to protect legitimate public welfare objectives. **The Tribunal emphasizes that it is not necessary that the measures achieve such objectives**; it is sufficient that they are designed and applied to protect legitimate public welfare objectives. (Emphasis added)

659. Paragraph 3 of Treaty Annex 10-B expressly cites, by way of example, three objectives that State measures can pursue without giving rise to an indirect expropriation: “public health, safety; and the environment.” Further, the Treaty expressly clarifies “[f]or greater certainty” that this list of “legitimate public welfare objectives’ . . . is not exhaustive.”¹²⁶⁷

660. The provisions of paragraph 3 of Treaty Annex B are consistent with the concept of police powers under international law. Under such concept, *bona fide*, non-

¹²⁶⁵ **RL-0001**, Treaty, Art. 23.6 (“The English and Spanish texts of this Agreement are equally authentic.”).

¹²⁶⁶ **RL-0118**, Chile - Colombia BIT (2000), Annex 9-C.3(b) (“Except in exceptional circumstances, non-discriminatory regulatory actions of a Party that are designed and applied to protect legitimate public welfare objectives do not constitute indirect expropriations.”).

¹²⁶⁷ See **RL-0001**, Treaty, Annex 10-B, fn. 20.

discriminatory regulatory actions that are aimed at legitimate public welfare objectives will not be considered expropriatory.¹²⁶⁸ The tribunal in *Magyar Farming v. Hungary* explained that a State's police powers generally include two categories of measures:

[(1)] generally accepted measures of police powers that aim at enforcing existing regulations against the investor's own wrongdoings, such as criminal, tax and administrative sanctions, or revocation of licenses and concessions

[and (2),] regulatory measures aimed at abating threats that the investor's activities may pose to public health, environment or public order.¹²⁶⁹

661. Importantly, precautionary measures such as seizures adopted in the context of criminal investigations and prosecutions have also been held by investment tribunals to form part of a State's police power. For example, in the case of *Muhammet v. Turkmenistan* the Tribunal rejected an indirect expropriation claim that was based on alleged physical intrusions of Turkmenistan's general prosecutor's office within the investor's construction sites. Among other actions of Turkmenistan's authorities, the claimant contested (i) investigations and inspections carried out, and the imposition of penalties, by the prosecutor's office; and (ii) the sealing of the claimant's construction sites by the tax authority.¹²⁷⁰ The tribunal concluded, however, that the Turkmen prosecutor's office and tax authority were properly exercising the State's police powers:
662. The case of *WNC v. Czech Republic* is also instructive. In that case, the tribunal confirmed that the imposition of freezing orders under legislation directed at

¹²⁶⁸ See, e.g., **RL-0129**, *AWG Group Ltd. v. Argentine Republic*, UNCITRAL, Decision on Liability, 30 July 2010 (Salacuse, Kaufmann-Kohler, Nikken), ¶ 139.

¹²⁶⁹ **RL-0130**, *Magyar Farming Company Ltd, et al., v. Hungary*, ICSID Case No. ARB/17/27, Award, 13 November 2019 (Kaufmann-Kohler, Alexandrov, Hanefeld), ¶ 366.

¹²⁷⁰ **RL-0121**, *Muhammet Çap & Sehil İnşaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan*, ICSID Case No. ARB/12/6, Award, 4 May 2021 (Lew, Hanotiau, Boisson de Chazournes) ("**Muhammet (Award)**"), ¶¶ 903, 906.

combatting money-laundering was a legitimate exercise of a State's police powers, and did not give rise to an obligation to provide compensation.¹²⁷¹

663. The tribunal in *Muhammet v. Turkmenistan* likewise recognized that precautionary measures adopted by State authorities pursuant to their regulatory powers fall within the police powers of the State and are not expropriatory:

[T]he actions of the different Prosecutors under all contracts set out above were a legitimate exercise of regulatory authority. They were conducted following alleged irregularities or violations of Sehil. Further, the Prosecutors' power to oversee and inspect the site projects was provided for by Turkmen law. The same holds true for the Prosecutors' authority to initiate and participate in court proceedings.

[. . .]

To the extent that the Turkmenistan tax authority sealed the construction sites at which Sehil was working and Sehil's place of business and sold Sehil's assets to meet its tax liabilities, the evidence shows that this was carried out within the limits of the law of Turkmenistan. **These actions were not expropriatory or a contribution to the expropriation of Claimants' investment but were carried out within the police powers of the State.**¹²⁷² (Emphasis added)

664. Similarly, commentators have highlighted that a State's police powers encompass criminal enforcement measures as essential tools for the implementation of a State's welfare objectives. For instance, Professor Sornarajah observes that

[i]t has always been recognised that ordinary measures of taxation, **the imposition of criminal penalties, export controls** and antitrust measures do not constitute taking that is compensable . . . These regulatory takings are regarded as

¹²⁷¹ **RL-0132**, *WNC Factoring Ltd (WNC) v. The Czech Republic*, PCA Case No. 2014-34, Award, 22 February 2017 (Griffith, Volterra, Crawford), ¶¶ 394–395.

¹²⁷² **RL-0121**, *Muhammet* (Award), ¶¶ 941, 968.

essential to the efficient functioning of the state. (Emphasis added)¹²⁷³

665. In the present case, the actions of the Peruvian authorities were not expropriatory but rather were carried out in full accordance with Peruvian law, and in the proper exercise of the State's police powers. Specifically, as explained in the following subsection, Peru's actions constituted non-discriminatory regulatory actions that were designed and applied to protect legitimate public welfare objectives. Therefore, pursuant to paragraph 3(b) of Treaty Annex 10-B and customary international law, such actions do not give rise to liability or any obligation to pay compensation.

b. Peru's measures were non-discriminatory and were directed and applied to advance legitimate public welfare objectives

666. The Challenged Measures fall squarely within the scope and meaning of paragraph 3(b) of Treaty Annex 10-B, and of the police powers exception under international law. That is so because such measures were directed and applied to protect legitimate public welfare objectives, including crime prevention, public health, safety, and the environment. In particular, the Challenged Measures were adopted by law enforcement agencies and other Peruvian State organs (including the Prosecutor's Office, the State Attorney's Office, and the Criminal Courts) to combat illegal mining, money laundering and related crimes. As explained in **Section II.A** (i) such illegal activities have had—and continue to have—devastating effects on Peru's socio-economic development, the environment, and the health and safety of Peruvian local communities;¹²⁷⁴ and (ii) the Peruvian authorities whose actions Kaloti is challenging

¹²⁷³ **RL-0167**, Muthucumaraswamy Sornarajah, *THE INTERNATIONAL LAW ON FOREIGN INVESTMENT* (2010), p. 443. *See also* **RL-0131**, UNCTAD, *Expropriation*, UNCTAD Series on Issues in International Investment Agreements II, 2012, p. 79 ("Although there is no universally accepted definition, in a narrow sense, this doctrine covers State acts such as (a) **forfeiture or a fine to punish or suppress crime**; (b) seizure of property by way of taxation; (c) legislation restricting the use of property, including planning, environment, safety, health and the concomitant restrictions to property rights; and (d) defence against external threats, destruction of property of neutrals as a consequence of military operations and the taking of enemy property as part payment of reparation for the consequences of an illegal war" (emphasis added)).

¹²⁷⁴ *See* **Section II.A.1-3**.

in this case play a crucial role in enforcing Peru’s legal framework against these pernicious crimes.¹²⁷⁵ The discussion below explains why all of the actions of SUNAT and all other State actors involved in the criminal investigations and proceedings in relation to the Five Shipments constituted legitimate exercises of regulatory authority, and cannot be correctly characterized as expropriatory.¹²⁷⁶

667. With respect to the SUNAT Immobilizations, as explained in **Section II.B**, SUNAT immobilized Shipments 1 to 4 in the appropriate exercise of its oversight and audit powers to fight illegal mining and related criminal activities, and to verify compliance with customs duties and regulations. While Kaloti argues that SUNAT immobilized the Shipments 1 to 4 “on the pretext that it needed to verify the origin of the gold,”¹²⁷⁷ the verification of the legal origin of gold to be exported is far from a pretext. Rather, such verification lies squarely within SUNAT’s powers and duties under Peruvian law to protect legitimate public policy objectives relating to the prevention of illegal mining.¹²⁷⁸
668. For example, pursuant to the General Customs Law, SUNAT is entitled to request additional documents from an exporter to confirm the accuracy of the information submitted by the exporter or customs agent, and to adopt control measures to prevent customs offenses.¹²⁷⁹ Such control measures include, among others, “preventive immobilizations and seizures over goods.”¹²⁸⁰ Additionally, Illegal Mining Controls and Inspection Decree—enacted as part of a series of legislative decrees designed to combat illegal mining and related criminal activities¹²⁸¹—established a range of mechanisms to allow SUNAT to oversee and control the transport and trade of

¹²⁷⁵ See **Section II.A.4-5**.

¹²⁷⁶ **RL-0121**, *Muhammet* (Award), ¶ 941.

¹²⁷⁷ Memorial, ¶ 136.

¹²⁷⁸ See **Section II.A.5**.

¹²⁷⁹ **Ex. R-0052**, General Customs Laws, Arts. 10, 163–165.

¹²⁸⁰ **Ex. R-0052**, General Customs Laws, Art. 165.b.

¹²⁸¹ See **Section II.A.4**.

mineral products.¹²⁸² As discussed in **Sections II.B** and **IV.A.3**, SUNAT conducted the oversight regulatory measures relevant to this case in strict compliance with Peruvian law and due process. In addition, as discussed above in **Sections II.B** and **IV.A.3**, the SUNAT Immobilizations were only in place for a short time period of less than six months and had all been lifted by May 2014. Kaloti was well aware of that fact, and its withdrawal of the Amparo Request indicates that it acknowledged that its rights were not being infringed by SUNAT following the lifting of the SUNAT Immobilizations.¹²⁸³

669. Further, SUNAT's actions were not targeted in any way at Kaloti, and they were non-discriminatory. As explained in **Section II.A.5**, beginning in 2013, SUNAT increased its oversight measures over the export of gold, intensifying its inspections of shipments, its requests for documents proving the origin of gold, and the immobilization gold shipments. Such measures were not applied solely in relation to the Five Shipments, but rather also to shipments of gold across the entire Peruvian gold market.¹²⁸⁴
670. Similarly, the actions of the Peruvian prosecutorial and judicial authorities involved in the criminal investigations and judicial criminal proceedings at issue in this case—such as the Prosecutor's Office, the State Attorney's Office, and the Criminal Courts—likewise fall squarely within the scope of the police powers principle under customary international law. The evidence adduced in **Section II.C** above demonstrates that the investigations and criminal proceedings were appropriately conducted in pursuance of legitimate State welfare objectives. That is, the State actors were exercising the State's legitimate police power to impose precautionary measures in order to address the important public policy objective of preventing money laundering linked to illegal mining. In particular, the investigations and criminal proceedings related to the Five Shipments were initiated pursuant to Money Laundering Decree which, as explained

¹²⁸² **Ex. R-0049**, Illegal Mining Controls and Inspection Decree, Art. 5.

¹²⁸³ See **Section IV.A.3** above.

¹²⁸⁴ See **Section II.A.5** above.

in **Section II.A.4** above, was enacted in 2012 to optimize Peru's legal framework to investigate and prosecute money laundering offences linked to illegal mining and other crimes.¹²⁸⁵ Moreover, the various State actors involved in the Criminal Investigations and the Precautionary Seizures acted diligently and independently, and in accordance with the applicable Peruvian procedural laws and their respective competencies.¹²⁸⁶

671. The commencement and conduct of the Criminal Proceedings were also non-discriminatory in nature and effect. Based on the indicia of criminality before it, the Prosecutor's Office requested the initiation of criminal investigations and proceedings against multiple companies (unrelated to Kaloti).¹²⁸⁷ All of Peru's measures, including the subsequent judicial proceedings, were appropriately taken, based on adequate indicia of the unlawful origin of the gold, and/or the commission of money laundering offenses.¹²⁸⁸

672. In light of the above, Peru's actions fall directly within the range of the regulatory actions encompassed by paragraph 3(b) of Treaty Annex 10-B, and accordingly, to invoke the words of that provision, they "do not constitute indirect expropriations."¹²⁸⁹

6. *In the event that an expropriation were deemed established, it would have been a lawful one and thus would not give rise to any obligation to pay compensation*

673. The Expropriation Provision does not prohibit expropriation; instead, it imposes certain requirements and limitations in relation to expropriatory measures. Specifically, that provision imposes an obligation upon the Parties to the Treaty not to expropriate an investment except: (a) for a public purpose; (b) in a non-discriminatory manner; (c) in accordance with due process and MST, and (d) in exchange for

¹²⁸⁵ See **Ex. R-0218**, Money Laundering Decree.

¹²⁸⁶ See **Sections II.A.5, II.B and II.C**.

¹²⁸⁷ See **Section II.B** above.

¹²⁸⁸ See **Sections II.B, II.C**.

¹²⁸⁹ **RL-0001**, Treaty, Annex 10-B, ¶ 3.

“prompt, adequate and effective compensation.”¹²⁹⁰ Measures that meet these requirements are deemed to constitute lawful expropriation under the Treaty and general international law.

674. Given that no expropriation has occurred, any discussion of whether the measures challenged by Kaloti constitute lawful or unlawful expropriation is rendered otiose. However, for completeness, and without prejudice to its primary position that there has been no expropriation, Peru briefly explains below why, to the extent that the Tribunal were to conclude that an expropriation exists in this case, such expropriation would have been a lawful one, and thus would not result in any award of damages to Kaloti.
675. *First*, Peru’s measures were taken “for a public purpose”. As Peru has explained, the measures contested by Kaloti were directed and applied to protect legitimate public welfare objectives, including in particular crime prevention, but also more generally public health, safety and the environment.¹²⁹¹
676. *Second*, Peru’s measures were not discriminatory. As explained by Peru, the existence of a discriminatory measure or action requires a fact-based inquiry and a comparison of the complainant to a similarly-situation person or persons.¹²⁹² However, Kaloti has failed to identify any appropriate comparator to demonstrate Peru’s alleged discriminatory treatment.¹²⁹³ Such failure is unsurprising, for the simple reason that no discriminatory treatment took place. As Peru has shown, starting in 2012 it strengthened its legal framework against illegal mining, money laundering, and related criminal activities. This policy gave rise to measures that were applied to the entire gold industry, not just against Kaloti.¹²⁹⁴ Peru also demonstrated that its State

¹²⁹⁰ **RL-0001**, Treaty, Art. 10.7.1.

¹²⁹¹ See **Section IV.B.5**.

¹²⁹² See **Sections IV.A.4 and IV.B**.

¹²⁹³ See **Sections IV.A.4 and IV.B**.

¹²⁹⁴ See **Sections II.A and IV.B**.

entities acted in accordance with its own laws and procedures, and without any intent whatsoever to discriminate.¹²⁹⁵

677. *Third*, Peru acted in accordance with due process of law and MST. Peru has already demonstrated above, in the context of Kaloti's denial of justice claim under MST, that SUNAT, the Prosecutor's Office, and the Criminal Courts acted at all times properly and in accordance with their respective competencies.¹²⁹⁶ Peru has also shown that, under Peruvian law, Kaloti had ample occasion to challenge relevant executive and judicial branch actions and determinations, and more generally to make its concerns regarding Peru's measures heard. However, Kaloti decided to disregard the remedies that were formally available under Peruvian law, instead filing requests for self-invented remedies that left the Peruvian entities with no other choice than to reject them.¹²⁹⁷

678. *Fourth*, Peru has not violated any duty to pay "prompt, adequate and effective compensation." In accordance with paragraph 2 of the Expropriation Provision, the compensation due for expropriation (if any) is equivalent to the fair market value of the expropriated investment immediately before the expropriation took place. However, as explained in **Section V**, Kaloti has manifestly failed to establish causation, and its quantification analysis model is riddled with inaccuracies, flawed assumptions and inconsistencies. Accordingly, even if an expropriation had taken place (quod non), no damages would be payable to Kaloti.¹²⁹⁸

C. Kaloti's National Treatment Provision claim lacks any merit

679. Kaloti argues that Peru breached the National Treatment Provision of the Treaty by "treat[ing] foreign purchasers much worse than it did the domestic buyers."¹²⁹⁹ This claim, like Kaloti's others, lacks merit.

¹²⁹⁵ See **Sections II.A and IV.B**.

¹²⁹⁶ See **Section IV.A.3**.

¹²⁹⁷ See **Sections II.B.4 and II.C.4**; Missiego Report ¶¶ 139; 141; 144-145.

¹²⁹⁸ See **Section V.B**.

¹²⁹⁹ Memorial, ¶ 124.

680. The National Treatment Provision stipulates as follows:

Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.¹³⁰⁰

681. Kaloti has not even attempted to articulate the legal standard and requirements that are applicable to a claim under the National Treatment Provision. In fact, Kaloti devotes a mere *two* paragraphs of its Memorial to its national treatment provision claim (one of which is confined to the single, conclusory statement that “[i]t is therefore clear that Peru breached Article 10.3 of the TPA”).¹³⁰¹

682. Kaloti appears to conflate or confuse the National Treatment Provision and FET obligations under the Treaty, as it includes its claim for breach of the National Treatment Provision under a heading entitled “Peru denied KML **fair and equitable treatment** by treating domestic (Peruvian) purchasers of gold differently from foreign purchasers” (emphasis added).¹³⁰² Obviously, the National Treatment Provision in Article 10.3 is a separate and distinct substantive protection from the fair and equitable treatment one in Article 10.5 (which is addressed in **Section IV.A** above).

683. Although Kaloti has failed to make even a *prima facie* case in respect of its claim under the National Treatment Provision, in the discussion below Peru (i) articulates the legal standard relevant to the National Treatment Provision; and (ii) explains why Kaloti has failed to meet that standard.

1. *The applicable legal standard in relation to national treatment*

684. National treatment clauses codify the principle that “foreigners should be afforded treatment no less favorable than the one granted to local citizens.”¹³⁰³ The national

¹³⁰⁰ **RL-0001**, Treaty, Art. 10.3.

¹³⁰¹ Memorial, ¶ 125.

¹³⁰² Memorial, p. 65.

¹³⁰³ **CL-0056**, *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007 (“*Parkerings-Compagniet (Award)*”), ¶ 367.

treatment obligation is “aimed at protecting foreign investors from de jure or de facto discrimination based on nationality.”¹³⁰⁴ It does not, however, establish a wholesale prohibition on a State from adopting measures that result in a difference in treatment with respect to different investors.¹³⁰⁵ Rather, what this obligation prohibits is merely less favorable treatment of a foreign investor that cannot be objectively justified. As the tribunal in *Parkerings v. Lithuania* put it, “[a]n objective justification may justify differentiated treatments of similar cases.”¹³⁰⁶

685. Further, “[e]stablishing a national treatment violation is a fact-specific inquiry.”¹³⁰⁷ The test applicable to a national treatment claim, adopted consistently by previous tribunals – and now well-established in the case law and in doctrine – consists of three cumulative elements:¹³⁰⁸
- a. The identification of a local comparator that is in “like circumstances”¹³⁰⁹;
 - b. A determination that the treatment of the local comparator was in fact more favorable than that provided to the investor; *and*

¹³⁰⁴ **RL-0015**, *Total* (Decision on Liability), ¶ 211. See also **RL-0016**, *Loewen* (Award), ¶ 139 (the national treatment obligation under NAFTA Article 1102 proscribes only “nationality-based discrimination and . . . demonstrable and significant indications of bias and prejudice on the basis of nationality.”); **RL-0017**, Rudolf Dolzer and Christoph H. Schreuer, “Chapter VII: Standards of Protection,” *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* (2nd ed., 2012), p. 198 (“[T]he purpose of the clause is to oblige a host state to make no negative differentiation between foreign and national investors when enacting and applying its rules and regulations and thus to promote the position of the foreign investor to the level accorded to nationals.”).

¹³⁰⁵ 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) (“*Champion Trading (Award)*”), ¶ 130.

¹³⁰⁶ **CL-0056**, *Parkerings-Compagniet* (Award), ¶ 368 (“[T]o violate international law, discrimination must be unreasonable or lacking in proportionality, for instance, it must be inapposite or excessive to achieve an otherwise legitimate objective of the State. An objective justification may justify differentiated treatments of similar cases.”).

¹³⁰⁷ **RL-0153**, Chester Brown, “United States,” *COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES* (2013), p. 776.

¹³⁰⁸ See, e.g., **RL-0017**, Rudolf Dolzer and Christoph H. Schreuer, “Chapter VII: Standards of Protection,” *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* (2nd ed., 2012), p. 199 (articulating the same three-step test).

¹³⁰⁹ See, e.g., **RL-0019**, *Bayindir* (Award), ¶ 399; **RL-0018**, *Champion Trading* (Award), ¶ 128.

c. A determination that such differential treatment was not objectively justified.¹³¹⁰

686. Kaloti bears the burden of proof to establish each of the above elements.¹³¹¹ In the event that any one of them is not fulfilled, Kaloti's claim must fail.

2. *Peru has not violated the National Treatment Provision*

687. Notwithstanding the fact that Kaloti indisputably holds the burden of proof with respect to all three of the above-mentioned elements of its national treatment claim, Kaloti has manifestly failed to establish *any* of them, let alone all three. That failure is unsurprising, given that the evidence demonstrates that none of the above elements is satisfied.

688. *First*, Kaloti has not even attempted to identify a comparator for the purposes of the national treatment analysis, let alone show that there is a comparator that is in "like circumstances" to Kaloti. Rather, Kaloti contents itself with the assertion that "SUNAT only pursued asset seizures against the foreign purchasers, while none of the domestic purchasers had any of their gold seized."¹³¹² The sole piece of evidence on which Kaloti relies in support of this sweeping statement is a paragraph from the self-serving statement of its own witness, [REDACTED].¹³¹³ However, that paragraph does not purport to identify any potential comparators to Kaloti. In fact, such paragraph does not even support Claimant's proposition that Peru only pursued asset seizures against foreign purchasers.¹³¹⁴ Claimant appears to be drawing its conclusion from the first part of the paragraph which contains [REDACTED] assertion that "the Peruvian

¹³¹⁰ See **RL-0018**, *Champion Trading* (Award), ¶¶ 133–134, **CL-0080**, *Mr. Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Award (5 July 2011); **CL-0056**, *Parkerings-Compagniet* (Award), ¶¶ 368, 371; **RL-0020**, *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on the Merits, 24 May 2007 (Keith, Fortier, Cass), ¶ 83.

¹³¹¹ See **RL-0021**, *Thunderbird* (Award), ¶ 176 ("Thunderbird must show that its investment received treatment less favourable than Mexico has accorded, in like circumstances, to investments of Mexican nationals."); **RL-0015**, *Total* (Decision on Liability), ¶ 212.

¹³¹² Memorial, ¶ 124.

¹³¹³ Memorial, ¶ 124; [REDACTED] Witness Statement, ¶ 48.

¹³¹⁴ [REDACTED] Witness Statement, ¶ 48.

government made sure that the gold was paid by KML first, as it preferred to affect, and accuse, foreign companies like KML, rather than Peruvian parties with local connections.”¹³¹⁵ However, the sentence says nothing about immobilizations or seizures. In any event, ██████████ assertion that Peru “made sure that the gold was paid by KML first”, i.e., before the relevant immobilizations, is belied by the fact that, as discussed above, Kaloti did not actually pay for two of the Five Shipments prior to the immobilization of those two shipments. Thus, in addition to being unsupported, ██████████ statement is contradicted by the facts.

689. *Second*, to the extent that Kaloti is relying on general measures adopted by SUNAT with respect to gold shipments, there is nothing at all in such measures that would even remotely substantiate a claim for discrimination on the basis of nationality. As discussed in **Section II.A**, in 2012 Peru strengthened its legal framework against illegal mining, money laundering and related criminal activities. During 2013 and 2014, SUNAT also increased its review and oversight of the export of gold. As part of this process, and in compliance with its legal duties under Peruvian law, SUNAT conducted inspections, requested supporting documents, and immobilized gold shipments from numerous companies.¹³¹⁶ Such measures applied to the entire gold industry, and therefore had an impact on Peruvian *and* non-Peruvian companies alike. For example, from 2013 to date, SUNAT has immobilized gold from dozens of Peruvian exporters.¹³¹⁷ Kaloti’s allegation of differential treatment between domestic and foreign purchasers of gold is therefore not only unsupported but contradicted by the evidence.

690. Moreover, contrary to Kaloti’s allegations, SUNAT’s oversight measures – which are relevant to Shipments 1 to 4 – were *not* adopted on the basis of the nationality of the purchasers of the gold. As explained in **Section II.B** above, SUNAT’s measures were taken against the entities listed as the exporter in the Customs Declaration filed for

¹³¹⁵ Memorial, ¶ 124.

¹³¹⁶ See **Section II.A.5** above.

¹³¹⁷ See **Section II.A.5** above.

each shipment. In relation to Shipments 1 to 4, the exporters listed in the Customs Declaration were the Suppliers, not Kaloti, and the Suppliers were all *Peruvian* companies. It is therefore incorrect to suggest that the SUNAT Immobilizations were motivated by Kaloti's (foreign) nationality.

691. *Third*, there was ample objective justification for the immobilizations of all of the Five Gold Shipments. With regard to Shipments 1 to 4, as explained in **Section II.B** above, SUNAT's review of the relevant documentation on such shipments had revealed various money-laundering and/or illegal mining risk indicators in relation to the Suppliers. Such risk indicators included: (i) then-recent transfers of ownership of the shares in the Supplier (Shipment 1)—a common practice amongst companies conducting illegal mining; (ii) a prior history of tax evasion by the Supplier (Shipment 1) and deficient customs documentation (Shipments 1 and 2); (iii) discrepancies between the activities carried out by the Supplier and the Supplier's corporate records (Shipments 2 and 3); (iv) large volumes of gold transactions by the Supplier despite having limited operations and/or having only recently been incorporated (Shipments 2, 3 and 4); and (v) links between the Supplier and high-profile gold smugglers (Shipment 4).¹³¹⁸ In addition, the supporting documents in relation to Shipments 1 to 4 failed to demonstrate the lawful origin of the gold, as required under Peruvian law, and contained numerous irregularities.¹³¹⁹
692. Given the circumstances identified above, it was eminently reasonable—and consistent with its statutory duties to assist in the prevention of money-laundering and illegal mining¹³²⁰—for SUNAT to determine that the relevant gold shipments should be immobilized pending further investigation.
693. As discussed above, Shipments 1 to 4 were also made subject to precautionary seizures in the context of criminal proceedings relating to suspected money-laundering and illegal mining. As discussed in **Sections II.C** and **IV.A.3**, such

¹³¹⁸ See **Section II.B** above.

¹³¹⁹ See **Section II.B** above.

¹³²⁰ See **Section II.A.5**.

Precautionary Seizures were issued in full accordance with Peruvian law, and were based on a significant body of evidence of unlawful activity.

694. Similar concerns existed in relation to Shipment 5. Specifically, the Supplier of such shipment, [REDACTED], was suspected of having links to the notorious gold smuggler [REDACTED].¹³²¹ Such shipment was not immobilized by SUNAT, but rather was subject to a precautionary measure in the context of two proceedings (each of which is described below): (i) a civil lawsuit filed by [REDACTED]; and (ii) criminal proceedings commenced with respect to [REDACTED].
695. With respect to the first point, [REDACTED] commenced a lawsuit in the Civil Court against Kaloti because the latter had failed to pay for Shipment 5. In that lawsuit, [REDACTED] sought (i) a declaration that the contract for Kaloti's purchase of Shipment 5 be terminated; and (ii) an order that the relevant gold be returned to [REDACTED].¹³²² In addition, [REDACTED] sought an attachment in relation to Shipment 5, to require that such shipment be placed under the custodianship of a third-party agent while the proceedings were pending, [REDACTED]. The court granted such attachment, and, as discussed above, subsequently issued an order that the contract for Shipment 5 be terminated and the gold be returned to [REDACTED], on account of Kaloti's failure to pay. Kaloti has put forward no basis to argue that the Civil Attachment lacked objective justification, and in any event the Civil Attachment resulted from a private dispute caused by Kaloti's failure to pay one of its Suppliers.
696. The above-mentioned criminal proceedings relating to [REDACTED] similarly led to the granting of a provisional seizure against Shipment 5.¹³²³ The criminal proceedings in question related to suspected money-laundering by [REDACTED], and included a specific criminal complaint against [REDACTED] CEO, [REDACTED], for money-laundering in

¹³²¹ See **Section II.B.**

¹³²² See **Section II.C.6.**

¹³²³ **Ex. R-0210**, Resolution No. 1, Precautionary Seizure against Shipment 5, 20 March 2015, p. 3.

relation specifically to Shipment 5.¹³²⁴ That provisional seizure was in place for only two months, as it was later discharged by the *Sala Penal Permanente de la Corte Superior de Lima Sur* following an appeal by ██████, on the basis of lack of jurisdiction by the court that granted the precautionary seizure.¹³²⁵ However, the Civil Attachment referred to above remained in place.

697. In sum, and as the above analysis demonstrates, Kaloti's national treatment claim lacks any basis whatsoever, either in law or fact. Kaloti has failed to satisfy any of the three elements that it must cumulatively prove for such a claim. It has not even purported to identify a domestic investor in like circumstances that was supposedly treated differently, and in fact the measures invoked by Claimant did *not* result in any disparate treatment between similarly-situated foreign and domestic gold investors. Further, and in any event, the seizures of the Five Shipments were carried out in accordance with due process, were motivated by legitimate concerns regarding potential illegal activity, and were therefore objectively justified. As a result, there would not have been an actionable claim even if there had in fact been a different treatment (*quod non*).

V. KALOTI IS NOT ENTITLED TO ANY COMPENSATION

698. Kaloti's claims for compensation suffer from a series of fatal flaws, and are consequently meritless. Thus, even if Kaloti were to establish that Peru has breached the Treaty (*quod non*), it would not be entitled to any compensation as a result of such breach—let alone the amount that it seeks in the present arbitration.

699. Kaloti raises the following three damages claims:

- *First*, it claims damages for alleged lost profits from 1 January 2014 to 30 November 2018, in the amount of USD 13,793,135 ("**Lost Profits Claim**").¹³²⁶

¹³²⁴ Ex. R-0210, Resolution No. 1, Precautionary Seizure against Shipment 5, 20 March 2015, pp. 1-2.

¹³²⁵ Ex. R-0211, Resolution No. 417-2015, Revokes Precautionary Seizure over Shipment 5, 1 June 2015, 1 June 2015, p. 9.

¹³²⁶ Memorial, ¶ 203.

- *Second*, it claims damages for the alleged expropriation of Kaloti “as a going concern enterprise”, in the amount of USD 47,296,862 (“**Going Concern Claim**”).¹³²⁷
- *Third*, it claims damages for the value of the Five Shipments, in the amount of USD 17,674,623 as of 30 November 2018, or alternatively USD 26,099,826 as of February 2022 (“**Inventory Claim**”).¹³²⁸

700. In addition to the above damages claims, Kaloti seeks (i) pre-award interest, at a rate of LIBOR + 4% (“**Interest Claim**”);¹³²⁹ and (ii) a tax gross-up on the amounts above, to account for tax that would allegedly be payable by Kaloti on any award of damages in its favor (“**Tax Gross-up Claim**”).¹³³⁰
701. The cumulative total of Kaloti’s claims is USD 123,784,685 (using the alleged value of the Five Shipments as of February 2022), or alternatively USD 118,561,151 (using the alleged value of the Five Shipments as of 30 November 2018).
702. All of Kaloti’s damages claims are baseless and must be rejected, as this section will show. It is indicative of the speculative and excessive nature of Kaloti’s claims that Kaloti has taken the non-permanent immobilization and subsequent seizure of gold inventory that Kaloti itself valued at just USD 12.6 million as the basis for its claim of more than USD 123 million, arguing that the mere seizure of that gold destroyed its entire global business.¹³³¹
703. Further, and as Peru will explain in this section, Kaloti has provided no credible evidence that there is a causal link between Peru’s actions and the losses Kaloti alleges to have suffered. Instead, Kaloti relies on speculative assertions that (i) the seizures of the Five Shipments, and the ensuing Criminal Proceedings, were the sole reason for its declining sales volumes starting in 2013; and (ii) Peru leaked confidential

¹³²⁷ Memorial, ¶ 215.

¹³²⁸ Memorial, ¶¶ 205–206.

¹³²⁹ Smajlovic Report, ¶ 8.4.

¹³³⁰ Memorial, ¶¶ 218–224.

¹³³¹ Smajlovic Report, ¶ 6.12; Memorial, Table 17.

information to the press regarding criminal investigations relating to Kaloti and the Five Shipments.¹³³² However, as Peru will demonstrate, even a cursory review of the evidence is sufficient to dismiss such allegations as fanciful.

704. Kaloti sweeps under the rug, and hopes thereby that this Tribunal will entirely ignore, the far more likely reasons for the decline of its sales volumes: Kaloti's own poor due diligence; its own lack of proper internal controls; its own high-risk transactions; and the various high-profile and widely reported scandals affecting its sister company, [REDACTED] (which included allegations of money-laundering, associations with drug cartels, and attempts to silence independent auditors). Kaloti also ignores the contemporaneous commercial factors that contributed to the decline of its business, such as the significant downturn in production from artisanal and small-scale producers, who Kaloti relied on for the majority of its gold purchases, in 2014. Kaloti also argues, without any substantiation whatsoever, that the immobilization and subsequent seizure of the Five Shipments—which took place solely in Peru—somehow destroyed Kaloti's entire business worldwide.
705. Even if Kaloti were to establish such causation, it would not be able to claim the damages it seeks, because its damages model is speculative and flawed. Extrapolating from just a few months of growth prior to the Challenged Measures (viz., from April to November 2013), Kaloti assumes that it would achieve and then maintain for 35 years a fixed market share of 21.25% of the gold export market in Peru. Kaloti makes this far-fetched assumption despite the fact that (i) only a small portion of the market was arguably within Kaloti's reach; (ii) there were no discernible barriers to entry to the gold export market in Peru (and thus Kaloti would have faced fierce and relentless competition on a continuing basis over the 35-year period); and (iii) Kaloti's business model was easily replicable by its competitors. In addition, Kaloti has overvalued its gold inventory for the purposes of its Inventory Claim, for example by failing to take into account that it failed to pay for at least one of the Five Shipments.

¹³³² Memorial, ¶¶ 158–159. *See also* Memorial, ¶¶ 55–56, 136.

706. Kaloti has then further inflated its claim by applying an inappropriately high rate of pre-award interest. Such rate lacks any basis in commercial reality, and is therefore unreasonable. Finally, Kaloti asserts an entitlement to tax gross-up based on the Peruvian corporate tax rate. However, such claim is inherently speculative and in any event Kaloti has failed to show that it would be liable for Peruvian corporation tax – or indeed any other form of tax – on the proceeds of any award.
707. The above-mentioned flaws, as well as many others, are analyzed in greater detail in the independent expert report of Darrell Chodorow and Fabricio Nuñez of Brattle (“**Brattle Report**”), which accompanies this Counter-Memorial. Brattle confirms, from an economic standpoint, that Kaloti has failed to establish a causal link between the Challenged Measures and the alleged damages.¹³³³ Brattle also demonstrates that the valuation carried out by Kaloti’s expert, Mr. Smajlovic of Secretariat Consulting, is incorrect and unreliable because it “suffers from serious economic, technical, and methodological flaws as well as implementation errors that produce unreliable and overstated damages.”¹³³⁴
708. The flaws in Mr. Smajlovic’s damages model render it too speculative to form any basis for an award of damages in this case. Notwithstanding that fact, in the event that Mr. Smajlovic’s discounted cash flow (“**DCF**”) model were to be used for the purposes of calculating damages, the errors in that model would necessitate a significant reduction in the damages claimed by Kaloti in its Lost Profits Claim and Going-Concern Claim (which are both based on that model).¹³³⁵ Taking into account such adjustments, as well as (i) correcting Kaloti’s overstated Inventory Claim; (ii) applying a more reasonable pre-award interest rate; and (iii) excluding Claimant’s speculative

¹³³³ Brattle Report, § III.

¹³³⁴ Brattle Report, ¶ 92.

¹³³⁵ The Lost Profits Claim does not use the discount rate proposed by Mr Smajlovic, but the other modelling inputs are based on the same DCF model as the Going-concern claim.

Tax Gross-up Claim, Brattle has calculated that the damages payable to Claimant should be no more than USD 6,388,569.¹³³⁶

709. In this section, Peru will demonstrate: (i) that Kaloti's alleged losses are not attributable to Peru (which explains why Kaloti has manifestly failed to meet its burden to demonstrate proximate causation between the alleged breaches and the damages it seeks) (**Section V.A**); (ii) that Kaloti's damages calculations are replete with flawed assumptions and calculation errors (**Section V.B**); (iii) that Kaloti has failed to mitigate its damages (**Section V.C**); (iv) that Kaloti's Pre-Award Interest Claim is based on a commercially unreasonable rate of interest (**Section V.D**); and (v) that Kaloti's Tax Gross-up Claim is baseless (**Section V.E**).

A. Kaloti's losses were not caused by any actions attributable to Peru

710. Pursuant to Article 10.16(1)(a)(ii) of the Treaty, an investor may only bring a claim under the Treaty if it "has incurred loss or damage by reason of, or arising out of" a breach of the Treaty by the host State. Accordingly, in order to be awarded the compensation it seeks in this case, Kaloti must establish (i) that its losses were caused by actions or omissions that are attributable to Peru; and (ii) that the quantification of its claims equates to the actual loss that it has suffered.¹³³⁷ It is Kaloti that bears the

¹³³⁶ Brattle Report, ¶¶ 234–235 and Table 9.

¹³³⁷ **CL-0040**, ILC Articles, Art. 31 ("The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act). *See also* **RL-0022**, ILC Commentary, Art. 36.1 ("The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby"); **CL-0035**, *S.D. Myers, Inc. v. Canada*, Ad hoc—UNCITRAL, First Partial Award and Separate Opinion (13 November 2000), IIC 249 (2000), ¶ 316 ("[T]he burden is on [the claimant] to prove the quantum of the losses in respect of which it puts forward its claims."); **RL-0023**, Meg Kinnear, "Damages in Investment Treaty Arbitration," *ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO THE KEY ISSUES* (2010), p. 556 ("The investor bears the burden of proving causation, quantum and the recoverability of the loss claimed."); **RL-0024**, *Rompetrol* (Award), ¶ 190 ("[I]t must, as a matter of basic principle, be for the claimant to prove, in addition to the fact of its loss or damage, its quantification in monetary terms. . .").

burden of proving that both of these requirements are satisfied.¹³³⁸ The first of these two elements – causation – will be the focus of the present section (V.A).

711. In accordance with well-established principles of international law, to satisfy its burden to establish causation Kaloti must demonstrate that there is a *proximate* causal link between (i) the actions that it alleges breached the treaty; and (ii) the damage that it allegedly suffered. This principle is encapsulated in Article 18 of the ILC Articles, which are widely regarded as reflecting customary international law. ILC Article 18 provides that

[v]arious terms are used to describe the link which must exist between the wrongful act and the injury in order for the obligation of reparation to arise. For example, reference may be made to losses ‘attributable to [the wrongful] act as a proximate cause’ or to damage which is ‘too indirect, remote, and uncertain to be appraised.’¹³³⁹

712. ILC Article 36.1 further provides that “[t]he State responsible for an internationally wrongful act is under an obligation to compensate for the damage **caused** thereby [...]”¹³⁴⁰ (emphasis added).

713. Investment treaty tribunals have consistently adopted the proximate causation standard. For example, the tribunal in *Pawlowski v. Czech Republic* noted that:

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

¹³³⁸ **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) (“*Gemplus (Award)*”), ¶ 12-56.

¹³³⁹ **RL-0022**, ILC Commentary, Art. 18.

¹³⁴⁰ **RL-0022**, ILC Commentary, Art. 36(1).

- that such damages flowed from the host State's conduct, and that the causal relationship was sufficiently close (i.e., not 'too remote').¹³⁴¹ (Emphasis added)

714. A crucial aspect of the proximate causation requirement is that there must not be any supervening causes of a claimant's loss. If there are supervening causes, the chain of causation will be broken, and the claimant cannot be awarded damages. This principle was aptly summarized by the tribunal in *Lemire v. Ukraine II*, which confirmed that:

The causal link can be viewed from two angles: the positive aspect requires that the aggrieved party prove that an uninterrupted and proximate logical chain leads from the initial cause . . . to the final effect . . .; while **the negative aspect permits the offender to break the chain by showing that the effect was caused -either partially or totally - not by the wrongful acts, but rather by intervening causes, such as factors attributable to the victim, to a third party or for which no one can be made responsible (like force majeure).**¹³⁴² (Emphasis added)

715. In this case, there is no proximate causation between the alleged breaches and the damages that Kaloti claims. This is so for the following two reasons (which are elaborated further in the paragraphs below): *first*, Kaloti has not provided any evidence of a proximate causal link between the conduct it alleges breached the Treaty (i.e., the Challenged Measures) and the loss allegedly suffered; and *second*, there were several supervening causes of Kaloti's losses, none of which is attributable to Peru.

1. *Kaloti has failed to establish a proximate causal link between Peru's conduct and Kaloti's loss*

716. In relation to its Lost Profits Claim and Going Concern Claim, Kaloti has made no serious attempt to link Peru's conduct to its alleged losses. Kaloti's position on

¹³⁴¹ **RL-0089**, *Pawłowski 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.

¹³⁴² **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.").

causation with respect to these claims essentially is comprised of two main arguments: (i) that the SUNAT Immobilizations and the Precautionary Seizures prompted a media “campaign” against Kaloti, which in turn caused Kaloti’s suppliers and financial institutions to refuse to do business with it;¹³⁴³ and (ii) that Peru stoked this media campaign by leaking to the press details of criminal investigations implicating Kaloti.¹³⁴⁴ Both of these arguments are baseless.

717. With respect to the first one, the primary piece of evidence on which Kaloti relies is the collection of book extracts and newspaper clippings contained in Exhibit C-0051.¹³⁴⁵ However, the majority of the material contained in that exhibit does not even mention the SUNAT Immobilizations or the Precautionary Seizures. In fact, much of that material references instead money-laundering scandals that had beset the wider [REDACTED], and the gold industry more generally.¹³⁴⁶ To the extent that the articles and book extracts contained in Exhibit C-0051 mention certain of the Five Shipments (for example the article from *El Comercio* dated 8 January 2014 which mentions Shipment 1¹³⁴⁷), the mere existence of such articles does not constitute proof that the Challenged Measures adversely affected Kaloti’s reputation with its suppliers, or its business more generally, as Kaloti asserts.
718. Consistent with the foregoing, the evidence on the record belies Kaloti’s allegations that its suppliers ceased trading with it on account of the SUNAT Immobilizations or the Precautionary Seizures. In its Memorial, Kaloti lists seven of its suppliers that allegedly “refused” to sell gold to it in 2015–2016 as a result of the seizure of the Five Shipments.¹³⁴⁸ However, a review of Kaloti’s Transaction History from 2011–2018—

¹³⁴³ See, e.g., Memorial, ¶¶ 148–151, 158.

¹³⁴⁴ See, e.g., Memorial, ¶¶ 58, 71, 136.

¹³⁴⁵ See, e.g., Memorial, ¶ 136.

¹³⁴⁶ **Ex. C-0051**, [News articles and books cited by Kaloti], pp. 31–34, 48–147, 177–197.

¹³⁴⁷ See **Ex. R-0227**, “*Aduanas incauto media tonelada de oro ilegal por US\$18 millones*,” *EL COMERCIO*, 8 January 2014 [Re-submitted version of C-0051, with Respondent’s translation].

¹³⁴⁸ Memorial, ¶¶ 59–60.

which was introduced into evidence by Kaloti itself¹³⁴⁹—reveals that all of those suppliers *continued* to sell gold to Kaloti even *after* the SUNAT Immobilizations, and in some cases after the Precautionary Seizures as well.¹³⁵⁰ In fact, in the years that followed those measures, two of those five suppliers (Vega Granada S.A.S. and Veta de Oro S.A.C.) actually *increased* the volumes of gold they supplied to Kaloti.¹³⁵¹ Indeed, Vega Granada’s supply of gold to Kaloti mushroomed from 4 kg in 2013 to 932 kg in 2017—an increase of approximately 23,100%.

719. Similarly, supplies to Kaloti from the largest of the suppliers that Kaloti asserts ceased trading with it, R.D. Precious Metals, Inc. (“**RDPM**”), had already started to decline well before the SUNAT Immobilizations and the Precautionary Seizures.¹³⁵² Kaloti provides no evidence that such trend would have been reversed but for such measures.
720. Regarding the remaining three suppliers that allegedly stopped selling gold to Kaloti in 2015–2016 as a result of the SUNAT Immobilizations and the Precautionary Seizures, Kaloti has provided no evidence of the reasons for which they ceased to supply gold to Kaloti.
721. Kaloti’s witness Ms. [REDACTED] lists five further suppliers who she alleges stopped selling to Kaloti in 2015–2016 as a result of the SUNAT Immobilizations and the Precautionary Seizures.¹³⁵³ Again, however, neither Kaloti nor Ms. [REDACTED] provide any evidence to suggest that such suppliers stopped selling gold to Kaloti as a result of such measures. Moreover, two of those suppliers, namely [REDACTED] and

¹³⁴⁹ **Ex. C-0030**, KML’s transaction summary of all suppliers and purchases between 2012 and 2018. The same list was also placed on to the record by Kaloti in the form of exhibits C-0043 and C-0051.

¹³⁵⁰ Brattle Report, ¶ 53 and fn. 35; **Ex. C-0030**, KML’s transaction summary of all suppliers and purchases, p. 11 (which shows that all seven companies sold to Kaloti in 2014), p. 14 (which shows that Veta de Oro S.A.C. sold to Kaloti in 2015), p. 17 (which shows that Veta de Oro S.A.C. and Vega Granada S.A.S. sold to Kaloti in 2016), and p. 20 (which shows that Vega Granada S.A.S. sold to Kaloti in 2017).

¹³⁵¹ Brattle Report, ¶ 55.

¹³⁵² Brattle Report, ¶ 56.

¹³⁵³ [REDACTED] Witness Statement, ¶ 34.

██████████ continued trading with Kaloti after the SUNAT Immobilizations and the Precautionary Seizures.¹³⁵⁴ Even if Kaloti were correct that all of the suppliers it alleges stopped selling to it before 2015 as a result of the SUNAT Immobilizations and the Precautionary Seizures, such suppliers would only account for roughly one third of the lost volumes that Mr. Smajlovic attributes to the Challenged Measures.¹³⁵⁵

722. And with respect to the following year (2017), Kaloti purports to identify certain other suppliers who also allegedly stopped selling to Kaloti as a result of the seizures of the Five Shipments.¹³⁵⁶ However, and once again, Kaloti has provided no evidence that such suppliers ceased trading with Kaloti due to the seizures, or to reports thereof.
723. Moreover, as Brattle explains, the Peruvian gold supply market has a high level of churn.¹³⁵⁷ Such is the instability that many suppliers only operate for a year or less. Indeed, information from the Peruvian corporate registry indicates that many of Kaloti's suppliers ceased to operate during the period 2012–2018, and are no longer active.¹³⁵⁸ This high degree of turnover is also evidenced by the Kaloti's changes of suppliers in the years prior to the Challenged Measures. According to Brattle's analysis, of the 90 suppliers who supplied gold to Kaloti in 2011–2012, *fewer than half* were still doing so in 2013.¹³⁵⁹ This evidence belies Kaloti's contention that its suppliers ceased trading with it because of the Challenged Measures, and suggests instead that the changes in suppliers and volumes were the result of intervening or supervening causes not attributable to Peru. Such causes are discussed in more detail in **Section V.A.2** below. In addition, the evidence shows that Kaloti's retention rate with respect to its suppliers – i.e., the proportion of its suppliers who supplied gold to

¹³⁵⁴ Ex. C-0030, KML's transaction summary of all suppliers and purchases, p. 10 (which shows that both companies sold to Kaloti in 2014).

¹³⁵⁵ Brattle Report, ¶ 52.

¹³⁵⁶ Memorial, ¶ 60.

¹³⁵⁷ Brattle Report, ¶ 59.

¹³⁵⁸ Brattle Report, ¶ 60.

¹³⁵⁹ Brattle Report, ¶ 58.

it in consecutive years – actually *increased* following the SUNAT Immobilizations and the Precautionary Seizures.¹³⁶⁰

724. Kaloti’s attempt to draw a link between the Challenged Measures and the closure of its bank accounts by several US-based financial institutions is similarly unavailing.¹³⁶¹ In support of its assertion, Kaloti cites several letters from banks notifying it of the closure of its accounts.¹³⁶² However, none of the letters makes any mention of the SUNAT Immobilizations and the Precautionary Seizures, the Criminal Proceedings, or even of Kaloti’s business in Peru. Instead, they merely make generalized references to the banks’ internal policies and procedures.¹³⁶³ Therefore, the letters submitted by Kaloti do not serve to establish the requisite causality. It is far more likely that the closure of those bank accounts was a result of the scandals directly involving the ██████████ as a whole (including its involvement in suspected money-laundering and association with drug cartels).
725. A further flaw in Kaloti’s causation theory is that it has adduced no evidence at all that the gold seizures in Peru affected its business in other countries. As Kaloti’s expert Mr. Smajlovic explains, more than 50% of Kaloti’s business originated from countries other than Peru, and the majority of Kaloti’s damages relate to hypothetical future revenues outside Peru.¹³⁶⁴ Brattle’s analysis shows that Kaloti’s business did not grow rapidly outside of Peru prior to the SUNAT Immobilizations and the Precautionary Seizures, nor did it decline rapidly after such measures.¹³⁶⁵ This indicates that Kaloti’s business outside Peru was largely unaffected by events within Peru, and accordingly

¹³⁶⁰ Brattle Report, ¶ 58.

¹³⁶¹ Memorial, ¶¶ 65–66.

¹³⁶² Ex. C-0027, Notice of closure of bank accounts of KML’s.

¹³⁶³ See, e.g., Ex. C-0027, Notice of closure of bank accounts of KML, p. 4, which is a letter from Metropolitan Bank, closing Kaloti’s bank accounts, noting that (“[t]his decision was made on the handling of this relationship in accordance with our policies and procedures”).

¹³⁶⁴ Smajlovic Report, ¶ 6.33 and Table 7. Brattle Report, ¶ 75.

¹³⁶⁵ Brattle Report, ¶¶ 77–78.

that the Challenged Measures would have had no or minimal impact on Kaloti's global business.

726. Finally, to the extent that Kaloti's reputation was affected by independent journalistic reporting of the seizures, such actions are not attributable to Peru. Peru is not responsible for the opinions of investigative journalists, or the reactions of third parties – such as Kaloti's suppliers and banking partners – to such opinions.
727. Kaloti's second allegation concerning causation of the asserted harm underlying its Lost Profits and Going Concern Claims is likewise entirely unsubstantiated. Such allegation, which is that Peru "leaked" to the press details of criminal investigations involving Kaloti, appears to be based on (i) the fact that Kaloti was included in a list of implicated persons in two separate investigations initiated by the Prosecutor's Office in 2014 and 2017 respectively;¹³⁶⁶ and (ii) a public statement by the Prosecutor's Office in 2018 in relation to an investigation that did not involve Kaloti.¹³⁶⁷
728. With respect to the first of these asserted bases, Kaloti has not provided any evidence to suggest that the inclusion of Kaloti in the scope of the relevant investigations was improper, or that it led to any negative press reporting in relation to Kaloti.
729. With respect to the second basis for Kaloti's allegation – namely, the 2018 statement by the prosecutor – such pronouncement had nothing to do with any investigation into Kaloti or its suppliers. While Kaloti alleges that the prosecutor's comments evidence a practice by the prosecutor of improperly leaking to the press details of investigations, as explained in **Section II.D.2** above the statement that Kaloti attributes to the prosecutor was actually part of a press release formally issued by the

¹³⁶⁶ Memorial, ¶ 55; **Ex. C-0067**, Preliminary Investigation Extension Order notified to KML by the 1st supraprovincial Corporate Prosecutor's Office Specializing in Money Laundering Crimes and Loss of Domain, Case No. 50601570101-2014-1-0, p. 2; **Ex. C-0101**, Prosecutorial Order No. 19, dated January 09, 2017, issued by the 1st supra-provincial corporate prosecutor's office specializing in money laundering and loss of domain crimes, p. 163.

¹³⁶⁷ Memorial, ¶ 136.

prosecutor following a public hearing in a criminal case.¹³⁶⁸ Therefore, contrary to what Kaloti suggests, such statement was not “leaked” surreptitiously to the press, nor does it otherwise constitute evidence of any improper practice by the public prosecutor.

730. Nor does the expert report of Mr. Smajlovic establish a proximate causal link between Peru’s conduct and Kaloti’s loss. Kaloti’s quantum expert, Mr. Smajlovic, makes no attempt to verify or test Kaloti’s assertions that the Challenged Measures were the proximate cause of its loss; he simply takes Kaloti’s assertion at face value.¹³⁶⁹ Kaloti in turn relies upon Mr. Smajlovic’s report to argue that its suppliers refused to conduct further transactions with Kaloti as a result of the Challenged Measures;¹³⁷⁰ however, nothing in Mr. Smajlovic’s report supports such argument. Indeed, the relevant extracts from Mr. Smajlovic’s report merely paraphrase *Kaloti’s* own arguments that Peru’s actions led to the loss of Kaloti’s supply base.¹³⁷¹ Thus, Kaloti’s causation argument is circular, as it is based on nothing at all beyond unsupported and self-serving assertions by Kaloti and its own expert Mr. Smajlovic.
731. Finally, with respect to Kaloti’s Inventory Claim, the SUNAT Immobilizations and the Precautionary Seizures were merely interlocutory in nature, and therefore did not affect – and could not have affected – any ownership rights that Kaloti may have held with respect to such shipments (to the extent that such ownership rights were ever acquired by Kaloti¹³⁷²). Indeed, the SUNAT Immobilizations have now been lifted.

¹³⁶⁸ **Ex. C-0114**, Raul Linares dice que no está implicado en el caso cuellos blancos. Article by Gestion – Grupo El Comercio, pp. 3–4.

¹³⁶⁹ Smajlovic Report, ¶¶ 3.15–3.17.

¹³⁷⁰ Memorial, ¶158.

¹³⁷¹ See Memorial, ¶ 60. See also Smajlovic Report, ¶ 3.17, under the heading “Legal Instructions” (“I understand that [Kaloti] alleges that the actions of the Peruvian government resulted in numerous cancellations of its supply contracts as well as the loss of financing arrangements with many banks which further limited KML’s purchases of gold. As a result of the gold inventory seizure and the alleged disinformation propagated by Peru, which allegedly tarnished both [redacted] and KML’s reputation and resulted in a loss of business opportunity, KML’s business was severely hindered, and after many years of struggle, went de facto bankrupt in 2018.”).

¹³⁷² As noted in Section III.A.2, Kaloti has not shown that it acquired title to any of the Five Shipments.

Moreover, as noted above, in the event that the Precautionary Seizures with respect to Shipments 1 to 4 are lifted, the gold will be returned to its respective owner.¹³⁷³ With respect to Shipment 5, the shipment has been ordered to be returned to its owner, [REDACTED], on account of Kaloti's failure to pay for that shipment.¹³⁷⁴ Accordingly, it is Kaloti's non-payment for that shipment, not any action of Peru that is the cause of Kaloti's failure to obtain possession of that shipment.

732. In light of the foregoing, it is clear that Kaloti has not established a causal link between the Challenged Measures and Kaloti's alleged losses. Accordingly, Kaloti is not entitled to any award of damages in the present arbitration.

2. *There were numerous supervening causes for the failure of Kaloti's enterprise*

733. A further reason why none of the losses allegedly suffered by Kaloti is compensable is that there were various supervening causes of the failure of Kaloti's business, none of which is attributable to Peru. Such causes included (i) various high profile scandals, investigations and lawsuits in relation to the activities of Kaloti and its sister company and main customer, [REDACTED]; (ii) Kaloti's own failure to conduct adequate due diligence regarding the source of the Five Shipments; (iii) the downturn in production from artisanal and small-scale gold producers—from whom Kaloti's gold was predominantly sourced—in the period from 2013-2014; (iv) the decision of Kaloti's shareholder, [REDACTED], to transfer Kaloti's business operations to a new enterprise, Global American LLC ("**Global American**"); (v) the significant volatility in the Peruvian gold market; and (vi) the fact that Kaloti's business was already declining prior to the seizure of the Five Shipments.

a. Kaloti's business was negatively affected by scandals relating to its own business activities and those of the wider [REDACTED]

734. As described in detail in **Section II.D** above, in recent years Kaloti and the [REDACTED] [REDACTED] have been mired in a series of scandals, investigations and lawsuits that have adversely impacted Kaloti's reputation. It was those events, rather any action by Peru,

¹³⁷³ See Sections II.C, IV.A.3

¹³⁷⁴ Section II.C.6.

that led to Kaloti's reputation being "tarnished",¹³⁷⁵ and that ultimately led to the failure of its business.

735. Such developments—which were widely reported in the press, and which for the most part predated the Challenged Measures—included the following:

736. *First*, in 2011, the DEA commenced an investigation, known as "Operation Honey Badger", into suspicious wire transfers made to the ██████████, which indicated that the ██████████ was providing financial services for criminal organizations and facilitating money-laundering. Such was the evidence against the ██████████ that the DEA recommended that the US Treasury designate the ██████████ as a "primary money-laundering concern"¹³⁷⁶—a designation under US law that is reserved for persons or entities that present a major money-laundering risk, and in relation to whom special measures can be taken to combat money laundering.¹³⁷⁷

737. *Second*, between 2007 and 2015, numerous banks issued SARs (i.e., Suspicious Activity Reports) to money laundering authorities in the U.S. with respect to dubious wire transactions. Such wire transactions involved a cumulative amount of USD 9.3 billion, from the ██████████ to shell companies;¹³⁷⁸

738. *Third*, in 2012, the two managers of one of the ██████████ suppliers, Renade Group, were found to be leaders of a 27-strong crime gang who were all convicted and jailed in France for drug trafficking and money-laundering.¹³⁷⁹

¹³⁷⁵ Memorial, ¶ 7.

¹³⁷⁶ **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.

¹³⁷⁷ **RL-0051**, U.S. Department of Treasury, "Fact Sheet: Overview of Section 311 of the USA PATRIOT Act," 10 February 2011. Such designations can also be made with respect to particular jurisdictions, transactions and accounts.

¹³⁷⁸ Section II.D; **Ex. R-0126**, "US Treasury Department abandoned major money laundering case against Dubai gold company," ICIJ, 21 September 2020, p. 2.

¹³⁷⁹ Section II.D; **Ex. R-0119**, *Rihan* (Judgment), ¶ 103; **Ex. R-0160**, "EY accountancy firm accused of facilitating money laundering by drug traffickers," EU-OCS, 30 October 2019, p. 1.

739. *Fourth*, in 2012–2013, Deutsche Bank issued two separate SARs in relation to cash withdrawals by ██████████ from a bank in Dubai which were so large that they required the use of wheelbarrows.¹³⁸⁰
740. *Fifth*, in a sign that the above events were causing immediate reputational damage to the ██████████, various members of the London Metals Exchange (including Goldman Sachs for example) ceased trading with, or otherwise distanced themselves from, the ██████████. The foregoing began happening as early as 2012 – *prior* to the Challenged Measures.¹³⁸¹
741. *Sixth*, in 2014, a whistleblower revealed that in 2012, (i) the ██████████ had paid USD 5.2 *billion* in cash for the purchase of gold; and (ii) that large amounts of gold were bought by the ██████████ from high risk customers without carrying out adequate KYC procedures.¹³⁸² The same whistleblower revealed that, also in 2012, ██████████ had acquired and exported “gold” bars from Morocco that were later found to have been coated with silver, in a deliberate attempt to circumvent export restrictions;¹³⁸³
742. *Seventh*, allegations emerged in 2014 that two years prior, in 2012, the ██████████ had sourced large volumes of suspected conflict minerals from Sudan and the Democratic Republic of the Congo;¹³⁸⁴ and
743. *Eighth*, in 2015, the Dubai Multi Commodities Centre removed Al Kaloti Jewellers Factory Ltd, the company which operated the ██████████ refinery, from its list of

¹³⁸⁰ Section II.D; **Ex. R-0128**, Suspicious Transaction Report, DEUTSCHE BANK ABU DHABI, 29 October 2012, p. 4; see also **Ex. R-0126**, “US Treasury Department abandoned major money laundering case against Dubai gold company,” ICIJ, 21 September 2020, pp. 7–8.

¹³⁸¹ Section II.D; **Ex. R-0200**, Suspicious Transaction Report, DEUTSCHE BANK TRUST CO. AMERICAS, 7 February 2013, p. 4; **Ex. R-0129**, *Waterhouse Witness Statement*, ¶¶ 5–13.

¹³⁸² Section II.D; **Ex. R-0119**, *Rihan* (Judgment), ¶¶ 100–101.

¹³⁸³ Section II.D; **Ex. R-0119**, *Rihan* (Judgment), ¶¶ 118–122. See also **Ex. R-0120**, “EY whistleblower awarded \$11 million after suppression of gold audit,” REUTERS, 17 April 2020, p. 1; **Ex. R-0116**, “EY ordered to pay whistleblower \$11m in Dubai gold audit case,” THE GUARDIAN, 17 April 2020, p. 1; **Ex. R-0115**, “EY ordered to pay \$10m to Dubai whistleblower,” FINANCIAL TIME, 17 April 2020, p. 1.

¹³⁸⁴ Section II.D; **Ex. R-0119**, *Rihan* (Judgment), ¶¶ 100, 116.

companies that comply with the Dubai Good Delivery standard of quality and responsible sourcing.¹³⁸⁵

744. It seems fair to assume that Kaloti's reputation also suffered as a result of a breach of contract lawsuit initiated against it in 2012 in the U.S. by one of Kaloti's suppliers in Mexico, Macbeg de Occidente S.A. ("**Macbeg**"). Such lawsuit was filed in the United States District Court for the Southern District of Florida, the U.S. State in which Kaloti is registered and had its center of operations.¹³⁸⁶ In that lawsuit, Macbeg alleged that Kaloti had systematically under-reported the gold content in shipments that Macbeg supplied to Kaloti, and thus paid Macbeg less than market value for such gold.¹³⁸⁷ The case eventually settled in 2014. Nevertheless, given (i) the nature of the allegations (which essentially amounted to fraud by Kaloti); and (ii) the fact that the proceeding was public, it is likely that such allegations would have made suppliers wary of conducting business with Kaloti.

b. Kaloti's own due diligence failings caused it loss

745. As discussed in **Section II.A** above, pursuant to Peruvian law it is incumbent on purchasers of gold to verify that such gold has been lawfully sourced. This obligation stems from both the General Mining Law and Illegal Mining Controls and Inspection Decree.¹³⁸⁸ As noted in **Section II.B** above, however, the evidence indicates that Kaloti did not comply with its obligation to verify the lawful origin of the Five Shipments.¹³⁸⁹ It ignored obvious red flags with respect to its Suppliers and did not carry out adequate verification procedures. In fact, the deficiencies and inconsistencies in the information and evidence provided to the Peruvian authorities regarding the source

¹³⁸⁵ Section II.D; **Ex. R-0124**, "*Dubai's Kaloti Removed From Gold List as New Factory Near*," BLOOMBERG, 13 April 2015, p. 1.

¹³⁸⁶ Memorial, ¶ 11.

¹³⁸⁷ **Ex. R-0131**, *Macbeg de Occidente S A. v. Kaloti Metals & Logistics, LLC*, U.S. Southern District of Florida Case No. 1:12-cv-24050, Complaint, 8 November 2012 (Lenard), pp. 2-5.

¹³⁸⁸ **Ex. R-0013**, Supreme Decree 014-92-EM, General Mining Law, 3 June 1992, Art. 4; **Ex. R-0049**, Illegal Mining Controls and Inspection Decree, Art. 11. *See also* Section II.A.4 above.

¹³⁸⁹ Section II.B.

of Shipments 1 to 4 directly led to the seizures and criminal investigations regarding such shipments.¹³⁹⁰

746. Having failed to carry out adequate due diligence with respect to the Five Shipments, Kaloti took the risk that the Peruvian authorities might not be satisfied with the relevant evidence regarding the provenance of such shipments. Kaloti could have avoided the immobilizations, seizures and subsequent criminal proceedings in relation to Shipments 1 to 4 by backing out of the relevant transactions once it became evident that it would not be possible to verify the source of the gold in compliance with Kaloti's legal obligations. Thus, to the extent that Kaloti suffered losses due to its failure to obtain possession of the shipments, such losses are entirely attributable to Kaloti's own due diligence failings and its decision to transact with the Suppliers heedless of the compliance risks associated with such transactions. In addition, as noted above, Kaloti's inability to obtain possession of Shipment 5 is due to the Civil Attachment that resulted from its own failure to pay one of its Suppliers.

c. The downturn in production from artisanal and small-scale gold producers from 2013–2014 negatively affected Kaloti's business

747. A further reason for Kaloti's poor financial performance in the period following the SUNAT Immobilizations was the decline in production from artisanal and small-scale gold producers in Peru during that period.

748. As Brattle explains in its report, most large mining companies in Peru sell directly to refiners, rather than using intermediaries such as Kaloti. Such large producers comprise approximately 40% of the gold export market in Peru.¹³⁹¹ Thus, a large part of the gold export market was effectively closed to Kaloti. In order to source gold for export, Kaloti instead had to turn to smaller suppliers, who typically sourced their gold from artisanal and small-scale gold producers.¹³⁹² However, the internal controls of such producers are typically far less stringent than those of medium- and large-

¹³⁹⁰ See Section II.C above.

¹³⁹¹ Brattle Report, ¶ 105.

¹³⁹² Brattle Report, ¶ 107.

scale suppliers, and thus such smaller producers are more likely to trade illegally mined gold.

749. In the period from 2013–2014, there was a significant downturn in gold production from artisanal and small-scale gold producers in Peru, with such production decreasing from 15,397,595 kg in 2013 to 7,867,402 kg in 2014—a drop of nearly 50%.¹³⁹³ Given Kaloti’s extensive reliance on artisanal and small-scale suppliers, it was inevitable that a downturn in production from artisanal and small-scale producers would affect Kaloti’s business. Not surprisingly then, the downturn in artisanal and small-scale gold production coincided with a reduction of Kaloti’s sales revenue of *more than 40%*, from USD 1.33 Bn in 2013 to USD 795M, in 2014.¹³⁹⁴

d. Kaloti’s shareholder redirected Kaloti’s business activities to a new enterprise, Global American

750. A further supervening cause of Kaloti’s loss was the decision of its own shareholder, ██████████, to terminate Kaloti’s operations and commence a new enterprise, Global American.

751. While publicly available information regarding Global American is scarce, the evidence indicates that such company substantially replicated the operations previously carried out by Kaloti. Global American was founded just two months before Kaloti purportedly became *de facto* bankrupt.¹³⁹⁵ ██████████ admits that, and also that Global American’s business is “similar to” that of Kaloti.¹³⁹⁶ Publicly available records indicate that Global American operates from the same principal address as Kaloti, namely ██████████.¹³⁹⁷ Thus, ██████████ established a new business in the same sector as Kaloti, from the same address

¹³⁹³ Ex. R-0011, Mining Annual Report 2020, MINEM, May 2020, p. 69.

¹³⁹⁴ Ex. AS-0007, Appendix 3 – Discounted Cash Flow Model and Accompanying Support, Tab 3.4. *See also* Brattle Report, ¶ 71.

¹³⁹⁵ *See* Ex. R-0161, Certificate of Status of Global American Consulting LLC, 27 September 2018, which records that Global American was incorporated on 27 September 2018, two months before Kaloti allegedly became *de facto* bankrupt, p. 1.

¹³⁹⁶ ██████████ Witness Statement, ¶ 10.

¹³⁹⁷ Ex. BR-0004, Florida Division of Corporations, Detail by Entity Name; Brattle Report, ¶ 171.

and conducting the same business as Kaloti. Then, having effectively replicated Kaloti's operations, [REDACTED] shortly afterwards decided to cease Kaloti's operations. In other words, [REDACTED] transferred Kaloti's operations to a newly established competing business and then caused Kaloti to cease trading. That decision, not any actions by Peru, caused Kaloti to stop trading as a going concern.

752. Moreover, as Brattle explains in its report, even if Kaloti had continued to trade after Global American was established, the value of Kaloti's business would have been diminished because Global American would have operated in competition with it:

The simultaneous operation of both existing and new businesses serving the same geographic markets (aside from Peru) would normally be expected to cannibalize the sales and profitability of the existing business, leading to a diminution of its value.¹³⁹⁸

753. Despite these facts, Kaloti does not account in its quantum analysis for revenues of Global American, which could have been realized by Kaloti but for [REDACTED] decision to transfer Kaloti's operations to Global American.¹³⁹⁹ Plainly, Kaloti cannot claim for damages with respect to losses that would be the result of competition created by its own principal shareholder ([REDACTED]).

e. Kaloti's business was affected by the significant volatility of the Peruvian gold market, and factors in overseas markets

754. As Brattle explains in its report, the gold market in Peru appears to have been volatile during the period in which Kaloti operated. Kaloti's own financial statements serve as evidence of this fact, as they show that Kaloti's purchase volumes varied significantly from month to month.¹⁴⁰⁰ In addition, as Brattle explains, Kaloti experienced a high level of turnover amongst its suppliers even before the Challenged Measures.¹⁴⁰¹ For example, only 34 out of 90 companies who supplied gold to Kaloti

¹³⁹⁸ Brattle Report, ¶ 172.

¹³⁹⁹ Brattle Report, ¶ 173.

¹⁴⁰⁰ Brattle Report, ¶¶ 64, 101.

¹⁴⁰¹ Brattle Report, ¶ 58.

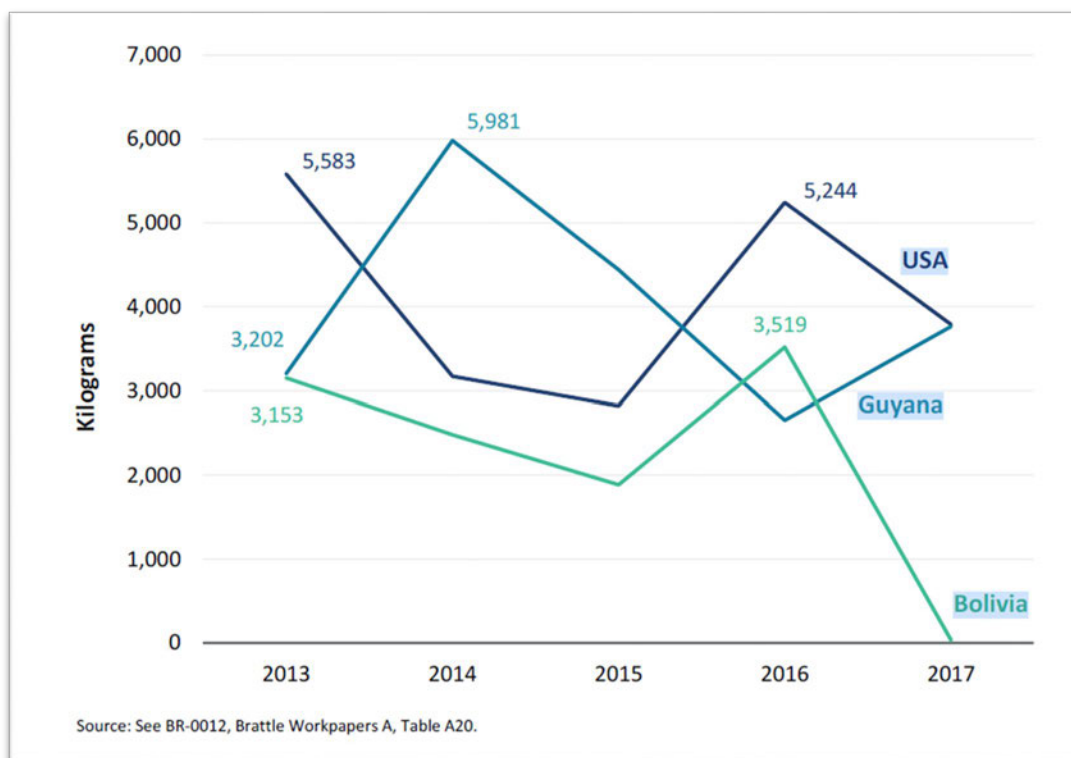
in 2012 continued to supply gold to Kaloti in 2013.¹⁴⁰² In addition, in many instances companies selling gold would only operate for a short time before ceasing operations, potentially in order to evade regulatory control and enforcement.¹⁴⁰³

755. The abovementioned volatility of the Peruvian gold market would undoubtedly have affected Kaloti's business. The high turnover of suppliers referred to above would have made it more difficult to establish lasting and consistent supply-side relationships in order to guarantee a steady flow of gold for Kaloti to sell and export. Kaloti has not established that it was the Challenged Measures, rather than the inherent volatility of the market in which it operated, that caused its business to decline and ultimately fail.
756. In addition, market factors in countries outside Peru may have had an adverse impact on Kaloti's business. As Brattle's analysis demonstrates, Bolivia was one of Kaloti's three principal sources of gold outside Peru. However, supplies from Bolivia plummeted to nearly zero in 2017, the year before Kaloti says it became *de facto* bankrupt. This is illustrated in the below chart:

¹⁴⁰² Brattle Report, ¶ 58.

¹⁴⁰³ Brattle Report, ¶ 59.

Figure 11: KML's Volumes from their Three Largest Countries/Suppliers Outside Peru¹⁴⁰⁴



757. The reasons why supplies from Bolivia dwindled is unclear, but it conceivably related to the fact that, like Peru, Bolivia updated and strengthened its enforcement regime with respect to money laundering in the period from 2014 onwards.¹⁴⁰⁵

f. Kaloti's business was already declining prior to the seizure of the Five Shipments

758. The fact that the downturn in Kaloti's business after 2012 was unrelated to the Challenged Measures is also consistent with the fact that Kaloti's business had already begun declining *before* the Challenged Measures. As Brattle explains in its report, Kaloti's gold purchases had decreased by 38% from October to November 2013 (i.e., before the Challenged Measures). Indeed, the *first* of the SUNAT Immobilizations, namely that of the Shipment 1, did not occur until 27 November 2013. It is therefore a

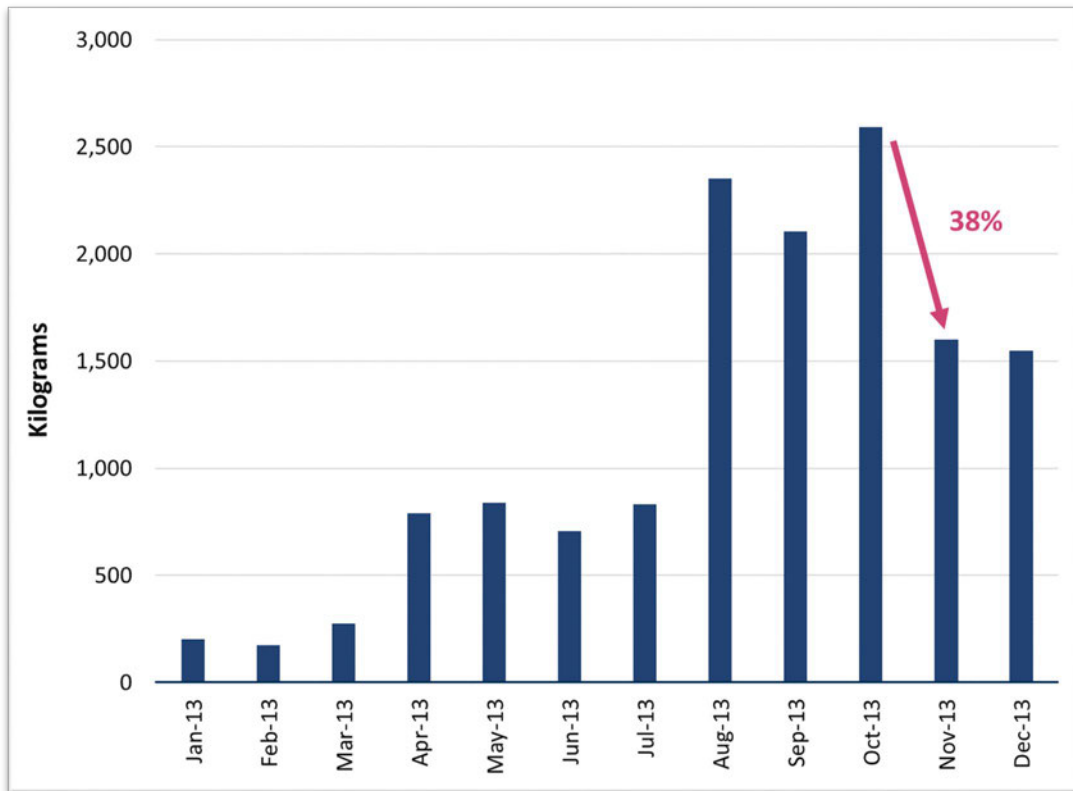
¹⁴⁰⁴ Brattle Report, Figure 7.

¹⁴⁰⁵ Ex. R-0231, International Narcotics Control Strategy Report: Bolivia, US DEPARTMENT OF STATE, 2016.

chronological impossibility for such 38% decrease in sales volumes to have been caused—even in part—by *any* of the Challenged Measures.

759. Moreover, the earliest press report cited by the Kaloti in relation to the SUNAT Immobilizations is an article published by El Comercio in January 2014.¹⁴⁰⁶ Kaloti’s business had continued to decline prior to that date. The decline in Kaloti’s purchase volumes is illustrated in the following chart:

Figure 12: Monthly Gold Purchases in Peru¹⁴⁰⁷



760. Thus, the decline of Kaloti’s business from 2014–2018 merely marked a continuation of a trend that had already started before the seizures took place.

761. The above facts, and related supporting evidence, demonstrate that there is simply no basis to conclude that Kaloti’s losses were caused by the Challenged Measures or by

¹⁴⁰⁶ 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], p. 1.

¹⁴⁰⁷ Brattle Report, Figure 4.

any conduct attributable to Peru. It appears therefore that Kaloti is seeking herein more than USD 123 million in compensation from Peru essentially by means of an effort to exploit the rough contemporaneity between (i) the decline and ultimate demise of Kaloti's business; and (ii) the Challenged Measures. However, the fact that such events happened at approximately the same time does not mean that there was a causal nexus between them.

B. Kaloti has failed to substantiate the damages it seeks

762. Kaloti's damages calculation is replete with unjustified assumptions, calculation errors, and flawed inputs. Thus, even if Kaloti were to prove that Peru breached the Treaty, and were also to establish a proximate causal link between such breach and the alleged losses – neither of which it can do – the amount of any award of damages would need to be dramatically lower than the figure claimed by Kaloti.

763. In order to demonstrate the glaring deficiencies in Kaloti's damages case, in **Section V.B.1** below Peru will first address the relevant legal standard, which Kaloti has failed to meet. Peru will then summarize the various fundamental problems that undermine the DCF model used by Kaloti for its Lost Profits Claim and Going Concern Claim (**Section V.B.2**). Peru will then demonstrate that Kaloti's Inventory Claim is inappropriately inflated (**Section V.B.3**).

1. *The applicable legal standard for damages under international law*

764. Peru does not dispute Kaloti's assertion that the relevant standard for compensation for breaches of international law obligations is that of full reparation. That standard, articulated by the Permanent Court of International Justice ("PCIJ") in the oft-cited *Chorzow Factory* case, requires that

reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.¹⁴⁰⁸

¹⁴⁰⁸ **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. 45.

765. As the PCIJ made clear, full reparation must reestablish the situation which would “in all probability” have existed but for the relevant acts. Accordingly, the standard of full reparation does **not** permit compensation for damages that are speculative, remote or uncertain.
766. The fact that speculative, remote or uncertain damages may not be awarded under the full reparation standard is well-established in international law jurisprudence. For example, the Iran-US Claims Tribunal in *Amoco International Finance v. The Islamic Republic of Iran* stressed that “[o]ne 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.”¹⁴⁰⁹ Similarly the ILC Commentary notes that international tribunals “have been reluctant to provide compensation for claims with inherently speculative elements.”¹⁴¹⁰
767. Consistent with the above principles, investment treaty tribunals have emphasized that speculative, remote or uncertain damages may not be awarded to investors even in cases in which the State’s liability has been established. For example, the tribunal in *Gemplus v. Mexico* noted that “[i]f . . . loss is found to be too uncertain or speculative or otherwise unproven, the Tribunal must reject [the investor’s] claims, even if liability is established against the Respondent.”¹⁴¹¹ In a similar vein, the tribunal in *LG&E v. Argentina* held that it could “only award compensation for loss that is certain.”¹⁴¹²
768. The concept of speculative, uncertain or remote damages is particularly relevant in the context of claims for lost profits, which form an important part of Kaloti’s claims in this arbitration. Investment arbitration case law establishes that lost profits will only be awarded when the anticipated income stream (on which the claimed lost profits

¹⁴⁰⁹ **CL-0058**, *Amoco International Finance Corporation v. Islamic Republic of Iran*, Iran-U.S. Claims Tribunal, Partial Award (14 July 1987), ¶ 238.

¹⁴¹⁰ **RL-0022**, ILC Commentary, Art. 36, Commentary 27.

¹⁴¹¹ **RL-0025**, *Gemplus* (Award), ¶ 12.56.

¹⁴¹² **RL-0028**, *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Award, 25 July 2007 (de Maekelt, van den Berg, Rezek) (“**LG&E (Award)**”), ¶ 88.

are based) is sufficiently certain. Both of the above-cited cases – *Gemplus* and *LG&E* – are instructive in this regard.

769. In *Gemplus*, the tribunal analyzed the investor’s claims for lost profits, and noted that the claimant’s expert had “produce[d] figures for the Concessionaire’s future lost profits which are manifestly too high on the facts found by the Tribunal.”¹⁴¹³The tribunal in *LG&E*, for its part, cited the ILC Commentary for the proposition that

lost 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.¹⁴¹⁴

Applying the above approach to the facts before it, the *LG&E* tribunal adjudged that “future loss to the Claimants is uncertain and any attempt to calculate it is speculative.”¹⁴¹⁵

770. As discussed in more detail below, the Tribunal cannot award any damages at all in this case, because Kaloti has failed to establish that the losses that it is claiming reflect a situation that would, *in all probability*, have existed but for Peru’s measures. In the context of Kaloti’s claims for lost profits, the Tribunal must be persuaded that the income stream forming the basis of the claim is sufficiently certain. To the extent that any of Kaloti’s damages claims are speculative, remote or uncertain, the Tribunal should dismiss such claims. Brattle’s expert analysis demonstrates that there is nothing certain about Kaloti’s projected income stream from 2013 to 2048 in a ‘but for scenario’; rather, its projections are completely speculative, remote, and uncertain.

2. *Kaloti’s damages claims are speculative and uncertain*

771. In support of both its Lost Profits Claim and its Going Concern Claim, Kaloti relies on the DCF model compiled by its expert, Mr. Smajlovic. However, that DCF model

¹⁴¹³ **RL-0025**, *Gemplus* (Award), ¶ 13.72.

¹⁴¹⁴ **RL-0028**, *LG&E* (Award), ¶ 89.

¹⁴¹⁵ **RL-0028**, *LG&E* (Award), ¶ 90.

contains numerous speculative and uncertain elements, and therefore cannot properly form the basis of an award of damages against Peru. In the paragraphs that follow, Peru will summarize some of the most glaring failings in that model which necessitate a significant reduction in any damages award.

a. Kaloti's damages model is based on a flawed valuation date

772. One significant flaw in Kaloti's damages model is its selection of 30 November 2018 as the valuation date for the purposes of assessing damages. As explained in **Section III.B** above, Kaloti's argument that this date constituted the moment in time when Kaloti's losses became "permanent and fully irreversible" is a self-serving attempt to circumvent the three-year limitation period that applies to claims under the Treaty.¹⁴¹⁶ For the same reasons as outlined in the referenced section, 30 November 2018 cannot serve as a valuation date for the purposes of an award of damages, as both the alleged breach and the losses allegedly stemming from that breach crystallized long before that date.
773. Brattle confirms in its report the artificiality of Kaloti's chosen valuation date of 30 November 2018. As Brattle explains, Kaloti selected this valuation date on the basis that it was the date on which Kaloti's net equity became negative (i.e., the value of its assets fell below the value of its liabilities), and on which Kaloti thus became "de facto insolvent".¹⁴¹⁷ Such negative equity was, according to Kaloti and its expert Mr. Smajlovic, caused by the need to write down Kaloti's gold inventory from its balance sheet as a result of the fact that the Five Shipments remained outside Kaloti's possession.¹⁴¹⁸
774. As Brattle explains, however, the above logic is flawed. Had Kaloti genuinely believed that a write-down to its inventory was required as of 30 November, this should have been reflected in Kaloti's financial statements. However, Kaloti did not record any

¹⁴¹⁶ Memorial, ¶ 163.

¹⁴¹⁷ Brattle Report, ¶ 236. *See also* Memorial, ¶¶ 17, 163.

¹⁴¹⁸ Smajlovic Report, ¶¶ 6.10–6.15.

write-down of the inventory in its 2018 balance sheet.¹⁴¹⁹ Not only that, but in fact Kaloti has not provided any evidence that it wrote down the inventory at *any* time – either prior to or following 30 November 2018. Nor has Kaloti provided any basis to conclude that 30 November 2018 was the date on which such write-down became necessary, or that no write-down was necessary prior to that date.

775. Moreover, Brattle confirms in its analysis that a write-down of Kaloti’s gold inventory at any time after 2014 would have tipped Kaloti into negative equity.¹⁴²⁰ Brattle also explains that, due to KML’s thin capitalization, taking a reserve for even a small chance of the loss of seized inventories would have been more than sufficient to cause KML to become effectively insolvent at any time following the seizures.¹⁴²¹ In other words, it can reasonably be deemed that the *de facto* insolvency that forms the basis of Kaloti’s chosen valuation date occurred far sooner than Kaloti would have the Tribunal believe.

776. Nor does Mr. Smajlovic’s testimony support Kaloti’s choice of valuation date, as such testimony is both thinly evidenced and contradictory. For example, Mr. Smajlovic seeks to justify Kaloti’s choice of valuation date on the basis that “up to 30 November 2018 (Valuation Date) neither KML’s management nor auditors considered the temporary seizure of the Company’s gold inventory as a ‘triggering event’ requiring a permanent impairment or write-down of temporarily seized inventory.”¹⁴²² However, Mr. Smajlovic does not cite to any evidence that Kaloti’s management or auditors considered whether a write-down was necessary on 30 November 2018, or at any time before that date.¹⁴²³ Mr. Smajlovic goes on to say that “[t]he actual triggering event which caused a permanent loss of the inventory value was . . . prompted by the [sic] KML’s insolvency in November 2018.”¹⁴²⁴ In other words, Mr. Smajlovic argues

¹⁴¹⁹ Brattle Report, ¶ 238.

¹⁴²⁰ Brattle Report, ¶ 237.

¹⁴²¹ Brattle Report, ¶ 240.

¹⁴²² Smajlovic Report, ¶ 6.13.

¹⁴²³ Brattle Report, ¶ 238.

¹⁴²⁴ Smajlovic Report, ¶ 6.14.

that Kaloti's insolvency caused the loss of its inventory. However, this argument contradicts the argument made earlier in Mr. Smajlovic's report that the need to write down the inventory had caused Kaloti to be in negative equity and had therefore rendered it "de facto bankrupt".¹⁴²⁵

777. Mr. Smajlovic also argues that "[o]n or around 30 November 2018 the Company's management was unable to service debt of approximately \$12.6 million."¹⁴²⁶ Again, however, neither Kaloti nor Mr. Smajlovic provide any evidence as to what this alleged debt comprised, or the reasons why it could not be serviced.¹⁴²⁷

778. In sum, Kaloti's choice of 30 November 2018 as the valuation date for the purposes of its damages claim is not supported by any evidence, and appears rather to have been arbitrarily chosen to fabricate jurisdiction and evade the three-year limitation period under Article 10.18 of the Treaty. An objective analysis of the evidence would lead to the selection of a far earlier valuation date.

b. Kaloti's damages analysis suffers from numerous other flaws

779. There are numerous other deficiencies in Kaloti's quantum analysis, which are discussed in full in the Brattle Report. Without prejudice to Brattle's more detailed analysis, in this section Peru identifies nine flaws that suffice to demonstrate that Kaloti's damages model cannot be relied upon as a basis for an award of damages against Peru.

780. *First*, Kaloti was a fledgling business that had been operating in Peru for merely one year prior to the first of the SUNAT Immobilizations. Despite that fact, Kaloti's but for scenario simply assumes that somehow Kaloti would have *doubled* its market share by 2015, i.e., within one year, to 21.25% of the Peruvian gold market.¹⁴²⁸ It then makes the equally unwarranted assumption that it would have been able to maintain that market

¹⁴²⁵ Smajlovic Report, ¶ 6.11.

¹⁴²⁶ Smajlovic Report, ¶ 6.14.

¹⁴²⁷ Brattle Report, ¶ 238.

¹⁴²⁸ Smajlovic Report, ¶¶ 6.5, 6.27.

share consistently and uninterruptedly for more than three decades.¹⁴²⁹ Both assumptions are speculative and utterly untenable. As Brattle explains, Kaloti had a limited track record (not only in Peru, but in all other jurisdictions as well).¹⁴³⁰ While Kaloti claims to have “disrupted” the market in its first (and only) full year of operation prior to the Challenged Measures, such disruption would have elicited a response from Kaloti’s competitors, who would have sought to stymie Kaloti’s attempts to gain market share.¹⁴³¹ For example, such competitors could have started either (i) undercutting Kaloti by selling to customers at a lower price than Kaloti, or (ii) offering suppliers higher prices, leading them to prefer such competitors over Kaloti. Actions such as these would have eroded Kaloti’s newly acquired market share, thereby preventing it from obtaining and maintaining the projected market share that underpins Kaloti’s damages model.

781. *Second*, and relatedly, the market in which Kaloti operated had limited barriers to entry, and Kaloti’s business model – which essentially involved buying large volumes of gold and then selling them at a slight uplift – was easily replicable. In fact, Kaloti itself describes its business model as “simple”.¹⁴³² For these reasons, as Brattle explains, competitive pressures would have driven market participants’ returns on investment down to opportunity cost, which is usually measured as the cost of capital in a particular market.¹⁴³³ According to Kaloti’s own expert, Mr. Smajlovic, the average cost of capital for Kaloti’s market was approximately 5%.¹⁴³⁴ Despite that fact, Kaloti’s valuation model assumes that Kaloti would have achieved a 200% annual

¹⁴²⁹ Smajlovic Report, ¶¶ 5.5, 6.5.

¹⁴³⁰ Brattle Report, ¶¶ 95–96.

¹⁴³¹ Brattle Report, ¶¶ 97, 113.

¹⁴³² Memorial, ¶ 144 (“KML’s business strategy was simple: offer very attractive prices to its suppliers, and competitive prices to its buyers.”).

¹⁴³³ Brattle Report, ¶ 111.

¹⁴³⁴ Smajlovic Report, ¶ 6.74. *See also* Brattle Report, ¶ 111.

return on investment – i.e., 40 times the average return on investment in the sector.¹⁴³⁵ The foregoing underscores the unrealistic nature of Kaloti’s assumptions.

782. *Third*, Kaloti overestimates the size of the portion of the market that was actually available to Kaloti (“**Addressable Market**”) in Peru, making its assumed 21.25% market share even more unrealistic. As noted above, many gold producers in Peru – especially large producers – sell directly to refiners, rather than using intermediaries. This means that the Addressable Market was largely limited to artisanal and small-scale miners. If one applies Kaloti’s projections to the Addressable Market, rather than to the overall gold market, they yield an expected market share of between 70% and 90% – unquestionably a fanciful range.¹⁴³⁶ Kaloti identifies no competitive advantage that would have allowed it to maintain such a dominant share in the Addressable Market, let alone one that would have allowed that over a period of 35 years.
783. *Fourth*, Mr. Smajlovic’s forecast purchase volumes suffer from a series of calculation errors. For example, Mr. Smajlovic assumes a 36,000 kg annual volume based on 2,517 kg average monthly volumes in the two months prior to the SUNAT Immobilizations.¹⁴³⁷ However, such monthly volumes would amount to annual volumes of approximately 30,000 kg, not 36,000 kg. By dint of a manifest error in his calculations, Mr. Smajlovic has therefore over-projected Kaloti’s purchase volumes – and therefore the amount of gold that it would have been able to sell – by 20%.¹⁴³⁸ In addition, Mr. Smajlovic’s calculations are based on the gross weights of projected gold volumes rather than the actual weight of the gold contained in such volumes. As Brattle explains, such weights are different because unrefined gold contains impurities. To take into account the exclusion of such impurities, it is necessary to use actual gold weights, i.e., those of the refined gold rather than gross gold weights, in

¹⁴³⁵ Brattle Report, ¶ 111.

¹⁴³⁶ Brattle Report, ¶ 108.

¹⁴³⁷ Smajlovic Report, ¶ 6.21.

¹⁴³⁸ Brattle Report, ¶ 99.

order to calculate purchase volumes.¹⁴³⁹ Mr. Smajlovic's use of gross weights results in 4,000 kg over-estimation of Kaloti's projected annual purchase volumes.¹⁴⁴⁰

784. *Fifth*, Mr. Smajlovic fails to take into account the volatility of Kaloti's purchase volumes. Instead, he conveniently selects the high volumes that Kaloti achieved in the two months prior to the SUNAT Immobilizations as the basis for his projections,¹⁴⁴¹ whilst ignoring the fact that the volumes in prior months had been lower, and had already started to decline over the course of the month of November 2013 (at the end of which month the first of the SUNAT Immobilizations took place).¹⁴⁴²

785. *Sixth*, Kaloti asserts that its unrealistic projections are supported by the alleged fact that its main customer and sister company, ██████████, was "demanding" that Kaloti supply it with 45,000 kg of unrefined gold per year.¹⁴⁴³ However, the "demand" that Kaloti refers to is in reality a single-page, self-serving letter in which ██████████ stated that it would

[c]hannel the necessary resources to support the exponential growth in quantities by pledging the required resources technically and financially to meet and satisfy your need to cater your client base in Peru so you can achieve the forecasted target of 45 tons per year for the coming 2-3 years.¹⁴⁴⁴

786. As the above-quoted language demonstrates, far from being a "demand", ██████████ letter was framed merely as a courtesy to Kaloti, to allow the letter to serve its "need to cater [its] client base" and meet its sales targets. The letter did not provide or constitute any legally binding commitment, and in any event was limited to a short time period, namely 2-3 years. As Brattle points out, Kaloti has not provided any evidence that there was any supply or financing agreement between Kaloti and ██████████ that would reflect a commitment by ██████████ to purchase 45,000 kg

¹⁴³⁹ Brattle Report, ¶ 100.

¹⁴⁴⁰ Brattle Report, ¶ 100.

¹⁴⁴¹ Smajlovic Report, ¶ 6.21.

¹⁴⁴² Brattle Report, ¶ 101.

¹⁴⁴³ Memorial, ¶ 31.

¹⁴⁴⁴ Ex. C-0047, ██████████ International letter to KML dated September 10, 2013, p. 2.

of gold per year from Kaloti.¹⁴⁴⁵ Nor has Kaloti provided any evidence of short or long-term commodity purchase arrangements with [REDACTED].¹⁴⁴⁶ Similarly, on the supply side Kaloti has exhibited just one supplier contract, and that contract does not contain any commitment to supply specific volumes of gold to Kaloti.¹⁴⁴⁷ The absence of such documents has a significant impact on Kaloti's fair market value, because any prospective buyer would have had no concrete basis to believe or expect that Kaloti would be able to maintain its sales volumes following a sale.¹⁴⁴⁸

787. *Seventh*, Kaloti has applied the same unrealistic assumptions regarding growth in its gold volumes sourced *in* Peru to its volumes sourced *outside* Peru.¹⁴⁴⁹ However, there is no basis to assume that Kaloti's sales of gold from outside Peru – which accounted for more than half of its business¹⁴⁵⁰ – would grow at the same rate as its sales of gold from Peru. In fact, Kaloti does not provide any data at all regarding the size or features of the Addressable Market in the countries other than Peru in which it operated, or any contemporaneous business plans, purchase arrangements, or forecasts with respect to its operations in those countries.¹⁴⁵¹ Kaloti's projections of growth outside Peru are therefore even more unsupported and speculative than its projections of growth within Peru.

788. *Eighth*, the discount rate selected by Kaloti for the purposes of its DCF model, namely 5.19%, is artificially low. Mr. Smajlovic argues that such rate is reasonable when compared to the weighted average cost of capital ("WACC") in the precious metals industry, which Mr. Smajlovic estimates at 4.4%.¹⁴⁵² However, this 4.4% estimate is based on an incorrect ratio of the capital structure of companies in the sector. As

¹⁴⁴⁵ Brattle Report, ¶ 115.

¹⁴⁴⁶ Brattle Report, ¶ 115.

¹⁴⁴⁷ **Ex. AS-0053**, Agreement for the Sale and Purchase of Precious Metals Between KML and Stedson's Jewellery USA Inc. Dated 12 May 2017, pp. 2-3.

¹⁴⁴⁸ Brattle Report, ¶ 118.

¹⁴⁴⁹ Brattle Report, ¶ 119.

¹⁴⁵⁰ Smajlovic Report, ¶ 6.34.

¹⁴⁵¹ Brattle Report, ¶ 122-124.

¹⁴⁵² Smajlovic Report, ¶ 6.84, fn. 254.

Brattle explains, applying the correct capital ratios, the WACC for the precious metals sector is in fact significantly higher, namely 8.4%.¹⁴⁵³ As Brattle explains, a more reasonable approach than that adopted by Mr. Smajlovic would be to adopt this average WACC for the purposes of the discount rate.¹⁴⁵⁴ Accordingly, Kaloti's proposed discount rate, being more than 3% lower than the average WACC for the sector, is untenably low.

789. *Ninth*, and finally, Mr. Smajlovic's DCF model fails to take into the account various significant risks that affected Kaloti's business. Such risks included (i) Kaloti's affiliation with ██████████, which, as discussed above, had been in involved in several high-profile scandals that hurt its reputation; (ii) the risk that Kaloti would (accidentally or not) procure illegally sourced gold, which it would then be unable to sell; and (iii) price-fixing risk, i.e., the risk that would result from Kaloti's exposure to price movements between the time that Kaloti purchased gold and subsequently sold such gold.¹⁴⁵⁵

790. In light of the errors and mistaken assumptions embedded in Kaloti's DCF model, such model simply cannot form the basis of any reliable calculation of damages in the present case.

c. Kaloti has overstated the value of its gold inventory

791. In addition to inflating its Lost Profits Claim and Going Concern Claim, Kaloti has overvalued its inventory, which renders its Inventory Claim incorrect and unreliable.

792. In particular, Kaloti asserts that it is entitled to be compensated for the full market value of the Five Shipments. However, as noted above, Kaloti had not yet paid anything at all for two of those shipments: the Shipment 3 and the Shipment 5.¹⁴⁵⁶ Thus, in the event that Kaloti were to receive damages with respect to those

¹⁴⁵³ Brattle Report, ¶ 164.

¹⁴⁵⁴ Brattle Report, ¶ 168.

¹⁴⁵⁵ Brattle Report, ¶¶ 156–161.

¹⁴⁵⁶ See Section III.A.2.

shipments, it would be receiving a complete windfall, since such damages would be compensation for the deprivation of assets for which it never even paid.

793. Kaloti has also inflated its Inventory Claim by using incorrect prices for the Five Shipments. As Brattle explains, each of the Five Shipments contained unrefined gold.¹⁴⁵⁷ Mr. Smajlovic therefore should have discounted the value of such gold to reflect the costs, risks and delays attendant to the refining of such gold.¹⁴⁵⁸ However, he failed to do so, and instead applied prices that are applicable to *refined* gold.¹⁴⁵⁹
794. Finally, Kaloti's alternative valuation, in which it values the gold inventory using 2022 prices, is similarly invalid. Under well-settled international investment law jurisprudence, the relevant valuation date in relation to an expropriated asset is the date on which the expropriation took place.¹⁴⁶⁰ Here, Kaloti itself alleges that such date was 30 November 2018.¹⁴⁶¹ Thus, in the event that the Tribunal were to find that any of the Five Shipments was indeed expropriated, the valuation of such shipments would need to be based on the date that the Tribunal determines that such expropriation took place.

* * *

795. Even assuming that a DCF model could be relied upon to calculate the amount of damages allegedly caused by the Measures, a proper application of that model would yield an amount significantly lower than the amount proffered by Mr. Smajlovic, given the numerous calculation errors and flaws contained in his DCF model. Brattle has calculated that an amount of USD 68,572,755 needs to be deducted from Kaloti's Lost Profits Claim and Going-Concern Claim, which rely on Mr. Smajlovic's DCF model. Taking into account Mr. Smajlovic's own adjustment to such claims to

¹⁴⁵⁷ Brattle Report, ¶ 199.

¹⁴⁵⁸ Brattle Report, ¶ 199.

¹⁴⁵⁹ Smajlovic Report, ¶ 7.2, fn. 256.

¹⁴⁶⁰ **RL-0072**, *Perenco Ecuador (Award)*, ¶ 116; **CL-0024**, *Bernardus Henricus Funnekotter and others v. Republic of Zimbabwe*, ICSID Case No. ARB/05/6, Award, 22 April 2009 (Wasi Zafar, Cass, Guillaume), ¶ 115.

¹⁴⁶¹ Memorial, ¶ 8.

“prevent double-counting”,¹⁴⁶² each of these claims results in a negative figure, meaning that Kaloti’s damages must be zero. Even excluding Mr. Smajlovic’s double-counting adjustment, Kaloti’s Lost Profits Claim would be no more than USD 1,786,065 (as opposed to the USD 26,407,094 claimed) and its Going-Concern Claim could be no more than USD 3,769,861 (as opposed to the USD 47,296,862 claimed).¹⁴⁶³ Brattle calculations are summarized in the following table:

Figure 13: Cumulative Impact of changes on Damages¹⁴⁶⁴

	Lost Profits		Damages from Alleged Expropriation (2019-2048) [C] See note \$	Total Damages [D] [A]+[B]+[C] \$	Reduction in Damages [E] %
	Before Double-Counting Adjustment [A] See note \$	Mr. Smajlovic’s Adjustment to Avoid Double-Counting [B] See note \$			
Smajlovic Estimate	26,407,094	-12,613,959	47,296,862	61,089,997	
#1: Adjusting But-For Peru Gold Volumes	7,734,700	-12,613,959	18,514,204	13,634,945	-78%
#2: Removing Lost Gold Volumes Outside Peru	5,759,963	-12,613,959	7,803,784	949,788	-98%
#3: Correcting Gold Prices	5,795,466	-13,038,683	6,555,527	-687,690	-101%
#4: Correcting Unreasonable Income Projections	4,219,124	-13,038,683	5,246,564	-3,572,995	-106%
#5: Correcting Working Capital	2,137,328	-13,038,683	5,584,281	-5,317,074	-109%
#6: Correcting the Discount Rate	2,137,328	-13,038,683	3,965,209	-6,936,146	-111%
#7: Accounting for KML’s Actual Value	2,137,328	-13,038,683	3,769,861	-7,131,494	-112%
#8: Updating Interest Rate in Lost Profits	1,786,065	-13,038,683	3,769,861	-7,482,758	-112%

Sources and notes:
[A]-[C]: See BR-0012, Brattle Workpapers A and AS-0007-ENG. See 'Control Panel' tab to turn adjustments on/off.

C. Kaloti has failed to mitigate its losses

796. It is a well-established principle of international investment law that claimants must take reasonable steps to mitigate their losses. As noted by the *East Cement v. Egypt* tribunal, the duty to mitigate losses “can be considered to be part of the General

¹⁴⁶² Smajlovic Report, ¶ 6.9. See also Ex. AS-0007, Appendix 3 – Discounted Cash Flow Model, Tab “3.3 Damages”. As Brattle notes in its report, Mr. Smajlovic has not explained the basis of this adjustment or how it was calculated (see Brattle Report, ¶ 36 and fn. 8).

¹⁴⁶³ Brattle Report, ¶ 231 and Table 7.

¹⁴⁶⁴ Brattle Report, Table 7.

Principles of Law which, in turn, are part of the rules of international law.”¹⁴⁶⁵ Similarly, the ILC commentary to ILC Article 31 notes that a claimant’s “failure to mitigate . . . may preclude recovery to that extent.”¹⁴⁶⁶ Tribunals have articulated the scope of the duty to mitigate in different ways. Some have defined it as a “failure to take reasonable steps,”¹⁴⁶⁷ while others have required “significant efforts,”¹⁴⁶⁸ and still others have framed it as the duty to do the “utmost to overcome the consequences.”¹⁴⁶⁹

797. Regardless of how the standard for mitigation is articulated, the duty to mitigate includes a party’s duty to avail itself of applicable administrative or judicial remedies. In *Dunkeld International v. Belize*, for example, the tribunal concluded that a claimant’s failure to exhaust available judicial remedies had constituted a failure to mitigate damages.¹⁴⁷⁰ It explained that “local administrative procedures may offer a remedy that appears more rapid or certain than that of an international claim, such that a party would be derelict in failing to attempt the local process.”¹⁴⁷¹

¹⁴⁶⁵ **CL-0069**, *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award (12 April 2002), ¶ 167; see also **RL-0029**, *Hrvatska Elektroprivreda d.d. v. Republic of Slovenia*, ICSID Case No. ARB/05/24, Award, 17 December 2015 (Williams, Brower, Paulsson) (“**Hrvatska (Award)**”), ¶ 215 (“With regard to the second issue, that of mitigation, the Tribunal finds that general principles of international law applicable in this case require an innocent party to act reasonably in attempting to mitigate its losses.”); **RL-0030**, *EDF International S.A., et al. v. Argentine Republic*, ICSID Case No. ARB/03/23, Award, 11 June 2012 (Park, Kaufmann-Kohler, Remón) (“**EDF (Award)**”), ¶ 1302 (“The duty to mitigate damages is a well-established principle in investment arbitration. This idea is reflected in *Middle East Cement v. Egypt*, where that tribunal clearly recognized it as a general principle of law. . .”); **RL-0032**, *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Final Award, 14 March 2003 (Kühn, Schwebel, Brownlie) (“**CME (Final Award)**”), ¶ 482 (“One of the established general principles in arbitral case law is the duty of the party to mitigate its losses (Fouchard, Gaillard, Goldmann - International Commercial Arbitration para. 1491 with further citations).”).

¹⁴⁶⁶ **RL-0022**, ILC Commentary, Art. 31(11).

¹⁴⁶⁷ **RL-0030**, *EDF (Award)*, ¶ 1310.

¹⁴⁶⁸ **RL-0031**, *Cairn Energy Plc and Cairn UK Holdings Ltd. v. Government of India*, PCA Case No. 2016-7, Final Award, 21 December 2020 (Lévy, Alexandrov, Thomas), ¶ 1896.

¹⁴⁶⁹ **RL-0032**, *CME (Final Award)*, ¶ 482.

¹⁴⁷⁰ **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) (“**Dunkeld (Award)**”), ¶ 197.

¹⁴⁷¹ **RL-0033**, *Dunkeld (Award)*, ¶ 197.

798. In the instant case, Kaloti failed to take *any* steps—let alone reasonable ones—to mitigate its losses. While Kaloti asserts that the cashflow modelling that underlies its Lost Profits Claim “includ[es] cashflows resulting from mitigation efforts,”¹⁴⁷² it does not identify what such efforts comprised. In any event, such alleged efforts expressly relate to the period prior to November 2018,¹⁴⁷³ i.e., *before* Kaloti alleges the Treaty was breached. In any event, the evidence shows that Kaloti did not mitigate its losses. As noted in **Section IV.A.3** above, several avenues of recourse with respect to the seizures were available to Kaloti but not pursued by it. These included filing a *reexamen*, or an appeal, with respect to the Precautionary Seizures and filing an *amparo* request before the Peruvian Constitutional Court. Kaloti’s failure to mitigate its losses by declining to pursue available remedies under Peruvian law necessitates a reduction in the damages awarded to Kaloti.
799. Kaloti could also have mitigated its losses by continuing to trade beyond 30 November 2018. While Kaloti alleges that its business could not continue after 30 November 2018, as demonstrated above Kaloti’s selection of this date is not based on objective evidence of the date on which the alleged harm was actually suffered. Rather it is based on Kaloti’s own self-serving (*see* **Sections III.B and V.B.2.b**), post hoc decision to write down or impair the seized inventory at that moment.
800. That Kaloti could have continued to trade and mitigated its losses is further demonstrated by the fact that Kaloti’s shareholder, ██████████, was able to start up a new enterprise (Global American) in order to carry out the same business as that previously carried out by Kaloti. The fact that with the new company ██████████ was able to continue engaging in the same business of buying gold inside Peru and selling it abroad suggests that he could have simply carried on the same through Kaloti.

¹⁴⁷² Memorial, ¶ 191.

¹⁴⁷³ Memorial, ¶ 191.

801. In light of the foregoing, any award of damages against Peru should be reduced taking into account the revenues that have been achieved, and may be achieved in the future, by Global American.

D. Kaloti's claim for pre-award interest is inflated

802. In a further attempt to augment its damages claim, Kaloti has applied an artificially high pre-award interest rate, namely LIBOR + 4%, to its damages claims.

803. It is well-established that interest may be awarded on damages, but only at a rate that is reasonable.¹⁴⁷⁴ Kaloti's selected pre-award rate of LIBOR +4% is *not* reasonable.

804. As Brattle explains, interest should be awarded at the risk-free rate – equivalent to the U.S. Treasury Bill interest rate – unless there were a risk that Peru would not comply with an eventual award of damages against it.¹⁴⁷⁵ However Kaloti has not even attempted, let alone established, that such a risk exists. Accordingly, any pre-award interest should be limited to the U.S. Treasury Bill rate.

E. Kaloti is not entitled to any "Tax Gross-up"

805. In yet another attempt to inflate the quantum of damages, Kaloti seeks a "tax gross-up" on any compensation awarded to it, assertedly for the purpose of accounting for tax liability that Kaloti alleges may arise in Peru, in Kaloti's home country (the United States), or indeed "anywhere,"¹⁴⁷⁶ with respect to an eventual award in its favor in this arbitration. According to Kaloti, damages therefore need to be grossed-up to place Kaloti in the same situation it would have been in but for the measures that it

¹⁴⁷⁴ **RL-0034**, *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, 27 June 1990 (El-Kosheri, Goldman, Asante), ¶ 113 ("In accordance with a long established rule of international law expressed since 1872 by the Arbitral Tribunal which adjudicated the Alabama case between the U.K. and U.S.A, 'it is just and reasonable to allow interest at a reasonable rate'). **RL-0029**, *Hrvatska* (Award), ¶ 547 ("It is therefore appropriate that the rate of interest represents a reasonable and fair rate that approximates the return the injured party might have earned if it had had the use of its money over the full period of time.").

¹⁴⁷⁵ Brattle Report, ¶ 206.

¹⁴⁷⁶ Memorial, ¶¶ 221-224.

challenges herein.¹⁴⁷⁷ For his part, Mr. Smajlovic asserts that a tax gross-up is necessary because an award would be “subject to taxation in the United States.”¹⁴⁷⁸

806. Kaloti’s Tax Gross-up Claim has the effect of increasing its overall damages claim by USD 25.6 million.¹⁴⁷⁹ For the reasons articulated below, this claim should be dismissed.

807. Despite the fact that Kaloti’s Tax Gross-up Claim purportedly encompasses an unlimited range of potential taxation regimes and jurisdictions, Mr. Smajlovic uses only the Peruvian corporate tax rate of (29.5%) to calculate Kaloti’s Tax Gross-up Claim.¹⁴⁸⁰ However, there is no legal or evidentiary basis for Kaloti’s damages to be grossed up to account for alleged tax liability (whether in Peru or in any other country), for the following reasons.

808. *First*, and contrary to Kaloti’s contention,¹⁴⁸¹ the principle of full reparation does *not* require that compensation awarded be grossed up to account for a potential tax liability. The foregoing was confirmed by the tribunal in *Abengoa v. Mexico*, which noted that

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 protected against any imposition [of taxation] on compensation**

...

¹⁴⁷⁷ Memorial, ¶ 221.

¹⁴⁷⁸ Smajlovic Report, ¶ 6.61.

¹⁴⁷⁹ Smajlovic Report, ¶¶ 8.6–8.8.

¹⁴⁸⁰ Smajlovic Report, ¶ 6.60. *See also* Ex. AS-0007, Appendix 3 - Discounted Cash Flow Model, Tab “3.3 Damages”.

¹⁴⁸¹ Memorial, ¶ 222.

Therefore, the award to [the claimant] should not be increased to take into account a hypothetical future unfair tax treatment of the . . . award.¹⁴⁸² (Emphasis added)

809. *Second*, the decision of another sovereign State on whether or not to levy taxes on an arbitral award against Peru is an issue that is outside Peru's control, and does not qualify as a consequential loss. It therefore cannot form any basis for liability. In rejecting a similar tax gross-up claim, the tribunal in *Rusoro v. Venezuela* explained that

[a]ny tax liability arising under [the investor's home State's] tax laws (or from any other fiscal regime, other than the [respondent State]), does not qualify as consequential loss arising from [the respondent's] breach of the Treaty and does not engage [the respondent's] liability.¹⁴⁸³

810. *Third*, while investors frequently make tax gross-up claims in investment arbitrations, tribunals have consistently rejected such claims, on a variety of bases. Some tribunals have reasoned that the ultimate tax treatment of an award must be addressed by the fiscal authorities in the investor's home jurisdiction and/or the host state, not by an arbitral tribunal.¹⁴⁸⁴ Moreover, tax obligations are notoriously complex to assess and quantify, as they are subject to exemptions, credits, deductions, amendments in tax

¹⁴⁸² **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 (“*No cabe por tanto aumentar la indemnización otorgada a [la Demandante] para tomar en cuenta un hipotético futuro tratamiento fiscal injusto del . . . laudo*”). See also **RL-0036**, *Mobil Investments Canada Inc. and Murphy Oil Corp. v. Government of Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum, 22 May 2012 (van Houtte, Janow, Sands), ¶ 485 (wherein the tribunal noted that it was “not aware of a requirement under international law to gross up compensation as a result of tax considerations.”)

¹⁴⁸³ **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; see also **RL-0038**, *Rusoro Mining (Award)*, ¶ 854.

¹⁴⁸⁴ See, e.g., **RL-0039**, *Les Laboratoires Servoier, S.A.A., et al. v. Republic of Poland*, UNCITRAL, Final Award, 14 February 2012 (Park, Hanotiau, Lalonde) (“**Laboratoires (Final Award)**”), ¶ 666 (“Although the Tribunal has considered the possible tax ramifications of this Award, it can find no reason to speculate on the appropriateness, one way or another, of any proposed ‘gross-up’ to take into account potential tax liability, whether in Poland or in France. The ultimate tax treatment of an award representing the ‘real value’ of an investment must be addressed by the fiscal authorities in the investor’s home jurisdiction as well as the host [S]tate.”).

law, and difficulties in application. For these and other reasons, tribunals have consistently rejected tax gross-up claims as speculative and uncertain.¹⁴⁸⁵

811. While Kaloti cites three cases (*Birnbaum v Iran*, *Ebrahimi v. Iran* and *Siemens v. Argentina*) in support of its Tax Gross-up Claim, none of those actually involved a tax gross-up claim.¹⁴⁸⁶ Both *Birnbaum* and *Ebrahimi* are distinct from the present case, as they involved a request from the respondent State (i.e., Iran) that damages be *reduced* when calculating the value of assets that had allegedly been expropriated.¹⁴⁸⁷ And Kaloti's reliance on *Siemens v. Argentina* is similarly unavailing, because the claimant in that case did not make a claim for a tax gross-up (nor did the tribunal award one).
812. *Fourth*, while Kaloti bases its Tax Gross-up Claim entirely on the Peruvian corporation tax rate, it has failed to show that a potential award would in fact be subject to such tax in Peru. Kaloti is a US company, and, as Kaloti is at pains to point out, it no longer has any operations in Peru.¹⁴⁸⁸ Kaloti has provided no basis to conclude that, despite

¹⁴⁸⁵ **RL-0040**, *Sevilla Beheer B.V. and others v. Kingdom of Spain*, ICSID Case No. ARB/16/27, Decision on Jurisdiction, Liability and the Principles of Quantum, 11 February 2022 (Fathallah, Cameron, Tanzi), ¶ 1077 (“The tribunal joins the long line of decisions that found similar tax gross-up claims uncertain and speculative.”); see also **RL-0039**, *Laboratoires* (Final Award), ¶ 666 (“Although the Tribunal has considered the possible tax ramifications of this Award, it can find no reason to speculate on the appropriateness, one way or another, of any proposed ‘gross-up’ to take into account potential tax liability, whether in Poland or in France. The ultimate tax treatment of an award representing the ‘real value’ of an investment must be addressed by the fiscal authorities in the investor’s home jurisdiction as well as the host [S]tate.”); **RL-0041**, *BayWa* (Decision), ¶¶ 621–628; **RL-0042**, *AES Solar and others (PV Investors) v. Kingdom of Spain*, PCA Case No. 2012-14, Final Award, 28 February 2020 (Kaufmann-Kohler, Brower, Sepúlveda-Amor), ¶¶ 859–865; **RL-0043**, *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, 16 May 2018 (Beechey, Born, Stern), ¶ 660; **RL-0044**, *SolEs Badajoz GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/38, Award, 31 July 2019 (Donoghue, Williams, Sacerdoti), ¶ 554; **RL-0045**, *Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V. v. Kingdom of Spain*, ICSID Case No. ARB/13/31, Award, 15 June 2018 (Jaramillo, Orrego Vicuña, Thomas), ¶ 673; **RL-0046**, *InfraRed* (Award), ¶ 598.

¹⁴⁸⁶ Memorial, ¶¶ 223–224.

¹⁴⁸⁷ **CL-0064**, *Birnbaum v. Islamic Republic of Iran*, Iran-U.S. Cl. Trib. Award No. 549-967-2 (6 July 1993), ¶ 128; **CL-0078**, *Ebrahimi v. Islamic Republic of Iran*, Iran-U.S. Cl. Trib. Award No. 560-44-3 (12 Oct. 1994), ¶ 164.

¹⁴⁸⁸ See, e.g., Memorial, ¶¶ 7, 17.

these facts, an award of damages in its favor would give rise to tax liability under Peruvian law.

813. *Fifth*, Kaloti has similarly provided no basis to conclude that an award of damages would give rise to tax liability in the U.S. Kaloti is a limited liability company (“LLC”). As Brattle explains, LLCs do not pay taxes in the United States.¹⁴⁸⁹ Indeed, despite asserting that a tax gross-up is necessary to account for U.S. taxation,¹⁴⁹⁰ Mr Smajlovic does not purport to include any U.S. taxes in his gross-up calculations.¹⁴⁹¹ Mr Smajlovic mentions certain taxes (viz., income tax and capital gains taxes) to which Kaloti’s *shareholders* would allegedly be subject in the U.S. However, he does not claim that Kaloti itself would be exposed to U.S. tax liability, and the Tribunal would be even less justified in increasing the amount of damages to account for potential tax liability of *Kaloti’s shareholders*, who are non-parties to the arbitration.
814. In addition, even if Kaloti had established that an arbitral award would necessarily be taxed in the U.S., or indeed elsewhere, the Tribunal would have no basis on which to assess whether Kaloti would be in a position to challenge or reduce such tax liability on some after-the-fact basis.
815. *Sixth and finally*, Kaloti’s argument that a tax gross-up is necessary to account for potential tax liability “anywhere” in the world¹⁴⁹² is by definition uncertain and speculative. Kaloti does not purport to identify any jurisdictions other than Peru and the U.S. in which it could be exposed to alleged tax liability, nor has it explained why any taxes that would be applicable in such other jurisdictions should be accounted for in any award here. Accordingly, Kaloti’s Tax Gross-up Claim, along with all of its other damages claims, should be dismissed.

¹⁴⁸⁹ Brattle Report, ¶ 214.

¹⁴⁹⁰ Smajlovic Report, ¶ 6.61.

¹⁴⁹¹ Smajlovic Report, ¶ 8.7, Tables 16, 17; *see also* Brattle Report, ¶¶ 213–214.

¹⁴⁹² Memorial, ¶ 224.

VI. CLAIMANT SHOULD BE ORDERED TO PROVIDE SECURITY FOR PERU'S COSTS IN THIS ARBITRATION

816. Peru hereby respectfully requests that the Tribunal order Claimant to provide security for Peru's costs of defending the claims against it in this arbitration (including arbitrator fees and expenses, ICSID's administrative costs, and legal and expert fees and expenses incurred by Peru), pursuant to Article 47 of the ICSID Convention and Rule 39 of the ICSID Rules of Arbitration ("**2006 ICSID Rules**").¹⁴⁹³ Peru submits that the amount of such security should be no less than four million US dollars (USD 4,000,000.00), which is Peru's reasonable estimate of the costs that it is likely to incur in this arbitration.
817. As explained in more detail below, Kaloti should be required to provide security for costs because there is a substantial and likely risk that, if it were ordered to pay Peru's costs and legal fees in this arbitration, Kaloti would lack the financial resources or willingness to comply with such an order. Peru thus stands to suffer substantial prejudice in the event that it were the successful party in this arbitration and were awarded its costs, as it would have incurred significant costs in defending a meritless arbitration claim, and would have no real prospect of recovering such costs from Kaloti.
818. In addition to the requested security, Peru respectfully requests that the Tribunal suspend the present proceeding in the event that (i) in response to the present application for security for costs, the Tribunal were to issue an order directing Kaloti to post security; and (ii) Kaloti were to fail to comply with such an order.
819. In the remainder of this section, Peru will:
- a. demonstrate that the Tribunal has the power to order Kaloti to provide security for costs (*see Section VI.A* below);
 - b. describe the relevant legal standard for granting security for costs (*see Section VI.B* below);

¹⁴⁹³ 2006 ICSID Rules.

- c. show that the applicable legal standard is met in this case (*see* **Section VI.C** below); and
- d. articulate its request for relief (*see* **Section VI.D** below).

A. The Tribunal has the power to order claimant to provide security for costs

820. The power of the Tribunal to award security for costs arises from its power to recommend provisional measures.¹⁴⁹⁴ That power, in turn, arises from Article 47 of the ICSID Convention and Rule 39(1) of the 2006 ICSID Rules, which are the applicable rules in this arbitration.

821. Article 47 of the ICSID Convention provides:

Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party.¹⁴⁹⁵

822. Rule 39(1) of the 2006 ICSID Rules provides:

At any time after the institution of the proceeding, a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures.¹⁴⁹⁶

823. It is well established that the word “recommend” as used in Article 47 of the Convention is functionally equivalent to “order”. For example, in *Maffezini v. Spain*, after explaining that its “authority to rule on provisional measures is no less binding than that of a final award,” the tribunal concluded it “deem[ed] the word

¹⁴⁹⁴ **RL-0005**, *RSM Production Corp. v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on Saint Lucia’s Request for Security for Costs, 13 August 2014 (Elsing, Griffith, Nottingham) (“*RSM (Decision on Security for Costs)*”), ¶ 54.

¹⁴⁹⁵ ICSID Convention, Art. 47.

¹⁴⁹⁶ 2006 ICSID Rules, Rule 39(1).

‘recommend’ to be of equivalent value as the word ‘order.’”¹⁴⁹⁷ For its part, the tribunal in *City Oriente v. Ecuador* asserted that “a teleological interpretation of [Article 47 and Rule 39] leads to the conclusion that the provisional measures recommended are necessarily binding.”¹⁴⁹⁸ The tribunal in *Tokios Tokeles v. Ukraine* reached the same conclusion, stressing that under the “well-established principle laid down by the jurisprudence of ICSID tribunals, provisional measures ‘recommended’ by an ICSID tribunal are legally compulsory; they are in effect ‘ordered’ by the tribunal, and the parties are under a legal obligation to comply with them.”¹⁴⁹⁹

824. Furthermore, arbitral tribunals have noted that Arbitration Rule 39(2) mandates that tribunals give priority to the consideration of a provisional measures request.¹⁵⁰⁰
825. There is a growing international consensus that ICSID tribunals should exercise the power to order security for costs, to protect States from the consequences of the failure of impecunious claimants to comply with costs orders. This consensus view is reflected in the new ICSID rules of arbitration that entered into force on 1 July 2022 (“**2022 ICSID Rules**”). These new rules are not applicable in this arbitration (which is governed by the 2006 ICSID Rules), but nevertheless reflect the collective will of the Member States to the ICSID Convention, which in turn sought to strengthen the investor-State arbitration system and correct some of its deficiencies. Importantly for present purposes, the 2022 ICSID Rules contain a new rule that addresses more directly and explicitly the issue of security for costs, and that reinforces and ratifies

¹⁴⁹⁷ **RL-0073**, *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Procedural Order No. 2, 28 October 1999 (Orrego Vicuña, Buergenthal, Wolf) (“**Maffezini (Procedural Order No. 2)**”), ¶ 9.

¹⁴⁹⁸ **RL-0059**, *City Oriente Ltd. v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador* (Petroecuador), ICSID Case No. ARB/06/21, Decision on Provisional Measures, 19 November 2007 (Fernández-Armesto, Grigera Naón, Thomas) (“**City Oriente (Decision on Provisional Measures)**”), ¶ 52.

¹⁴⁹⁹ **RL-0061**, *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Order No. 1, 1 July 2003 (Weil, Bernardini, Price), ¶ 4.

¹⁵⁰⁰ **RL-0066**, *Transglobal Green Energy, LLC, et al., v. Republic of Panama*, ICSID Case No. ARB/13/28, Decision on Respondent’s Request for Provisional Measures, 21 January 2016 (Sureda, Schreuer, Paulsson), ¶ 26.

the tribunal's pre-existing, inherent power to order security for costs. The new provision on security for costs is contained in Rule 53 of the 2022 ICSID Rules, the first two paragraphs of which reads as follows:

- (1) Upon request of a party, the Tribunal may order any party asserting a claim or counterclaim to provide security for costs.
- (2) The following procedure shall apply:
 - (a) the request shall include a statement of the relevant circumstances and the supporting documents;
 - (b) the Tribunal shall fix time limits for submissions on the request;
 - (c) . . .
 - (d) the Tribunal shall issue its decision on the request within 30 days after the later of the constitution of the Tribunal or the last submission on the request.¹⁵⁰¹

826. The 2022 ICSID Rules were adopted following extensive consultations by ICSID with the various stakeholders in the system, as well as several rounds of public comments. With respect to the security for costs rule, numerous States supported the adoption of a rule that addressed the issue more specifically. For example, Singapore noted the following in its comments on the proposal for a security for costs under the 2022 ICSID Rules:

We strongly support this proposal [security for costs]. Many respondent States currently end up with the short end of the stick even if they succeed in defending themselves as they are statistically less successful in recovering costs than claimants. In contrast, given the relatively stronger financial standing of a State, a successful investor rarely has to worry about recovering any costs that are awarded in its favour. This proposal would

¹⁵⁰¹ 2022 ICSID Rules, Rule 53.

address the current systemic imbalance on costs recovery in ISDS.¹⁵⁰²

827. Several States, including Peru and several other Latin American States, offered similar comments.¹⁵⁰³

B. The relevant legal standard

828. The standard for issuing an order for security for costs is that which applies to provisional measures set forth in Article 47 of the ICSID Convention and Rule 39 of the 2006 ICSID Rules.

829. Rule 39 of the 2006 ICSID Rules requires that the party requesting provisional measures “for the preservation of its rights . . . shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures.”¹⁵⁰⁴ Article 47 of the ICSID Convention for its part provides that a tribunal may order interim measures “if it considers that the circumstances so require.” As one ICSID tribunal observed with respect to the relevant standard,

[i]t is generally acknowledged that, by providing that the Tribunal may order provisional measures ‘if it considers that the circumstances to require,’ Article 47 of the ICSID Convention requires that the requested measure be both necessary and urgent.¹⁵⁰⁵

¹⁵⁰² **RL-0068**, ICSID Rule Amendment Project - Member State & Public Comments on Working Paper #1, 3 August 2018, Singapore 4 January 2019, p. 342.

¹⁵⁰³ **RL-0068**, ICSID Rule Amendment Project - Member State & Public Comments on Working Paper #1, 3 August 2018, Austria 21 December 2018, p. 334; **RL-0069**, ICSID Rule Amendment Project - Member State & Public Comments on Working Paper #3, 16 August 2019, Panama’s comments on proposed Rule 52, p. 36; **RL-0070**, ICSID Rule Amendment Project - Member State & Public Comments on Working Paper #2, 15 March 2019, Joint Comments of Chile, Colombia, Costa Rica, Mexico, Peru, 26 June 2019, p. 136.

¹⁵⁰⁴ 2006 ICSID Rules, Rule 39.

¹⁵⁰⁵ **RL-0071**, *Saipem S.p.A. v. People’s Republic of Bangladesh*, ICSID Case No. ARB/05/07 (Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007 (Kaufmann-Kohler, Schreuer, Otton) (“*Saipem (Decision)*”), ¶ 174.

830. Accordingly, a tribunal may grant provisional measures if: (i) there is an actual legal right to be preserved; (ii) the measures requested are urgent; and (iii) the measures requested are necessary in the circumstances.¹⁵⁰⁶
831. With respect to the first element, ICSID tribunals have recognized that the legal rights to be preserved by provisional measures may consist not only of substantive rights¹⁵⁰⁷ but also procedural rights, such as the right to non-aggravation of the dispute.¹⁵⁰⁸ The tribunal in *Burlington v. Ecuador* clarified that the existence of rights must be examined under a *prima facie* standard.¹⁵⁰⁹
832. With respect to the second element (i.e., urgency), provisional measures are deemed urgent when, unless they are “ordered rapidly, there are risks that the rights of the applicants will be jeopardized.”¹⁵¹⁰ As noted by the tribunal in *Biwater Gauff v. Tanzania*, there must be “a need to obtain the requested measure at a certain point in the procedure before the issuance of an award.”¹⁵¹¹ As the *Burlington* tribunal further explained, provisional measures are required urgently “when it is impossible to wait

¹⁵⁰⁶ See **RL-0072**, *Perenco Ecuador (Award)*, ¶ 43 (Explaining that provisional measures “must be necessary, because that is what “require” [of Article 47 of the ICSID Convention] means,” and they must also be urgent to the effect that there be a “demonstrable need for them” at the time); **RL-0071**, *Saipem (Decision)*, ¶ 174; **RL-0059**, *City Oriente (Decision on Provisional Measures)*, ¶ 54.

¹⁵⁰⁷ **RL-0073**, *Maffezini (Procedural Order No. 2)*, ¶¶ 13–14 (stating that the rights to be preserved “must exist at the time of the request” and indicating that “an example of an existing right would be an interest in a piece of property”); **RL-0074**, *Amco Asia Corp. v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision On Request For Provisional Measures, 9 December 1983 (Goldman, Foighel, Rubin), ¶ 3; see also 2006 ICSID Rules, Rule 39, § 1.

¹⁵⁰⁸ **RL-0075**, *Burlington Resources Inc. and others v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador)*, ICSID Case No. ARB/08/05, Procedural Order No. 1 on Burlington Oriente’s Request for Provisional Measures, 29 June 2009 (Kaufmann-Kohler, Stern, Orrego Vicuña) (“*Burlington (Procedural Order No. 1)*”), ¶ 60 (“[T]he rights to be preserved by provisional measures are not limited to those which form the subject-matter of the dispute or substantive rights (. . .) but may extend to procedural rights”).

¹⁵⁰⁹ **RL-0075**, *Burlington (Procedural Order No. 1)*, ¶ 53.

¹⁵¹⁰ **RL-0076**, *Milicom International Operations B.V. and Sentel GSM SA v. Republic of Senegal*, ICSID Case No. ARB/08/20, Decision on the Application for Provisional Measures Submitted by the Claimants, 24 August 2009 (Tercier, Abraham, Hobér), ¶ 48.

¹⁵¹¹ **RL-0077**, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 1, 31 March 2006 (Hanotiau, Born, Landau) (“*Biwater (Procedural Order No. 1)*”), ¶ 76; see also **RL-0075**, *Burlington (Procedural Order No. 1)*, ¶ 73.

until the award because actions prejudicial to the rights of the petitioner are likely to be taken before the Arbitral Tribunal decides on the merits of the dispute.”¹⁵¹² This understanding of urgency by ICSID tribunals is consistent with the view articulated by the International Court of Justice in *Great Belt (Finland v. Denmark)*, that provisional measures are “only justified if there is an urgency in the sense that action prejudicial to the rights of either party is likely to be taken before such final decision is given.”¹⁵¹³

833. Finally, with respect to the third element (i.e., necessity), provisional measures have been deemed “necessary” if they are “required to avoid harm or prejudice being inflicted upon the applicant.”¹⁵¹⁴ The element of “necessity” is generally assessed by “balancing the degree of harm the applicant would suffer but for the measure.”¹⁵¹⁵ In weighing the need for provisional measures, tribunals also consider the harm that would be caused to the other party as a result of granting the requested measures.¹⁵¹⁶ Thus, a tribunal should “weigh the interests of both sides in assessing necessity.”¹⁵¹⁷

834. Assessing the level of harm required for provisional measures depends on the type of measures requested, but in any event the degree of harm need not be extreme to warrant issuance of provisional measures. As the tribunal in *City Oriente* explained, “neither Article 47 of the Convention nor Rule 39 of the Arbitration Rules require[s] that provisional measures be ordered only as a means to prevent irreparable

¹⁵¹² **RL-0075**, *Burlington* (Procedural Order No. 1), ¶ 72; see also **RL-0078**, Christopher Schreuer, *et al.*, *THE ICSID CONVENTION: A COMMENTARY* (2009), p. 775 (“[P]rovisional measures will only be appropriate where a question cannot await the outcome of the award on the merits”).

¹⁵¹³ **RL-0079**, *Case Concerning Passage Through the Great Belt (Finland v. Denmark)*, ICJ, Order, 29 July 1991, p. 17, ¶ 23.

¹⁵¹⁴ **RL-0075**, *Burlington* (Procedural Order No. 1), ¶ 75; see also **RL-0063**, *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Order No. 3, 18 January 2005 (Weil, Bernardini, Price), ¶ 8 (“The circumstances under which provisional measures are required under Article 47 are those in which the measures are *necessary* to preserve a party’s rights and that need is *urgent*. The international jurisprudence on provisional measures indicates that a provisional measure is necessary where the actions of a party ‘are capable of causing or of threatening irreparable prejudice to the rights invoked’”) (emphasis in original).

¹⁵¹⁵ **RL-0075**, *Burlington* (Procedural Order No. 1), ¶ 78.

¹⁵¹⁶ **RL-0075**, *Burlington* (Procedural Order No. 1), ¶ 82.

¹⁵¹⁷ **RL-0075**, *Burlington* (Procedural Order No. 1), ¶ 82.

harm.”¹⁵¹⁸ Thus, as far as harm is concerned, “[i]t is not so essential that provisional measures be necessary to prevent irreparable harm, but that the harm spared the petitioner by such measure must be significant and that it exceed greatly the damage caused to the party affected thereby.”¹⁵¹⁹

835. The *City Oriente* tribunal concluded that Article 47 of the ICSID Convention authorizes the issuance of provisional measures to prohibit “any action that affects the disputed rights, aggravates the dispute, **frustrates the effectiveness of the award** or entails having either party take justice into its own hands . . . ” (emphasis added).¹⁵²⁰

C. All the conditions for ordering Claimant to provide security for costs are satisfied in this case

1. *There is a legal right to be preserved*

836. Peru has the procedural right to seek a cost award in its favor to recoup from Kaloti all the costs that it may incur in the course of this arbitration (including its share of the administrative costs plus its own expenses, including counsel and expert fees and expenses).¹⁵²¹ As the *RSM v. St. Lucia* majority confirmed, “[t]he right to seek reimbursement of one’s costs in the case of a favorable award likewise constitutes a

¹⁵¹⁸ **RL-0060**, *City Oriente Ltd. v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador* (Petroecuador), ICSID Case No. ARB/06/21, Decision on the Revocation of Provisional Measures, 13 May 2008 (Fernández-Armesto, Grigera Naón, Thomas) (“*City Oriente (Decision on Revocation)*”).

¹⁵¹⁹ **RL-0060**, *City Oriente* (Decision on Revocation), ¶ 72; see also **RL-0080**, *Sergei Paushok, et al., v. Government of Mongolia*, UNCITRAL, Order on Interim Measures, 2 September 2008 (Lalonde, Stern, Naón), ¶¶ 62, 68 (expressing “reservations about the concept that the possibility of monetary compensation is always sufficient to bar any request for interim measures under the UNCITRAL Rules,” and concluding, citing the opinion of the Iran-U.S. Claims Tribunal in *Behring International, Inc. v. Islamic Republic Iranian Air Force*, that “in international law, the concept of ‘irreparable prejudice’ does not necessarily require that the injury complained of be not remediable by an award of damages” (citing *Behring International Inc. v. Islamic Republic Iranian Air Force*, 8 Iran-U.S. C.T.R. 23B, Award No. ITM/ITL 52-382-3, 21 June 1985, p. 276)).

¹⁵²⁰ **RL-0059**, *City Oriente* (Decision on Provisional Measures), ¶ 55.

¹⁵²¹ 2006 ICSID Rules, Rule 28 grants the tribunal authority to determine (“with respect to any part of the proceeding, that the related costs (as determined by the Secretary-General) shall be borne entirely or in a particular share by one of the parties.”). Further, Arbitration Rule 47 provides that in its award, a tribunal shall contain (“any decision of the Tribunal regarding the cost of the proceeding.”).

procedural right . . . Hence, there has to be an effective mechanism for protecting this right in order to render it meaningful.”¹⁵²²

2. *The measures requested are urgent*

837. The urgency criterion is satisfied when the requested measures cannot await the outcome of the award on the merits.¹⁵²³ To recall, the tribunal in *Biwater Guaff v. Tanzania* explained that

the degree of “urgency” which is required depends on the circumstances, including the requested provisional measures, and may be satisfied where a party can prove that there is a **need to obtain the requested measures at a certain point in the procedure before the issuance of an award.**¹⁵²⁴ (Emphasis added)

838. A security for costs from Kaloti is urgent for purposes of the ICSID norms on provisional measures because Peru will continue to incur mounting costs until the issuance of the award by the Tribunal. Peru’s requested security for costs is also urgent and thus justified because Kaloti has ceased trading, and by its own admission is “*de facto* bankrupt.”¹⁵²⁵ This fact is further confirmed by Kaloti’s own damages expert, Mr Smajlovic, who opines that Kaloti has been *de facto* bankrupt since at least 30 November 2018.¹⁵²⁶ Moreover, according to Kaloti and Mr Smajlovic, the former is *de facto* bankrupt by a significant margin.

839. In light of the above facts, there is a significant risk that, if Kaloti were ordered to pay Peru’s costs, it would be unable or unwilling to satisfy such an order. And in the interim, prior to issuance of the award, Peru would continue to incur significant costs to defend itself in these proceedings. An order for security for costs thus cannot wait

¹⁵²² **RL-0005**, *RSM* (Decision on Security for Costs), ¶ 69.

¹⁵²³ **RL-0078**, Christopher Schreuer, *et al.*, *THE ICSID CONVENTION: A COMMENTARY* (2009), Art. 25 p. 775; *see also* **RL-0077**, *Biwater* (Procedural Order No. 1), ¶ 76; **RL-0075**, *Burlington* (Procedural Order No. 1), ¶ 73.

¹⁵²⁴ **RL-0077**, *Biwater* (Procedural Order No. 1), ¶ 76.

¹⁵²⁵ Memorial, ¶ 163.

¹⁵²⁶ Smajlovic Report, ¶ 6.11.

for the final award in this case, as otherwise Peru would be forced to continue incurring costs until the award is issued, and would have no means of recourse following any costs order in its favor. It is precisely that risk that Peru seeks to avoid through the security requested herein.

3. *An order for security for costs is necessary, and Peru would suffer significant harm if security were not ordered*

840. As noted above, arbitral tribunals have confirmed that the test for “necessity” is whether the interim relief requested (i) is “required to avoid or prejudice being inflicted upon the applicant,”¹⁵²⁷ and (ii) is justified following a balancing of the harm thereby spared against harm caused to the party opposing the application.¹⁵²⁸
841. Peru’s requested security for costs measure is necessary in the present instance because the evidence before the Tribunal confirms that there is a substantial risk that if Peru were to receive an award of costs for successfully defending the arbitration, Kaloti would be either unable or unwilling to satisfy such award. Kaloti’s own expert, Mr. Smajlovic, opines that Kaloti’s equity as of 30 November 2018 was “negative \$13,649,821,”¹⁵²⁹ and that, as of that same date, Kaloti was “unable to service debt of approximately \$12.6 million.”¹⁵³⁰ As noted above, Kaloti admits that it is “*de facto* bankrupt.”¹⁵³¹ It is evident, therefore, that Kaloti would not satisfy an adverse costs order if it were ultimately unsuccessful in the arbitration. In that scenario, Peru would suffer significant harm, as it would have incurred substantial costs in defending against meritless claims, but without any prospect of recovering such costs even if the Tribunal were to order such recovery.
842. On balance, Peru runs a far greater risk of suffering potential harm in the absence of provisional measures, than does Kaloti in the event that the Tribunal were to

¹⁵²⁷ **RL-0075**, *Burlington* (Procedural Order No. 1), ¶ 75.

¹⁵²⁸ **RL-0059**, *City Oriente* (Decision on Provisional Measures), ¶ 72.

¹⁵²⁹ Smajlovic Report, ¶ 6.12.

¹⁵³⁰ Smajlovic Report, ¶ 6.14.

¹⁵³¹ Memorial, ¶ 163.

recommend security for costs. For Peru, the harm from an unrecoverable cost award is evident: it would have expended millions of US dollars in taxpayer funds to cover the procedural costs and legal and expert fees associated with defending against Kaloti's claims, as well as potentially post-award enforcement costs, while having no prospect of being compensated if a costs award were rendered in its favor. By contrast, if the Tribunal were to grant Peru's request for security for costs, the harm to Kaloti, if any, would be minimal: Kaloti would only be required to post security (such as a bond) that would cover a reasonable estimation of the costs and fees associated with Peru's defense. The cost to Kaloti of obtaining and maintaining a bond would amount to a fraction of the cost that Peru will have expended.

843. Naturally, the security would only be enforced *if* the Tribunal were to award Peru its costs and fees. Thus, if at the conclusion of the arbitration Kaloti were *not* ordered to cover Peru's costs, any security that it may have been ordered to provide at the outset of the arbitration would promptly be released upon issuance of the award. If, on the other hand, at the end of the case the Tribunal were to order Kaloti to cover Peru's costs, the security to satisfy that costs award would merely have given effect to Kaloti's legal obligations under the costs award. Such being the case, the security would not have caused any "harm" to Kaloti other than the cost of securing the guarantee (and the time value of money, which is inherent in any financial guarantee).
844. The substantial harm that Peru would suffer if security for costs were not ordered by the Tribunal is illustrated and confirmed by the repeated inability of States to collect costs awards against unsuccessful claimants. There have been numerous instances in which States – including Peru – have been unable to recover against costs awards in their favor, resulting in great expense to taxpayers. In *Convial v. Peru*¹⁵³² the claimants failed to satisfy a cost award issued in Peru's favor. Peru was therefore forced to commence bankruptcy proceedings to collect on the debt, but to this day it has been unable to obtain compensation. Peru suffered likewise prejudice in the recent case of *Hydrika 1 S.A.C., et al v. Peru*, where the tribunal in its award ordered claimants to pay

¹⁵³² **RL-0081**, *Convial Callao* (Award), ¶ 681.

the entirety of Peru's costs,¹⁵³³ but the claimants abjectly refused to comply with the award.

845. El Salvador faced the same problem following its successful defense in the *Inceysa* case; the insolvent claimant in that case ultimately proved unable to pay the cost award that had been rendered in El Salvador's favor.¹⁵³⁴ Similarly, Costa Rica was unable to collect on a costs award following the dismissal of claims brought by investors in *Quadrant Pacific*,¹⁵³⁵ and Panama was likewise unable to collect on costs awards against the claimants in two separate cases: *Nations Energy*¹⁵³⁶ and *Transglobal*.¹⁵³⁷
846. The extent of the problem caused by the pursuit of unmeritorious claims by impecunious claimants is rendered evident by a survey released by the ICSID Secretariat on compliance with costs awards. This survey shows that, within the ICSID framework alone, Member States have been unsuccessful in fully collecting on costs awards in 35% of the cases reported.¹⁵³⁸
847. This problem poses a fundamental risk to the credibility of the investor-State arbitration system. As the tribunal in *Burimi v. Albania* noted, the "non-payment of

¹⁵³³ **RL-0217**, *Hydrika 1 S.A.C. and others v. Republic of Peru*, ICSID Case No. ARB/18/48, Award, 17 August 2021 (Mourre, Hierro, Oreamuno), ¶ 295.

¹⁵³⁴ **RL-0082**, *Inceysa* (Award), ¶ 339.

¹⁵³⁵ **RL-0083**, *Quadrant Pacific Growth Fund L.P. and Canasco Holdings Inc. v. Republic of Costa Rica*, ICSID Case No. ARB(AF)/08/1, Order of the Tribunal Taking Note of the Discontinuation of the Proceedings and Allocation of Costs, 27 October 2010 (Garro, Lowenfeld, Cremades) ("*Quadrant Pacific (Order of Discontinuance)*"), ¶ 73.

¹⁵³⁶ **RL-0084**, *Nations Energy Inc., et al., v. Republic of Panama*, ICSID Case No. ARB/06/19, Award, 24 November 2010 (Mourre, Medina, von Wobeser), ¶ 715.

¹⁵³⁷ **RL-0067**, *Transglobal Green Energy, LLC, et al., v. Republic of Panama*, ICSID Case No. ARB/13/28, Award, 2 June 2016 (Sureda, Schreuer, Paulsson), ¶ 130.

¹⁵³⁸ **RL-0085**, Survey for ICSID Member States on Compliance with ICSID Awards, ICSID, 2018, pp. 3–4 ("The States reported compliance with 18 of the 34 Awards of Costs and/or Damages in favor of the State, and non-compliance with 12 of the 34 Awards of Costs and/or Damages in favor of the State.").

awards of damages or costs by respondents and claimants poses a systemic risk to the arbitration of international investment disputes.”¹⁵³⁹

848. Pursuing frivolous or meritless claims (often in the hope of extracting a settlement from the respondent State) should not be a cost-free option for claimants. As the *Foresti v. South Africa* tribunal stated in respect of claims that were asserted but subsequently abandoned,

while claimants in investment arbitrations are in principle entitled to the costs necessarily incurred in the vindication of their legal rights, they cannot expect to leave respondent States to carry the costs of defending claims that are abandoned.¹⁵⁴⁰

849. Although in *Foresti* the situation concerned the abandonment of claims, the principle and rationale reflected in the tribunal’s statement above applies with equal force to the pursuit of meritless claims. Other tribunals have reasoned along similar lines. For example, the tribunal in *Isolux v. Peru* noted as follows:

There is a responsibility when one commences arbitration and the counterparty is forced to respond to the claim against it. The decision to resort to arbitration must be made in all seriousness and with full cognizance of its implications.¹⁵⁴¹

¹⁵³⁹ **RL-0049**, *Burimi SRL and Eagle Games SH.A v. Republic of Albania*, ICSID Case No. ARB/11/18, Procedural Order No. 2, 3 May 2012 (Price, Cremades, Fadlallah), ¶ 49.

¹⁵⁴⁰ **RL-0086**, *Piero Foresti, et al. v. Republic of South Africa*, ICSID Case No. ARB(AF)/07/01, Award, 4 August 2010 (Lowe, Brower, Matthews), ¶132. See also **RL-0087**, *Canfor Corp. v. United States of America and Tembec et al. v. United States of America and Terminal Forest Products Ltd. v. United States of America*, Consolidated NAFTA and UNCITRAL, Joint Order on the Costs of the Arbitration and for the Termination of Certain Arbitral Proceedings, 19 July 2007 (van den Berg, de Mestral, Robinson), ¶ 149 (“The rule that a claimant is liable for the costs of the proceedings when that claimant unilaterally withdraws from the proceedings is in accord with many national legal systems.”); **RL-0083**, *Quadrant Pacific* (Order of Discontinuance), ¶ 70 (“The Tribunal believes that much of Respondent’s costs, those of the Centre administering this arbitration, as well as the time of the members of the Tribunal, could have been spared if Claimants had given timely and adequate consideration to the consequences of their action. Accordingly, the Tribunal finds that Claimants should bear responsibility for Respondent’s costs.”).

¹⁵⁴¹ **RL-0088**, *Isolux Corsán Concesiones S.A. v. Republic of Peru*, ICSID Case No. ARB/12/5, Procedural Order No. 2, 8 August 2013 (Perezcano Díaz, Mourre, Grigera Naón), ¶ 22 (“[e]xiste

850. For all of the above reasons, the requisite requirements for provisional measures are met, and Kaloti should therefore be ordered to provide security for Peru's costs.

851. Peru submits that: (i) such security should be provided in the form of a bond, as this is an instrument commonly used for purposes of providing security for costs; and (ii) the amount of such security should be set at no less than USD 4,000,000.00, which is Peru's reasonable estimate of the costs that it will incur in defending this arbitration, including legal fees, institutional costs, expert fees, and all other expenses.

D. The Tribunal should suspend the proceeding in the event of non-compliance by Claimant with any order of security for costs

852. In the event that the Tribunal were to accept Peru's request herein by ordering security for costs, Peru further requests that the Tribunal suspend the proceeding in the event that Kaloti does not comply with the Tribunal's order to post the security within a reasonable timeframe (e.g., 30 days).

853. The Tribunal inherently possesses the power to suspend the proceeding in the event of non-compliance with a security for costs order, pursuant to Article 44 of the ICSID Convention, which provides that "[i]f any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question." The *RSM v. St Lucia* tribunal confirmed that the above-mentioned provision authorizes an ICSID tribunal to sanction a party for failing to comply with an order for security for costs.¹⁵⁴² In that case, the claimant failed to comply with the tribunal's order to provide security for costs, and the respondent then applied for suspension or discontinuance of the proceedings. In addressing the respondent's application, the tribunal noted that its security for costs decision was

una responsabilidad cuando se pone en marcha el mecanismo de arbitraje y se fuerza a la contraparte a atender la demanda que pesa en su contra. La decisión de recurrir al procedimiento de arbitraje debe tomarse con toda seriedad y plena conciencia de sus implicaciones."

¹⁵⁴² **RL-0050**, *RSM Production Corp. v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision On Saint Lucia's Request For Suspension or Discontinuation of Proceedings, 8 April 2015 (Elsing, Griffith, Nottingham) ("**RSM (Decision On Suspension)**"), ¶¶ 32-36.

predicated on a finding that the claims may not proceed unless and until the requisite security is provided, and implicitly upon the assumption that if the directed security is not provided as had been directed the matter will not proceed. Otherwise Respondent would – contrary to the reasoning of the Security for Costs Decision – be left in a situation where it had to bear the risk as described.¹⁵⁴³

854. The same logic applies in this case. Any order for security for costs should be predicated on a finding that the claims should not proceed until the requisite security is provided. Otherwise Peru would be forced unfairly to incur further costs if the proceeding were to continue.

* * *

855. For the above reasons, Peru respectfully requests that the Tribunal order Claimant to post and maintain a bond (or some other equivalent financial instrument) (“**Security**”) with the following characteristics:

- a. in the amount of USD 4,000,000;
- b. issued by a creditworthy bank or insurance company in Peru;
- c. payable to the order of the Republic of Peru, to cover any costs award issued by the Tribunal in favor of Peru;
- d. effective no later than 30 days from the date that the Tribunal orders Claimant to post the Security;
- e. effective until the earliest of the following dates:
 - i. the date on which Claimant complies in full with any costs award in favor of Peru;
 - ii. the date on which the Security is drawn down by Peru (which in any event would be no less than 30 days after any costs award issued by the Tribunal in favor of Peru); or

¹⁵⁴³ **RL-0050**, RSM (Decision On Suspension), ¶ 55.

iii. the date on which the Tribunal issues a determination declining to issue a costs award in favor of Peru.

856. Peru further requests that the Tribunal suspend the present arbitral proceeding in the event that (i) the Tribunal orders Claimant to post and maintain security for costs in favor of Peru; and (ii) Claimant fails to comply with such order within 30 days of its issuance.

VII. REQUEST FOR RELIEF

857. For the reasons set forth in this Counter-Memorial, the Republic of Peru respectfully requests that the Tribunal:

- a. dismiss all of Claimant's claims for lack of jurisdiction and/or inadmissibility;
- b. dismiss for lack of merit any and all claims in respect of which the Tribunal may determine that it has jurisdiction;
- c. reject in its entirety Claimant's request for compensation, should the Tribunal find that it has jurisdiction and that there is 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, and all 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 risk-free US Treasury Bill rate; and
- e. order Claimant to post a security for costs, per Peru's detailed request in **Section VI**.

Respectfully submitted,



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